

CHAPTER 2

THE EDUCATOR AND THE LEARNER: THE LEGAL POSITION OF THE LEARNER WITHIN THE SCHOOL SYSTEM

2.1 INTRODUCTION

The fundamental rights of *all* South African people, enshrining the democratic values of human dignity, equality and freedom, are affirmed by the Bill of Fundamental Rights contained in the SA Constitution.

According to Merriam-Webster (1985:498 and 1015) the word "*fundamental*" could be defined as "...*belonging to one's innate or ingrained characteristics...*" and "*rights*" refer to "...*powers or privileges to which one has a just claim...*". The term "*fundamental rights*" thus implies that *all* people (including learners) can lay claim to the democratic values of human dignity, equality and freedom as they are affirmed by the Bill of Rights.

Beckmann *et al.* (1995:5-6) describe the entrenchment of the fundamental rights in the SA Constitution as being of specific importance since section 7(2) affords citizens special protection against the power of the State: *the State must respect, protect, promote and fulfil the rights in the Bill of Rights*. The Bill of Rights therefore provides all people (even non-citizens) with the guarantee that they will be able to exercise a certain degree of control over their own lives since there are certain aspects which the government cannot readily touch (Beckmann *et al.*, 1995:6).

These rights should, however, not be seen as unlimited or inalienable: they can be limited by the State (*cf.* the *Limitation of rights* found in section 36) as long as the limitation is reasonable and justifiable, having taken into account all the relevant factors: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. At the same time an individual person's fundamental rights are also limited by the rights and freedoms of others and should therefore never be seen in isolation (Beckmann *et al.*, 1995:6).

It can no longer be assumed that the family constitutes a safe haven for children (Bosman & Van Zyl, 1997:49). The legal relationship between children and their parents (Van der Vyver & Joubert, 1991:443) therefore necessitates a legal definition determining, *inter alia*, the child's status in such a relationship (Beckmann & Prinsloo, 1989:4). This is doubly important as he stands in an intertwined legal relationship with the educator as well (Oosthuizen & Bondesio, 1988:14).

It should be borne in mind for educational purposes that the law bestows on learners, parents, educators and the state (Oosthuizen & Bondesio, 1988:14):

- individual competencies (defined by Van der Vyver & Joubert, 1991:3-4, as firstly a person's ability to be a legal subject (*cf.* 2.2.2.1) and secondly the ability to perform certain juridical actions);
- subjective rights (claims which legal subjects lay to legal objects, such as the right to a name); and
- legal obligations.

It is imperative that all participants in educational actions should be fully conversant with these capacities, subjective rights and legal obligations as the only way in which they can vindicate their own fundamental rights and fulfil their duties (Beckmann & Prinsloo, 1989:4). Moreover, Bray (1998:77) adds that conflicting rights or interests of different persons often need to be counterbalanced, as fundamental rights impose obligations.

For the purpose of this research the following terminology needs to be defined:

- A *legal subject* is an entity who has subjective rights and legal duties, and who bears capacities (Davel & Jordaan, 1995:3-5; *cf.* 2.2.2.1). Legal relationships and the persons involved (the legal subjects) may vary. Thus it is necessary to determine who these persons are before the different legal relationships are examined (Bray, 2000:8). Two categories of legal subjects are acknowledged in private law, namely natural persons (human beings, such as learners) and juristic persons. In South African private law every person is a legal subject (Davel & Jordaan, 1995:3).

Juristic persons (*cf.* 2.2.2.1) are associations of people (social entities) who have an independent right of existence according to the law. These associations must comply with certain formalities laid down by South African law in order to establish it as a juristic person (Bray, 2000:8).

Legal subjectivity (*cf.* 2.2.2.1) concerns the characteristic of being a legal subject in legal intercourse. While it is true that both human beings and juristic persons have legal subjectivity, many authors prefer the term *legal personality* when describing the legal subjectivity of juristic persons. Reference is made to the *legal subjectivity* of a person (Davel & Jordaan, 1995:4).

- *Capacity* relates to whatever a person *can* do legally as a legal subject (Van der Vyver & Joubert, 1991:3). Merriam-Webster (1985:203) defines the term capacity as *legal fitness*. According to Van der Vyver and Joubert (1991:4-7) a person's capacities can be divided, on the one hand, into the private law capacities of being a legal subject (*cf.* 2.2.2) and having the capacity to act (*cf.* 2.2.2). On the other hand, the scope of a person's capacities ranges beyond that of private law to include his capacity to act within public law as well (Van der Vyver & Joubert, 1991:7; *cf.* 2.4).
- *Private law* is defined by Merriam-Webster (1985:936) as the branch of law which concerns itself with private persons, property and relationships. Private law is mainly concerned with demarcating and counterbalancing the subjective rights of individuals in such a way that a peacefully regulated society is established (Davel & Jordaan, 1995:2). At the same time, these relationships can be described as equal or horizontal in nature (*cf.* 2.2.2 & 2.4.2.1).

Although crucial relevant aspects of private law will be addressed, the focus in this research will fall on public law as educators who work in the public sector are in the service of the State. These authorities exercise state authority over them in a typical public-law relationship.

- *Public law*, on the other hand, is the branch of law in which the State as bearer of authority, and as central role-player, regulates both the relations of individuals and the organization and conduct of the State itself (Merriam-Webster, 1985:952). It is primarily aimed at serving the public interest (Wiechers, 1984:3). According to

Davel and Jordaan (1995:1), it is centred around the State in its authoritative capacity, or as Wiechers (1984:3) puts it, public law involves unequal relationships, indicating relationships of authority. Since one of the parties involved is vested with authority, the relationship will be a vertical one because the other party is in a subordinate position.

As pointed out by Bray (2000:12) the distinction between public law and private law has become artificial and unrealistic. Modern State is powerful and dictates many private law relationships through legislation, as can be seen from the fact that the fundamental rights of a child are protected by the State in terms of the SA Constitution and other legislation (*cf.* 2.4).

- *Administrative law* is that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organizations, or with other public authorities (Baxter, 1991:2). Administrative law forms part of public law in South Africa and comprises the actions, competencies and organization of state administration; it is mainly concerned with second and third level legislation (Bray, 1988:7-8). It ensures the smooth execution of legislative acts (such as performed by the Department of Education), administrative actions (such as performed by educators), as well as controlling actions (such as performed by the Minister or principal).
- *School law* is defined by Maithufi (1997: 237-238) as relating to law which is applicable to schools: especially the South African Schools Act 84 of 1996 (hereafter referred to as Schools Act) and all regulations made in terms of this Act, and also educational enactments and regulations of the various provinces of the Republic of South Africa. These documents should be read in the light of provisions relating to education contained in the SA Constitution.
- *Legal capacity* can be described as that capacity which vests a person with legal subjectivity (*cf.* 2.2.2.1). Legal capacity therefore also refers to the capacity to take part in legal intercourse as a legal subject (*cf.* 2.2.2.2); Neethling, 1985:3; Van der Vyver & Joubert, 1985:4). Van der Vyver and Joubert (1985:4) go on to say that legal capacity enables the legal subject to be the bearer of all rights and obligations flowing from such office.

- As much reference will be made to the *learner* or the *child* in this education-directed thesis, it is necessary to point out that this does not imply the legal definition of *minor* as being somebody between 7 and 21 years of age (Barnard *et al.*, 1986:58, Van Zyl, 1987:380 & Cronje, 1990:88). Although there is legally a difference between the status of the 6-year old (infant) and the 7-year old (minor) (Boberg, 1977:235; Van Zyl, 1987:376), for the purpose of this thesis *learner / child / minor* refers to a person under the age of 18 years as stipulated in section 28(3) of the SA Constitution.

The term *learner* thus refers to a child who is receiving or who is obliged to receive education at a public school in terms of the Schools Act: compulsory school attendance is stipulated in section 3(1) as involving the age requirements from the first day of the year in which the learner reaches the age of 7 until the last day of the year in which the learner reaches the age of 15 or the ninth grade, whichever occurs first.

During the course of this study the male reference will be used to simplify matters.

- The term *school* is used as reference to an ordinary public school, contemplated in chapter 3 of the Schools Act.
- *Status*, in the juridical sense of the word, depicts a person's position in legal life (Van der Vyver & Joubert, 1991:53; Barnard *et al.*, 1994:33; Davel & Jordaan, 1995:6). Kruger and Robinson (1997:13-14) point out that status encompasses the role which the person is legally able to play in legal intercourse, by setting out the functions which he can fulfil as a human being (legal subject). The same authors agree with Davel and Jordaan (1995:6) that status can be defined as the sum total of a legal subject's capacities.

In this chapter the fundamental rights of the learner will be scrutinized by focussing on the following:

- learners within the South African legal system;
- learners within the South African school system; and
- the fundamental rights of learners in the context of the administration of justice.

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2.2 LEARNERS WITHIN THE SOUTH AFRICAN LEGAL SYSTEM

Education can take place only if it is structured and ordered. It cannot function within an area which is free of the law (*cf.* 2.3). Beckmann and Prinsloo (1995:6-7) point out that this order implies the acceptance not only of certain values, but also of a general pattern of conduct followed by most members of society. The order of social conduct may be expressed in terms of rules, such as instructions, laws and norms. The same authors emphasize the active role played by the legislator in the legal field.

