



## Chapter 2

# THE RIGHT TO EDUCATION AND OTHER HUMAN RIGHTS OF LEARNERS

### 2.1 INTRODUCTION

The background and orientation, aims, rationale and conceptual framework of this research were discussed in chapter 1. The research design, data analysis procedures, limitations, significance, and delimitations of the study were explained. Lastly the chapter planning for the research were explained.

A review of the literature is presented in Chapters 2 and 3. I conducted a systematic literature search and traced published and unpublished information relating to my topic in the form of primary, secondary, and tertiary sources. Gash (1989), cited by Bartmann and Pretorius (1996:305), describes a literature search as a systematic and judicious search to trace and collect all the published and unpublished information about a specific subject, in whatever form it exists. The literature provides several definitions of a literature review. Hart (1998:13) defines a literature review as:

The selection of available documents (published and unpublished) on the topic, which contain information, ideas, data and evidence written from a particular standpoint to fulfil certain aims and how it is investigated, and effective evaluation of these documents in relation to the research being proposed.

McMillan and Schumacher (1993:113 & 2001:108) define a literature review as a 'critique of the status of knowledge of a carefully defined topic'. In the same vein Jansen (2003:1-2) defines a literature review as a critical and integrative synthesis of the ways in which various researchers have dealt with the problem under study, with the goal of justifying one's endeavour. Mouton (2001:86) comments that it is important for 'every' research project to begin with a review of the existing body of accumulated scholarship in the same discipline as the study being conducted. Following this advice I carefully conducted a literature review. This provided an opportunity to locate my research within the existing body of knowledge, to define and limit my research problem, and to select appropriate research methods (McMillan & Schumacher 2001:109). By reviewing the literature I gained an understanding of the topic in relation to what other researchers have already written on the matter and, most importantly, I synthesised recent authoritative theorising about the topic (Mouton 2001:87; Hart, 1998:1).

Since the study involves learners' understanding of human rights, particularly their right to education, an in-depth review of human rights instruments was made, for example, existing



declarations, covenants and conventions (The Universal Declaration of Human Rights (1948) (UDHR), The Convention on the Rights of the Child (1989) (CRC), The UN Declaration on the Rights of the Child of (1959) (UNDRC), and The International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)). Whenever human rights are alleged to have been infringed, courts intervene to interpret the law and to ascertain whether or not an infringement of rights has actually occurred. Many studies that were undertaken in the past were concerned with learners' knowledge of their civil liberties (Helwig 1995:152) and rights in the legal sphere, and such studies consisted of large surveys (quantitative research) (Abramovitch *et al.* 1993: 313; Abramovitch *et al.* 1995: 1; Grisso & Pomicter, 1977:333; Ruck *et al.* 1998(a): 404 & 1998(b): 275; Tapp & Levin 1974:1). This study, besides exploring and understanding what learners understand about their right to education, tries also to determine the level of human rights reasoning that learners employ when they are dealing with situations at school where rights are in conflict. The literature on moral and ethical development assisted me to appreciate the mechanisms through which understanding develops, and the stages through which people pass during their moral and ethical development which, in essence, involves the understanding of human rights (see § 3.5.2).

The aim of this study was to investigate learners' understanding of human rights with particular emphasis on their right to education. It became clear that three phenomena are involved and interlinked namely **understanding**, **human rights**, and the **right to education**. The literature review chapters have been divided according to these observable occurrences. Firstly, in this chapter, the focus is on description of a learner the concept of human rights, since the right to education is embedded in the larger sphere of human rights. The second focus is on the right to education as this is a core human right and the centre of investigation in this study. The phenomenon of the development of understanding is discussed in more detail in Chapter 3.

The historical development of the right to education was traced, including its recognition in international law, the core content of the right to education and the recognition of the learner's right to education in South Africa. The recognition of the right to education, internationally and in South Africa, is based on social contracts in the form of human rights instruments upon which national states have agreed by ratifying various declarations, covenants and conventions signifying that they will uphold human rights (including the right to education). These treaties and covenants once ratified, become law, are legally binding and form the basis for the legal protection of human rights. Since the right to education is aligned with other human rights, various human rights which have direct and indirect relevance to the right to education are highlighted in this review. The infringement of these allied rights within the confines of the school may, in some form or other, impact on the realisation of learners' right to education.



Finally, the limitation of the right to education is explained, as no human right is absolute. This concept is very important, as it concerns the subtle balance between the violation of fundamental human rights and guaranteed human rights, and the limitation of human rights by the application of various legal principles. It is necessary to remember that the principles embodied in social contract theory, as reflected in human rights instruments and constitutions, are the ideals towards which states strive. The social contracts form the foundation on which the international law is derived.

## **2.2 WHO IS A LEARNER?**

Before I discuss the public law status of a learner, it is important to define who a learner is. According to the Schools Act section 1(ix) a learner is defined as any person receiving education or obliged to receive education in terms of the Act. According to Davel (2000:281) a learner acts in different capacities in the education situation, for example, as a person who has fundamental rights, as learner in the educator-learner relationship, a partner in education and as a bearer of rights.

### **2.2.1. Public law status of a learner**

The status of a learner in public law is influenced by sources of law such as international treaties, the Constitution, legislation, case law and common law. The legislation determines the public law status of a learner by providing sections dealing with the rights of learners (Oosthuizen 1994:54-57). An example of such legislation is the Schools Act. The Schools Act deals with protection of the learner's rights within the school and his competences and obligations in relation to his education. There are also guidelines and rules of public law which influence the status of a public law learner by dealing with issues such as suspension, expulsion and school discipline. These are dealt with in detail in § 2.6.6.1. The private law status of a learner is determined mainly by his age. Age determines the legal roles and duties of a learner. It is accepted that in his development a learner gradually becomes independent. As his capacity to make judgements increase, he is expected to take responsibility for his actions. Between the ages of 7-21 a learner has limited contractual capacity and cannot solely be held accountable for his actions. The duties and responsibilities of learners in terms of Section 5 (3.5-3.7) of the Guidelines for the consideration of the SGB in adopting a code of conduct for learners (1998) are explained in § 2.5.10.

### **2.2.2. Is a learner the bearer of the right to education?**

Section 7 of the Constitution recognises that the Bill of Rights is a cornerstone of the democracy in South Africa. It enshrines the rights of everyone. According to Davel (2000:175) everyone within the territory of South Africa, is a bearer of rights contained in the Bill of Rights - adults and children, citizen and aliens. The right to education is contained in the Bill of



Rights. According to Bray (2000:79), the right to basic education in terms of s29 of the Constitution belongs to everyone including learners.

### **2.2.3 Relationship between the educator and the learner**

Within the school context the educator and a learner enter into a relationship. This relationship is uneven in nature, due to the fact that the educator is in a position of authority and a learner is in a subordinate position. The educator derives his authority from his professional status and legislation. The authority of an educator is also based on the fact that the parents have delegated their parental authority to the educator who then possesses delegated authority. In this regard the principle of *in loco parentis* applies. The educator acts in the place of parents but cannot be entrusted with all parental authority (Beckmann, *et al* 1995:50,104). The Schools Act Sections, 3, 5, & 6 compel parents to take full responsibility for the education of their children. Learners are compelled to respect the educators and to submit themselves to the authority of the educator. The right to education applies to the teaching process in school and the involvement of an educator. This places a duty on the educators to teach, respect learners' rights, protect learners from foreseeable harm, and above all to know the nature and status of a learner. It is required by common law that schools should ensure both the physical and psychological safety of learners (Netshitahame 1999:14)

### **2.2.4 Position of a school as a legal organ**

In terms of the Schools Act a school is defined as a public school which enrolls learners in one or more grades between grade zero and twelve. This gives rise to two categories of public school: an ordinary public school or public school for learners with special needs and an independent school. A school is at the centre of the education system and it may be a primary or secondary school. The legal status of a public school refers to the position the law affords to the public school. A school derives its legal status from the Schools Act. In terms of Section 15 of the Schools Act public schools are declared juristic persons with legal capacity to perform their functions (Beckmann *et al* 1997:12-13). As a legal person the law affords the school the rights and duties in its name not in the name of people associated to it. For example the school can enter into contracts, buy, sell, hire staff and make investments under its own name. The school governing body acts on behalf of the school. The school has special legal powers which it executes through its governing body. When the school governing body suspends a learner from the school, the action against a learner is taken in the name of the school. Parents and learners may approach a court of law if they feel that the action of suspending a learner was procedurally unfair. Parents may also lay charges against a school in matters concerning discriminatory school policies, corporal punishment, and refusal of access to information and denial of administrative justice. As a legal entity, the school is responsible for its actions. The school through its governing body has the legal



responsibility to see to it that its environment is conducive for teaching and learning by adopting a code of conduct for the learners and acting in the best interest of the learner (Potgieter, *at al.*1997:12,31; Bray 2006:95-99).

### 2.3 WHAT ARE HUMAN RIGHTS?

The concept 'human rights' has become a 'buzz word' to which many people and authors give different definitions and attach different meanings and purposes. D'Engelbronner-Kolff (1993:65) regards human rights as those rights and freedoms which are inherent in all human beings by virtue of their humanity alone, and which are not bestowed on them by any ruler, nor earned or acquired by purchase.

Human rights are those rights which belong to every man, woman and child simply because each of them is a person, a human being. These are rights which exist prior to, and independent of, governments and therefore human rights are rights which are inalienable. Perhaps in order to understand clearly what human rights are, it will help to say what they are not. For example, human rights are not a recent discovery, a passing concern, or a short-lived issue. They are not something about which only people in the Western world care, a new morality or a lay religion. They are claim-asserted and recognised as originating as rights, not in the form of love or grace that may be bestowed upon people. They are not related to any institution of welfare or charity. One does not have to earn or deserve them. Besides being aspirations or moral assertions they are increasingly becoming legal claims under some applicable laws, such as the UN Charter, the UDHR, the ICESCTR and the ICCPR (Branson 1982:7).

Singh (1986:70-71) writes that human rights are ideals for a democratic government as formulated in the UDHR of 1948. They are value expressions, relating to human beings by virtue of their humanity and are normative ideals of human life. Human rights belong to all human beings and, as such, they are universal and inalienable and cannot be overridden, except by other moral considerations.

Gewirth (1982:1-3) notes that human rights are of supreme importance and are central to all moral considerations. They can be justified by moral principles, because they are rights of every human being, and a necessary condition for human actions. Because they are such inherent and fundamental rights, they must be respected by every human being.

Bray (1996:151), Maree (1995:1,-2); and Kleyn and Viljoen (1995:236) regard human rights as basic rights or fundamental rights. Rautenbach and Malherbe (1998:10) and Beckmann, Klopper, Maree, Prinsloo and Roos (1995:3) indicate that the Bill of Rights, which is entrenched in the South African Constitution, contains value expressions relating to human beings by virtue of their being humans (or of humanity). People are born with human rights. In



the same vein, De Waal, Currie and Erasmus (2000:326) comment that people are equally entitled to rights, regardless of their sex, race, colour, language, national origin, age, class or religious belief. They further define human rights as 'generally accepted principles of fairness and justice or universal moral values, rights that belong equally to all people'. This means that people still have rights, even if the law of their countries does not respect or recognise them.

The above definitions lead us to the conclusion that human rights are natural rights, belonging to all human beings and therefore they do not need to be earned, bought or inherited by a specific group of people. What is common in all definitions is that human rights are, in essence, values belonging to all humans.

Against the background given above, this study firmly supports the definition provided by Beckmann *et al.* (1995:3) and Beckmann, Foster and Smith (1997:125) that human rights belong to all people, including learners. Because learners are human beings, they are also entitled to legal, moral and human rights, including the right to education. Learners should have a knowledge and understanding of their rights, because these are part of the broad set of basic values that inform the way in which humans organise the societies within which they live in order to ensure the preservation of those values (Dlamini, 1997:45). One should also understand that every human right comes with responsibilities.

## **2.4 THE RIGHT TO EDUCATION**

The right to education is a core human right. The next paragraph explores the historical development of the right to education.

### **2.4.1 Historical development of the right to education.**

The literature indicates that the term 'education' has long been with humankind (Volio, 1979:19), but the notion that education is a fundamental human right is a relatively new concept (Huberman, 1979:57). Societies have been educating their learners for ages, for different aims. Learners might be educated to fulfil different roles in the home and in society. This, therefore, means that societies continually ask themselves different questions about what kind of education is necessary for the child (Mialaret, 1979:48) and how relevant that particular kind of education would be for the child. For example, during the early Christian era, the aim of education was related to the moral-religious enlistment of both the individual and the community (Venter, Theron, & Van Zyl 1982:7), or the attainment of certain values and the preservation of one's own culture (Volio 1979:20), or protection from gross material need and as a means to experience the 'good life' (Wringe 1981:146-147).

In Western Europe, prior to the age of enlightenment and throughout the 19<sup>th</sup> century, education and schooling were provided completely by private agencies. Schooling was





provided either as private schools financed by parents, guilds or employers or, alternatively, by church-run schools aimed at the moral and religious improvement of the lower class (Huberman, 1979:57; Nowak, 1995:191; Hodgson, 1998:7). During this time it was very hard to accept the idea that public revenues could be used for education, that is, one man's taxes should be used to finance the schooling of another man's children. Education became a matter of public concern and state responsibility only with the emergence of the secular state. A letter written by Thomas Jefferson to George Wythe in Paris in 1786, as quoted by Volio (1979:22) and Starkey (1991:42) reads as follows:

I think by far the most important bill in our whole Code is that for the diffusion of knowledge among people. No other sure foundation can be devised for the preservation of freedom and happiness.... Preach! My dear sir, a crusade against ignorance; establish and improve the law for educating the common people.

There can be no doubt that Jefferson placed a high value on education, as it is through education that people can be freed from ignorance. Laws had to be passed to enforce such ideals and to ensure that people receive education.

In the sixteenth and seventeenth century philosophers such as John Lock and Jean-Jacques Rousseau adumbrated in their writings the modern concept of the individual right to education. They advocated a parental obligation to educate children until they become of age and are able to make full and proper use of their freedom and faculties. Education was perceived and conceived as pre-existing or as a natural right, which is superior to the positive law. This means that the right to education is a human right that man has by virtue of his or her being human, and parents have the obligation to nurture, protect and to provide children with basic education in order to prepare them for life (Hodgson 1998:7; Wringle, 1981:140). This idea is evidenced by the following quotation:

...giving children an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world, if he afterwards entirely neglects his culture, and education, and ...leads a life useless to others and shameful to himself (Hodgson 1998:8).

In the wake of the French and American Revolutions, education was considered to be a democratic principle and the promotion of education became a state or public function. Public education, which dates back to antiquity, took on a new and wider meaning. Education was no longer used for the purpose of educating a particular social class or a 'selected few' but for the benefit of all and was made available to the majority (Volio, 1979:21). The argument that the state should provide education to all learners merged economics and governance. It was argued that the 'poor', illiterate and armed are difficult to govern (Tomasevski, 2003:2).

The right to education emerged rather belatedly in the history of civil liberties, despite its importance (Volio 1979:19). Civil liberties instruments such as the English Bill of Rights of 1689 (hereafter referred to as EBR), the Virginia Declaration of Rights of 1776 (hereafter



referred to as VDR), the American Declaration of Independence 1776 (hereafter referred to as ADI) and the French Declaration of the Rights of Man of 1789 (hereafter referred to as FDRM) focused on the rights to life, freedom, equality, private property, freedom of expression and religious beliefs. These instruments did not contain any specific mention of the human right to education (Volio 1979:19; Hodgson 1998:9).

During the course of the nineteenth century the development of liberalism and socialism placed education on the catalogue of human rights. The liberalist concept of human rights focused on the duty of parents to provide education, their freedom to choose the education of their children within the limits established by law, and the duty of the state to guarantee that every child receives education by means of compulsory school attendance and legal regulation of school curricula (Nowak 1995:192).

At the international level, the right to education has been recognised by a number of universal and regional instruments, adopted particularly after World War II. To mark the importance of education, different countries recognised the right to education and included it in their constitutions, for example:

- The Constitution of the German Empire of 1849 contained a section entitled 'Basic Rights of German People' which provides for education-related rights.
- The Constitution of Nicaragua (1986) proclaims in Article 121 that all shall receive free and compulsory education.
- The Constitution of the Union of Soviet Socialist Republics (1977) (in Article 45) declared that all citizens of the USSR have the right to education, which shall be free at all levels and compulsory at the primary and secondary levels, including higher education.
- Article 20 the Constitution of Cyprus (1960) provides that every person has the right to receive education or instruction, with primary education being free and compulsory.
- The Egyptian Constitution of 1971 provides for full and compulsory education (De la Vega 1994:48-49; Hodgson, 1998:11-12; Nowak 1995:191; Wringe 1981:139).

The right to education is recognised as a legal right in the above-mentioned countries. South Africa included s29 in her Constitution, which provides for the right to education which forms part of the national legislative framework. Its recognition reflects both the liberal and the socialist basis of equality of educational opportunity for everyone, citizens and the aliens alike.

In this section the historical development of the right to education was discussed and in the next section the recognition of the right to education in international law is presented.





