

Children’s right to basic education

Lori Lake and Shirley Pendlebury (Children’s Institute)

In South Africa, the right to education is guaranteed by section 29 of the Bill of Rights in the Constitution. Broader constitutional values and principles also support *rights within* and *rights through education*. Government is obliged to pass laws, develop policies and establish programmes that “protect, respect, promote and fulfil” the right to education. The right to education is thus justiciable and government can be challenged in court if it fails to meet its constitutional obligations.

Claims about human rights also extend beyond legislation and jurisprudence. International declarations, national legislation and policies do not necessarily translate into actual rights on the ground, and many children struggle to realise their right to education both within and outside the classroom. In this context, human rights play an essential role as moral imperatives and political resources that can enable people to stand up for their rights and hold the State accountable.

This essay focuses on:

- What is meant by the right to basic education?
- What is the relationship between children’s right to education and their other rights?
- What are the State’s obligations regarding children’s right to basic education?
- Why is ongoing public debate about rights important?

What is meant by the right to basic education?

Education is a human right. This means that there is a universal moral imperative for all people, irrespective of citizenship or national legislation, to have opportunities for formal education. This moral conception of human rights underpins international conventions such as the UN Declaration of Human Rights (1948), which recognises the right to education, together with other rights, as essential in promoting world peace and democracy.

Human rights are universal and all human beings are equal as rights-holders. The moral significance of human rights does not vary with local legislation or according to whose rights are at stake. Where a government or any of its agencies

or agents violates or disregards the moral rights of the people it governs, it is what Thomas Pogge calls “official disrespect”.

In South Africa, education is also a justiciable constitutional right. The Bill of Rights binds all three arms of government to give effect to the right to education. Government can thus be held accountable through the courts for failing to meet its obligations regarding education.

The constitutional right to education

Section 29(1)(a) of the Bill of Rights in the Constitution establishes the right to basic education — for both adults and children — as an immediate right unqualified by any limitation related to progressive realisation. Fulfillment of the right places both positive and negative obligations on the State. The positive obligation requires government to take active steps to ensure that every child has access to educational facilities and enjoys the right to education. The negative obligation means that government and its agencies (such as public schools) should not impede children’s access to education.

In addition, section 29(1)(b) establishes the right to further education, which the State must “through reasonable measures” make “progressively available and accessible”.

This essay focuses on children’s rights *to, in and through* basic education (see figure 1 on p. 21). Currently, basic education for children in South Africa comprises compulsory school enrolment for the full General Education and Training (GET) band from grade R to grade 9, or from 7 to 15 years of age, whichever is reached first. While the reception year (grade R) is not yet compulsory, the Department of Education aims to make grade R available to all five-year-olds by 2010.

Language rights go hand-in-hand with the right to education. Section 29(2) of the Bill of Rights states that everyone who attends a public school also has a constitutional right to receive education in the official language or languages of their choice, where this is “reasonably practicable”. This recognises South Africa’s linguistic diversity and aims to redress historical discriminatory practices, but it does not affirm an unqualified right to first language instruction.

In keeping with the constitutional rights to freedom of association, belief, culture and religion, section 29(3) assures the right for everyone to establish independent educational

institutions, provided that they do not discriminate on the basis of race; are registered with the Department of Education; and maintain appropriate standards.

The Constitution does not specify the content of the right, but section 39 states the requirements for interpreting constitutional rights, including the right to education. The interpretation must “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” and must consider international law.

International law

Most international conventions offer similar definitions of the right to education and commonly recognise two main aspects of the right: the purpose and process of education.

For example, the International Covenant on Economic and Social Rights (1966) requires education to “be directed to the full development of the human personality and its sense of dignity; strengthen respect for human rights and fundamental freedoms; enable all persons to participate effectively in a free society; promote understanding, tolerance and friendship among all nations and all racial, ethnic and religious groups; and further the activities of the United Nations for the maintenance of peace”.

A similar broad purpose statement appears in article 29 of the UN Convention of the Rights of the Child (1989), and is elaborated in General Comment No. 1 of the UN Committee on the Rights of the Child. The Dakar Framework for Action: Education for All (2000) is more specific. Goal Six is to improve every aspect of the quality of education so that “recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills”.

International conventions also outline a number of common elements in terms of process, including: non-discriminatory access to public educational institutions and programmes; compulsory, free primary education for all; free choice of education; minimum standards and a transparent, effective monitoring system.

The 1999 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 13 provides further guidelines for interpreting the right to education and calls for basic education to be available, accessible, acceptable and adaptable (see the box on the right).

What is the relationship between the right to education and other rights?