Van Wyk (1991:26-27) describes South African law as a hybrid system as it exhibits features of both the Roman-Dutch and the English law families. Over the years the South African law has also been adapted to suit typically South African circumstances.

As found in English law, there is no clear demarcation between the various spheres of the law: private law and administrative law, for example, are not so fundamentally separated that they are applied in separate courts as is the case in some continental countries (Van Wyk, 1991:27). In South Africa all the spheres of the law (with a few exceptions) are covered by the ordinary jurisdiction of the courts.

2.2.1 Brief exposition of the South African legal system

It is necessary to understand the basic classification of South African law in order to be able eventually to place school law correctly. This is depicted in Figure 2.1.

FIGURE 2.1: The South African legal system

PUBLIC LAW	PRIVATE LAW	FORMAL LAW
Constitutional law	Law of persons	Civil procedure
Administrative law	Family law	Criminal procedure
Criminal law	Law of obligations:	Evidence
Labour law	- <i>delict</i>	Interpretation of statutes
.....	- <i>contract</i>	
	Law of succession	
		

(Oosthuizen & Van der Westhuizen, 1998:15)

The first two legal areas in this three-fold exposition of South African law will determine the foundation of this study (*cf.* 2.2.2 and 2.3.1).

2.2.2 South African private law: the status of learners

As defined in 2.1, private law busies itself with equal, voluntary legal relationships which are of individual and private concern to those involved.

Educators involved with the daily welfare of the learners must be aware of their learners' legal status in order to be able to apply legal strategies which bring about the creation of a secure educational environment for the learners. Therefore, although the emphasis will fall on public law, attention should be given to relevant private law aspects (*cf.* 2.2.2.1 and 2.2.2.2). According to Bray (2000:9), private law has its origins in common law. However, the private law branch of the law does not function in isolation: it has been influenced and developed by other branches of the law.

Private-law relationships are usually defined as equal (horizontal) relationships (*cf.* 2.1 and 2.4.2.1) which exist between parties who are acting voluntarily, on equal terms and in their private capacity (Bray, 2000:9). Both natural persons and juristic persons (entities) may enter into private-law contracts. Careful consideration should be given to who the parties are, such as whether they act as equals, or whether one party is in a position of authority (Bray, 2000:9).

2.2.2.1 The legal subject and legal subjectivity: the learner

As pointed out in 2.1, the term legal subject can be defined as an entity who has rights, duties and capacities (Davel & Jordaan, 1995:3-4). The same authors acknowledge two categories of legal subjects: that of natural persons, (such as learners) and juristic persons, or social entities (*cf.* 2.4.1.2). A social entity (such as an educational institution) which wants to function as a legal subject must comply with certain formalities laid down by South African law in order to establish it as a juristic person (Davel & Jordaan, 1995:3; *cf.* 2.1).

While Van der Vyver and Joubert (1985:44-45) define legal subjectivity (*cf.* 2.1) as the ability to have juridical capacities, subjective rights and duties, Kruger and Robinson (1997:2) state that it refers to the characteristic of being a subject in legal intercourse.

It is indeed by being vested with legal subjectivity that the legal subject becomes capable of taking part in legal intercourse.

A natural person's legal subjectivity originates at birth (Kruger & Robinson, 1997:2). All persons' legal subjectivity is the same, which implies that each has the capacity to act, capacity to litigate and legal capacity. However, the extent of his legal subjectivity and his legal status is determined by various factors such as age (*cf.* 2.2.2.2), legitimacy and domicile. Only the first-mentioned is relevant here as an indicator of education at South African public schools.

2.2.2.2 Age as determinant of legal status

In terms of South African law every person has legal capacity so that legal incapacity is a juridical impossibility (Kruger & Robinson, 1997:14). But the same authors state that it is legally a given fact that certain individual capacities or conditions may limit the individual's legal capacity. An example would be the legal impossibility of a child below the age of puberty to hold the office of married spouse.

According to Barnard *et al.* (1994:33) the capacity to act refers to the competence to perform legally binding acts, such as the conclusion of a contract, independently. While Van Zyl (1987:378) and Wiechers (1984:310) state that the capacity to act refers to the competence to perform a legal act either independently or with the help of someone, Kruger and Robinson (1997:14) state that as such the capacity to act deals with the question of which juristic acts a person is legally able to perform in legal intercourse.

The capacity to litigate enables a person to act as plaintiff, defendant, applicant, or respondent in a civil action (Kruger & Robinson, 1997:15).

For the purposes of this research it is important to be aware of the impact a child's age has on both his capacity to act and his capacity to litigate.

A person with the status of an infant comes into existence at birth. An infant has no personal capacity to act (*cf.* 2.2.2) or to litigate (*cf.* 2.2.2). Neither can he be held accountable or criminally responsible. His parents act for him or on his behalf.

An infant, however, acquires legal subjectivity at birth and is therefore capable of being vested with rights and obligations; such as would be the case with all the rights

and obligations pertaining to the infant holding the office of an owner of property. On the other hand, it is also true that certain rights and obligations, as well as many offices that adults can hold, cannot be held by an infant at all.

At the age of 7 the status of the infant progresses to that of a minor who, as a general rule, has limited capacity to act or litigate. This would imply that the minor can litigate either as plaintiff, applicant, defendant or respondent only when he has the consent of his parents. Otherwise the parent or guardian can institute an action on his behalf (Kruger & Robinson, 1997:34; *cf.* 4.5.5.1).

In judgement handed down in **O'Linsky v Prinsloo** 1976 4 SA 843 (O), it becomes obvious that the parent or guardian must have knowledge of the case which is instituted by or against the minor. In a summons against the defendant for the delivery of a radio and a tape recorder (or alternatively their value), the plaintiff described the defendant as a major. When the case was heard, however, the defendant proved that he was in fact a minor. The plaintiff then amended the summons by alleging that the defendant, a minor, was assisted by his father and suggested that the defendant be permitted to testify on the merits. At the closure of the appeal, the judge pointed out that it is imperative, according to South African law, that anyone who is either summoned to court or is needed in court in any capacity whatsoever, be formally given notice to such effect. At the same time such notice must be evident from the court documents. According to both the court proceedings and the documents, the defendant's father did not assist the defendant; neither was he even aware of the proceedings. As the minor did not have the capacity to litigate (*cf.* 2.2.2), the plaintiff's claim was denied with cost.

Boberg (1984:682), Van der Vyver and Joubert (1991:181), and Davel and Jordaan (1995:78) agree on the fact that, since it is the minor who is party to the lawsuit, any rights and obligations arising from the action, however, are those of the minor and not of the parents or guardians (*cf.* 4.5.5.1).

Bondesio (1995:31-32) reminds the educator to be aware of the limited legal capacity of the learner, since this implies the existence of specifications to safeguard a minor from abuse (*cf.* 2.3.2.1.2 and 2.4.1.2 and 3.3.5). According to Boberg (1984b:533), minors are protected legally because of their lack of experience, and Davel and

Jordaan (1995:7) are of the opinion that the restriction on minors to perform legal acts should be regarded as a protection against the pitfalls of youth (*cf.* 2.3.2.1.2), rather than as a penalty for youth.

Scrutiny of the legal subjectivity of the learner now leads to observing his position in the school system.

2.3 LEARNERS WITHIN THE SOUTH AFRICAN SCHOOL SYSTEM

It is a given fact that education cannot occur within an area which is beyond the reach of jurisdiction (*cf.* 2.2). Every single managerial or educational action which is taken has legal ground. As mentioned already, the main function of law is to create order in society. Therefore legal grounds for the education environment can be found in school law.

2.3.1 The South African legal system and school law

The South African public law system, as defined in 2.1, is concerned with the activities, powers and organization of the State. The SA Constitution (*cf.* 2.4) is not only the supreme law of the country (*cf.* 2.3.2), but it is also concerned with the functioning and relationship of all central State organs empowered with authority.

Seen in a wider perspective, public law encompasses administrative law (*cf.* Figure 2.1) and this is the public law area where school law is found. In practice this occurs, for example, when the school acts legally against a learner who has transgressed.

On the other hand private law busies itself with equal, voluntary legal relationships which are of individual and private concern to those involved (*cf.* 2.2.2). These private law prescriptions have relevance to the educator-learner relationship. In practice this occurs when the parent enters into a contract with the school for his child's tuition: the contract with the school is entered into according to private law, while the school's acts will be in the domain of public law.

Formal law contains the procedural rules which prescribe the procedures to be followed when a statute, regulation or rule has been contravened, as well as the rectifications which are to be made. It is of the utmost importance that prescribed procedures be adhered to in the education system (*cf.* 2.1 and 3.2.3 and 3.3).

As already mentioned, school law forms part of the South African public law system, resorting specifically under administrative law which needs further clarification.

2.3.1.1 School law as part of administrative law

Although there is no clear distinction between constitutional law and administrative law, it is quite obvious that constitutional law functions on the highest level of state authority. Administrative law, concerning itself with the actions, capacities and organization of state administration, functions on the second and third level of state authority, such as the education departments and the school (Bray, 1988:7-8).