#### 2.4.2 The international law foundation of the learners' right to education

In this section I justify the importance of considering international human rights instrument when dealing with learners' right to education. Human rights were initiated on the international level. It is in the international level where the solid legal foundation of human rights and the right to education was laid. Previously the South African constitution made no mention of the place of international law in the South African legal system (Dugard 2005:55). The 1996 Constitution remedied this situation. The South African common law treats international law as part of its national law. In terms of section 232 of the Constitution customary international law is the law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. Further, The Constitution recognises international agreements or "treaties". A treaty that has been signed and ratified, but not enacted in local law, is binding on the South Africa on the international plane. The Constitution also reveals a clear determination to ensure that South African law is interpreted to comply with international law particularly in the field of human rights. The Bill of Rights is modeled on international human rights conventions. These international human rights instruments are important as they guide the interpretation of the South African Bill of Human Rights (Van Raemdonck, 1997:258). The Constitution prescribes the interpretation of human rights in the Bill of Rights. In terms of section 39 of the Constitution:

1. When interpreting the Bill of Rights a court, tribunal or forum
  - a. must promote the values that underlie an open and democratic society based on human dignity equality and freedom,
  - b. must consider international law,
  - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and the object of the Bill of Rights.
3. The Bill of Rights does not deny the exercising of any rights and freedom that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill. (Dugard 2005:65).

International human rights instruments such as the UDHR 1948, the ICESCR of 1960, the ICCPR and the ACHPR of 1990 heavily inspired the content of the South African Bill of Rights

The human right to education was not fully proclaimed at the international level until after the World War II. At that time the human right to education was recognised in international and regional instruments and in customary law, and appeared most prominently in the hierarchy of human rights (Hodgson 1998:39). The progress made in the recognition of the right to education has resulted in the fact that it is now recognised and reaffirmed in some detail by major international human rights instruments (UDHR, CDE, CRC, and ICSECR) (Daudet & Singh 2001:13). International states have agreed, by ratifying several declarations, conventions and covenants, that they will uphold human rights and protect the rights of their citizens, including the rights of learners to education. Once human rights instruments are ratified, they become legally binding on the state that ratified them (Balton 1992:211; Dorr



1994:10). Some of these human rights instruments are explained in the following paragraphs.

#### **2.4.2.1 The Declaration of Geneva of 1924**

Although the Declaration of Geneva of 1924 does not specifically make reference to the right of learners to education, it does lay some foundations for such a right. Principle V states that a child must be brought up in the consciousness that its talent must be devoted to the service of its fellow men (Arajärvi 1992:410; Detrick 1999:427; Hodgson 1998:11; Van Bueren 1995:7; Van Bueren 1998:3).

#### **2.4.2.2 The Universal Declaration of Human Rights (1948) (UDHR)**

According to the first sentence of Article 26 of the UDHR (1948) “everyone has the right to education”. This Article refers to both adults and learners and to education in the broad sense (Arajärvi 1992:406). It includes all activities by which human beings transmit to their descendants a body of knowledge and skills and a moral code, however elementary, which will enable that group to subsist in the particular conditions of its characteristic environment and ethics (M’Bow 1979:7; Detrick 1999:475). This declaration provides the foundation for both moral and legal principles in education. Although it was not recognised as being legally binding, it covers the political and moral scope of human rights resolutions by which member states to the declaration must abide. In order to make it binding, it was necessary that its major principles should also be taken up in an instrument such as a covenant. The importance of the UNESCO conventions, declarations and programmes adopted on the right to education, lies in the fact that firstly they reaffirm certain principles enshrined in the basic text of the conventions, and then these are given concrete substance, otherwise they would remain ‘mere principles’ whose application would not be clear. Secondly they ensure that member states commit to the right to education by updating the principles for reaffirming that right (Daudet & Singh 2001:14).

#### **2.4.2.3 The UN Declaration on the Rights of the Child of (1959) (UNDRC)**

In its preamble, the UNDRC reaffirms the proclamation made in the UNDHR of 1948 that everyone is entitled to the rights enshrined in the declaration without distinction of any kind. The first direct reference in an international human rights instrument to the child’s right to education is in Principle 7 of the UNDRC. This principle proclaims that “the child is entitled to receive education, which shall be free and compulsory at least in the elementary stage” (Arajärvi 1992:411; Detrick 1999:472; Van Bueren 1998:5), but it does not include provisions with regard to the quality of education.



#### **2.4.2.4 The Convention against Discrimination in Education (1960) (CDE)**

A further international recognition of the right to education came with the adoption of the CDE in Paris by the UN General Conference of UNESCO in 1960, which came into force in 1962. The Convention reaffirms Article 7 of the UDHR of 1948, which asserts the general principle of non-discrimination and proclaims in Article 26 that every person has the right to education. The Convention also reaffirms the UNESCO Constitution that advocates the ideals of equality of educational opportunity without regard to race, sex or any other discrimination (Daudet & Singh 2001:15). This convention not only proscribes discrimination in education, but it also promotes equality of opportunity and equal treatment for all. It allows the establishment and maintenance of private educational institutions based on language, religion and cultural beliefs, as long as their purpose is not to discriminate or exclude other groups of persons, and provided that they offer a quality and level of education equal to those provided by public authorities (Article 2(c) of the CDE of 1960).

#### **2.4.2.5 The International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)**

According to Daudet and Singh (2001:7), Detrick (1999:474), Singh (2003: 16) and Van Bueren (1998:72), the ICESCR of 1966 covers the right to education comprehensively, especially Articles 13 and 14, as they set out the aims of education systems and the content of education. Article 14 deals more specifically with the provision of free primary education. Article 13(2) corresponds with Article 26(1) of the UDHR (1948) and points out that “primary education shall be compulsory and available to all”.

#### **2.4.2.6 The Convention on the Rights of the Child (CRC) (1989)**

The latest of the international conventions concerning the child’s right to education is the CRC adopted by the United Nations General Assembly in 1989. This convention contains numerous provisions with regard to education. Whereas Article 23(3) obliges the state parties to ensure that disabled learners have access to education and training, Article 29(1) (a) provides for the aims and purposes of education and states that education shall be directed to the development of the child’s personality, talents and physical and mental ability. Article 30 guarantees the monitoring of education and states that learners must not be denied the right to use their language, observe their culture and profess their religious beliefs (Arajärvi 1992:417; Detrick 1999:471-472; Hodgson 1998:44; Tomasevski 2003:54; Van Bueren. 1998:16).



#### **2.4.2.7 Regional human rights instruments**

Regional human rights instruments are also important components of the international legal framework providing for the right to education. The African Charter on Human and People's Rights adopted in 1981 (ACHPR) provides that every individual shall have the right to education Article 17(1). Article 11 of the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC) also covers the right to education and makes direct reference to the child (Ghandi 1995:330, 349; Van Bueren 1998:36). Article 11(1) provides for the content of education, non-discrimination, parental choice and school attendance, as well as the reduction of dropout rates.

South Africa ratified the human rights treaties such as UDHR of 1948, UNESCO CDE of 1960, ICESCR of 1966, CRC of 1989, ECCPR and ACRWC during the period 1994–1996 (Sarkin 1998:635, Davel 2000:199). By so doing South Africa agreed, along with the international world, to abide by international law (DUGARD 2005:27). Having discussed the recognition in international law of learners' rights to education, this overview continues with the core contents of learners' rights to education.

#### **2.4.3 The state obligation with regard to the right to education**

Aspects of the right to education are found in human rights treaties and declarations. States are under obligation to provide education at certain specific levels. They are also compelled under the law to provide education that exemplifies the following interrelated and essential features: it should be available, accessible, acceptable and adaptable. These features are referred to as the 'four A's' (Tomaševski 2003:51; UNESCO General Comment 13 of 2003: 9). What each feature entails with regard to the right to education is now briefly explained.

##### **(a) Availability of the right to education**

Availability of the right to education implies that functioning educational institutions and programmes have to be available in sufficient quantity. These may include, but may not be limited to, buildings, sanitation, safe drinking water, trained educators, teaching materials, libraries, computer facilities and information technology (UNESCO General Comment 13 of 2003::9; the South African Human Rights Commission (hereafter SAHRC) 2006:10).

##### **(b) Accessibility of the right to education**

Accessibility of the right to education incorporates three overlapping dimensions. Firstly, education must be accessible to all without unfair discrimination (see § 2.4.5 and § 2.5.2). Secondly, education must be physically accessible, that is, schools should be within safe physical reach. Schools and educational institutions must also be accessible to people with



disabilities to exercise their right to access education. Thirdly, education must be economically accessible, that is, it must be affordable to all. In terms of the human rights instruments there is a distinction between accessibility to primary, secondary and higher education, with primary education being made free and compulsory to all (UNESCO General Comment 13 of 2003:9) (see § 2.4.1).

### **(c) Acceptability of the right to education**

Acceptability of the right to education refers to the substance of education, that is, quality of education, including curricula and teaching methods. These features should be acceptable in term of relevance, culturally appropriate for learners and in some cases, also for parents. Most importantly the standard and quality of education must be in line with the standards set by the state. Some of the rights arising from government's obligations to make education acceptable include language of instruction (see § 2.5.2.2), respect for religious convictions (see § 2.5.2.3), and prohibition of corporal punishment (see § 2.5.4).

### **(d) Adaptability of the right to education**

Adaptability of the right to education refers to the capacity of the education system to adapt to the diverse and changing needs of learners, parents and communities. The adaptability of education requires schools to adapt to the needs of learners, by applying the CRC principle of the best interest of the learner. This includes whether or not education is adaptable in a manner to include the education of people with disabilities.

The following paragraphs cover the content of the right to education arising from the 'four A's' (Tomaševski 2003:51), and the scope of the right to education as set forth in international human rights treaties and declarations.

## **2.5 Principles regarding the right to education**

Human rights treaties provide the basic principles which are pillars of the right to education. These are the principle of free and compulsory education, the principle of non-discrimination in education and the best interests of the child. Each of them will be discussed in the next paragraph.

### **2.5.1 The principle of free and compulsory education**

Various international and regional human rights instruments, some of which are reflected in Table 2.1, make provision for the principles of free and compulsory education. The notion that education is a basic human right is widely accepted today. Through the ratification of the treaties in Table 2.1, the party states agreed that everyone has the right to education. To



make this agreement real, the party states also agreed on measures to be taken to make education accessible, available, acceptable and adaptable to everyone. They also laid down principles to guide states in their endeavour to make the right to education a reality for everyone.

In the eighteenth century it was believed that young boys should start working earlier in their lives than girls, to prepare them for work in adult life. For example

Going to school in comparison to working is idleness and the longer the boys continue in this easy sort of life, the more unfit they will be when growing up for downright labour (Tomasevski 2003:24).

This perception has evolved with time. Most people today no longer publicly advocate that primary school learners should work, as was done in the 1700s (Tomasevski 2003:24). Primary or elementary education has since been made free and compulsory for all. The concern about access to education is a relatively recent phenomenon, for example, neither France nor England introduced free and compulsory education until the 1980s (Rideout (1987:21). However compulsory primary education was advocated by some states as early as the late 1700s, with Prussia being the first country to introduce it in the year 1793. In South Africa compulsory education starts in grade 0 and ends in grade 9 and is not free. Parents pay school fees determined by the school governing body and approved by parents.

The expansion of public education was rapid during the first decade after World War II (Tomasevski 2003:69). The duty of states to provide free education differs according to the level of education, with the duty being stronger with respect to primary education and weaker in terms of the provision of secondary education (Van Bueren 1995:234). Article 26(1) of the UDHR (1948/1998) provides that education should be free at least on the elementary and fundamental levels. Article 13(2) (a) of the ICESCR (1966) provides that, with a view to achieving the full realisation of the right to education, state parties should make primary education compulsory and available free of charge to all. The same standard is reiterated in Article 28(1) (a-f) of the CRC (1989). In the same vein, Article 12 of the American Declaration provides that “at least a primary education should be free” and Principle 7 of the DRC (1959) provides that education should be free at least in the elementary stages.

All these instruments seem to indicate the direction in which states should move when extending free education (Arajärvi. 1992:408; Halverson 1990:341). Education as a universal human right requires worldwide monitoring in terms of governments’ obligations and policies for education, because inequalities accumulate in time and space (Tomasevski 2003:53).





**Table 2.1: Key treaty provisions on free and compulsory education**

INSTRUMENTS	ARTICLES	PROVISIONS
UDHR: 1948	Article 26(1)	Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.
UNESCO CDE (1960)	Article 4(a)	The state parties to this Convention undertake to formulate, develop and apply a national policy which will tend to promote equality of opportunity and of treatment and in particular, to make primary education free and compulsory.
ICESCR (1966)	Article 13 (2)(a)	Primary education shall be compulsory and available free to all.
CRC (1989)	Article 28 (1)	State parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity they shall make primary education compulsory and available free for all.
ACRWC (1990)	Article 11 (3)(a)	State parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular (a) provide free and compulsory basic education.

Adapted from Gandhi (1995:349); Van Bueren (1998:38,69)

In this vein Davel (2000:204) observes that learners who live in rural areas have less access to the right to education than learners living in urban area in the same state and inequalities widen and affect them in their adult life. Article 2(1) of the ICESCR (1966) adds that state parties undertake to implement the rights to education progressively, to the maximum of their available resources. This Article indicates that the state should provide free primary education to a certain level, depending on the availability of resources. Article 14 of the ICESCR (1966) requires states to formulate and adopt a reasonable plan that determines the number of free and compulsory school attendance years for which states are obliged to provide. Not only is the number of years considered but also the level of education. Table 2.2 indicates the length of legally mandated compulsory education in different countries.

**Table 2.2: The legally mandated length of compulsory education, by country**

No of Years	Country
13	Netherlands
12	Belgium, Brunei, Jerusalem, Germany, St. Kitts and Nevis.
10	Argentina, Australia, Canada, France. Namibia, Spain, Venezuela, USA.
9	Algeria, Australia, Bahamas, China, Cuba, Hong Kong, Mali, South Africa, Tunisia.
8	Albania, Italy, Angola, Chile, Croatia, Egypt, Malawi, Romania, Zimbabwe.
7	Burkina Faso, Lesotho, Mozambique, Tanzania, Zambia, Mauritius.
6	Afghanistan, Benin, Burundi, Chad, Iraq, Peru, Togo, Rwanda.
5	Bangladesh, Colombia, Iran, Laos
4	São Tomé and Príncipe.

Adapted from Tomasevski (2003:26)



Table 2.2 shows that the number of years of compulsory education differs according to various countries, ranging between 13 years for the Netherlands to four years for São Tomé and Príncipe. In many countries the period of primary education has been lengthened. The problem of introducing and mandating free primary education lies in the fact that the state parties who are signatories to the covenants, have to introduce a range of education rights, usually within one historical epoch. This process in some ways hampers the goal of access to basic education for 80% of relevant school age learners, as set out in the plan of implementation of the World Declaration on Survival, Protection and Development of the Child (Van Bueren 1995:235).

The reason why primary education was made free and compulsory revolved around economic, social and cultural arguments (Tomasevski 2003:22). Economically, the need for a pool of literate and skilled people was a driving force behind compulsory education during the early period of industrialisation. One of the reasons was to ensure that people could be self-employed or employable after leaving school, rather than becoming a financial burden to public authorities. Although the present global emphasis is on primary education as a 'passage way out of poverty', evidence indicates that the key to reducing poverty is secondary schooling, rather than primary schooling (Tomasevski 2003:102). However, since primary education lays the foundation for secondary education, it can be concluded that primary education contributes indirectly to poverty alleviation.

The United Nations Economic Commission for Latin American and the Caribbean (ECLAC) has found that young people have to complete secondary school in order to achieve an 80% probability of avoiding poverty. The Commission's subsequent research also confirmed that 96% of families where the parents have less than nine years of education, live in poverty.

Another reason for making primary education free and compulsory was to keep learners out of the labour market, and to prevent possible learner exploitation and entry into the adult world too early in life. The International Labour Organisation (ILO) linked the age for completing compulsory education and the minimum age for employment and in 1921 set the latter at 14 years. In 1945 the ILO Convention on the Minimum Age for Employment set the upper limit of compulsory school attendance age at 16 years (Tomasevski 2003:22, 24). The minimum age of employment differs from country to country.

Article 14 of the CESCRC establishes an obligation of conduct on states to implement free and compulsory education. It provides that state parties which have not yet secured free and compulsory primary education, have an obligation to formulate and adopt a detailed plan of action for the progressive implementation thereof, within two years after ratification. The implementation must occur within a reasonable number of years (Nowak 1995:199). The discussion with regard to education in South Africa will be dealt with in § 2.7. Having explored



the principle of free and compulsory education, the next section discusses the principle of non-discrimination in education, as it concerns the accessibility of the right to education.

### **2.5.2 The principle of non discrimination in education**

The standard of non-discrimination and the right to education are not new. Non-discrimination is a fundamental pillar in international law. Table 2.3 summarises the original text of the treaty provisions that prohibit discrimination. These treaty provisions comprehensively cover the right to education without discrimination. They spell out what is considered to be non-discrimination and discrimination in education in international law (UNESCO 2003:16). The discussion that follows is based on the treaty provisions shown in Table 2.3.