Rights are interdependent and the right to education should therefore be interpreted in the context of the full Bill of Rights. The rights to equality (section 9) and human dignity (section 10) set the ethical standards for a democratic system of education in which every child — regardless of race, gender, culture, language, religion, ability or disability — is equally

Education and the 4 As

Availability

Educational institutions and programmes must be available in sufficient quantity to meet local needs. This includes a range of resources, eg buildings, water and sanitation, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computer facilities and information technology.

Accessibility

Education must be accessible to all. There should be no discrimination on the basis of race, class and gender, and vulnerable groups must be catered for (such as refugee children or children with disabilities). Schools must be physically accessible (eg it must be safe and easy for children to travel to school). Schools must be economically accessible and affordable. Primary education should be free to all.

Acceptability

Education programmes, including curricula and teaching methods, must be acceptable to students. Education should be relevant, culturally appropriate and of good quality. It should also respect the rights of learners (eg school discipline and language of instruction).

Adaptability

The education system needs to be flexible so it can adapt to the needs of changing societies and communities, and respond to the needs of students in diverse social and cultural settings (such as children with disabilities or children living in child-headed households).

Sources: Adapted from the United Nations Committee on Economic, Social and Cultural Rights (1999) *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999. E/C.12/1999/10; Tomaševski K (2001) *Right to Education Primer No. 3 Human rights obligations: making education available, accessible, acceptable and adaptable*. Gothenburg: Novum Grafiska.

entitled to learn, under conditions that respect, protect and promote the inherent human dignity of each child.

The right to education is part of a compendium of socio-economic rights, including rights to access to adequate housing, health-care services, sufficient food and water, and social security. Although children’s right to basic education is not subject to progressive realisation, the CESCR and the South African Human Rights Commission regard it as dependent on the progressive realisation of other socio-economic rights. For example, children who are sick or hungry will struggle to learn.

Arguably, socio-economic rights are necessary conditions for people to exercise their civil and political rights. The rights to freedom and security of the person; freedom of religion, belief and opinion; and freedom of expression are pertinent to

both *rights in* education and *rights through* education. For example, schools must provide a safe learning environment and create opportunities for learners to participate in decision-making.

Section 28 of the Bill of Rights safeguards children’s rights to care and protection, and recognises that the best interests of the child are of paramount importance in all matters concerning the child, including education.

Just administrative action (section 33) grants everyone the right to administrative action that is lawful, reasonable and fair. This includes the administration of school admissions, children’s educational achievement records and disciplinary hearings.

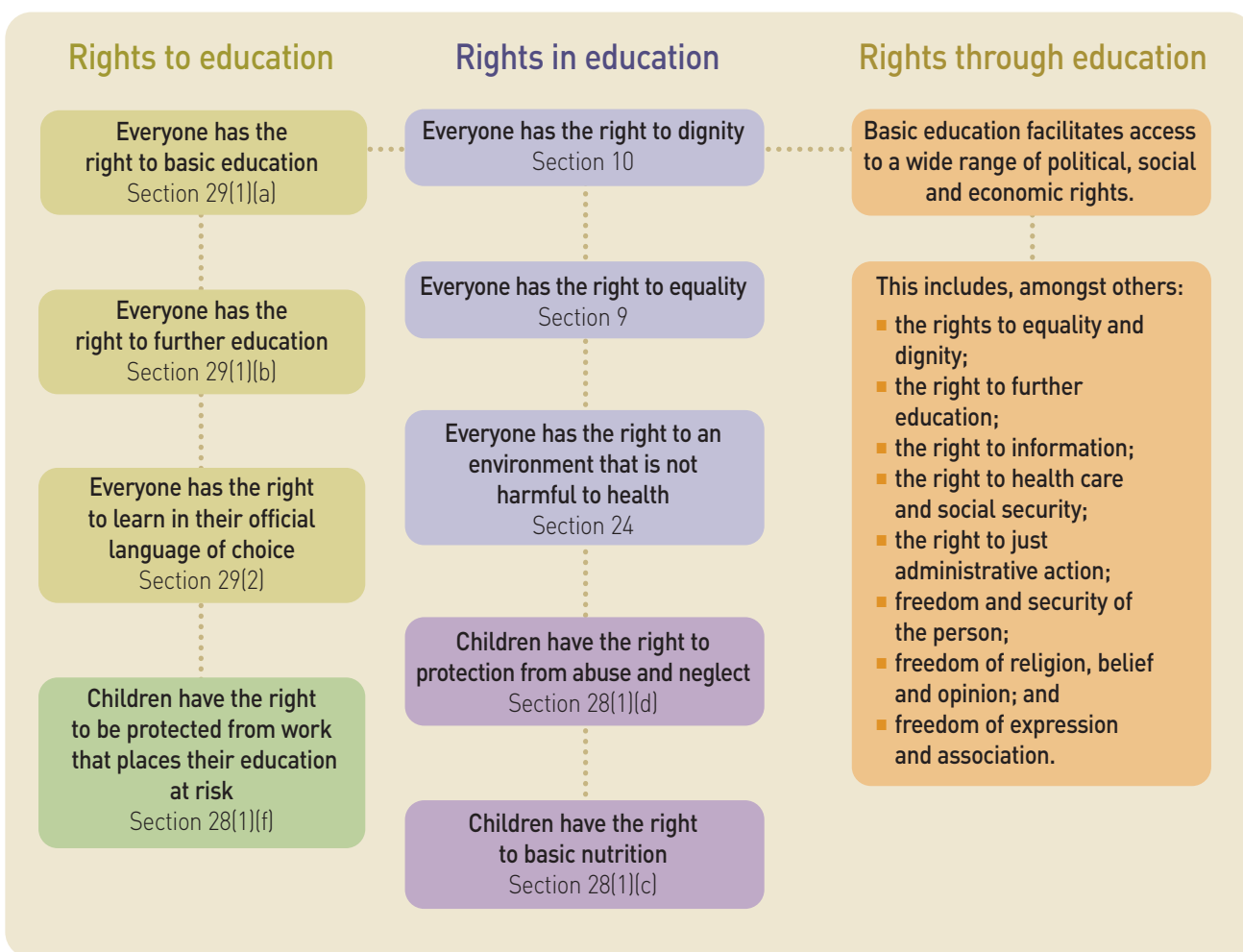
Education is not only a right in itself, it also empowers people to claim and realise their other rights. According to the South African Human Rights Commission, the right to basic education is a central facilitative right in South Africa’s constitutional democracy. Through basic education, people are better able to appreciate and exercise the full range of their human rights. For example, the *Education for All – Global Monitoring Report* describes how access to education enables women to