While it is true that South African school law functions as a sub-section of administrative law, it is also true that the South African education system is intertwined to the degree that it touches a wide spectrum of the legal system. School law is affected by both public law and private law areas in the following manner (Bray, 1988:8):

- Public law affects school law in terms of certain criminal law stipulations such as statutory or common law misdemeanours.
- Private law regulates, for example, the legal relationship between parent and child.

Each country has its own sources of law: legislation, common law and case law being those in South Africa (Bray, 1988:8; Beckmann & Prinsloo, 1995:8).

2.3.1.2 The sources of school law

- Legislation - The SA Constitution is the supreme law of the country. This implies that all laws, including education laws, are subordinate to the SA Constitution and are tested in terms of the SA Constitution (Bray, 1998:76).
- Common law Bray (1988:18) defines common law as that part of South African law which developed from Roman-Dutch law and English law, and which is not laid down in statutory law. Common law principles can be found in traditional legal works as well as in case law. At the same time common law refers to judgements in court decisions and the way

these have interpreted and applied the meanings of old writings. Mention of common law is made in the SA Constitution, as can be seen in section 8(3).

- Case law This source of school law refers to the records of court cases and the way in which the courts have interpreted and applied statutory and common law (Beckmann *et al.*, 1995:4).

2.3.2 Learners and the South African school law

As holders of legal subjectivity, the learner in the school system is intimately involved with school law. So the latter necessitates clarification.

Maithufi (1997:236) is of the opinion that the adoption of a new constitutional dispensation in South Africa of necessity implicated changes to the school system which was inherited at the time of political transition. These changes had to be made in the light of the principles enshrined in the SA Constitution (*cf.* 2.4) as it is the supreme law of the country (*cf.* 2.3.1).

In an Education White Paper entitled *Education and training in a democratic South Africa: First step to develop a new system* (SA, 1995:17 and 67) the challenges in South African education were stated as being those of:

- creating a system which would fulfil the vision of opening up the doors of learning and culture to everyone;
- building a just and equitable system which would provide quality education and training to learners; and
- devising a new policy for school provision which would create democratic governance, rehabilitate schools and raise the quality of performance, thus alienating illegal discrimination.

The Ministry of Education appointed the Committee to Review the Organisation, Governance and Funding of Schools which was to report back on 31 August 1995. The Schools Act came about as the result of their recommendations.

2.3.2.1 The South African Schools Act 84 of 1996

The purpose and objective of the Schools Act are set out in the preamble which is of vital importance in understanding its provisions:

" WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and

WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the state; and

WHEREAS it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa."

As Maithufi (1997:242) puts it, the Schools Act applies to school education (chapter 1, section 1 and section 2) subject to the provisions of the National Education Policy Act No. 27 of 1996 (hereafter referred to as National Policy Act). The National Policy Act is aimed at facilitating the democratic transformation of the national system of education into one which would serve the needs and interests of all South Africans, and uphold their fundamental rights. Some of the fundamental rights which are to be upheld in terms of this Act are stipulated in section 4. Entrenching the fundamental rights of all persons as enshrined by chapter 2 of the SA Constitution, and in terms of international conventions ratified by parliament, the following specific rights are guaranteed:

- protection from unfair discrimination within or by an educational institution on any grounds whatsoever (article 9; cf. 2.4.1.2);

- basic education and equal access to education institutions (article 29; cf. 2.4.1.2);
- the rights of parents or guardians with respect to the education of their children (article 28 and 29; cf. 2.2.3.1.1 and 2.4.1.2); and
- the rights of children with respect to their own education (article 28; cf. 2.4.1.2).

The Schools Act is divided into chapters. Chapter 1 deals with the definition of words used (cf. 2.1) and the application of the Schools Act (as mentioned above). Although Beckmann *et al.* (1997:6) find it surprising that this Act does not define "*basic education*", they do find the specifications of section 3(1) concerning the period of compulsory schooling adequate in satisfying any reasonable interpretation of "*basic education*".

While chapter 2 of the Schools Act specifies the rules relating to compulsory school attendance, exemption from such attendance, and admission and expulsion from public schools, chapter 3 deals with the provision and governance of public schools, and chapter 4 with the funding of these schools. Chapter 5 concerns itself with independent schools (irrelevant to this research), and in chapters 6 and 7 the transitional and general provisions are to be found respectively.

As basic learner rights are contained in the Schools Act, perspective should be given on probable legal obligations as counterbalance.

2.3.2.1.1 The legal obligations of learners

According to Bondesio (1995:41) submission to authority, discipline and punishment must be expected from any child who has been placed under the control and custody of the parent or guardian (cf. 3.3.5 and 4.5.3.4).

Certain authors therefore find that the learner's right to education, maintenance, welfare and education places specific obligations on him, such as compliance with compulsory education, submitting to authority (cf. 4.5.3.4), and participating in activities (Bondesio, 1995:41-43).

On the first count of compliance with compulsory school attendance requirements Beckmann *et al.* (1997:8) tend to agree with the former authors when they state that "*...it is a learner's right, if not obligation, to attend school...*". Maithufi (1997:257) writes

that "A learner who has been admitted to a public school is, unless exempted, obliged to attend such school...".

Although Beckmann *et al.* (1997:7) interpret the Schools Act itself as imposing a duty only on the parent (and not the learner) to ensure compliance with the provisions of compulsory school attendance as they are set out in section 3(1) (*cf.* 2.1), it should be noted that section 3(5) actually does imply an obligation of the learner himself concerning school attendance. In the phrase "...a learner who is subject to compulsory attendance", the word "subject" is defined by Merriam-Webster (1985:1174) as "owing obedience or allegiance to the power or dominion of the other". The Schools Act thus also implies the learner's obedience towards his "parents", keeping in mind the expansive definition in the Schools Act of the latter which embraces three categories of persons (Beckmann *et al.*, 1997:7):

- the parent or guardian of the learner;
- the person with legal custody of the learner; or
- a person who has undertaken to fulfil the obligations of the parent, guardian or person with legal custody towards the learner's education at school.

Should a learner fail to enrol at or attend a school, section 3(5) empowers the Head of Department (hereafter called HOD) to:

- investigate the circumstances of his absence from school;
- take appropriate measures to remedy the situation; and
- in failing to remedy the matter, issue a written report to the parent requiring compliance with his obligation to ensure that the learner attend school.

Anyone, including the parent after having received the written notice, who, without just cause, fails to ensure the school attendance of a learner of compulsory school age, is guilty of an offence and liable upon conviction to a fine or imprisonment not exceeding six months (section 3(6)(b)). x.

With reference to the age requirements involved in compulsory school attendance (*cf.* 2.1), Beckmann *et al.* (1997:7) find in the analysis of the Schools Act that no right is conferred on the learner to start his school career before he reaches the compulsory

school age. Neither does the Schools Act specify the maximum age at which the right to attend school terminates, although section 5(4) does confer on the National Minister of Education the power, after consultation with the Council of Education Ministers, to specify the maximum age of admissibility to schools. The latter appears to be the more urgent of the two, since these authors point out that the Minister could thus enable learners to be educated appropriately to their learning needs, age and personal circumstances.

Even the Education White Paper (SA, 1995:40; *cf.* 2.2.3) refers to educational experiences "*...targeted at the specific requirements of particular learning audiences or groups*". It thus follows that it would be in a learner's *best interest* (*cf.* 2.4.1.2) if the maximum age of admissibility to schools were to be officially specified in the Schools Act.

The learner's obligation to submit to authority is worded by Beckmann *et al.* (1995:43) as that he should submit to the rules of order within the school and show obedience to his educators (*cf.* 3.3.5 and 4.5.3.4). Section 8 of the Schools Act is dedicated to a school's code of conduct: following a consultation process with learners, parents and educators of the school (*cf.* 2.3.2.1.2), such a code should help establish a disciplined and purposeful school environment and should aim at improving and maintaining the quality of the learning process. Provision should also be made for due process (*cf.* 2.4.1.2 and 3.3.2) in order to safeguard the interest of the learner and any other party involved in the disciplinary proceedings.

At the same time section 8(2) and 8(4) specifically corroborate the learner's obligation to comply with the rules of order within the school and to show obedience towards the educators since they remind the learner of his obligation to comply with the code of conduct (*cf.* 2.3.2.1.2).

Prinsloo and Beckmann (1988:101) state that the obligation to participate in certain events and activities stems from the right to participation and freedom. These authors come to the conclusion that it applies not only to education and the school, but also in a broader sense of the word, *inter alia*, to the enhancement and improvement of society.

It is the duty of the educator to take action if the learner fails to submit to and obey the educator. Whenever the general welfare of the school becomes threatened by a continued breach of reasonable rules (*cf.* 4.5.3.4), it might lead to the suspension of the learner (*cf.* 2.3.2.1.2.). This, however, does not imply that the learner loses his right to education because of his disobedience; neither does it relieve the parent of his duty towards the education of his child, as stipulated in the Schools Act (Beckmann *et al.*, 1995:43).

Section 9(5) of the Schools Act stipulates that expulsion from a school (*cf.* 2.2.3.1.2) does not exempt such a learner from compulsory school attendance. The HOD is responsible for making alternative arrangements to place such a learner at another school.

It is therefore clear that the Schools Act not only legally obligates the learner to comply with school rules, but also affords him legal rights.