The term 'discrimination', as defined in Article 1 of the CDE 1960/1962, includes any form of distinction, exclusion, limitation or preference based on race, colour, sex, language, religion, political or other opinion, national or social origins, economic condition or birth and has the purpose or effect of nullifying or impairing equality of treatment in education and in particular. It could be considered as discrimination in education if an education system deprives any person or group of persons of access to education of any kind or at any level or limits any person or group of persons access to education of an higher standard (Cullen, 1993:153; De la Vega 1994:46; Nowak 1995:208; Van Bueren 1995:246).

Article 2 of the UDHR (1948) sets out the basic requirements for non-discrimination in education. It states that everyone is entitled to all the rights and freedoms set forth in the declaration without discrimination of any kind. The principle of non-discrimination protects citizens and aliens alike. Knight (1995:200) states that the prohibition of discrimination applies in law and in practice in all fields regulated and protected by public authorities. The notion that discrimination against anyone is prohibited is made clear by the language used in the international standard-setting instruments such as UDHR, CRC and ICESCR

According to Daudet and Singh (2001:15) the purpose of the CDE is not only to proscribe discrimination in education, but also to adopt measures aimed at promoting equality of opportunity and treatment for all in the field of education. In the cases where discrimination has already occurred, Van Bueren (1995:246) states that parties are obliged to implement immediate measures to both prevent and eliminate further discrimination. The measures are clearly set out by Van Bueren (1995:246) and include repealing any statutory, administrative instruction or practice which involves discrimination; ensuring equality in the admission of learners to educational institutions; prohibiting differences of treatment between nationals by public authorities on the basis of merit or needs in matters of school fees, scholarship or other forms of assistance to learners; ensuring access to education for girls; and eliminating any form of stereotyping (Hodgson 1998:98).



**Table 2.3 Key treaty provisions on non-discrimination in education**

Instruments	Article	Provisions
<b>CDE (1960/1962)</b>	<b>Article 1</b>	The state parties to this convention undertake to formulate, develop and apply international policy, of which Article 4 tends to promote equality of opportunity and treatment in education. The term 'discrimination' includes any distinction, exclusion, limitation or preference which, based on race, colour, sex, language, religion, political opinion national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment and education and in particular:  (a) of depriving any person or group of persons of access to education of any type or any level; (b) of limiting any person or group of persons to education of an inferior standard; (c) of establishing or maintaining separate educational systems or institutions.
<b>ICCPR(1966)</b>	<b>Article 24</b>	Every child shall have, without any discrimination as to race, colour, sex, language, religion, nation or birth, the right to protection.
<b>ICERD(1965)</b>	<b>Article 7</b>	State parties undertake to adopt immediate and effective measures, in particular in the field of teaching, education and culture, to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or nationality or ethnicity to equality before the law, notably in the enjoyment of the right to education and training.
<b>CEDW(1979)</b>	<b>Article 10</b>	State parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on the basis of equality of men and women: (a) Access to the same curriculum, the same examination, teaching staff with qualifications of the same standard and school premises and equipment of the same quality. (b) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education. (c)The reduction of female student drop-out rates and the re-organisation of programmes for girls and women who have left school prematurely, who acquire education at all levels on at least an equal footing with the rest of the national community.
<b>CRC(1989)</b>	<b>Article 2 (1,2)</b>  <b>Article 30</b>	(1) The state parties shall respect each child without discrimination of any kind, irrespective of the child's, race, colour, sex, language, religion, political opinion, ethnic or national status.  (2) State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination.  In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such minorities shall not be denied the right in community with other members of his or her group, to enjoy his or her own religion or to use his/her own language.
<b>ACRWC(1990)</b>	<b>Article 5(3)</b>	The state parties to the present charter shall take all appropriate measures in respect to female, gifted and disadvantaged learners to ensure equal access to education for all Sections of the community.
<b>UN DEID(1981)</b>	<b>Article 5(3)</b>	Based on religion the child shall be protected from any form of discrimination on the ground of religion or belief.
<b>UDHR(1948 1998)</b>	<b>Article 2</b>	Everyone is entitled to all the rights and freedom set forth in this declaration without distinction of and kind such as race, colour, sex, language and religion.
<b>CITP 1989</b>		Measures shall be taken to ensure that members of the indigenous people have the opportunity to acquire education at all levels on at least equal footing with the rest of the national community.

Any unreasonable discrimination or distinction on the basis of sex, race, social origin or any other criteria relating to the law or/and practice of education, access to education, dismissal,



tuition and fees, subsidies, content and quality of education constitutes a violation of Article 26 of the ICCPR (Nowak 1995:201). Victims of such discrimination have the right to submit their complaints to the Human Rights Committee of the state concerned. Article 11(3) (e) of the ACRWC obliges state practice to take special measures to ensure equal access to education for girls.

Article 2(2) of the CDE (1960) provides that, when permitted in a state, the following situations do not constitute discrimination and do not contradict any provision on non-discrimination:

- a) The establishment and maintenance of separate educational institutions or systems for pupils of different sexes if those institutions or systems offer equivalent access to education and courses of study, provide professionally qualified teaching staff, equal standards in teaching, well equipped school premises and equipment.
- b) The establishment and maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupils' parents, if the participation in such a system or attendance at such institutions is optional and if the education of such institutions conforms to the standard laid down or approved by the competent authorities for education of the same level.
- c) The establishment or maintenance of private educational institutions, if the objective of such an institution is not to secure the exclusion of a group but to provide educational facilities in addition to those provided by the public authority or if the education provided conforms with the standards laid down or approved by the public authorities, in particular for the same level of education.

There are numerous instruments containing similar provisions on non-discrimination and the right to education as those indicated in Table 2.3. The laws and constitutions of several nations provide for the right to education without discrimination and specifically for equality of opportunity in the exercise of the right to education. Examples of such provisions in various countries are:

- Morocco: The National Charter of Education (1980) guarantees the right to education and equal access to educational resources for all citizens regardless of race or sex.
- Japan: Article 26 of the Constitution of Japan states that education is a right of people and that all people have a right to receive equal education according to ability or talent. Equal educational opportunity is guaranteed regardless of race, sex or economic position.
- South Korea: The Constitution of South Korea provides that all people have the right to education according to their ability. Article 81 of the education law of 1949 also guarantees equal opportunities in education regardless of faith and sex, and goes further to include socio-economic position.



- Provisions regarding the right to equal educational opportunities are also guaranteed by the constitutions of countries such as Denmark, Finland, Sweden and Iceland (Arajärvi 1992:405).
- Peru: The general law of education (1983) of Peru requires all Peruvian citizens to pursue primary instruction, states that public education is free, and prohibits discrimination on the basis of sex, race, language, political affiliation or socio-economic status (De la Vega 1994:49; Hodgson 1998:12-13; Knight 1995:195).

In the light of the foregoing one can conclude that the principle of non-discrimination seeks to promote equal educational opportunities for all and in the process outlaws unfair discrimination in educational institutions. To legalise the principle different countries included the clause dealing with equality in their constitutions. The next section discusses court cases with regard to the principle of non-discrimination in education.

#### **2.5.2.1 Court cases with regard to the principle of non discrimination in education**

Courts play a significant role in eliminating government practices which systematically violate human rights. Alexander and Alexander (1992:192-196), Knight (1995:186-187) and Hodgson (1998:19) refer to the *Plyler v Doe* case. The question presented in this case was whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, the state of Texas may deny undocumented school learners the free public education that it provides for learners who are citizens of the United States or legally admitted aliens. The United States Supreme Court held in this case that the Equal Protection Clause of the US Constitution prohibits a state's discriminatory denial of education to undocumented aliens. It is evident that the Supreme Court's reasoning was due to its recognition that education is a right which all individuals should enjoy, regardless of their legal status or lack thereof (Alexander & Alexander 1992:196; Hodgson 1998:177). The comments on the implementation of Article 13(e) of the Convention against Discrimination in Education (CDE) (1960) (UNESCO 2003:16) confirm that the principle of non-discrimination extends to all persons of school age residing in the territory of the state party, including nationals irrespective of their legal status.

The next paragraph considers various realities which affect the principle of non-discrimination in education.

#### **2.5.2.2 Extraordinary realities with regard to the principle of non-discrimination in education**

From a legal point of view the position that all humans have the right to education and that the principle of non-discrimination should form the basis of all educational practices, is seldom





compromised. However, from a practical point of view, the implementation of the policy directives and the realisation of education free from discrimination, sometimes falls short (Rideout 1987:18). Charles Ammoun (special reporter of the Sub Commission on Prevention of Discrimination of Minorities) presented a research report dealing with the situation around the world covering all grounds for discrimination. The study concluded that while legal discrimination has virtually been eliminated, discriminatory practices are nevertheless frequent (Cullen 1993:147). Mower (1997:23) confirms that discrimination, or inequality in treatment of learners, takes many forms, for example, denial of equal access to education on the basis of sex, colour, language, religion or culture.

Gosh and Attieh (1987:41-46) conducted a comparative study investigating the right to education free from discrimination in India and Saudi Arabia. Their findings are that while the literacy rate has risen in some states, in other states it is below 20%. Nearly 120 million people in the age group 15-35 are illiterate. Dimensions of culture, religion and class still have a significant impact on the education of girls.

The next section considers the principle of the learners' best interests as it applies to the learners' right to education.

### **2.5.3 The principle of the best interest of the learner in relation to the right to education**

Article 3 of CRC of 1989 provides that in all actions concerning children, whether undertaken by public or social welfare institutions, courts of law legislative bodies, the best interest of the child shall be a primary consideration. Along this line Chapter 2 of the Constitution entrenches human rights. Section 28 of the Constitution is meant specifically for children in addition to other basic rights. Section 28((2) of the Constitution reaffirms Article 3 of CRC and provides that a child's best interests are of paramount importance in every matter concerning a child.

The school as a public institution should promote and respect the learners' best interests. There are provisions in the Schools Act which are meant for the protection of the learners' best interests. Section 10 of the Schools Act prohibits the administering of corporal punishment to a learner at a public school. Section 9 of the Schools Act requires that a learner may be suspended from school after a fair hearing. In terms of Section 8(3) of Schools Act the code of conduct of learners must provide for due process to ensure the protection of the rights and the best interest of the learner and any other party who is involved in disciplinary proceedings. This provision is consistent with Section 33(1) of the Constitution which guarantees the right to administrative action that is lawful, reasonable and fair. To conclude, those who make decisions about the learner are increasingly required by law to act in the best interest of the learner.



## **2.6 THE CORE CONTENTS OF THE RIGHT TO EDUCATION**

With the recognition of the right to education in public law, the scope of the right to education has widened to include legal issues. The next paragraph explores the core content of the right to education.

### **2.6.1 The right to secondary education**

The right to secondary education includes the elements of availability, accessibility, acceptability and adaptability, which are common to education in all its forms and levels (UNESCO 2003:9-10; Tomasevski 2003:51). Article 28(1) (b) of the CRC (1989) obliges state parties to develop various forms of secondary education. The right to access to a secondary school should be achieved progressively; financial assistance should also be given where there is a need (Detrick 1999:471). Similarly Article 12(2) of the ICESCR (1966) provides that state parties recognise that, with a view to achieving full realisation of the right to education:

Secondary education in its different forms, including technical and vocational secondary education shall be made generally available, accessible to all by appropriate means and particularly by the progressive introduction of free education (Detrick 1999:481).

State parties are obliged to provide free secondary education to the maximum extent of their available resources. The reference to “financial assistance in case of need” legitimises fee payments for secondary education, even if primary education should be available ‘free of charge’. Financial assistance does not cover expenses incurred in providing transport and uniforms. Parents are required to meet these expenses with regard to the education of their children (Arajärvi 1992:408; Van Bueren 1995:236). The content of secondary education varies among state parties, but should include the completion of basic education. It is also important for secondary education to be flexible to respond to the needs of students in different social and cultural settings. This is because secondary education prepares learners for vocational and higher education (UNESCO 2003:11). The right to education requires learners to attend school regularly, which is dealt with in the next paragraph.

### **2.6.2 School attendance**

There are international and regional instruments aimed at the realisation of learners’ rights to education through monitoring school attendance and attempting to reduce the dropout rate. The party states have an obligation under Article 28(1) (e) of the CRC (1989) which includes “taking measures to encourage regular attendance at school and the reduction of the dropout rate”. Article 11(3)(d) of the ACRWC (1990) contains a similar provision.

Although such provisions are documented, more and more learners are being kept away from school because of different reasons. Jeffs (1986:55) and Freeman (2002:112) note that truancy is a major problem facing school administrators, and the incidence thereof is



increasing. There is no single cause of truancy, but various factors might contribute towards the phenomenon. Such factors might include perceived irrelevance of the curriculum; poor relationships with educators; thin employment prospects; corporal punishment or other inhumane disciplinary measures in schools; poverty in the home; school uniforms; racism at school; schools charging or demanding higher school fees which parents are unable to afford; schools tending to label slow learners as special-needs learners (the labelled learners feel stigmatised); situations requiring learners to walk long distances to school; and violence and bullying at school.

Ohsako (1997:12-13) argues that school violence may impact badly on the realisation of learners' rights to education. He summarises the findings of studies conducted in Ethiopia, Israel and Latin America about the impact of violence on learning. The results show that 40% of students indicated that they had repeated classes or dropped out of school due to violence. In general, reported consequences of school violence were innocent learners joining gangs; increased corporal punishment by educators and parents; the weakening of school discipline and breaking down of school rules; changing schools and absenteeism; vandalism in schools; disruption of teaching; and wasting normal working hours of educators, principals and other school personnel.

The school and parents can work together to promote better school attendance. The school can draw up a school policy to promote better attendance. At the same time the policy should be sensitive to non-attendance and be able to differentiate between learners' behavioural problems or phobias, and learning difficulties. The school may improve school attendance by considering the individual needs of learners. Absenteeism can become habitual like anything in life. Written agreements between learners and the school could also help by serving as a reminder for a learner who is habitually absent (Whitney 1993:106,107 & 112).

There are various regulations that must be followed should circumstances arise which prevent a learner from attending school. For example, in Illinois (USA) a learner is allowed to stay on a school register for a period not exceeding three months. The parents of a learner must notify the school of the learners' illness or hospitalisation. On his return the parents must show valid proof of illness. Parents who claim that their child is ill and cannot attend school but fail to produce a valid medical certificate may face charges. An example of a case involving failure by parents to produce a valid medical certificate is the Illinois case (Alexander & Alexander 1992:22) which resulted in a charge of truancy. In this case the learner was absent from school for 339½ days over a period of two years. Testimony of the doctor about the illness of the learner indicated that he (the learner) suffered from allergies, but these were not of such a magnitude to warrant prolonged absence from school. Having no proof of illness and thus being guilty of non-compliance with the law, the parents' conviction was upheld. Parent's insistence on taking their learners out of school for unauthorised purposes may be



grounds for conviction under attendance laws. In such cases the school policy limits absence for educational trips to one trip per year not exceeding five days.

When dealing with learners' right to education, the issue of school discipline is inevitable. According to Alston and Staden (2006:373) education and a lack of sound discipline are a contradiction. Order and stability with the school create safety and result in an environment that is conducive to learning and teaching. No matter how comprehensive school policies and rules are, learners will always commit offences for which they could be disciplined. The next paragraph investigates the issue of school discipline through the lens of international treaty provisions.

### **2.6.3 Humane school discipline**

One of the most persistent and troublesome problems confronting educators and school principals is learner discipline following misconduct. Various strategies used to command obedience and respect in school situations are briefly examined in this section. The legal and human rights stance in connection with humane disciplinary measures is explored.

The underlying principle concerning the imposition of school discipline is that it should be administered in a manner that is consistent with the dignity of a learner and in accordance with other applicable international laws on the rights of a learner (Van Bueren 1995:249). The principle of humane school discipline was first expressed in treaty form in Article 28(2) of the CRC (1989). Poland proposed the inclusion of this Article in the CRC, and was strongly supported by the Soviet Union and Ukraine on the basis that "in many countries degrading and cruel methods of discipline were still inflicted upon school learners" (Detrick 1999:488; Van Bueren 1995:249). Ray (1994:27), who wrote that cruel and unusual punishment is the problem of the society as a whole rather than of the school in particular, supports this viewpoint. Many societies still practise the infliction of pain on learners as the best way of discipline.

Article 28(2) of the CRC prohibits inhumane school discipline (Detrick 1999:208; Nowak 1995:208) and provides that "state parties shall take all appropriate measures to ensure that school discipline is administered in a manner that is consistent with the child's human dignity". This provision can be interpreted in line with Article 27(a) of the CRC (1989) which provides that "no child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment". Articles 11(5) and 16(1) of the ACRWC (1990) also prohibit cruel and inhumane treatment. These articles compel state parties to respond appropriately to ensure that learners who are subjected to school discipline be treated with humanity and respect for their human dignity.