make choices that improve maternal and child health. In other words, education gives people the freedom to make informed choices and enhances what Amartya Sen calls their capability to lead lives they have reason to value.

Spren and Vally describe how education acts as a multiplier. Where the right to education is effectively guaranteed, it enhances the enjoyment of all individual rights and freedoms. Conversely, where the right to education is denied, violated or disrespected, this deprives people of their awareness and enjoyment of many other rights and freedoms. (Of course, education acts as a multiplier only if schools are not being used – as most of them were under apartheid – to indoctrinate learners or produce a compliant underclass.)

Human rights considerations inform every facet of the education system. Vally points out that this includes policy, access, budgeting, curriculum, management, assessment, teaching and learning. Human rights education is also an essential component of the Revised National Curriculum Statement which aims to develop informed and active citizens who know their rights and can challenge injustices.

Figure 1: Rights to, in and through education as described in the Constitution



What are the State's obligations regarding children's right to basic education?

Section 7(2) of the Constitution requires the State to "respect, protect, promote and fulfill the rights in the Bill of Rights". Each obligation imposes a related set of duties on the State:

- the obligation to respect requires the State to avoid measures that prevent children's enjoyment of the right to basic education;
- the obligation to protect requires the State to prevent others (for example, parents and caregivers) from interfering with children's enjoyment of the right to basic education;
- the obligation to promote imposes a duty on the State to encourage educational participation and to make citizens aware of their educational rights; and
- the obligation to fulfil imposes a duty on the State to take positive measures that enable all children to enjoy the right to basic education.

South Africa has developed an impressive array of laws, regulations and policies which aim to get all school-aged children into schools and ensure a safe school environment. The policy intent is to establish an education system that is inclusive, efficient and attentive to the quality of learning conditions and outcomes. Children's rights to dignity and equality are protected through, for example, the abolition of corporal punishment, the prohibition of discriminatory practices, codes of ethics for educators and learners, and particular attention to the rights of children infected or affected by HIV/AIDS and those with disabilities and special education needs.

Despite a comprehensive set of laws and policies to give effect to rights to, in and through education, many children in South Africa do not yet enjoy these rights in practice. The other essays in this publication present some key factors that hamper full realisation of the right to basic education.

Legislation gives effect to the right to basic education and defines some of the corresponding duties and duty-bearers. But in the absence of clear norms and standards, many of the State's constitutional obligations remain loosely specified.



© Jenni Karlsson

Children's moral rights often extend beyond existing policy and legislation and create what Sen calls "imperfect obligations" that stretch beyond the fully delineated roles of duty-bearers. Sen argues that, in the case of imperfect obligations, there can and should be ongoing deliberation about the way in which the right is best fulfilled; what would count as genuine realisation; and how the respective demands of different rights should be integrated. As education is itself a contested terrain, many of the obligations regarding the right to education are imperfect and thus open to debate.

Why is ongoing public debate about rights important?