2.3.2.1.2 The legal rights of learners

Section 3(3) of the Schools Act contains the provision that it is the duty of each Member of the Executive Council (hereafter called MEC) to ensure enough place to accommodate every learner of compulsory school age at school in that province. According to section 3(4) immediate steps to remedy the situation should be taken if the MEC lacks the capacity to comply with this requirement immediately. An annual report must be made to the Minister on the progress achieved.

Section 4 (1) of the Schools Act confers on the HOD the power to exempt a learner entirely, partially or conditionally from compulsory school attendance if it should prove to be in the learner's (not anyone else's) best interest (*cf.* 2.4.1.2).

According to section 4(2) the HOD must keep a register of all the learners exempted from attendance. Beckmann (1997:8) makes the reader aware of the fact that, with the exception of home schooling, the Schools Act does not specify any other circumstances in which non-attendance may be considered to be in the best interest of the learner.

Section 51 confers on the parent the right to apply to the HOD for registration of a learner to receive his education at home. The learner must be registered for home schooling if the HOD is satisfied that:

- “(a) *the registration is in the interests of the learner;*
- “(b) *the education likely to be received by the learner at home*
 - (i) will meet the minimum requirements of the curriculum at public schools; and*
 - (ii) will be of a standard not inferior to the standard of education provided at public schools; and*
- “(c) *the parent will comply with any other reasonable conditions set by the HOD.”*

The HOD has the right to withdraw the registration only after the parent has been informed of the HOD's intention and reasons, and after the parent has been given opportunity to make representations to the HOD in relation to such action. Due consideration must be given to such representations and the parent has the right of appeal against either the withdrawal or refusal of registration.

As is pointed out by Beckmann *et al.* (1997:8), the direction of section 5(1), that public schools are to admit learners and serve their educational needs without unfair discrimination in any way whatsoever, is consistent with the learner's rights to basic education and freedom from unfair discrimination as embodied in the SA Constitution (cf. 2.4.1.2). Thus section 5(2) bars the governing body of a school from administering, or directing or authorising the principal to do “...*any test related to the admission of a learner to a public school*” (Beckmann *et al.*, 1997:8).

The same authors (Beckmann *et al.*, 1997:8) state that the provision in section 5(3) is consistent with the fact that it is the learner's right (if not obligation, cf. 2.2.3.1) to attend school. According to this section a learner may not be refused admission to a public school if his parent:

- is unwilling or unable to pay the school fees;
- does not subscribe to the school's mission statement; or

- refuses to release the school from liability for any damages arising from the learner's education.

Apart from these three exceptions, it is not obligatory for a school to admit all the learners who apply. Section 5(5) and 5(8) clearly provide for:

- an admission policy to be set by the governing body of the school; and
- for the HOD to inform the parent in writing (stating also the reason for the refusal) if the learner has been refused admission.

It then follows in section 5(9) that such a learner or his parent has the right to appeal against the decision.

Beckmann *et al.* (1997:9) find it strange that the Schools Act confers only on the parent the right to be informed of the reasons for the refusal, which must be in a written document. In the absence of such communication it would seem that the learner's right to an appeal then becomes of no consequence. At the same time any appeal against a learner's being refused admission should comply with the basic principles of "*just administrative action*" (section 33 of the Constitution; *cf.* 2.4 and 3.2 and 3.3.2), seeing that "*administrative action*" is implied in the provision of section 5(7) which requires the application to be made in a manner determined by the HOD.

Although nothing is clearly documented in the Schools Act about the learner's right to receive education in the language of his choice where it is reasonably practicable (*cf.* 2.4.1.2), it is implied by the fact that the Schools Act is subject to the SA Constitution. Section 6(1) of the SA Constitution empowers the Minister, after having consulted with the Council of Education Ministers, to determine and publish in the Government Gazette the norms and standards for the language policy in schools.

The right of choice with regard to the language of instruction in schools poses a formidable challenge in a country with the linguistic diversity of South Africa (Van der Vyver, 1997:312). The same author points out that the term *mother-tongue education* (*cf.* 2.4.1.2 and 5.5.2) was first used in the Soviet Constitution of 1924 and is a highly emotional issue in South Africa. Although the SA Constitution does not compel a person to undergo education in his mother tongue, as was previously the policy, it

permits education in the official language or languages of the *learner's* own choice (*cf.* 2.4.1.2 and 5.5.2).

Implementation of language rights in South African education would not be a problem if education in the official languages of South Africa were freely and adequately accessible throughout the country. Since this is not the case, the right to education in any particular official language can only be insisted on where provision of education through that medium of instruction is *reasonably practicable* as it is stipulated in section 29(2) of the Constitution (Van der Vyver, 1997:312; *cf.* 2.4.1.2).

The same author points out that the State is given wide discretion in considering its options concerning the allocation of linguistically scarce sources. Not only must the State consider all the educational alternatives, including single medium institutions, but it must also take into account equity, practicality and considerations of remedial actions.

The wide discretion given to the State implies that the substance of its decision on the matter of language rights can possibly only be challenged or contested on constitutional grounds on the basis of its not having applied its mind *bona fide* (in good faith and sincerity) (*cf.* 3.2.5.2) to the matter. A solution could be for the community to simply establish a private educational institution (Van der Vyver, 1997:312-313).

Section 6(3) protects the learner from racial discrimination when it indicates that the language policy adopted by a school's governing body (section 6(4)) should be free from any such violation. The learner is even awarded the right to instruction in sign language due to the fact that section 6(4) gives the status of an official language to a "*recognized sign language*" for the purposes of learning at a public school.

All learners and staff members are fully and equally entitled to enjoy and have access to religious observances of their faith at a public school (Beckmann *et al.*, 1997:10). This follows from the requirement in section 7 that religious observances which are conducted in keeping with the rules of the school's governing body, be conducted "*on an equitable basis*". Furthermore, both learners and staff members have the guarantee that attendance of these religious observances is on a voluntary basis (*cf.* section 15 of the SA Constitution as discussed in 2.4.1.2).

The learner has the right to be included in the process of drawing up a code of conduct for his school (*cf.* 2.3.2.1.1), as section 8(1) indicates that governing bodies are entitled to adopt such codes only after consultation with learners, parents and educators. Simultaneously section 8(5) stipulates that such a code of conduct has to contain provisions of "*due process*" (*cf.* 2.3.2.1.1 and 2.4.1.2) in order to ensure the protection of the rights and interests of the learner or any other party involved in the disciplinary proceedings.

It is noted by Beckmann *et al.* (1997:10) that the provision of section 8(5) of the Schools Act is in keeping with the guarantee of the SA Constitution (section 33(1)) that everyone has the right to legal, reasonable and procedurally fair "*administrative action*" (*cf.* 2.4.1.2 and 3.2 and 3.3). The practice of "*administrative action*" involves two basic principles (Beckmann *et al.*, 1997:10-11):

- the duty of affording the person negatively affected by a decision the opportunity to present his case, commonly referred to as the *audi alteram partem* principle; and
- the duty of remaining objective in listening to both sides of the case and not being biased when reaching a decision.

These principles should be adhered to by following four steps (Beckmann *et al.*, 1997:10-11):

- stating the reasons for action taken;
- stating the nature and source of the relevant evidence against the accused;
- giving the accused meaningful opportunity to present his case within reasonable time limit; and
- ensuring a hearing before an appropriate and impartial decision-maker.

As was noted above (*cf.* 2.3.2.1.1), no right afforded the learner in the Schools Act exempts him from complying with the code of conduct of his school (section 8(4)).

In the case of suspension from a school, section 9(1) affords the learner the right to a fair hearing; suspension also intends to correct the learner's behaviour on a temporary basis, since it would be valid for only a week unless he is suspended from attending school pending a decision from the HOD to expel him. If a learner has been afforded a

fair hearing and is found guilty of serious misconduct, he can be expelled only by the HOD (section 9(2)), who has to make alternative arrangements for placement at a school if a learner of compulsory school age has been expelled (section 9(5); cf. 2.2.3.1.1).

Beckmann *et al.* (1997:11), however, correctly point out that the Schools Act does not specify:

- a definition of serious misconduct which would justify expulsion;
- the disciplinary proceedings which are to be followed; or
- the provisions of due process which would ensure the protection of rights and interests of all parties concerned in the disciplinary proceedings.

These three aspects are to be determined by the MEC through notice in the Provincial Gazette (section 9(3)).

According to the same authors it appears that the learner and his parent do not have the right to appeal against his suspension: section 9(4) awards the learner or his parent the right to lodge an appeal against his expulsion, without any mention being made of appealing against his being suspended.

Learners are no longer subject to corporal punishment at school, as the latter is prohibited by section 10(1) and 10(2). Anyone contravening this prohibition would be guilty of an offence and, on conviction, liable to the penalty which could be imposed for assault.

The extension of this prohibition to hostels which provide residential accommodation to learners at public schools is questioned by Beckmann *et al.* (1997:12). They draw the conclusion that section 12(2) clearly indicates the hostel as being part of the public school: "*...the provision of public schools ... may include the provision of hostels for the residential accommodation of learners*". The prohibition of corporal punishment at schools is also in keeping with the SA Constitution (cf. 2.4.1.2).

The final right afforded to learners by the Schools Act is their right to be part of not only the representative council of learners, but also of the governing body of their schools. Section 11 stipulates the establishment of a representative council of learners at schools that enrol learners from grade eight to grade twelve. Section 23(2) and

23(4) point out that the elected members of a school's governing body should comprise, among other members, a member or members of the learners in the eighth grade or higher, elected by the representative council of learners themselves.