Article 1(d) of the UNESCO CDE of (1960) links the concept of human dignity to disciplinary measures in education. It binds state parties to follow educational practices which do not inflict “[O]n any person or group of person’s conditions which are incompatible with the dignity of man”. In international law, state parties are obliged to protect learners from all forms of physical or mental injury or abuse while they are with any person who has the duty to care for the child, including parents and educators. This protection is enshrined in Article 19(1) of the CRC (1990). Article 5(1) of the American Convention of Human Rights (1969) also provides that every person has the right to have his physical, mental and moral integrity protected (Van Bueren 1998:98).

In its General Comments, the Committee on ICCPR acknowledges that the prohibition of torture, cruel, inhumane and degrading treatment must be extended to include corporal punishment and excessive chastisement as educational disciplinary measure. Authors such as Imbrogno (2000:127) and Squelch (2000(a): 28-31) are opposed to corporal punishment. They define corporal punishment as a deliberate forceful act against a child that is aimed at inflicting pain or physical discomfort, but not injury, for the purpose of correcting or controlling the child’s behaviour. Although corporal punishment in schools and at home has deep historical, cultural and religious roots, it has been abolished in several countries. The United States continues to permit corporal punishment in public schools in some states (Imbrogno, 2000: 125).

Although tangible progress has been achieved with regard to learners’ rights within the school setting in the United Kingdom (Jefferies 2002: 45), it took until 1999 for corporal punishment to be eradicated there (Freeman 2002:112). The Human Rights Act of 1998 is the most significant step that led to the final eradication of corporal punishment in school and at home in the United Kingdom. Article 3 of the Act is concerned with freedom from torture or inhumane, degrading treatment. The next discussion explores court cases with regard to legally indefensible school discipline.

### **2.6.3.1 Court cases with regard to legally indefensible school discipline**

Schools operate under an entrenched Constitution which is the supreme law of the country, and to which all other laws and school administrative actions must conform. Failure to do so may lead to legal charges levelled against the perpetrator. The case *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) is the last word on corporal punishment in South African public and private schools, outlawing it completely. In the case of *Halics v United Kingdom* a nine-year-old boy was beaten by his stepfather at intervals for over a week (Fortin 2002:125). The law in the UK at that time allowed parents the use “of moderate and reasonable” corporal punishment on their children. The jury in this case acquitted the stepfather of criminal assault. The Human Rights Act of 1998, which became fully operational in 2000, is considered to be significant in the history of English law. Article 3



of this Act protects learners from abuse and inhumane punishment even in the privacy of their own home. In the case of *UY v United Kingdom* the school principal of a private school caned a fifteen-year-old boy. According to Nowak (1995:209) and Van Bueren (1995:251), the European Commission on Human Rights found the four cane strokes on the buttocks of this boy to be degrading under Article 3 of the European Commission of Human Rights (ECHR).

Another case concerning the use of corporal punishment in school is the case of *Campbell and Cosans v UK*. In this case two mothers complained about the use of corporal punishment at the school attended by their learners. They alleged that their children had been hit with a leather strap. The court held that there was no evidence that the learners underwent any humiliation or debasement solely by reason of being subjected to strapping. However, the European Court of Human Rights not only found violation of Article 13 of the ECHR because the learners had been strapped, but also ruled that their suspension from school as a result of their parents' refusal to accept the existence of corporal punishment as a disciplinary measure, amounted to the denial of the learners' right to education (Detrick, 1999:490; Kilkelly, 1999:77; Nowak, 1995:208; Van Bueren, 1995:249).

In the case of *Warwick v the United Kingdom* the applicant was subjected to corporal punishment. An educator caned her on the hand because she smoked on her way from an examination. Article 13 of the ECHR was applied in judging this case. The European Commission on Human Rights held that the caning on the hand by the male educator in the presence of another male educator had caused the learner humiliation and the educator also violated Article 13 of the European Convention on the Rights of the Child (Van Bueren 1995:251).

In the case of *Jeremy Costello-Roberts v United Kingdom* the applicant was beaten with a rubber soled gym shoe by a schoolmaster at a private school. The European Commission on Human Rights concluded that this relatively moderate punishment of a nine-year-old boy did not constitute degrading treatment, but did however violate his right to respect for private life. Van Bueren (1995:252) comments on the inconsistency of the judgment in the *Jeremy Costello-Roberts v United Kingdom* case and suggests that it is difficult to argue that caning is degrading when administered to a learner at a state school, but that it is not so in a private school. She also argues that it is difficult to see how corporal punishment amounts to an assault when inflicted upon an adult, yet does not amount to assault when inflicted upon a child by an adult as in the case of *Tyre v United Kingdom*. In the latter case, the European Commission held that moderate corporal punishment in schools does not constitute institutional violence. The above discussion explored court cases with regard to legally indefensible school discipline, the next paragraph explains some views in favour of or against physical punishment.





### **2.6.3.2 Some views in favour of or against physical punishment**

In the view of the United Nations Committee on Economic, Social and Cultural Rights, corporal punishment is inconsistent with the fundamental guiding principles on international human rights law enshrined in the preamble of the UDHR and both the covenants (UNESCO 2003:16). There are, however, people who are in favour of corporal punishment, despite the fact that it is prohibited in international law. Imbrogno (2000:130) and the Department of Education RSA (2000:6-7) (hereafter referred to as DoE) note that those who support the use of corporal punishment present various arguments. For example corporal punishment teaches learners to obey and respect authority and it helps build student character; it is consistent with the right of all learners to receive an education uninterrupted by a single disruptive learner; it is part of their cultural or religious beliefs; is a desirable alternative to more severe punishment like suspension; it is quick and easy and does not require any patience and skill on the part of the educator; and it is the only way to deal with learners who are disobedient, disruptive and who do not respond to punishment other than being beaten.

Those who do not support the use of corporal punishment argue its disadvantages (Imbrogno 2000:131 and DoE 2000:6-7). For example, corporal punishment legitimises violence in the eyes of the child. Research links the increased violence on the part of the recipient during childhood with violence occurring later in adulthood; it has been linked to juvenile delinquency and adult criminal behaviour. It generates feelings of anger, rage, resentment and indignation which cannot be expressed because of fear that further punishment will result. The learner is thereby forced to suppress his or her feelings. It does not bring about the intended results of discipline in the classroom but instead 'violence begets violence'; it does not nurture self-discipline in learners. Instead, it evokes feelings of revenge and it leads to anti-social behaviour. It transfers the focus of the learner away from the wrongdoing committed, to the act of beating itself. The next section explains measures to ensure legally defensible school discipline

### **2.6.3.3 Ensuring legally defensible school discipline.**

Squelch (2000(a):28-24) suggests certain disciplinary measures that could be used as alternatives to corporal punishment. These measures include verbal reprimands of learners; written warnings, if the learner does not respond to verbal warnings; involving parents where necessary; suspension and eventually expulsion if the learner deliberately causes disturbance in a school. If the misdemeanour takes the form of violence, drug and alcohol abuse, carrying dangerous weapons or disobedience, then alternative disciplinary measures may be detention in the form of isolation or being asked to report to the principal's office at a specific time every day for a specific period. Having explored measures to ensure legally defensible school discipline the next paragraph explains aims of education.



#### 2.6.4 Aims and purposes of education

The debate concerning the aims of education preceded the recognition of the right to education and the adoption of modern human rights instruments. Education is as old as humankind. The fascinating history of education unfolds to yield a rich variety of purposes of education. Different aims and objectives of the human right to education are well documented in the international and regional standard-setting documents, such as those presented in Table 2.5. There have often been contradicting or conflicting concepts of the purpose of education, some of which may even be at cross-purposes with each other (O’Hair, McLaughlin & Reitzug 2000:6). Tomasevski (2003:61) claims that schools reflect their surroundings and although education is embedded in existing values, it also helps to create other values. People attach different values and significance to the education of their children, depending on their socio-economic status, cultural backgrounds, religious beliefs and the levels of education they attained (Bohrnstedt 1981:455; Mehan 1992:34 Melton & Limber 1992:176-197; Muianga 1998:278). The following discussion on the aims of education is based on the key treaty provisions presented in Table 2.4.

**Table 2.4 Human rights instruments and provisions on the aims and purposes of education**

Instruments	Articles	Provisions
UNESCO CDE(1960)	Article 5(1) (a)	The state parties to this convention agree that (a) education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial and religious groups.
UDHR(1948)	Article 26 (2)	Education shall be directed to the full development of human personality and to strengthening of respect for human and fundamental freedoms.
CRC(1989)	Article 29 (1)	(a) The development of the child’s personality, talents and mental and physical abilities. (b) The development of the child’s respect for his parents or his own cultural freedoms. (c) The preparation of the child for a responsible life in a free society in the spirit of understanding, peace equality, and friendship. (d) The development of respect for the natural environment.
ACRWC(1990)	Article 11(2)	(a) The preservation of and strengthening of positive African morals, traditional values, and cultures; (b) The promotion of African unity and solidarity, and (c) The promotion of respect for the environment and natural resources.

The aim of education places an obligation on children to perform their moral duties, that is, the duty expected of them in relation to their communities, parents and other social responsibilities. Many people believe that the purpose of education or of the school is to prepare learners for a future job.



Learners themselves sometimes seem to feel that learning without connection to the real world is meaningless and useless, despite good intentions by the government and education policies. In this regard Tomasevski (2003:60) argues that education can prepare learners for life well or badly, depending on the quality, nature and the standard of education offered. Learners might be abused in the name of being educated because of respect for authority figures or out of fear that they might be victimised if they challenge the authorities. Learners learn the value of their education after they have finished school. In this regard a particular learner is quoted as saying: “It is hard to know if school is doing a good job of getting you ready for life... You can’t know until you’ve left school” (Tomasevski 2003:60).

Much inspiration for the provision of education has been drawn from the justification that schooling and education prevent pauperism, ensure employability, and prepare learners for later professional training and eventual professional careers (Van Raemdonck & Verheyde, 1997:250).

Although the aims of education seem to differ according to the historical, political, cultural, religion or national context (Hodgson 1998:64; Nowak 1995:189), there is a growing consensus in present international law about the aims of education. While international law enshrines details of the aims of education (Van Bueren 1995:253), it does not provide guidance regarding the relative importance of each aim. Without that expression of priority one may assume that all educational aims are of equal value. International law, however, endeavours to provide a framework that enshrines the basic aims of education, to enable states to retain power to incorporate national characteristics in education.

The following basic aims of education are recognised in international human rights law:

- The full development of the individual’s personality, talents and abilities, including physical, intellectual, social and psychological development may be pursued (Singh 2003:16; Van Bueren 1995:253; Volio 1979:24). Article 26(2) of the UDHR (1948) proclaims that “education shall be directed to the full development of the human personality”. Other binding and non-binding human rights instruments that proclaim the same aim include Article 11(2)(a) of the ACRWC, Article 5(1)(a) of the UNESCO CDE (1960), Article 29(1)(a) of the CRC of 1989 and Principle 7 of the UNDRC of 1954.
- Article 29(1) (b) of the CRC of 1989 provides for the strengthening of respect for human rights and fundamental freedoms.
- Article 13(1) of the ICESCR establishes additional aims of education. These include the development of the sense of dignity; the enabling of all persons to participate effectively and responsibly in a free society; and the promotion of understanding, tolerance and friendship among ethnic groups (Lenhart & Savolainen 2002:146; Van Bueren 1995:253).



- Whereas the Article XII of the ADRDM of 1948 only proclaimed that the right to education should be based on the principles of liberty, morality and human solidarity and should prepare every person to attain a decent life, to raise his standard of living and be a useful member of the society, Article 13(2) of the Additional Protocol to the American Convention on Human Rights (AMCHR) adds the goal of strengthening respect for ideological pluralism, justice and peace (Nowak 1995:193). For example:
  1. Preparing a child for a responsible life. Articles 24(e) and (f) of the CRC (1989) provide particularly for children in that they should have access to and support in the use of basic knowledge of health and nutrition, as children cannot learn on a hungry stomach (Van Bueren 1995:253).
- Principle 5 of the Declaration of Geneva of 1924 and principle 7 and 10 of the DRC of 1959 provide that education should aim at the development of a sense of moral duty and social responsibility.
- Education aims to enable individuals to contribute to the economic and social development of the community (Hodgson 1998:79).
- Article 11(2) of the ACRWC(1990) provides that the education of the child shall be directed to:
  - e) The preservation of and strengthening of positive African morals, traditional values and cultures;
  - f) The promotion of African unity and solidarity, and
  - g) The promotion of respect for the environment and natural resources (Van Bueren 1998:36).

Cultural purposes of the right to education include preserving the parents' way of life and preparing the child to live in a particular culture by including particular cultural values. Education aims to enhance practices associated with the goals of traditional African society, such as to develop the learner's physical skills, to develop character, to inculcate respect for the elders and those in positions of authority, to develop intellectual skills, to develop a sense of belonging and to participate in family and community affairs. This reflects a communal approach to teaching. The over-used phrase "It takes a whole village to educate a child" accurately represents the philosophy of African education (O'Hair *et al.* 2000:80-81).

The next section considers parental choices with regard to the education of their children.

#### **2.6.5 Guarantees of parental freedom of choice with regard to the right to education**

Whitney (1993:11) notes that it is impossible to study the right to education without referring to parents, since they have a wide range of responsibilities towards the education of their children. Philosophers such as John Locke emphasise the obligation of parents to educate their children until they become of age, in order to enable them to make full and proper use of their freedoms (Hodgson 1998:189).



Although parents have the right to choose a particular kind of education for their children, they do not have the right to select learning content deliberately from the prescribed school programme or the right to reject individual educators they do not like (Lenhart & Savolainen, 2002:151). Several international human rights instruments recognise and regulate the rights of parents to choose the education of their children according to their religious or philosophical convictions. Their choices include either the component of freedom of religion or of language, within the framework of the right to education (UNESCO 2003:15; Hodgson 1998:189; Nowak 1995:206).

The human rights instruments that strongly support the liberty of parents to choose a kind of education for their children according to their own religious, moral, or philosophical convictions are listed in Table 2.5.

**Table 2.5: Guarantees of parental freedom of choice**

Instruments	Article	Provisions
UDHR(1948-1998)	Article 26(3)	Parents have prior rights to choose the kind of education that shall be given to learners.
UNESCO CADE(1960)	Article 5(1)	The state parties to this convention agree that it is essential to respect the liberty of parents; legal guardians firstly to choose for their children institutions other than those maintained by public authorities, but conforming to minimum educational standards and secondly to ensure the religious and moral education for their learners are in conformity with their own convictions.
ICESCR(1966)	Article 13(3)	State parties to the present covenant undertake to have respect for the liberty of the parents to choose for their children schools other than those established by the public authorities. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to direct educational institutions.
ICCPR(1966)		State parties to this covenant undertake to have respect for the liberty of parents to ensure the religious, moral education of their children is in conformity with their convictions.
CRC(1989)	Article 28 and 29	No part shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions.
UNDEIDRB (1981)	Article 5 (1) and (2)	Parents or legal guardians have the right to organise family life and moral education in accordance with their religion or belief, and no child shall be compelled to receive teaching on religion or belief against the wishes of his or her parents or guardians.

These human rights instruments are important because they also protect learners from the risk of being indoctrinated by state public schools (Hodgson 1998:190). Article 26(3) of the UDHR (1948) recognises that parents have prior rights to choose the kind of education that shall be given to their children. What is implied is that they can choose the quality of education that includes among other things their philosophical, ethical or religious principles. Public education that includes instruction in a particular religion or belief is inconsistent with Article 13(3) of the ICSECR, unless provision is made for non-discriminatory exemptions or alternatives that accommodate the wishes of parents (UNESCO 2003:15). The basic



principles regarding the learners' right to education are recognised in the International Bill of Rights (see § 2.4.1 & § 2.4.5).

## 2.7 The recognition of learners' right to education in South Africa

In the past South Africa was characterised by the policy of apartheid. Until 1994, the role that apartheid, or separate development, played in every sphere of South African society influenced the concept of human rights (Peens 1998:62).

**Table 2.6: Comparisons between autocratic and democratic views of education**

Autocratic views of education	Democratic views of education
Authoritarian education in its various forms has one person or a small group of persons making and implementing the decisions about what to learn, when to learn, how to assess learning and the learning environment before the learners are recruited as individuals or groups. As an exclusive method, it is favoured by a totalitarian regime because it produces a conformist mentality.	In a democratic system of education, learners have the power to make some, most or even all decisions, since power is shared and not appropriated in advance by the minority.
<b>Knowledge</b> is essentially information contained in traditional subjects.	<b>Knowledge</b> is essentially skills and information needed by a group to maintain and develop its learning.
<b>Discipline</b> is learning to obey the rules and instructions decided by the management.	<b>Discipline</b> is democratic discipline by working co-operatively according to agreed rules and principles.
<b>Learning</b> is mostly listening to subject experts and reading their books.	<b>Learning</b> is actively agreed by the group to gain experience, information or particular skills working either together or reporting back on tasks delegated to individuals.
<b>Teaching</b> is usually formal instruction by trained or approved adults.	<b>Teaching</b> is an activity including instruction that the group judges will lead to effective learning.
<b>Parents</b> are expected, for the most part, to be admiring spectators of experts.	<b>Parents</b> are seen as part of the resources available and potentially as partners in the learning group.
<b>Resources</b> are predominantly subject textbooks and subject educators trained in instructional methods.	<b>Resources</b> are anything appropriate to the groups' research and learning, including people, places and experiences.
<b>Location</b> is a central place (school) where the experts (educators) can easily be assembled.	<b>Location</b> is anywhere that the group can meet to pursue effective learning.
<b>Organisation</b> is usually in a class formally arranged for instruction of the whole class.	<b>Organisation</b> is usually in a group where cooperative dialogue can take place.
<b>Assessment</b> is mostly tests of how well learners can repeat the subject matter.	<b>Assessment</b> takes various forms using tests devised by learners or others that are seen to be appropriate to the situation.
<b>Aims</b> are essentially to produce mini academic subject experts. Those who fail in this enterprise are required to become useful in industry/commerce.	<b>Aims</b> are essentially to produce people with confidence and skills to manage their own lifelong learning within a democratic culture.
<b>Power</b> is in the hands of an appointed individual or small management team who impose decisions on others.	<b>Power</b> is shared in the group who are seen as responsible both as individuals and collectively for its exercise.