Sen argues that a theory of human rights "cannot sensibly be confined within the juridical model within which it is so frequently incarcerated". Human rights are also moral injunctions that can be used as political tools to challenge and extend existing policies and to motivate and mobilise for social change.

Wilson argues that rights have conservative as well as radical potential. The concept of rights can be used to challenge injustices or it may be used to mask existing inequalities. Spreen and Vally warn against "constitutional romanticism" or proceeding as if rights exist for everyone instead of recognising circumstances where people's rights on paper don't translate to rights on the ground. It is therefore vital that the concerns and needs of those who are most deprived become central in defining what is meant by the right to basic education.

While legislation and litigation can get results, enduring respect for human rights is sustained not just by a country's constitution, government and legal system. It is, Pogge suggests, sustained more deeply by people's values, as shaped by the education system and the economic distribution of resources. What is needed to secure a right, he suggests, is a vigilant public that is willing to work towards the political realisation of the right. Ongoing public debate is critical for securing meaningful access to education. So, too, is what Vally describes as "an active and responsible citizenship who understand the law and its limitations and are willing to insist on their rights and mobilise when these aren't forthcoming".

What are the conclusions?

In South Africa, the right to education is defined in section 29 of the Bill of Rights, which must be interpreted in line with international law and democratic values.

Human rights are indivisible, and the right to education must be seen in relation to other human rights. Children have rights in and through education, as well as to education. The rights to equality and dignity set the standards for a

democratic system of education, and the right to education acts as a multiplier that enables people to access other political and socio-economic rights.

Government has an obligation to respect, protect, promote and fulfil these rights through policy and legislation; yet many of these obligations are imperfect and the precise content and meaning of the right to education remain open to debate.

Rights are political resources that can be used to extend and deepen meaningful access to education. Children's right to basic education will only be realised when government meets the educational needs of all children in South Africa. Ongoing dialogue and advocacy are essential in order to interpret what is meant by the right to basic education, and to mobilise public action for its full realisation.

Sources

- Constitution of the Republic of South Africa. Act 108 of 1996.*
- Currie I & De Waal J (2005) *The Bill of Rights Handbook (Fifth Edition)*. Cape Town: Juta.
- EFA Global Monitoring Report Team (2009) *Education for All – Global Monitoring Report. Overcoming inequality: why governance matters*. Paris: United Nations Educational, Scientific and Cultural Organisation.
- Motala S, Dieltiens V, Carrim N, Kgobe P, Moyo G & Rembe S (2007) *Educational access in South Africa: Country Analytic Report*. Prepared for the Consortium for Research on Educational Access, Transitions and Equity (CREATE). Johannesburg: Education Policy Unit, University of the Witwatersrand.
- Office of the United Nations High Commissioner for Human Rights (2001) *United Nations Convention on the Rights of the Child General Comment No. 1. The Aims of Education (Art. 29 of the Covenant), 17 April 2001*. CRC/GC/2001/1. Geneva: UNCHR.
- Office of the United Nations High Commissioner for Human Rights (1989) *Convention on the Rights of the Child, General Assembly Resolution 44/25*. Geneva: United Nations.
- Office of the United Nations High Commissioner for Human Rights (1966) *International Covenant on Economic, Social and Cultural Rights*. Geneva: UNCHR – UNOG.
- Pogge T (2002) *World Poverty and Human Rights*. Cambridge: Polity Press.
- Right to Education Project (2008) *The Right to Education Project*. Available: www.right-to-education.org.
- Sen A (2004) Elements of a theory of human rights. *Philosophy and Public Affairs*, Fall 2004; 32(4): 315.
- South African Human Rights Commission (2006) *Report on the Public Hearing on the Right to Basic Education, 12 – 14 October 2005*. Johannesburg: Human Rights Commission.
- Spreen CA & Vally S (2006) Education rights, education policies and inequality in South Africa. *International Journal of Educational Development*, 26(2006): 352-362.
- Tomaševski K (2001) *Right to Education Primers No. 3 Human Rights obligations: making education available, accessible, acceptable and adaptable*. Gothenburg: Novum Grafiska.
- United Nations Committee on Economic, Social and Cultural Rights (1999) *General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999*. Geneva: Office of the United Nations High Commissioner for Human Rights.
- Vally S (2007) Rights and Responsibilities in Education. In: *The Star Series – Education in South Africa Today*. Johannesburg: Wits School of Education/The Star: 3-5.
- Wilson S (2004) Taming the Constitution: Rights and reform in the South African education system. *South African Journal on Human Rights*, 20(3): 418-447.
- World Education Forum (2000) *The Dakar Framework on Action. Education for All: Meeting our collective commitments*. Adopted by the World Education Forum, Dakar, Senegal, 26 – 28 April 2000.