It is interesting to note that the learners who form part of the governing body of a school are granted protection based on their status as minors (*cf.* 2.2.2.2). Section 32 stipulates that members of governing bodies who are minors:

- may not contract on behalf of their schools;
- may not vote on resolutions of the governing bodies which impose liabilities on third parties or on the school; and
- cannot incur any personal liability for a consequence of their membership of the governing body.

The special protection of *learners who are minors* is reminiscent of the previous discussion in 2.3.2.1.1 of the urgency for laying down specifications concerning the maximum age of admissibility to schools. Although no indication is given in the Schools Act itself of what is meant by the term "*minor*", it is taken for granted that the legal parameters of 7-21 years of age (Kruger & Robinson, 1997:15-16) would describe this concept accurately.

Fact is, there is no doubt that the Schools Act protects the learner's legal rights as well as his fundamental rights as shown in 2.3.2.1. Therefore it is necessary to discuss his fundamental rights within the administration of justice.

2.4 THE FUNDAMENTAL RIGHTS OF LEARNERS IN THE CONTEXT OF THE ADMINISTRATION OF JUSTICE

Together with the international attempt at striving towards the constitutionalisation of human rights, there has been a dynamic movement aimed at recognising the fundamental rights of children and therefore of learners. The reader is reminded of the profound transformation of the legal relationship between family members *inter se* (*cf.* 2.4.1), and between the family and the State which took place in Western industrialized societies during the previous century (Sinclair, 1994:503-504). South Africa, because of far-reaching political and socio-economic change, occupies a

distinctive position in the context of developments concerning the legal relationship between family members, and between the state and family members.

In her discussion of family rights, Sinclair (1994:511) states that the argument that the protection of the individual rights of members of the family, such as those of the child, will threaten the family's existence, is reasonable only if it is accepted that justice is somehow incompatible with the intimacy, harmony, altruism, generosity and loyalty which are sought in private lives. She finds this argument superficial. Law makers should ensure that the place in which children are raised is one that mitigates the harshness of life and upholds justice.

Freeman (as cited by Sinclair, 1994:511) is of the opinion that the ideology that the State should refrain from intervention in the private lives of individuals, has served to deny protection to, *inter alia*, women and children. According to him, such an ideology should not be seen as a liberal stance to protect areas of freedom, but rather as a deliberate insistence on perpetuating male domination and female subordination. The State sees the eradication of male domination and female subordination as crucial to the *assumed stability of the family unit* (Sinclair, 1994:511).

It has become quite clear, as was stated by Mureinik (1994:32) in a discussion of the Interim Constitution, that the SA Constitution attempts to establish a culture of justification: as it is a bridge away from the previous culture of authority (since apartheid fostered an ethic of obedience), the SA Constitution must lead to a new culture in which every exercise of power must be justified or else eradicated.

Clearly there is an urgent need to recognise the fundamental rights of learners within the family relationship. Next it is important to observe the learner when he comes face-to-face with the State in the administration of justice.

2.4.1 The status of the minor in public law

As stated before (*cf.* 2.1), South African public law busies itself with the activities, powers and organization of the State. The SA Constitution has substantially influenced private law and relationships which had been viewed in terms of private law prescriptions: for example, further dimensions concerning the legal nature of the family relationship have been added by the special provision to protect the fundamental

rights of the child (and thus of the learner). Robinson (1995:100) points out that while section 28 (1)(b) of the SA Constitution provides for the *child's right to parental care*, South African common law defines the parent-child relationship in terms of *parental authority over the child*. Sinclair (1994:533) states that with the new SA Constitution, the emphasis has been changed from "...the **power** of the parents to the **responsibilities** of the parents and the **rights** of the child".

Section 28 of the SA Constitution provides that every child has the right, *inter alia*, to basic nutrition, shelter, basic health, care services and social services (*cf.* 2.4.1.2). Even though it appears that the State is primarily liable to provide these rights in view of the fact that it is the party against whom fundamental rights are generally directed, Robinson (1995:108) maintains that this responsibility is primarily a natural right which accrues to parents. Van der Vyver (1997:306) is of the opinion that the duty to provide family and parental care, and to nutritiously feed, house and secure medical treatment of a child, vests primarily in the parents or other persons *in loco parentis*. The State's duty is complementary to that of the parents or their substitute and would arise only if the parent or other person *in loco parentis* is unable to do so.

When endowing the child with fundamental rights (*in casu* second-generation rights; *cf.* 2.4.2.2.1), cognizance must of necessity be taken of the reality of parental care in the domain of public law. It would certainly not be in the best interests of the child to interpret these provisions as placing every child in a direct oppositional relationship *vis-à-vis* the State. Indeed it is submitted that *grundrechtmündige* children (*cf.* 2.4.1) and *Gillick competent* children (*cf.* 5.5.1) could personally compel the State either to act positively in their favour or to refrain from certain negative conduct towards them. However, children who are not so competent, still need parental assistance also when exercising their fundamental rights.

An interpretation that no child needs parental assistance in the exercising of his fundamental rights would also constitute a deviation from the *Convention on the Rights of the Child* (1989) of the United Nations (Robinson, 1995:108). On the one hand the Convention acknowledges the child's right, *inter alia*, to safety and education, but on the other hand it strongly emphasizes the child's need of parental care in all circumstances.

Given this vital importance of parental duty, society expects constitutional protection of the family as an institution.

2.4.1.1 The omission of family protection in the SA Constitution

Robinson (1995:100) indicates that the socio-economic background to the SA Constitution (the policy of *apartheid* which formally regulated racial affairs) must be acknowledged as underlying the need for the protection of, *inter alia*, the rights of children. The history of racism and discrimination in South Africa (Dlamini, 1994:573) has had a particularly devastating impact on Black families and also on the children of these families (Robinson, 1995:100).

While educators could assume in the past that the family constituted a "*safe haven for children*", reality has proven the opposite: there is an increasing need for the law to protect children (and thus learners) from all forms of abuse, even from their own parents (Bosman & Van Zyl, 1997:49).

The inclusion of children's rights (implying those of learners) in the SA Constitution was meant to remedy their plight, but its provisions fail to meet the challenge of rebuilding the family structure (Robinson, 1995:106-107) which was voiced in 1983 as "*probably the most fundamental problem which will face any democratic government coming to power in the future*" (Duncan, as quoted by Robinson, 1995:106).

Robinson (1995:106) points out that the SA Constitution fails to

- protect the family as an institution;
- protect the rights of parents to care for and educate their children; and
- stipulate the duty of the State to watch over a parent's exercising of his rights.

Educators need to be fully aware of this in their dealings with children and their parents. It is not typical to guarantee the family institution by setting out institutional guarantees comprehensively in bills of rights. However, such guarantees could indicate not only the nature and structure of the institution, but also the seriousness with which the existence and survival of such an institution is regarded (Robinson, 1995:106). At the same time the guarantees are not aimed primarily at protecting

individual rights. It is left to legislature to concretise the constitutional prescriptions regarding the family institution (Robinson, 1995:106).

As the matter stands at the moment, however, the omission of family protection would seem to increase the *educator's* duty of care (*cf.* chapter 4) in order to facilitate the learner's fundamental rights.

2.4.1.2 The fundamental rights of the learner

The relationship between the learner, his parents, the educator and the State is of necessity influenced by his being vested with specific fundamental rights as they have been affirmed in the SA Constitution (*cf.* 1.2).

The following fundamental rights of learners deserve to be identified:

- Section 7(2) affirms that the State (and therefore the educator too) will respect, protect, promote and fulfil all the fundamental rights stipulated in the Bill of Rights.
- De Waal and Currie (1998:24) state very emphatically that the traditional function of a bill of rights is to protect the individual against the power of the State, thus placing a duty on the State to respect and uphold the rights of the individual. Such a duty is imposed by section 8(1) which provides that the Bill of Rights applies to all law and that it binds the legislature, the judiciary and all organs of State. The fact that the Bill of Rights applies to all law and that even the judiciary is bound, supports the conclusion that the Bill of Rights applies to State action as well as to acts of private individuals (Cheadle & Davis, 1997:44).

Section 8(2) provides that the rights in the Bill of Rights will bind natural and juristic persons (*cf.* 2.2.2.1), should the nature of the right and the nature of any duty imposed by the right permit. Cheadle and Davis (1997:47) point out that section 8(3) is designed to ensure that, when an express rule of common law (*cf.* 3.2.3.2 and 3.3) exists to cover a relationship to which a right contained in the Bill of Rights applies, the court should make its starting point the common law and develop such law in order to give effect to constitutional right of the relationship.

The learner *qua* natural person (*cf.* 2.2.2.1) is entitled to the rights contained in section 8 of the Bill of Rights.

- Section 9 provides the learner with equal protection and benefit of the law, the full and equal enjoyment of his rights and freedoms as well as protection from any unfair discrimination. Subsection (3) includes a list of characteristics which limits the grounds of discrimination:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

According to Beckmann *et al.* (1995:35) this equality clause is of particular relevance to education: court cases on the issue of equality and discrimination abound in foreign countries. With reference to South Africa, this section seems destined to acquire a distinctly South African application as a result of the country's political history.