Adapted from Bobbett (1996:576-7)

Rex (1979:122-3), Fourie (1990:107) and Dlamini (1997:40) note that the education system in South Africa was characterised by inequalities and discrimination. It was designed to promote





white supremacy and black dependency. The policy of Bantu Education suggested denial of learners' right to education in all its forms. It ensured that black learners did not aspire to positions in life which they could not attain. It was aimed at social control and was characterised by an autocratic view of education. This view stressed the philosophy "you will do it our way". Table 2.6 compares such autocratic views of education with alternative democratic views.

Osler and Starkey (1998:315) note that traditionally schools were organised for instruction. They provided instruction in a specific curriculum, designed or laid down by the authorities, where the knowledge gained from each subject was compartmentalised and without any link to real life. Learners were required to be passive recipients of instruction and therefore it is not surprising that, in such situations, learners would not even have the courage to assert their right to education.

In this regard Belter and Grisso (1984:899) and Kisser (1996:413) argue that beyond the question of knowing and understanding lies the question of the ability to apply knowledge in a practical way. This is exhibited in a learner's capacity to take appropriate actions and decisions and to stand up for the rights they feel may have been violated.

After the elections in 1994, South Africa adopted a new Constitution which has the Bill of Rights enshrined in Chapter 2. The right to education was then recognised for the first time as a fundamental human right in South Africa. This right is very complex in that it is linked with other human rights. Figure 2.1 indicates the education clause as entrenched in Section 29 of the Constitution and its relationship with other fundamental human rights. Table 2.5 indicates a paradigm shift from an autocratic education system (South African education system prior to 1996) to a democratic education system (South African education system after 1994). For the survival of the new democracy the curriculum must be designed in such a way that it creates avenues where this new paradigm can be explored. This must also take cognisance of the teaching strategies employed by educators, different ways of learning, various resources, and including parents as partners in the education process. All these factors may ultimately influence the way in which learners view their right to education. The aspects that influence learners' understanding of their right to education are explored in more detail (see § 3.4.)

The apartheid education system adopted by the then South African government inculcated into society the tendency to disrespect diversity, equality and human dignity, and non-tolerance was viewed as being acceptable. Although apartheid has since been legally abolished, its effects were widespread and still remain engraved in the minds of some South African citizens (Peens 1998:62). The fragmentation of the education system led to the inefficient education of a large proportion of the population. The transformation of the



education system in South Africa was made possible by the fact that in 1994 South Africa abolished apartheid and thus stepped out of isolation. South Africa showed her commitment and obligation to redressing past imbalances, not only by adopting a Constitution that incorporates a Bill of Rights, but also by ratifying several human rights treaties during the years 1994 to 1996.

The new constitution is based on the values of equality, human dignity, freedom and security of a person (Dlamini 1997:40; Potgieter *et al* 1997:5; Rautenbach & Malherbe 1998:6; Van Raemdonck & Verheyde 1997:245)

Peens (1998:71) notes that some of the strategies which the present government has put in place are aimed at improving the rights of learners, especially their right to education. These strategies encompass providing at least nine years of compulsory education; upgrading qualifications and conditions of services for educators; reforming the curriculum in order to make it more relevant to the academic, vocational and cultural needs of learners by making it less biased and more race, religious, and gender sensitive; improving facilities and the physical environment of all schools; developing appropriate language and religious policies so that learners have the opportunity to be educated in their home language where reasonably applicable; and providing financial assistance to upgrade and develop pre-primary, primary, secondary and tertiary education facilities.

### **2.7.1 The Constitutional background of the right education**

South African Constitution came into operation in 1997. It has been adopted as the supreme law of the country and therefore it is the most important legal document. This signalled the dawn of a new democracy. In its preamble, the purposes of the Constitution are written, that is, to heal the past imbalances and to create a society based on democratic values, social justice and fundamental human rights, to improve the quality of life of all citizens. In chapter 2 the Constitution enshrines the Bill of Rights. The right to education is protected in the bill of rights. Section 29 provides that everyone has the right to basic education (see Table 2.7). Unlike in the past where education was offered in unequal bases under a divided education system, the bill of Rights reversed that as is stated in the preamble of the Constitution. The general equality clause, Section 9 of the Constitution prohibits discrimination and it also applies to the right to education in educational institutions.

Other fundamental rights that have direct relevance to the right to education are also protected in the bill of rights (see Figure 1.1). Violation of one of these rights in the school



situation may impact on the right to education. Because the right to education is enshrined in the Constitution, it is protected in the supreme law of the country.

**Table 2.7: The Education Clause in the South African Constitution of 1996**

<b>The Constitution</b>	<b>Section 29</b>	<p>(1) <b>Everyone has the right:</b></p> <p>(a) To basic education, including adult basic education and</p> <p>(b) To further education which the state, through reasonable measures, must make progressively available and accessible.</p> <p>2. Everyone has the right to receive education in the official language or language of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium instruction, taking into account:</p> <p>(a) Equity;</p> <p>(b) Practicability; and</p> <p>(c) The need to redress the results of past racially discriminatory laws and practices.</p> <p>3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that:</p> <p>(a) Do not discriminate on the basis of race;</p> <p>(b) Are registered with the state; and</p> <p>(c) Maintain standards that are not inferior to the standards at comparable public educational institutions.</p>
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**Source: The Constitution of South Africa 1996**

The content of the South African Bill of Rights resonates with international human rights instruments such as the UDHR 1948, the ICESCR of 1960, the ICCPR and the ACHPR of 1990 (Van Raemdonck & Verheyde, 1997:159). These instruments form the basis of human rights, in particular learners' rights to education. The discussion which follows the table below concerns the recognition of learners' rights to education and other rights which have direct relevance to the right to education in the South African Constitution and other related laws.

### **2.7.2 The public law foundation of learners' right to education**

The sources of the right to education include international human rights instruments, such as UDHR, 1948, ICESCR, 1966, CRC, 1989, regional human rights instruments such as ECHR and the ACHPR, the Constitution and public law. This section is restricted to the Constitution and the public law foundation of the learners' right to education. In South Africa the right to education is constitutionally guaranteed. Chapter 2 of the Constitution contains the Bill of Human Rights. The right to education is a constitutional right. Section 29 guarantees educational rights which cannot be violated by national or provincial bodies when enacting legislation concerning education and natural and judicial persons. (Beckmann, *at al* 1997:3). Two laws were enacted in 1996. The NEPA of 1996 determines the national policy for



education under Section 3, stipulates directive principles for education under Section 4 and serves to facilitate transformation of the education system. The NEPA provides for the organisation, management, governance, funding, establishment, and registration of educational institutions educational rights under Section 3(4). The Schools Act in its preamble provides its general purpose which is to establish a legislative framework for uniform norms and standards for education of learners at school, governance and funding. It stipulates the duties of parents and learners with regard to the right to education. Basically it is the duty of the parents to comply with the provisions (Beckmann, *at la* 1997:3).

### 2.7.3. The right to basic education

In terms of Section 29(1) (a) of the Constitution everyone has the right to education, including adult basic education. The Constitution does not have a provision concerning compulsory education, neither does it provide that basic education is free and compulsory (see the education clause in Table 2.7). The Constitution does not provide for pre-primary education *per se* (Cachalia, *et al.* 1994:104; De Groof, 1996:68). The principle of compulsory school attendance is provided for in Schools Act under Section 3(1). It imposes an obligation on parents to ensure that every child for whom they are responsible attends school from the first day of the year in which the learner turns six years to the last day of the year in which the learner reaches the age of fifteen years or the ninth grade, whichever happens first (Beckmann *et al.*, 1997:7; Visser, 1997:135). The learner has to undertake nine years of compulsory education either at home, in public education institutions or in independent schools if the parents so choose. The state in turn has an obligation to ensure that compulsory education is attainable by establishing schools, ensuring that educators are trained and paid, and purchasing education materials (Potgieter, 1997:5).

In order to ensure that all learners in the provinces attend school and enjoy their right to basic education, Section 3(2) of Schools Act places a duty on the relevant Member of the Executive Council (MEC) to see to it that there are enough school places in each province. If the parent of a learner, without just cause, fails to ensure the attendance of a learner at a school, that parent is guilty of an offence and is liable, if convicted, to imprisonment for a term not exceeding six months (Schools Act Section 3(6)(b)).

Section 29(1) of the Constitution does not preclude the paying of fees at schools (Van Raemdonck & Verheyde, 1997:270). Public schools are authorised under Section 39 of SASA to impose school fees (Beckmann *et al.*, 1995:27). In terms of SASA Section 40(1), parents have a duty to pay fees for the education of their children, unless they are fully or partially exempted from doing so. The parents pay fees in terms of a resolution taken at a parents' meeting to determine fees payable at a public school. The governing body of each public school sees to it that the school fees determined by the parents are paid at its school. It may use legal processes if a parent of a learner refuses or fails to pay school fees, provided that



such parent is able to pay the fees (Potgieter *et al* 1997:41). Non-payment of school fees does not give the school the right to refuse learners admission to a public school on the basis that their parents are unable or unwilling to pay school fees.

#### **2.7.4 Equal access and non-discrimination in education**

The equality clause in Section 9 of the Constitution is particularly relevant to education. The clause outlaws unfair discrimination within the school situation, but it does not preclude all differentiation or fair discrimination (Beckmann, 1995:35, 27). The issue here is that due consideration should be given to matters that concern language, religious and language policies and the promotion of learners in schools. The policy directive in NEPA Section 3 is directed towards the advancement and protection of fundamental human rights and in particular, under Section 4(a), the right of:

- (a) Protection against unfair discrimination within an education department or institution on any ground;
- (b) Equal access to education in an institution; and
- (c) Education in one's own language or language of choice.

The education clause, Section 29 of the Constitution, does not explicitly include the right to equal access to educational institutions. The principle of equal access or non-discrimination is, however, covered in the general equality clause (Malherbe, 1997:64).

Section 9(3) prohibits unfair discrimination based on race, gender, sex, pregnancy, colour, culture, religion, conscience, belief, age and language (Potgieter, 1996(b):175, 1997:110). Discrimination based on these grounds is regarded as unfair and therefore forbidden, unless established that it is fair. According to Malherbe (1997:64), nothing in the education clause can be interpreted to condone discrimination or to prevent, redress and perpetuate inequalities in education. The education system of South Africa recognises diversity of cultures, languages and religion. The following subsections discuss learners' rights in terms of admission, language and religion.

#### **2.7.5. Right of admission to a public school**

In order to serve learners' educational requirements without discrimination, Section 5(2) of Schools Act prohibits, among other things, the governing body of a public school from administering any test related to admission tests. This section is consistent with the learner's right to basic education embodied in Section 2 (1) (a) of the Constitution. The Schools Act directs under Section 5(3) (a-c) that learners may not be refused admission to a public school



because their parents are unable or unwilling to pay school fees as determined by the SGB; do not subscribe to the schools mission statement; or refuse to release the school from liability for damages arising out of the education of the learner (Beckmann *et al*, 1997:9).

A school may not refuse a learner admission to a public school particularly on the grounds of race, colour, sex, religious belief, culture or language. If this happens without due cause, it may be considered unfair discrimination. The *Matukane v Laerskool Potgietersrus* case is a good example of discrimination based on race. The Promotion of Equality and Prevention of Unfair Discrimination Act, (Act 4 of 2000) Section 7(a-e) and the Constitution, Section 9(3) explicitly proscribes unfair discrimination based on race. In practice discrimination still persists in educational institutions. In the *Matukane v Laerskool Potgietersrus* case the Supreme Court sanctioned the primary school in Potgietersrus for discriminating unfairly against learners on the basis of race. The school refused the admission of black learners who applied for admission to the English medium class (Van Raemdonck & Verheyde. 1997:290). The next discussion concerns language rights

### 2.7.6 Language rights

South Africa is a country which is composed of minority groups with diverse languages, religions, ethnicity, races and cultures (Van Raemdonck & Verheyde 1997:248). With regard to language rights, Section 6(1) of the Constitution recognises, protects and makes provision for eleven official languages and sign language (Bray 2000(a):30; Cachalia. *et al*. 1994:102; Potgieter 1996:169). Table:2.8 represents home language groups in South Africa

**Table 2.8 Home language groups and approximate number per group in South Africa**

	Home language group	Approximate number per group
1	Zulu	6 041 000
2	Afrikaans	4 309 000
3	Xhosa	4 035 000
4	English	3 122 000
5	North Sotho	2 363 000
6	South Sotho	2 245 000
7	Tswana	2 113 000
8	Tsonga	918 000
9	Swazi	647 000
10	Venda	409 000
11	Ndebele	311 000

**Source: Le Roux & Beckmann (1999:47)**





Section 29(2) of the Constitution guarantees everyone the right to receive education in the official language or language of their own choice in public education institutions, where that is reasonably practicable (Rautenbach & Malherbe 1999:377).

Language rights are also provided for in NEPA Section 4(a)(viii). In order to ensure effective access to language rights in education, the state must consider all reasonable alternatives, including the use of single medium education (Bray 2000(a):80; Dlamini 1997:5). When doing so, equality, practicability and the need to redress past imbalances should be taken into account (Rautenbach & Malherbe 1998:18). The SGB of the school is vested with the power to determine the language policy as long as the policy does not unfairly discriminate against other groups of learners on the basis of race, gender, religion, or creed (Schools Act 6(2) (3)). Affording this power to the SGB was specifically aimed at improving democratic participation in education, but many governing bodies are not fully functional and thus their decisions may not reflect the true feeling of the parents with regard to the language of learning.

Although English is the home language of only 8, 2% of the population of South Africa, it enjoys the status of being a global economic language and thus parents want their children to be taught in English (SAHRC 2006:29). This seems to suggest that they do not take pride in their own languages. Although parents determine the language of instruction and number of languages taught at a school, the reality is that African languages are not sufficiently recognised in schools. African languages are being taught in some schools where parents exercise their right to a choice. Although an African language was compulsory in all model C schools from grade 5-9 and could be chosen as one of the 6 subjects in grade 10-12, it was usually a third language and never a first additional or home language. African learners were therefore forced to suspend their home language and enrol instead for either English or other non-African languages. However the choice still exists for them to learn their own language by moving to another school, even though this may have financial implications.

The impact of language on learning is felt particularly in poor rural schools. Often this causes learners to perform badly in examinations and thus impedes the realisation of intended educational outcomes. Instead of dealing with the tasks assigned to them, learners have to grapple first with the language of instruction, especially where this is not their mother tongue. The SAHRC reported that 42% of learners in poor rural schools have difficulty understanding their educators. This problem affects educators as well. "An inadequate command of language whether by educator, a learner or both, constitutes a serious barrier to effective schooling and education" (SAHRC, 2006:28). In this regard Tomasevski (2003:174-6) observes that learners may fail the examinations, not because they have learning disabilities, but because they could not read or understand a single word in the examination script. Yet failing the examination may be exacerbated by the diagnosis of severe learning disability.



Compulsory instruction in a language which learners do not understand constitutes an obstacle to the enjoyment of their right to education. Learners who are deprived of mother tongue instruction seem to progress well enough in their early school years but develop problems later in their school careers (Vermeulen 2000:14). Furthermore those whose proficiency in English is poor later bear the consequences of performing poorly in job interviews.

Mazaba and Nthepe (1979:163) argue that educating learners in their mother tongue offers unparalleled advantages for the learner. Their experimental project focused on improving primary education through mother tongue instruction, which, besides the transmission of culture, values and attitudes, equipped each individual to live fully and participate in the progress of his community. The outcome indicated that learners were able to discuss what they had been taught amongst themselves and with their educators. They mastered mathematical concepts and arithmetical concepts better and more quickly, and had a better grasp of the events and phenomena of the environment (scientific bases). The use of their home language helped to establish real links between the school and external institutions and laid the foundation for continued education in real life in the community. Given the above realities, it is evident that continued failure by learners due to the language barrier may influence the way in which they view their right to education and schooling. The next paragraph investigates the implications of religious rights.