Although the right to equality does not preclude all distinction, differentiation or classification of people, or even fair discrimination, it does seek to outlaw the element of unfairness (Beckmann *et al.*, 1997:35-36). Even though the list of characteristics in section 9(3) seems to be aimed at making the application of the equality clause less difficult for South African courts, Beckmann (1995:36) feels that some lessons can be learned from the way in which the Canadian courts have tried to solve the problem concerning the permissibility of certain distinctions or differentiations.

He points out that section 15 of the Canadian Charter of Rights and Freedoms (*cf.* 5.4.2) not only outlaws discrimination on the grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, but that the section is also formulated in a way very similar to South Africa's section 9(1), (3) and (4).

The Canadian Supreme Court reached a landmark decision in **Andrews v Law Society (British Columbia)** [1989] 1 S.C.R. 143, 2 W.W.R. 289, 56 D.L.R. (4th) 1 (S.C.C.) when six judges unanimously answered the question on how section 15 should be interpreted. In the principal judgement the court found that the kind of discrimination which the Charter sought to outlaw, was limited to the distinctions listed in section 15 and *analogous* distinctions. According to Beckmann *et al.*

(1995:36) this approach is reconcilable with South Africa's common law rule of interpretation, and is likely to be adopted by the Constitutional Court.

Within the South African school context, section 9 of the SA Constitution (which outlaws unfair discrimination) boils down, *inter alia*, to matters such as admission criteria for learners (Beckmann et al., 1995:37).

- While the learner's inherent human dignity is protected and respected by section 10, his freedom and security are guaranteed by section 12:

“(1) Everyone has the right to freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right -

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.”

This implies, *inter alia*, that corporal punishment at school is prohibited. The Constitutional Court considered the question of the judicial imposition of whipping on juveniles in the matter of **S v Williams and Others** 1995 (7) BCLR 861 (CC). The court ruled that the judicial imposition of a sentence of whipping was unconstitutional on the grounds that it offended against the constitutional protection of dignity and the protection against cruel and unusual punishment (Haysom, 1997:271).

- While section 14 protects the learner's right to privacy (including the right not to have his person or property searched, his possessions seized or the privacy of his communications infringed), the learner's right to freedom of conscience, thought, belief, opinion and religion is guaranteed by section 15.

Religious observances at state or state-aided institutions (such as public schools) may be conducted provided that they are held on an equitable basis, they follow the rules made by the appropriate public authorities and attendance of them is free and voluntary (*cf.* section 7 of the Schools Act discussed in 2.3.2.1.2).

According to Bray (1996b:155) the primary aim of this provision is to enable a person (such as the learner) to perform an act or to participate in collective action to practise his religious beliefs. The aim is not as such to provide for religious instruction. It is not only clear to her that religious activities will remain a part of the State and State-aided schools' curriculum, but she is also convinced that it signifies the State's duty to build society's norms, values and mores into its education system.

- The learner's freedom to receive or impart information or ideas, his freedom of artistic creativity, as well as his academic freedom are guaranteed by section 16.
- Section 22 affords everyone the right to choose his trade, occupation or profession.
- Everyone's right to a healthy, protected environment is provided for in section 24.
- According to section 27 everyone has the right to have access to health care services, sufficient food and water, social security and emergency medical treatment.
- Currie (1998:343) points out that section 28 of the SA Constitution sets out additional protection for children. Apart from the specific restrictions on the fundamental rights of the child which are imposed by his youth, such as the right to vote which is restricted in section 19(3) to *every adult citizen*, every child is afforded the same protection in the Bill of Rights as his adult counterpart.

Section 28 entrenches certain socio-economic rights for children (*cf.* 2.4.2.2) that are additional to the general socio-economic rights to housing, health care,

nutrition and social security of section 26 and 27 (Currie, 1998:343). Section 28(1)(a), (b) and (c) guarantees every child the right to a name, nationality, parental care, security, basic nutrition, basic health and basic social services. At the same time the learner is entitled to *"appropriate alternative care when removed from the family environment"*.

Section 28 therefore places a duty on the State to ensure that a child is provided with basic requirements and to provide the family of the child with the means to support those requirements (Currie, 1998:343). The same author points out that in addition to duties placed on the State, the application clause (section 8) provides that the rights in the Bill of Rights will bind natural persons, should the nature of the right permit. This indicates, according to Currie (1998:343), that certain of the section 28 rights will have horizontal application (cf. 2.4.2.1), placing a constitutional duty on the parents of the child to provide for a child's basic needs and not to abuse, exploit or require the child to perform unsuitable or unhealthy work.

A child shall not be subject to neglect, abuse, degradation, or maltreatment (a reminder that corporal punishment at school would be unconstitutional) according to section 28(1)(d). According to Currie (1998:345) this subsection places duties both on the individual (parents and other adults) and the State. The State is under a duty to use its resources (such as the criminal justice and welfare system) to prevent and punish the abuse and neglect of children.

Sections 28(1)(e) and (f) also afford children the right to be protected from exploitative labour practices. At the same time they have the right not to perform work or provide services which prove to be either inappropriate to their age or which places at risk their well-being, education, physical or mental health or spiritual, moral or social development. In his discussion of section 28, Haysom (1997:273) states that these two subsections are in conformity with international jurisprudence. He continues by saying that such protection would cover the employment of children in a setting which exposes them to sexual, alcohol or drug abuse.

Currie (1998:346) points out that while sections 28(1)(e) and (f) place no ban or age restriction on the employment of children, this could be seen as taking cognizance of the fact that there are thousands of child labourers in South Africa, especially in agricultural labour. He is of the opinion that the requirement that the education and health of a child should not be adversely affected, will protect a significant number of children working on farms; in particular those who are not attending school because they have to work, and those who have to deal with harmful substances such as insecticides.

Although current legislation provides that no child under the age of 15 may be employed, these provisions lack sufficient detail to provide adequate protection to children in employment and probably do not satisfy the constitutional requirement that a child is protected from exploitative and harmful labour practices (Currie, 1998:346).

In addition to the rights a child may have in terms of section 12 (right to physical integrity and protection against arbitrary detention) and section 35 (criminal process rights), section 28(1)(g) originates from the important principle that the detention of a child should only be a measure of last resort. Currie (1998:346) states that the child is far more vulnerable than the adult to the negative effects of imprisonment. For this reason the detention of children should be avoided where possible.

Haysom (1997:274) points out that the second injunction in section 28(1)(g) is that a child who cannot be otherwise placed in custody except in detention, must be so detained only for *the shortest appropriate period of time*. He furthermore states that this provision does not imply that a child may never be detained, but that regard must be had for the age of the child, the seriousness of the offence and the interests of justice when determining the shortest appropriate period of time.

When a child is detained, the following two subsections set out specific requirements for his lawful detention:

“(g) (i) (the child should be) kept separately from detained persons over the age of 18 years; and

- (ii) *treated in a manner, and kept in conditions, that take account of the child's age."*

According to Haysom (1997:274) these subsections provide not only for the child's right not to be incarcerated with adults, but also for the right to have access to educational material and the right of appropriate access to parents and relatives. Section 28(1)(g) will also have application in respect of the sentencing of the child to a period of imprisonment (Haysom, 1997:275).

A further protection of children has been introduced by section 28(1)(h): additional duties are imposed on the State to provide legal assistance to children, over and above those that are imposed by section 35 of the Constitution in respect of adults. Section 35(3)(g) affords persons in criminal proceedings the right to legal representation at state expense *"if substantial injustice would otherwise result ..."* According to Currie (1998:347) it seems clear that in most cases substantial injustice would result from allowing a child to initiate criminal proceedings without legal assistance (*cf.* 2.2.2.2). Section 28(1)(h) extends this right to children involved in civil litigation.

Subsection (i) places a duty on the State to take all feasible measures to protect children from participation in and the effects of armed conflict. This is in accordance with the general rules of international humanitarian law (Currie, 1998:347). Haysom (1997:276) finds that the appearance of this subclause reflects the international concern at the use and participation of children in Africa and elsewhere. It also reflects the concern that children are often most directly exposed to, and are most vulnerable to, the consequences of armed conflict, particularly civil war (Haysom, 1997:276).

Special provision is made in section 28(2) for *a child's best interest* to be paramount in all matters concerning him (*cf.* 2.3.2.1.1 and the educator's duty of care in 4.2), and section 28(3) defines a child as a person below the age of 18.

The concept of *best interest of the child* is not without difficulty: the concept has failed to provide a reliable standard in the past, thus causing controversy (Currie, 1998:347; *cf.* 5.5.2). At the same time the author states that it creates the danger of social engineering by allowing the helping professions or social services to

determine what is in the best interest of the child. However, a basis on which to work could be provided if the courts set down sound guidelines (Currie, 1998:347).

Useful content to the *best interest* requirement is given by the relatively detailed provisions of article 3 of the UN Convention of the Rights of the Child (Currie, 1998:347-348):

- "1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
3. *States Parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number of and suitability of their staff, as well as competent supervision"* (cf. chapter 4).

In order to give effect to the duties imposed by section 28, Currie (1998:343) calls on the State to pass legislation in which the rights of children and the duties of parents and the State in relation to those rights are clearly set out. Additional impetus is given to these duties by South Africa's ratification in 1995 of the UN Convention of the Rights of the Child (1989). The Convention requires the domestic law of a state to be consistent with its provisions.