### 2.7.7 Religious rights

Learners do not discard their religious rights when they enter the school premises. The school system through its religious policy should accommodate diversity of religion. Table 2.9 presents examples of religions and approximate percentages per religious group which are present in South Africa..

**Table 2.9 Different religions and approximate percentages per religious group in South Africa**

Religion	Approximate percentages
Christianity	70%
Traditional African religion	20%
Others	7%
Islam	1%
Judaism	1%
Hindu	1%

**Source: Le Roux & Beckmann (1999:50)**

Section 15(1) of the Constitution recognises personal freedoms of conscience and religion. This has implications for the right to education. The right protects learners' beliefs. A school may not expel a learner from attending school on the basis of hair style such as dreadlocks,



dress and wearing of head dress as these may express learners' beliefs. Consistent with this section of the Constitution, Schools Act Section 7 provides that religious observances may be conducted at state and state-aided schools, provided that they are conducted in accordance with rules as set forth by the SGB, are conducted on an equitable basis and the attendance thereof is free and voluntary (Beckmann 1995:99 & 1997:9). In terms of Section 4 of NEPA, the Minister of Education determines the national policy for religion in schools. In line with the international conventions ratified by parliament, the Act guarantees in Section 4(a)(vi) the right of every person to freedom of conscience, religion, thought, belief, opinion, expression and association in education.

The governing body of a public school may determine the religious policy of the school, which should be consistent with the Constitution or else it would be invalid and of no legal force. The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 Section 29 lists some unfair practices that occur frequently in education and need to be avoided. For example: unfair exclusion of other learners in education institutions, and failure to reasonably and practicably accommodate diversity.

#### **2.7.8 Parental freedom and responsibilities with regard to the education of their children**

Section 29(3) of the Constitution provides that parents have the liberty to establish and maintain independent educational institutions (Bray, 2000(a):8). These private educational institutions may cater for the particular needs of cultural, linguistic and religious communities and the parents maintain those institutions at their own expense. This liberty is in line with Section 31(1) (a) of the Constitution which states that persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practice their religion and use their language. What is also required is that the school must be registered with the state and may not offer education of a standard inferior to that offered in public educational institutions.

In terms of general law, parents have the freedom to choose the quality of education provided to their children and the right to choose the type of school to which they want to send their children (De Groof 1996:62; Malherbe 1997:55-58; Van Raemdonck & Verheyde 1997:273). Parents have the responsibility to ensure that their children attend school (see § 2.5.3) and they are responsible for paying school fees. The parent of a learner may apply to the head of department for registration of learners to receive education at home. The head of department may register learners for home schooling if satisfied that the education received is not of inferior standard when compared to the education offered in public schools, and if it meets the minimum requirements of the curriculum at a public school (Schools Act Section 46(



**2.7.9 South African perspectives on human school discipline**

Dlamini (1997:51) notes that no proper education and learning can take place without discipline. No matter how comprehensive school rules are, learners will always commit offences for which they should be disciplined. It is therefore important for the school to maintain discipline. Discipline creates safety in schools. The principals, educators and parents are vested with the responsibility of maintaining discipline, as they need to work hand in hand for the benefit of the learners.

Figure 2.1 forms the basis of the discussion on school discipline, since school discipline should be consistent with the Constitution. In terms of Section 10 of the Constitution everyone has inherent dignity and the right to have his or her dignity respected. This provision is extended to protect learners within the context of the school and the home. Section 10 of Schools Act prohibits the administration of corporal punishment to the learner at school by any person. It states that any person who does this will be guilty of an offence and liable on conviction to a possible sentence of assault (Beckmann *et al.* 1995:11 and Section 10 of Schools Act). As can be seen from Table 2.10, many schools still administer corporal punishment despite the fact that it is against the law. By practising corporal punishment, educators may infringe upon learners' right to freedom and security and as a consequence impact negatively on their right to education.

**Table 2.10 Percentages of incidents of corporal punishment in schools practising corporal punishment according to learners, educators and principals**

	Practising	Not practising
Learners	81.5%	18.5%
Educators	74.0%	26.0%
Principals	74.0%	26.0%

**Source: Prinsloo (2005:8)**

In terms of Section 8 of Schools Act, the SGB of a public school is empowered to establish a code of conduct for learners, aimed at establishing discipline and a purposeful school environment. A code of conduct for learners is also dedicated to the promotion of a quality learning process and sound relationships between learners and educators. Learners in particular are expected to observe the code of conduct, as they are party to its development.

The position of discipline of learners as illustrated in Figure 2.1 indicates the relationship between learners' rights and other provisions in the Constitution. Although learners have the right, amongst others, to equality, privacy and freedom of expression, those rights are limited by the code of conduct and school rules that are drawn up in order to maintain a safe school environment and respect for one another's rights (Beckmann *et al* 1997:10; Dlamini 1997:51).



When disciplinary measures are taken, common law principles should be considered in order to allow justice to prevail in educational institutions. The first principle to consider is that of just administrative action. Section 33(1) of the Constitution provides that everyone has the right to administrative action that is procedurally fair, reasonable and lawful. Due process is provided for in Section 8(5) and 9(1) of Schools Act and is in line with Section 33 of the Constitution. Learners' right to be heard is protected by the principles of natural justice. The reasonable educator must consider the learners' right to be heard (*audi alteram partem*) by allowing them a fair chance to state their side of the story. Oosthuizen *et al.* (1994:24-27) emphasise the importance and necessity of school rules in maintaining order and discipline in schools. The importance of rules lies in the fact that they create order and safety, protect human rights, and maintain properly functioning educational institutions.

Having highlighted learners' rights to education, it is relevant to discuss in the next section the duties of learners derived from their right to education.

#### **2.7.10 Learners' duties and responsibilities under their right to education**

According to Jennings and Eichinger (1999:37) learners' awareness of their responsibilities associated with human rights is the noblest outcome of education. While Section 29 of the Constitution guarantees the right to basic education for everyone, Schools Act Section 3(1) places the specific obligation on learners, who exercise their right to basic education, to undertake nine years of compulsory education. The argument here is that every right poses a corresponding duty on the bearer of that right. Therefore learners' right to education poses a duty on them to learn, attend school, comply with the code of conduct for learners, respect and obey the educators and respect the rights of other learners. The right of each person also poses a duty on other people, e.g. the right to education poses a duty on parents to ensure that their children attend school and on educators to be at school, be prepared and educate to the best of their abilities and in the best interests of the learners.

The following responsibilities of learners under their right to education are stipulated in the Ministerial Guidelines (developed and distributed by the Minister of Education) for SGB in formulating a code of conduct for learners:

- Responsibilities to attend school (Section 3);
- Responsibilities to learn;
- Responsibilities to comply with the regulations of conduct of the school they attend (Section 8 of the Guidelines).



Each of these responsibilities is discussed in more details in the following subsections

#### **2.7.10.1 The responsibility to attend school**

The right to basic education places the obligation on learners to attend school regularly (Squelch 2000(a):30). A learner of compulsory school going age is required to attend school. After the age of 15 years or passing grade 9, whichever comes first, a learner may stop attending school and there are then no legal steps that can be taken against his parents. Subject to Section 3(5) of Schools Act, if a learner who is subject to compulsory school attendance in terms of Section 3(1) of Schools Act, is not enrolled at or fails to attend a school, the Head of Department may investigate the circumstances of the learner's absence from school and take appropriate measures to remedy the situation. If the situation does not improve, a written notice may be issued to the parents requiring them to comply with Section 3(1). If the parents fail to comply, they are guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding six months. Parents have no right to deprive their children of the right to basic education. Learners themselves cannot be legally punished for truancy since the regulation imposes penalties on parents.

According to South African law a learner is allowed to be absent from school with a valid cause, for example death in the immediate family, an emergency, or other circumstances that cause concern to the parents. What is important is to provide valid proof of the reason for absence. If a learner is absent from the school for ten consecutive days and his parents fail to report the cause of such absence; and the educator's efforts to find a cause have been in vain, then such a learner will be withdrawn from the attendance register. That in itself places a learner's progress and his right to education in jeopardy. If he returns within 40 days he is readmitted and retains his/her former admission number. If he returns after 40 days he is allocated a new admission number. The head of department may exempt a learner entirely, or partially, from compulsory school attendance if it is in the best interest of the child (Section 4(1) of Schools Act).

#### **2.7.10.2 The responsibility to learn**

Ministerial guidelines for the SGB to adopt a code of conduct for learners (developed and distributed by the Minister of Education in terms of Schools Act section 8(3)), requires under Section 5 that learners must commit themselves to do their schoolwork during classes, complete assignments and homework and catch up on work missed because of absence. Disruptions of classes are not acceptable. Learners have the responsibility to learn and develop their academic, social, occupational, spiritual, and cultural potential. In this regard learners also expect their educators to assist them with their learning difficulties, report on





their progress, and to look after their wellbeing. These requirements presuppose a mutual relationship between educators and learners. Although learners have the duty to learn, their learning could be hampered by several other issues, such as the availability of learning and teaching resources, socio-economic status, type of school they attend, violence level at the school, and competency in the language of learning. These factors are crucial for academic mastery across the curriculum as stipulated in paragraph 3.4 of the Education Policy Document issued in 1997: The critical outcomes set forth in this document ensure that learners gain skills, knowledge and values necessary for their daily living. Educators thus have a responsibility to help learners to learn.

### **2.7.10.3 The responsibility to abide by the school regulations**

School regulations and rules are drawn up to ensure that schools are safe and peaceful environments where learning and teaching can take place. This implies that discipline must be maintained at all times so that the education of learners proceeds without disruptive behaviour and offences. The main aim is to teach and lead learners to self discipline.

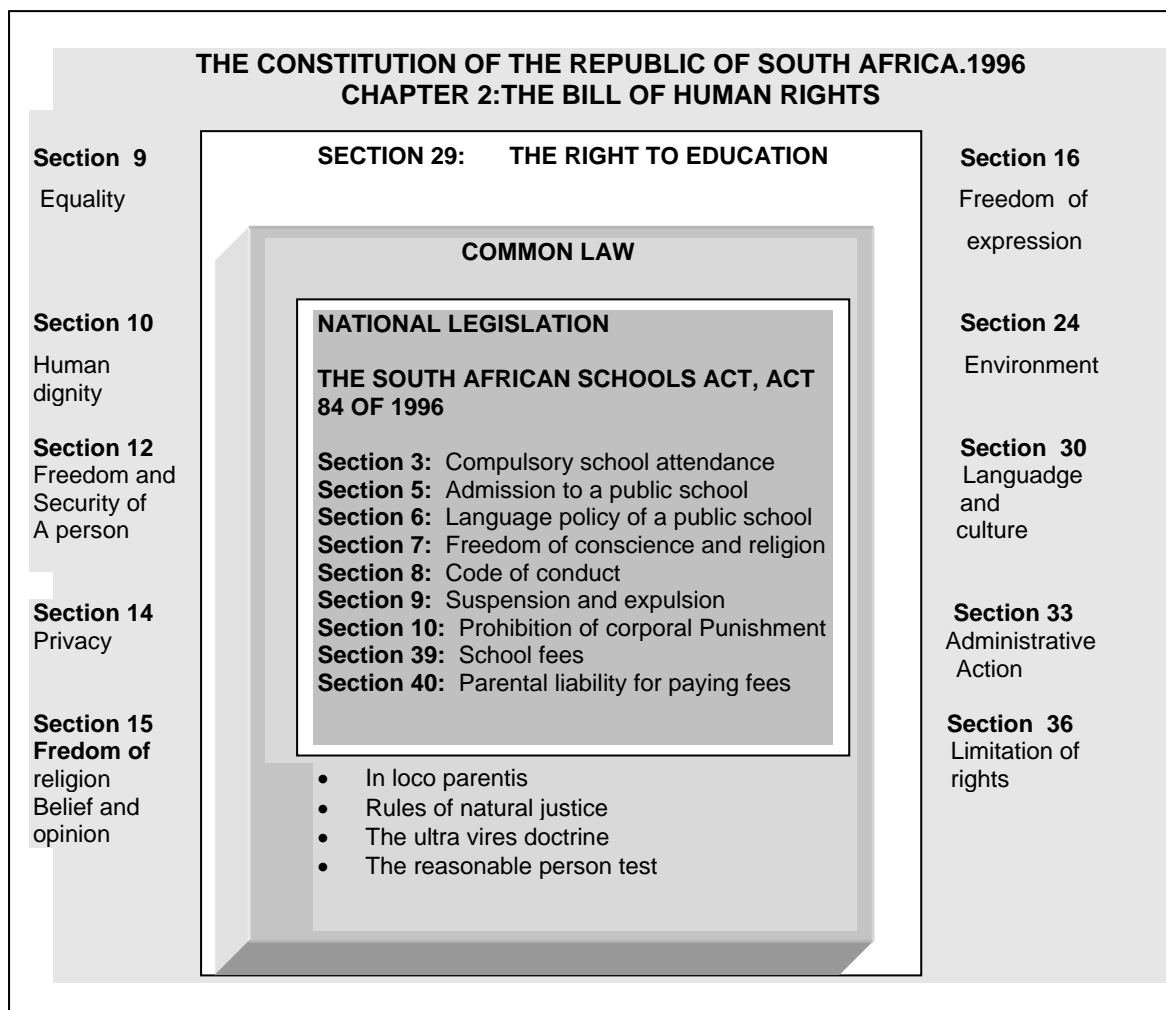
When disruptive behaviours are prevalent, educators are charged with the responsibility of restraining such activities or actions, as these may inflict harm on other learners or educators such that they may infringe upon others' rights to learn. Learners do not have the right to violate other learners' rights and the rights of the school authorities. If such offences occur, educators may use reasonable measures to ensure that such behaviour is corrected. Educators at a school have the same rights as parents (in *loco parentis*) to control and discipline learners according to the code of conduct during the time learners are at the school, or engaged in any official school activities.

In terms of Section 5 (3.5-3.7) of the Guidelines for the consideration for the SGB in adopting a code of conduct for learners (1998), the learners themselves must understand that action may be taken against them if they contravene this code. The Guidelines state that nothing exempts a learner from complying with the code of conduct of the school. Learners have the right though to be informed why particular conduct is considered to be misbehaviour and why they are to be disciplined. School rules are also designed to regulate the general organisation of school relationships between educators and learners. However, all rules should be consistent with the Constitution. A school should have precautions and corrective measures in place, to ensure that the code of conduct for learners is adhered to. There are some offences that can lead to suspension (Squelch 2000a:29) (see § 2.6.6.1).

## 2.8 Other human rights that have direct or indirect relevance to education

The right to education is often associated with other fundamental human rights and freedoms (De Groof 1996:224), namely the right to:

- Equality (Section 9);
- Human dignity (Section 10);
- Freedom and security of a person (Section 12);
- Privacy (Section 14);
- Freedom of religion, belief and opinion (Section 15);
- Freedom of expression (Section 16);
- Freedom of association (Section 18);
- Environment (Section 24);
- Language and culture (Section 30), and
- Just administrative action (Section 33).



**Figure 2.1: The right to education in relation to other human rights**  
Adapted from Joubert & Prinsloo (2001:36) and Van Vollenhoven (2005:13)



In the following sections, some of the human rights mentioned above are briefly discussed. Human rights under Sections 9, 10, 15 and 30 of the Constitution have already been covered in § 2.5.

### 2.8.1 The right to freedom and security of a person

The right to freedom and security of a person should be observed even in the school context. Section 12(1) of the Constitution provides that everyone has the right to freedom and security which includes the right:

- to be free from all forms of violence from either private or public sources;
- not to be tortured in any way; and
- not to be treated or punished in a cruel, inhuman or degrading way.

This right places the duty on the state and the SGB (by adopting the code of conduct for the learners) to take reasonable steps to ensure that learners are protected from mental and bodily harm or torture. In this regard the school must have a school safety policy and rules. The provision also includes protection of a person against cruel and degrading punishment that is not in accordance with the value of human dignity (Cachalia *et al.* 1994:38). Learners' right to education could be jeopardised if learners do not feel safe and secure within the school environment. Learning and teaching cannot function smoothly if learners and educators fear for their own safety.

Besides the Constitution, there is legislation which is meant to protect learners in their own home but which could also be applied to ensure the safety and security of learners at school. While the Child Care Act (Act 74 of 1983) (Sections (50-52A)) provides for the protection of learners against ill-treatment, the Prevention of Family Violence Act (Act 133 of 1993, now the Domestic Act 1998) (Section 4) protects learners against assault and encourages educators to report to the police if they have any reasonable suspicion that a learner has been ill-treated. Squelch (1995:3) and the Child Care Amendment Act, Act 96 of 1996 relate learner ill-treatment to learner abuse. Definitions of learner ill-treatment include **physical abuse**, that is, assaults such as beating and spanking, **emotional abuse**, such as name calling, labelling and hate speech, **sexual abuse** which includes rape, and **neglect** which includes exposure to hazards and failing to send a learner to school (Section 19 (b) (iii) & (iv) of the Child Care Amendment Act). When a learner's rights have been violated at school the provisions of this legislation may be invoked.



## 2.8.2 The right to privacy

The right to privacy is provided for under Section 14 of the Constitution and par 3.4 of the Guidelines for the consideration for the SGB in adopting a code of conduct for learners (1998). Under these provisions everyone has the right to privacy, which includes the right not to have:

1. their person or home searched;
2. their property searched;
3. their possessions seized; or
4. their privacy of communication infringed.

These provisions, as with all other rights, can be limited in terms of Section 36 of the Constitution, where it might be necessary to conduct a search and seizure of possessions. School authorities may conduct a search and seizure as long as it is done upon reasonable suspicion and is procedurally correct (Squelch 2000a:44). For example, a school may conduct a search and seizure of a learner's property, if an educator suspects that the learner possesses illegal drugs, weapons, alcohol or other contraband or illegal items. There is a compelling need for a search where the action of learners threatens the right to education of other learners. In this instance the search and seizure is done with the best interest of other learners to safety in mind.

Guidelines to be followed when conducting search and seizure require that searches should be authorised by the principal and strip searches are not permitted (school officials could be held liable if a learner can show that the person conducting the search acted with ill intentions and unfairly). Prior to search the principal and the educator should have reasonable suspicion that one or more learners have engaged in wrongful acts. Schools should have a clear set of rules dealing with searches and parents and learners must be informed of the school's procedures for carrying out search and seizure procedures (Squelch 2000a:49).

The right to privacy places a duty on the school not to disclose private information about a learner to an unauthorised person. Such information may, for example, include learners' HIV, AIDS and other disease status, school reports, disciplinary measures and inability of parents to pay fees. Educators must maintain records of the type of illnesses suffered by all learners. This is not only for the sake of knowing but also for the sake of the safety of the learner concerned and of other learners. For example, it is required by the National Policy on HIV/AIDS for Learners and Educators in Public Schools of 1999 paragraph 2.8 (hereafter called National Policy on HIV/AIDS) that learners infected by an infectious disease be kept away from school to prevent the spread of the illness. The educator may help inform the parents of infected learners about vaccinations if there are any. Notwithstanding the recommendation to maintain records of diseases, the compulsory disclosure of learners' HIV status and other diseases to school is not advocated. In cases of disclosure, educators must be able to handle confidential issues. Educators should also discourage unacceptable



behaviour that may create the risk of HIV transmission (National Policy on HIV/AIDS of 1999 par 2.5).

Under American law, the school is required to keep school records confidential, but parents are guaranteed access to their children's records. The law also prohibits the release of records without parental permission, except to those who have a legal right to know. An educator can be disciplined for sharing confidential information about a learner with unauthorised persons. In Minnesota, Fischer, Schimmel & Stellman (2003:280-281) a school guidance educator's service was terminated for breaching the confidentiality of learners when counselling. In this case the court ruled that sharing sensitive confidential information with those who did not have the right to know, was the most serious of the charges and could cause long lasting harm to a learner. An educator could share confidential information about a learner if it is in the best interests of the learner and the school. The best example is the Illinois case, in which the federal judge ruled that the school board did not breach the learner's right to privacy when it used a videotape without parental consent as evidence against a disruptive learner at a special education hearing meeting, because officials at the hearing had a legitimate educational interest in the school (Fischer *et al* 2003:280-281).

### **2.8.3 The right to freedom of expression**

Section 16 of the Constitution accords learners and every person the right to freedom of expression. Learners have the right to express their views by speech or any other means, as long as the conduct does not materially and substantially disrupt the work and discipline of the school (O'Hair *et al.* 2000:256). Freedom of expression includes not only freedom of speech but extends to rights to hear, read and wear. Freedom of expression also applies to learners' hairstyles, clothing and the wearing of symbolic items (Squelch 2000(a) 63-64). Within the school context, learners have freedom of expression but it is not unlimited. Learners are, for example, not allowed to use vulgar words, insults, or racial slurs directed at either educators or other learners. If a learner's freedom of expression leads to a substantial disruption of school activities or infringes upon the rights of others, it can be limited. The limitation must be done with the purpose of maintaining orderly teaching and learning, enforcing regulations and ensuring the safety of all learners (Van Vollenhoven 2005:69).

### **2.8.4 The right to freedom of association**

In terms of Section 18 of the Constitution everyone has the right to freedom of association. This section is particularly relevant and important in the school context. Learners are, for example, at liberty to participate in the learners' representative council. It is through this council that learners' voices are heard (Beckmann *et al.* 1997:38). The right to freedom of association allows learners to choose subjects they want to do at school and particularly in



further education and training, provided they do so within limits. For example, the Minister of Education passed a notice in 1999 regarding the National Policy on Instructional Time for School Subjects in terms of Section 7 of NEPA that requires him under Section 3(4) (1) to determine curriculum frameworks, core syllabi, education programmes and learning standards. In this notice, learners in grades ten to twelve are required to choose a minimum of six subjects of which two must be languages. One language must be taken at home language level and the second one either at first or second additional level. A minimum of four subjects should be taken from group A to F as provided in the notice. In addition, to meet the requirement for exemption, a learner is required to choose a minimum of six subjects thus; learners should exercise their right to choose school subjects within these limits.

The right to freedom of association also allows learners to participate in extramural activities of their own choice, provided that they are competent to perform those activities and proper instructions have been given before learners participate in the activities (Netshitahame 1999:31; Squelch 1994:103).

#### **2.8.5 The right to a safe and secure school environment**

The word 'environment', when interpreted broadly, includes any physical or mental condition or even a school (Cachalia *et al.* 1994:29). Section 4 of the Department of Education (1998) Guidelines for the consideration of SGB in adopting a code of conduct for learners provides that learners have the right to a clean and safe environment.



**Figure 2.2: Example of classrooms at a rural public school**  
(Netshitahame & Van Vollenhoven 2002:315)

This section is consistent with Section 24 of the Constitution (1996) that provides that everyone has the right to an environment which is not harmful or detrimental to one's health





and wellbeing. This provision also concerns a safe school environment such as safe school buildings, grounds and school excursions. The school should protect learners from both physical and mental violence, as these are not conducive to teaching and learning. It is also the duty of the school to establish clear rules and regulations concerning the code of conduct during breaks and sporting and classroom activities. A clean school environment, security of property, fencing, well cared for school facilities and school furniture all create an atmosphere that is conducive to education.



**Figure 2.3: Example of pit toilets at a rural public school in Limpopo Province**  
(Netshitahame 1999:82)

Prinsloo (2005:5) states that a safe school environment is an environment that is free of danger; there is an absence of possible harm; educators and learners can teach and learn without fear of physical (bodily) and psychological (mental) harm. Unfortunately, this is not the case in some of our schools. Zulu, Urbani, Van der Merwe and van der Walt (2004:172) found that 75% of learners felt schools were unsafe places.

The South African Police Service and the Department of Education (2002:6-7) (hereafter called SAPSD) report that schools in South Africa are battling to provide quality education required for the holistic development of learners and find it difficult to keep order and control at schools. When there is no order at school, learners and educators fear for their own lives and safety. Instances such as bullying, fighting, insults, drug abuse, assaults, grievous bodily harm, disrespect of one another's dignity and worth, and even murder are likely to occur in some schools. The more learners realise that management does little to stop such happenings, the more likely it is for some learners to engage in criminal behaviour, truanting, skipping classes and forming gangs in order to protect themselves or simply to conform to peer pressure. Such activities expose innocent learners to learning environments that are potentially damaging to their physical, mental and emotional wellbeing. In order to create a



safe school environment, school management teams are advised to follow the key principles of safe school initiatives and interventions. Examples of such principles are understanding what a safe school is, developing safety policies, developing prevention and response plans on issues of safety and violence, building a safety net for troubled learners, knowing where to get help, treating the aftermath of violence and trauma, practising effective school management and knowing how to identify indicators of violence, delinquent behaviour and troubled learners (South African Police Service and Department of Education 2002:7-9).

### **2.8.6 The right to just administrative action**

Section 33(1) of the Constitution provides for the right to administrative action that is lawful, fair, reasonable and procedurally just. Within the school context there are many situations that require fair administrative action, such as suspension and expulsion of learners where due process should be followed. Educators should be reasonable and fair when disciplining a learner and correct procedures must be followed (De Waal *et al.* 2000:378). Educators and principals of schools must follow fair procedures for adopting and enforcing a code of conduct for learners. Due process requires that the process must be fair, that is, learners should be afforded the opportunity to be heard and be given adequate notice of any action; officials that are in charge of the proceedings must be impartial and free of bias; and the information must be protected (Bray 2000b:88; Squelch 2000(a):36-38). Sections 8(5) and 9(3)(c) of the Schools Act affirm that due process safeguards the interests of learners in disciplinary proceedings.

#### **2.8.6.1 Suspension from school**

School suspension is a legal form of discipline for learners who violate school policies, including issues relating to safety in schools. Teaching and learning cannot occur in an environment that is unsafe and the rights of other learners and educators need to be protected. If learners do not respond to disciplinary measures taken by educators and frequently repeat misconducts such as interrupting education in the classroom, using abusive language, smoking or carrying tobacco, educators may try to discipline them. If the misconduct persists the educator may refer the case to the school authorities. Learners who have been found guilty of contravening the stipulated code of conduct may be suspended for a period not exceeding one week. What is important is that school suspension requires that procedural and substantive provisions on due process are met.

Offences that may warrant suspension and possible subsequent expulsion of a learner from a public school include: conduct which endangers the safety and violates the rights of others; possession, threats or use of a dangerous weapon; the use of unauthorised drugs, alcohol or intoxication of any kind; fighting, assault and battery; immoral behaviour or profanity; falsely



identifying oneself; harmful graffiti, hate speech, sexism and racism; theft or possession of stolen property, including tests or examination papers prior to the writing of tests or examinations; unlawful action, vandalism, or destroying or defacing school property; disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees and learners; repeated violation of school rules or the code of conduct; criminal and oppressive behaviour such as rape and gender based harassment; victimisation, bullying and intimidation of others; infringement of examination rules and knowingly supplying false information or falsifying documentation to gain an unfair advantage at school (Squelch 2000a:30 )

A learner may be suspended from school if, in the opinion of the principal, the language and conduct of a particular learner may jeopardise upholding an adequate level of moral behaviour, discipline or social wellbeing of the school, or a learner has committed a series of reprehensible deeds or has refused to participate in the prescribed curriculum or course of the school. Disciplinary measures can be taken against such a learner but the regulations and procedures should be followed. In terms of Section 9(1) of the Schools Act, as amended by Section 7 of Act 48 of 1999, and substituted by 2 (a) of Act 24 of 2005, the SGB may suspend a learner who is suspected of serious misconduct. Disciplinary proceedings must be held within seven school days after a suspension (Section 9 (1B)). If the proceedings are not conducted within the stipulated period the SGB must obtain approval from the HoD for the extension of the suspension (Sub Section (1B)).

Adequate notice must be provided to learners and parents regarding the existence of rules governing student behaviour. A record should be compiled that includes the type, time and place of an offence, those involved in the offence and previous efforts made to remedy the alleged misbehaviour. Learners facing suspension should be provided with a notice of charges brought against them either orally or in writing, followed by a formal hearing. During the hearing, the school official should listen to all sides of the issue (*audi et alteram partem*). Parents of the learner should be informed of the hearing. The suspension must be followed by written notification (Squelch 2000a:73; Essex 2005:94).

An example of a case regarding suspension of a learner without regard to due process is the American case of *Coss v Lopez* (Alexander & Alexander 1992:305). In this case, Lopez, a high school learner, faced suspension of up to ten days after causing a disturbance in the school cafeteria. There was no hearing prior to or after the suspension. Consequently Lopez was not afforded an opportunity to affirm or deny his participation in the disturbance. No notice of charges, no opportunity to be heard, no chance to confront witnesses and no right to further appeal were provided. Lopez filed a law suit. The lower court ruled in favour of Lopez. After due consideration of all evidence brought in the case, Justice White said that since the state had extended the right to attend public schools to learners, including Lopez, that right is legitimate and is protected by due process of the Constitution. He continued by stating that



the state “[may] not withdraw that right on the ground of misconduct and, in the absence of fundamentally fair due procedure to determine whether or not the misconduct has occurred, the Supreme Court affirms a learner’s right to due process” (Alexander & Alexander 1992:306). The court stated further that if charges were sustained and duly recorded, they could seriously damage the student’s standing in the school, as well as interfere with future opportunities to pursue education or employment. It is apparent that the rights claimed by the state to determine unilaterally without due process that misconduct occurred, clashed with the requirements of the Constitution.

### **2.8.6.2 Expulsion from school**

When a learner is enrolled at a public school it should be understood that he or she is subjected to the authority of the school and is bound to the rules (Prinsloo & Beckmann 1989:197). Expulsion is one of the common punishments used to remove disruptive learners from the school environment, if a learner is an immediate threat to the health and safety of other learners and of the school. “Lawful, reasonable” procedures must be strictly followed (Oosthuizen *et al.* 1998:63; Squelch 2000a:29-31).

In the case of *Michiel Josias De Kock v The Head of Department of the Department of Education, Province of the Eastern Cape, The Governing Body, Overberg High School, and the Minister of Education of the Province of The Western Cape, 12533 RSA 1998*, a disciplinary investigation resulted in a learner being expelled from Overberg High school on the grounds of alleged serious misconduct. This involved possession of dagga on the school grounds during school hours. The court ruled in favour of the applicant, on the grounds that gross irregularity had taken place during the proceedings before the SGB. The school principal and his deputy who were members of the SGB were witnesses in the hearing and also took part in the decision against a learner and consequently the learner had not been afforded a fair hearing. In this regard the court referred to the Roman-Dutch precept which maintains that a judge cannot act as a witness, prosecutor, and judge in his own case.

The final judgment of the court in this case was that the decision by the HoD of the Department of Education, Province of the Western Cape to expel Floris Johannes de Kock, a learner at Overberg High school was irregular and that the learner may be enrolled as a learner at Overberg High school

The court’s decision seems to suggest that if the SGB should recommend to the HoD the expulsion of a learner from school, the learner must be afforded a fair hearing and the procedures which lead to expulsion should be lawful and not flawed.

All learners have the right to basic education under Section 29(1) of the Constitution. Suspension and expulsion do not prevent a learner, who is of compulsory school-going age,



from attending school. In the case of disciplinary transfer, the HoD must find a school place for learners until they are beyond compulsory school age (15 years old), as learners' right to basic education cannot be violated. If learners are beyond the compulsory education age they may pursue their education in an adult basic education facility. If the principal expels learners without permission from the HoD, he or she has performed an act that is beyond his power (*ultra vires*), which is in contravention of Section 9(2) (a) of the Schools Act.

In terms of Section 9(1C) (a) of the Schools Act, as amended by Section 7 of Act 48 of 1999, and substituted by 2 (a) of Act 24 of 2005, the SGB may, if a learner is found guilty of serious misconduct during a disciplinary hearing, make recommendations to the HoD to expel such a learner from the public school. The HoD is vested with the authority to make the decision to expel a learner from a school (Schools Act Section 9(1D)).

In the South African case of *R v Muller* cited by Prinsloo and Beckmann (1989:197), it was pointed out that discipline is aimed at promoting the general education of a child and the welfare of the institution. This, by itself, indicates that learners are obliged to obey the law

## 2.9 THE REALISATION OF THE RIGHT TO EDUCATION

More than four decades ago the nations of the world, speaking through Article 26 of the UDHR (1948), asserted that everyone has the right to education (see § 2.3.2). Despite notable efforts by countries around the globe to ensure the right to education for all, the economic gap between developed and developing countries seems to have become wider and wider. In its preamble, the World Declaration on Education For All of 1990 (EFA) states that more than 1000 million children have no access to primary schooling, and more than 1000 million children fail to complete basic education programmes and therefore do not acquire essential knowledge and skills. The economic disparities among and within nations create a daunting problem which has led to major setbacks in the provision of basic education in many countries, especially the least developed countries. In other countries, economic growth has been available to finance education expansion, but even so, evidence reveals that millions of learners remain in poverty and are unschooled or illiterate. Governments of developing countries may lack funds to pay for buildings, staff and supplies (Ray & Tarrow 1987:11).

According to Tomasevski (2003:69), the expansion of public education was rapid during the first decade after the Second World War. Enrolments increased as newly independent states made it a priority to educate their citizens. In the 1960s, newly independent states introduced constitutional guarantees of free and compulsory primary education. The right to education was written into the Independence Constitutions of Chad, Mali, Togo and Mauritius in 1960. However, ten years later, education statistics revealed that promises of free and compulsory education had been a mirage. Primary enrolments for Chad were 25%, for Mali 15%, for





Mauritius 12%, and for Togo 53%. Although South Africa enjoys high enrolment rates (97-98.5%) (SAHRC 2006:19), as compared to other African states, some learners drop out of the system along the way. The SAHRC (2006:39) in its report of the Public Hearing on the Right to Basic Education reported a high percentage of boys dropping out of the education system.

The child's right to education is a requirement of human dignity. It is unacceptable that in the world of ours, possessing a store of scientific and technical knowledge unprecedented in history, there should be, side by side with the privileged people commanding access to the resources of knowledge, hundreds of millions, not only of boys and girls, but also of men and women, who are denied the possibility of simply learning to read and to write (M'Bow 1979:14-15).