- Section 29 guarantees every individual, including the learner, the right to basic education and equal access to educational institutions. Bray (1996b:153) states that the right to equal access is one of the most important elements of the right to education in the South African Bill of Rights.

Equal education, as required by the equality provision encapsulated in section 9, necessitates universal compulsory education for children (Devenish, 1998:235). Parents who, for some reason or other, wish to provide home schooling for their children (*cf.* 2.3.2.1.1) find this to be problematic. In this regard the author points out that courts have to weigh up conflicting fundamental rights, bearing in mind that the interest of the child should be paramount. The same author states that the right to education at home cannot be logically inferred from section 29.

Still on the issue of home schooling, Liebenberg (1997a:302) points out that since section 29(3) refers specifically to "independent educational institutions", it does impose an obligation on the State to allow parents to educate their children at home. However, she agrees with Devenish (1998:236) that if a right of this nature does exist it would have to be derived from other provisions of the Constitution, such as the right to freedom of religion and belief in section 15.

There is no express provision which requires the State to respect the right of parents to ensure education and teaching in conformity with their own religions and philosophical convictions in the exercise of any State functions in the educational sphere (Liebenberg, 1997a:302).

- The right to receive education in the official language of choice where it is reasonably practicable is guaranteed by section 29(2) (*cf.* 2.3.2.1.2). The Constitution itself does not define a policy on language in education. No attempt is made to give an indication of how education authorities will ensure preferred language medium instruction or what is considered to be *reasonably practicable* (Beckmann *et al.*, 1995:48).

The same authors (1995:50-51) are of the opinion that South Africa has something specific to learn from the Canadian experience with regards to mother-tongue instruction and the duties of the State in this regard (*cf.* 2.3.2.1.2 and 5.5.2). The *where-reasonably-practicable* provision in the SA Constitution is very similar to the *where-numbers-warrant* provision in the Canadian Charter. The Canadian Supreme Court held that a sliding scale of the responsibility of the province to provide minority language medium of instruction education was to be established. The scale had to be based on the number of learners of *parents* who qualify. The

application of the numbers test was not based on the number of parents who qualify within a specific geographical area (such as a school district), but was limited to provincial boundaries (Beckmann *et al.*, 1995:50-51; *cf.* 5.5.2).

If the South African Constitutional Court were to apply a similar sliding scale, it would seem that the future days of single-medium educational institutions might be numbered (Beckmann *et al.*, 1995:50-51).

- Section 33 provides everyone (thus also the learner) with the right to *lawful, reasonable and procedurally fair* administrative action (*cf.* 2.3.2.1.1 and 3.3.2) and reasons in writing if his rights are adversely affected by administrative action.

According to Currie and Stein (1998:385) the term *administrative action* covers adjudicative administrative decisions, also referred to as quasi-judicial action (*cf.* 3.3.1), as well as all categories of administrative action (including legislative and purely administrative action). The effect of this is that delegated rule-making (legislative administrative action) is brought within the scope of the requirements of procedural fairness (*cf.* 3.2.3 and 3.3.2).

Concerning the right to lawful administrative action this right constitutionalises the common law principles relating to the proper exercising of administrative discretion (*cf.* 3.2 and 3.3.1), which require that (Currie and Stein, 1998:392):

- ♦ administrative actions and decisions must be authorised by law (*cf.* 3.2.1);
- ♦ no errors of fact or law must contribute to the making of the decision (*cf.* 3.2.3); and that
- ♦ the decision-maker must not abuse his discretion by acting with an ulterior purpose (*cf.* 3.2.4), in bad faith (*cf.* 3.2.6) or by failing to consider the matter properly (*cf.* 3.2.3).

Currie and Stein (1998:383) state that it is important to note that the entrenchment of constitutional rights to just administrative actions do not replace or supersede the common law of judicial review of administrative action. It does, however, expand the field of judicial control of administrative power considerably.

Judicial control by the courts is the most important form of control over administrative education disputes; section 34 of the Bill of Fundamental Rights

provides that every person has the right to have his dispute adjudicated by the courts. An example of an administrative decision made by officials in terms of internal control which may then be controlled by means of judicial control, would be when the learner applies to the court for judicial review of the case in which the provincial HOD has expelled him. The decision made by a court is an authoritative judicial one which is a means of last resort, and which is sometimes published in law reports (Bray, 2000:51-52).

On the other hand, administrative control is the most common form of control and it takes place within the public education administration. Legislation usually makes provision for different channels of administrative control, for example the Schools Act which provides for the suspension of learners as well as for appeal procedures against such suspension (Bray, 2000:51).

Since the SA Constitution is the supreme law of the country, it follows that both the subjacent values of the new democratic dispensation and the cultivating of a human rights culture play an invaluable role in the reformation of South African education (Bray, 1998:77).

The learner is entitled to lawful and fair internal administrative hearings (Bray, 1998:78; cf. 3.3.2.2.1), as well as equitable procedures (cf. 3.3.2). The educator must take cognizance of the fact that the learner is no longer subject to the wide (and sometimes subjective) discretionary powers of administrative organs as was often the case in the past; he now has the right to administrative justice (Bray, 1998:78).

The aforementioned fundamental rights clearly imply that the South African learner is entitled to all the rights, privileges and benefits of his citizenship, as stipulated in section 3(2)(a) of the SA Constitution. However, no mention is made in the SA Constitution of his duties and responsibilities which he is equally subject to according to section 3(2)(b). Therefore it is imperative to scrutinize the nature of these fundamental rights.

2.4.2 The nature of a learner's fundamental rights

The parliamentary bills concerning open democracy, administrative justice, the promotion of equality and the prevention of unfair discrimination (all of which are enshrined in the SA Constitution) had to be approved by parliament before 4 February 2000 (Bezuidenhout, 1999:2).

One of the current debates is that of determining to what law chapter 2 of the SA Constitution applies and which persons are bound by this chapter. The relevance of this debate lies in the fact that it concerns the question whether the purpose of the entrenched rights is only to protect the bearers of rights against the State or also against individuals. Cheadle and Davis (1997:46) point out that the purpose of certain rights (such as those dealing with political and citizenship rights) are by their very nature clearly not applicable to private, individual relationships. Certain rights impose duties which could not possibly be imposed upon private individuals, such as rights relating to arrested, detained and accused persons. On the other hand, some rights such as children's rights, expressly extend to both private and governmental relationships. Section 28(1) which protects the rights of children would appear to impose duties not only on the State, but also upon private employers (Cheadle & Davis, 1997:46-47).

The traditional approach would be to view the SA Constitution as primarily a fundamental law which restricts the State and subjects its actions to judicial review. This confines constitutional challenges to legislative and administrative actions only and is often referred to as *the vertical operation of the Constitution* (Cheadle & Davis, 1997:31; cf. 2.4.2.1;).

The more modern approach supports a more extensive scope for the SA Constitution: limiting its scope to State action only does not take into account the realities of the modern distribution of power where in many cases it is not the State, but the exercise of private power that poses the greatest threat to the exercise of fundamental rights. Therefore, according to Cheadle and Davis (1997:31), lawyers who supported this approach called for the Bill of Rights to have horizontal effect (cf. 2.4.2.1): that is an application of the fundamental rights as between citizens.

It seems that defining the nature of the learner's fundamental rights is still a contentious matter. Their application also needs attention.

2.4.2.1 Vertical and horizontal application of a learner's fundamental rights

Traditionally doctrines of human rights functioned mainly within the parametres of public law, thus regulating the relationship between the State, State organs and individuals. This is referred to as the *vertical application* of fundamental rights since it implies that the Bill of Rights accords rights to individuals and imposes duties on the State. No duties are imposed on the individual and no rights are accorded to the State (De Waal & Currie, 1998:23).

Development of the law gave rise to the possibility of the *horizontal application*, also known as *Drittwirkung*, of fundamental rights. The *horizontal application* is described by Davis *et al.* (1994:75) as involved with conflicts concerning the constitutional rights and duties of individual parties, vesting individuals with rights as guarantees of freedom from society interference. Haupt (1999:238) points out that the horizontal application of fundamental rights concerns itself with the question to *which degree* a bill of rights could be reciprocally enforced between legal subjects in their private law relationships.

Direct *Drittwirkung* implies that fundamental rights form the basis for the rights and duties of individuals in private law (*cf.* 2.2.2) and other areas of common law. Indirect *Drittwirkung* involves the legitimate expectations of the bearer of fundamental rights that all law should conform to the SA Constitution and that all law will be interpreted in the light of the SA Constitution (Davis *et al.*, 1994:92).

The basis of the doctrine of indirect *Drittwirkung* (sometimes referred to as the *radiating effect of fundamental rights*) is found in the statement that the State exists for the sake of man and not man for the sake of the State (Zimmermann, as cited by Davis *et al.*, 1994:70). It is clear that this concept aims at protecting the individual from societal infringement of his rights.

The educator must take cognizance of the fact that the section of the Constitution which protects the rights of children (section 28(1)), appears to extend to both State

and private relationships, in other words vertical *and* horizontal application would seem to apply (Cheadle & Davis, 1997:46-47).