In developing countries such as Africa, learners enrol in primary schools in large numbers, only to drop out later without having completed primary education or having achieved the appropriate literacy level (Halvorsen 1990:360; Rideout 1987:21-23; Van Bueren 1995:237). Those who succeed in completing primary education often drop out in large numbers without achieving recognised secondary education certificates, and therefore very few learners manage to progress to higher education.

The pyramid is broad at the base with the numbers of learners in primary education, and gets narrower as they enter secondary school and higher education. In countries with higher enrolments, learners begin but tend not to complete primary school. Of 100% learners enrolled in 1960 in the People's Republic of Congo, Gabon and Libya, 50% had dropped out of school before the end of the primary circle. In Algeria, Burundi and Upper Volta, dropouts numbered 60%. In Botswana, the Central African Republic, Madagascar, Rwanda and Chad over 89% of learners dropped out. The will to provide education for all may have been there, but the ability to translate it into reality appears to be lacking (Tomasevski 2003:69). South Africa is no exception. Naidu (2005:2) reports that of every 100 learners who enrol in grade one, only 52% make it to grade 12. In the same vein, Momberg (2006:3) writes that South African learners are dropping out of school at an alarming rate, with coloureds appearing to drop out of secondary school in large numbers (generally around age 15) (Louw *et al.* 2006:14). Events recent years have shown that the implementation of the agreed rights to education has fallen far short of the widespread verbal commitment to the right to education. Almost daily the news media reports outright violations or neglect of a variety of rights, including educational rights (Ray & Tarrow 1987:11).

Hodgson (1996:261) indicates that the main obstruction frustrating the realisation of the learners' right to education in developing countries such as South Africa is grinding poverty and foreign debt. A Save the Children Fund study indicated that as a result of their debt burden, some African states have been forced to impose or increase school fees (Van Bueren 1995:237). As a result of fees, millions of learners never attend school or fail to complete basic education. Where school fees are not imposed, enrolments increase. For example, Tomasevski (2003:138-139) indicates that Uganda's Education Strategy Investment Plan of





1998-2003 pledged that universal primary education is its highest priority and emphasised the removal of financial impediments to schooling. As a result, enrolments increased from about 2.5 million in 1996 to 5.5 million in 1998 and about 6.5 million in 1999.

## **2.10 LIMITATION OF HUMAN RIGHTS**

All human beings have rights which they should exercise and enjoy. However, human rights are not absolute (De Waal, *et al.* 1999:141; Dlamini 1996:119; Squelch 2000a:9), but are subject to limitation. Limitation of a right is synonymous with an infringement or 'justifiable limitation' of a right. Sometimes, during the exercise of human rights, different interests may be relevant. Different individual interests may lead to conflicts and violation of one another's rights. In order to promote harmony, human dignity and equality, individual interests and rights must be balanced by collective rights. The persuasions of individual rights may be counter balanced by a collective right and thereby contribute to the benefit of both rights. It is believed that public order, safety, health, and democratic values justify the limitation of individual rights (Helwig 1993:43).

Whenever a violation of a right is assumed, the courts become involved to interpret the law and determine legal principles that can be applied to balance the right. While the main purpose of the legal system is to maintain order and security and to restore balance and stability in society (Beckmann *et al.* 1997:125; Bray 2000a:10), the main purpose of the Bill of Rights is to protect human rights against infringement (Rautenbach & Malherbe 1998:140). If human rights were absolute, everyone would selfishly claim his or her rights without due respect for the rights of others, which would render the Bill of Rights nominal. The violation of human rights would prevail in different spheres of human life.

The discussions that follow concern the limitation of fundamental human rights under the following headings:

- Limitation of human rights in the USA
- Limitation of human rights in the Republic of South Africa (RSA)
- Limitation of the right to education in the RSA.

### **2.10.1 Limitation of human rights in the USA**

Constitutions differ from one country to the other. Some countries include a limitation clause in their constitutions, while others do not. For example, the Constitution of the United States of America does not have a limitation clause (De Waal *et al.* 1999:142; De Waal *et al.* 2000:132). Therefore the courts play an important role in determining whether a right has been infringed and what legal principles may be used to balance the rights. Balancing human



rights is very important, since individuals might develop the attitude of absolutising their rights, in which case chaos might prevail. In USA courts different principles or tests have been developed to limit the rights and to establish whether or not a right has been infringed, for example:

- Some tests are called 'the least restrictive means'. These hold that the proposed limitation should be rejected in favour of the least restrictive means to achieve the same results.
- 'Clear and present danger' – this prohibits one from warning falsely about the existence of danger if there is none.
- The authorities may punish those who abuse freedom of expression by "utterances inimical to the public welfare, tending to corrupt morals, and incite or disturb the public order".
- Schools may limit the right to freedom of expression if in their opinion it is "contrary to the mission of the institution".
- Another test is the 'lifting words' test. This tends to limit the use of words that might contain an emotional message, arouse the interest of people such that they may cause them to act in a disruptive and unthinking immediate manner, and cause harm to others (Van Vollenhoven 2005:74-75).

### **2.10.2 Limitation of human rights in the RSA**

Chapter 2 of the Constitution of the RSA contains the Bill of Rights. This means that human rights are guaranteed in the supreme law of the country and may not be unfairly, unreasonably and unjustifiably infringed upon. Each right entrenched in the Bill of Rights is inalienable but subject to limitation because no right is absolute (Bray 2000b:8, 29). Each right has a corresponding duty or obligation, and can be limited in a case where the corresponding duty is not executed. A person can claim a right if he/she has fulfilled a corresponding duty. Human rights belong to everyone; therefore one must be careful not to infringe upon other's rights while exercising one's own rights. This means that one must claim one's rights responsibly, unselfishly and reasonably. If one disregards another's rights, it may lead to the absolutising of one's rights and resulting chaos. De Waal *et al.* (2000 132) recognise that in order to maintain public order, safety, health, and democratic values, it is justifiable to impose restrictions on the exercise of fundamental rights.

In South Africa human rights entrenched in the Bill of Rights can be limited in certain circumstances. Bray (2000b:29, 34), De Waal *et al.* (2000 144-153) and Prinsloo and Joubert (2001:134-140) provide some guidelines on the limitation of human rights in South Africa.



They indicate the following types of limitation, which are discussed in the subsections that follow:

- Limitation through the application of the limitation clause (Section 36 of the Constitution);
- Limitation through the application of an inherent or built-in limitation; and
- Limitation during a state of emergency (Section 37 of the Constitution).

#### **2.10.2.1 Limitation through the application of the limitation clause**

This is the most common form of limitation and can be applied to all rights entrenched in the Bill of Rights (Bray 2000b:32). The criteria to ascertain whether or not the limitation of a right is valid are that the limitation must be reasonable and justifiable in an open democratic society and must be based on the democratic values of equality, human dignity and freedom (see Table 2.11). This serves to ensure that a balance is struck between the limitation of a right and the purpose for which the limitation is being applied. It is important that various factors be explored and due consideration be given when limiting a right. In the absence of valid criteria applicable in the limitation of human rights, the limitations could be applied arbitrarily and unrestrictedly. That is, such application could impede the sustainability of democracy and render the provisions in the Bill of Rights nominal and of no legal force or value. Let us first consider the content of the limitation clause (Section 36 of the Constitution) and the requirements which must be considered to lawfully limit a right or a group of rights. Table 2.9 contains the core content of the limitation clause.

The first criterion that may be used to limit a right is in terms of the law of general application (Section 36(1)).

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

Bray (2000b:31) states that a law may limit a right in the Bill of Rights if it is a law of general application. This means that the law must be authorised by law, and such law must be of general application. In the process of balancing the right (Van Vollenhoven 2005:56), the values which most closely reflect the Constitution scheme should receive appropriate protection.

Balancing the right must be justifiable in an open democratic society, based on the principles of equality, human dignity and freedom. The term 'law of general application' refers to law that can be equally applied. It must be a legal rule – law that provides that a right can be limited. For example, Schools Act provides for the suspension and expulsion of a learner from a school in specific cases (Section 8 & 9). When the Provincial Department of Education expels



**Table 2.11: The content of the limitation clause**

The Constitution	Section 36(1)	The rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
	(a)	The nature of the right;
	(b)	The importance and purpose of the limitation;
	(c)	The nature and the extent of the limitation;
	(d)	The relation between the limitation and its purpose; and
	(e)	Less restrictive means to achieve.
	Section 36(2)	Except as provided for in Sub Section (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights.

**Source: The Constitution of the Republic of South Africa 1996**

a learner from school, the law of general application must apply, in that national or provincial legislation must authorise such expulsion. What is important is that the law that limits the right must be known and must be clearly understood. The law of general application applies equally to all schools. For example, a learner may be suspended from school for vandalism of school property, or theft or consumption of alcohol. In order to satisfy the limitation test it must be shown that the law in question serves a constitutionally acceptable purpose, and that there is sufficient proportionality. The Schools Act Section 3(10) prescribes age limits for primary education within the school context. In this way, the right to primary education may be limited by age. For example, learners are subjected to compulsory education from 7 years until they reach the age of 15 or grade 9, whichever comes first. While admission to a public school is limited by age, the right to adult basic education is not (SAHRC 2006:7). Learners who are beyond the maximum age requirements for admission, may pursue their right to basic education through adult basic education..

- **The limitation must be reasonable and justifiable**

It is required that the limitation should be reasonable and justifiable in an open and democratic society, based on the principles of equality, human dignity and freedom. These principles can be explained by applying the criteria contained in Section 36(1)(a-e) of the Constitution (Table 2.11). These criteria are discussed individually in the following paragraphs.

- **The nature of the right (Section 36(1)(a))**



The question to be asked here is: “What is being protected by the right, and what is its significance in an open society based on human dignity, freedom, and equality?” The closer the nature of the right is to the values of human dignity, freedom and equality, the less it should be limited, since those values underpin democracy and the Constitution (Section 1:7(1) of the Constitution). A balance should be struck between the harm done by the law (infringement) on other rights, and the benefit it desires to achieve (purpose). De Waal *et al.* (1999:152 and 2000 144) reveal that sometimes it is difficult to apply the general limitation clause to rights with internal limitation and which carry more weight than other rights. For example, in education the right to equality (Section 9), the right to human dignity (Section 10), the right to life (Section 11), and the right to education (Section 29), carry more weight than other rights, such as the right to property (Section 25). The right to basic education is certainly a very important right, since education is an essential component of an open and democratic society, and enhances human dignity, freedom, and equality.

- **The importance and the purpose of limitation (Section 36(1)(b))**

Again, the question that should be asked is whether the limitation serves the values that underpin the Constitution, what public purpose is being protected, which rights of others are being protected by the limitation, and how important is the purpose of this limitation (De Waal *et al.* 2000 145). Let us take, for example, if a learner is suspended from school because he is selling drugs to other learners, the suspension should acknowledge the fact that discipline is an important part of education, and that other learners have the right to basic education. Drugs have a disruptive influence on education and on individual learners and therefore should not be tolerated on the school grounds. To suspend a learner in this case would be acceptable in an open and democratic society based on human dignity, freedom and equality (Bray 2000b:33).

- **The nature and the extent of limitation (Section 36(1)(c))**

In this regard, one should consider the seriousness of a transgression. The concern is to ensure that the cost of the limitation imposed on the bearer of a right is not greater than the benefit gained by society at large. In other words, the same test as applied above would suffice. That is, the right can be limited if the limitation is reasonable and can be justified in an open and democratic society based on human dignity, equality and freedom (Bray 2000b:32-33).

De Waal *et al.* (1999:156) recommend that one should ascertain the proportion between the limitation and the nature of limitation. ‘Proportionality ascertainment’ means that the infringement of rights should not be more excessive than is warranted by the purpose served by the limitation. An example of this test is where an educator wants to discipline a learner who has not done her homework, or who has arrived late at school. The educator then beat



the learner which resulted in the learner losing an eye (Ngobeni 2001:9). This punishment (intended as a means of maintaining an orderly school environment) was incommensurate with the purpose which it was supposed to serve. It infringed upon the learner's general right to dignity, protection and equality. However, in the case of a learner being suspended because he has consumed alcohol or is selling drugs to other learners, the principal may have a reasonable and justifiable cause.

- **The relationship between the limitation and its purpose (Section 36(1)(d))**

The question is whether the limitation will advance its purpose at all and if so, how effectively does it serve that purpose. There must be a good reason for the infringement (limitation of the right); this means that there must be a balance between the harm or limitation, and the beneficial purpose that the law is meant to achieve. The law must serve the purpose which it is designed to serve (De Waal *et al.*, 2000:148). In the example of suspension mentioned above, the purpose was not only to remove the culprit from the school temporarily as a form of punishment, but also to protect other learners from bad influences and to maintain a safe school environment, characterised by peace and harmony. The question is: what are the details concerning how seriously the right may have been infringed? Furthermore, can the limitation enhance the purpose of the limitation at all, and if so, how sufficiently does it serve the purpose?

- **The availability of less restrictive means to achieve the purpose (Section 36(1)(e))**

One should determine whether there are other measures that could be applied to achieve the same purpose of an intended limitation. If there is a less restrictive way to maintain discipline at school than suspending a learner, that way should be applied. But if the learner has received verbal and written warnings, suspension would be the best option, as one presumes that the less restrictive ways would have been exhausted (Rautenbach & Malherbe 1998:14-15).

### **2.10.2.2 Limitation through the application of an inherent limitation**

An inherent limitation is also called a built-in limitation. This involves the formulation of a right in a way that it implies a limitation in itself, by means of the wording used. In addition to Section 36 of the Constitution, the Bill of Rights contains several inherent or built-in limitations or internal qualifiers that apply to a particular right. For example, everyone has the right to freedom of expression under Section 16(1) of the Constitution, but the right to freedom of expression does not extend to hate speech (Section 16(2)). This means that one is not allowed to use vulgar language, name-calling or use freedom of expression in a way that is





detrimental to the rights of others. In the same vein, Section 9(3) proscribes 'unfair discrimination' which implies that some form of discrimination (such as affirmative action) may be regarded as 'fair' (Bray 2000b:30).

Section 29 (1) of the Constitution guarantees the right to basic education and to receive education in an official language of own choice in a public institution. This right is inherently limited since the possibilities of exercising it to the full are dependent on other considerations, for example, whether or not the conditions are reasonably practicable. In order for learners to be educated in the language of their choice the educator: learner ratio should be at most 1:45 in primary schools and 1:35 in secondary schools, in terms of a specific medium of instruction. If that is not the case, it could be difficult for learners to exercise their right to choose their preferred medium of instruction.

The state must consider all reasonable educational alternatives, including single medium instruction, taking into account:

1. (a) Equity;  
(b) Practicability; and  
(c) The need to redress the results of past racially discriminatory laws and practices.
2. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that:
  - (a) Do not discriminate on the basis of race;
  - (b) Are registered with the state; and
  - (c) Maintain standards that are not inferior to the standards at comparable public educational institutions (SAHRC 2006:7, 8).

Whereas parents have the right to establish and maintain their own educational institutions, this right is limited in that the standard and quality of education are regulated in terms of the law. The Minister of Education is vested with the authority to determine the standard of education (NEPA Section 8(1)).

Although section 29(1) of the Constitution provides that everyone has the right to education, it qualifies this right by including the term 'basic' education. This inherent limitation presupposes that the right to education does not extend to a right to further education and training or higher education (Bray 2000b:30)



### 2.10.2.3 Limitation during a state of emergency

Section 37(5) of the Constitution provides for the derogation or suspension of rights during a state of emergency. The derogation applies only when the life of the nation is threatened by war, disorder or natural disaster. Some rights can be suspended under the state of emergency while others such as the right to equality with respect to unfair discrimination, human dignity and the right to life may not be limited. The difference between Sections 36 (the limitation clause) and 37 (state of emergency) is in their application. Section 37 applies only in a state of emergency, the duration of which may not exceed 21 days or may be extended to a period not exceeding three months from the time when it is declared. Section 36 applies continuously to human rights not temporarily suspended (De Waal *et al.* 2000:153 and 1999:162).

The right to education, like all other derogable rights, may be temporarily suspended in terms of Section 37(2) (a), when the country is experiencing a natural disaster like floods and it has been established that it would be unsafe for learners to cross flooded rivers, their attendance at school could be temporarily suspended until the threats are over or when alternative arrangements have been made.

## 2.11 Conclusion

In this chapter I explored the historical development of learners' rights to education, the recognition of learners' rights to education in international human rights law, the recognition of learners' rights to education in South Africa, the core content of the right to education, and other human rights that are directly and indirectly relevant to education. Lastly the limitation of human rights, including the right to education, was discussed.

In Chapter 3 I investigate international perspectives on learners' perceptions of their rights and the development of their understanding of human rights. Kohlberg's theory of moral ethical development is highlighted. This theory acquires a particular significance for this study, since understanding of human rights concerns social, moral and legal issues. Lastly, I shall consider the aspects that influence learners' understanding of human rights. The main focus in Chapter 3 is the development of the understanding of human rights.