Some rights expressly cover both private and governmental relationships. Section 28(1) which protects the rights of children provides, inter alia, that every child has the right not to be required or permitted to perform work or provide services:

- inappropriate for a person of that child's age; or
- that place at risk the child's well-being, educational, physical or mental health, or spiritual, moral or social development.

This section would appear to impose duties not only on the State, but also on private employers (Cheadle & Davis, 1997:46-47).

It is further important to explore the various categories into which fundamental rights fall legally.

2.4.2.2 Categories of justiciable rights

According to Merriam-Webster (1985:655-656) a justiciable category would refer to one that is capable of being decided either by legal principles or by a court of law. De Villiers (1994:603) describes the twentieth century as having witnessed several efforts to extend the categories of justiciable rights for inclusion in human rights documents.

While first-generation rights refer to the traditional civil and political rights, second-generation rights are concerned with the various aspects of social, cultural and economic rights (sometimes also termed *socio-economic rights*). Only recently have third-generation rights been asserted as being crucial in addressing the realities which confront governments and populations especially of developing countries: the rights most widely recognized as third-generation rights are the right to self-determination, the right of development and the right to a protected environment (De Villiers, 1994:603).

However, the difference between first- and second-generation rights needs further clarification.

2.4.2.2.1 The distinction between first-generation and second-generation rights

As pointed out above, first-generation rights refer to the traditional civil and political rights, which are divided into procedural and substantive rights. Examples of procedural rights would be protection against arbitrary arrest; protection against detention without trial; the right to a public trial, to information regarding the charges, to legal assistance and to be tried in a language the accused can understand. Substantive rights include the right to be treated equally and the freedom of religion, expression, assembly, association, and movement (De Villiers, 1994:603).

Second-generation rights refer especially to various aspects of social, cultural, and economic rights, such as the rights to employment, social security, shelter, family assistance, education, mother-tongue education (*cf.* 2.3.2.1.2 and 2.4.1.2 and 5.5.2), and State support of cultural activities (De Villiers, 1994:603). The distinction between first-generation and second-generation rights is made not only on a historical basis (seeing that most civil and political rights were recognised much earlier than socio-economic rights), but also for the following substantive reasons (Erasmus, 1998:336):

- The duties imposed by civil and political rights are termed "negative", as can be seen in the duty not to torture or the duty not to discriminate. The duties imposed in the case of socio-economic rights are termed "positive", as can be seen in the duty to provide housing.
- Civil and political rights are capable of immediate implementation. On the other hand socio-economic rights are capable only of gradual implementation, since their realisation depends on the availability of State resources.
- Unlike civil and political rights, socio-economic rights cannot be effectively enforced by the courts: civil and political rights are *justiciable*, but the programmatic and conditional nature of socio-economic rights makes them *non-justiciable*.

Dlamini (1994:574) points out that second-generation rights are somewhat problematic: unlike first-generation rights (which are largely negative in nature), these rights are positive and impose obligations on the State to use resources to provide for the basic needs of the people.

Many authors oppose the inclusion of second-generation rights in a bill of rights as these rights do not comply with the requirements of "practicability, paramount importance and universality" and therefore could only constitute claims and not *justiciable rights* (De Villiers, 1994:606-607). On the other hand, Kooijmans (as cited by De Villiers, 1994:605-606) argues in support of these rights since the requirements, needs and circumstances of modern society justify the inclusion of second-generation rights in the category of justiciable human rights. This does not, however, mean that all socio-economic "ideals and objectives" could be translated into justiciable rights.

According to Liebenberg (1997b:343,) the social-economic rights in South Africa's Bill of Rights are entrenched as justiciable rights. Although section 26 and 27 are the most significant socio-economic rights, Erasmus (1998:335-336) states that some of the provisions in section 28 (children's rights), section 29 (education), section 35(2)(c) (the rights to a legal practitioner at state expense) and section 35(2)(e) (detainees' right to adequate accommodation, nutrition, reading material and medical treatment) can also be classified as such.

It is quite clear to Robinson (1995:107) that the fundamental rights of South African children (and therefore of the learners) are cast also in the mould of second-generation rights which means that *socio-economic rights are aimed at placing the judicial duty on the State to participate actively in efforts to improve the position of the poor, the weak, the unemployed and the illiterate (cf. 2.4.1).*

Denying the relevance of parental care in public law may create *legal uncertainty* as to which of the two (State or parent) is responsible for the fulfilment of the obligations. Given the demographic realities of South Africa, *"it would seem to be an exercise in futility to expect results from the Constitution which it is not able to produce"* (Robinson, 1995:111).

Robinson (1995:112) quotes a judge who said *"What use to them is a bill of rights which may not ensure that needs so basic are met?"* This illustrates the difficulty of the recognition of second-generation rights in South Africa: against the economical reality, it may happen that the public exchequer may not be able to afford the exercising of these rights (Robinson, 1995:112).

Instead of endowing learners with socio-economic rights (seeing that they are "*laudable, but ill-affordable*" in South Africa), the Irish example of creating *policy directives* should have been investigated. If these rights were to be regarded as *directives* rather than as socio-economic rights, the State would be placed under a moral and political obligation to fulfil these ideals (Robinson, 1995:114).

The family as an institution should therefore be protected constitutionally.

2.4.3 The right of the learner to exercise his fundamental rights

The basic idea of *human rights* is embedded in the doctrine of natural rights which are typified as those rights that apply independent of human sanction. Veerman and Henkin (as cited by Haupt, 1999:24-25) are of the opinion that, similar to natural law, fundamental human rights are not granted to the citizens of a country either by the State or society; neither are they deduced from a bill of rights. These two authors believe fundamental rights to be preliminary to any constitution.

Both natural law and human rights apply in principle to *all* people and these rights are limited only because of functional reasons. The age and level of maturity of the learner serve as examples of functional reasons which could lead to the limitation of the learner's independent right to exercise his rights (*cf.* 2.2.2). Thus the relevancy of the learner and his being entitled to fundamental rights are emphasized.

The German *Grundgesetz*, the Constitution of the United States of America and the SA Constitution entrench the legally approved fundamental human rights. Comparing them is therefore relevant to this study.

2.4.3.1 A comparative law perspective

Private law in Germany and the United States of America require that the legal subject reach a specific age before he acquires the autonomous right to exercise his fundamental rights. Stipulations such as these (which are concerned with the setting of age restrictions as requirements for the exercising of certain capacities), are reminiscent of the fact that even if minors are vested with the same fundamental rights as adult persons, they are not always entitled to exercise them autonomously (Haupt, 1999:207; *cf.* 2.2.2.1).

Practical considerations such as age and emotional maturity necessitate and justify limitations concerning the exercising of a learner's rights in general.

The reality that the child (and thus the learner) needs parental education and care when it comes to being endowed with and exercising his fundamental rights (cf. 2.3.2.2), is illuminated in German law by distinguishing between the *Grundrechtsfähigkeit* and *Grundrechtsmündigkeit* (cf. 2.4.1) of the minor (Robinson, 1995:109) and in the United States of America by applying the principle of being *sufficiently mature* or *sufficiently intelligent* (Haupt, 1999:208-209).

According to German law, *Grundrechtsfähigkeit* starts at birth and refers to a person's ability to be vested with fundamental rights. The principle of *Grundrechtsmündigkeit* concerns itself with the ability of a person to exercise his fundamental rights independently: contrary to private law no age limit is specified. The fact that he can exercise the particular fundamental right only when he becomes able to distinguish, makes it clear that *Grundrechtsmündigkeit* has to be established individually for every single fundamental right. The development of the personality of the child makes it obligatory to endow him with the competence to exercise certain fundamental rights independently, irrespective of the question whether he has attained majority in private law (Robinson, 1995:109-110).

As is the case with German law, one of the ground rules in American common law is that parents act on behalf of their children due to the fact that the child needs parental guidance. The legal tradition in America is similar to that of Germany in that it is based on the requirement that a person be vested with specific legal capacities in order to be able to exercise his fundamental rights. It follows that although a minor as individual may be vested with the same fundamental rights as those of a person of majority age, the minor may not be ordained with the full legal capacity to exercise these rights.

Judgement handed down in ***Bellotti v Baird*** 443 US 622, 635 (1979) verifies this situation:

"The court has held that the state may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often

lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."

The legal system of the United States of America stipulates preconditions where it concerns itself with the minor's autonomous exercising of his fundamental rights. This implies the principle of being *sufficiently mature or sufficiently intelligent*.

South Africa's legal system, like those of Germany and the United States of America, recognizes the fact that the child is in need of parental support and guidance (*cf.* 2.4.1.1). The legal subjectivity of a minor is intimately related to that of his parent, especially when the parent acts on behalf of his child in legal intercourse (*cf.* 2.2.2). Thus common law differentiates between minors and persons of majority age with relation to the exercising of their capacity to act and their capacity to litigate (*cf.* 2.2.2.2).

However, in the domain of the South African public law, the SA Constitution vests the child with the same rights as the person of majority age (this refers to someone older than 21 years). Section 28(2) makes it clear that the learner's best interests are paramount. This section therefore seeks to protect or establish only such rights which are in the learner's best interest. At the same time it is made explicit that, according to the SA Constitution, a child is any person under the age of 18 years (Haysom, 1997:265).

2.5 SUMMARY

As education presupposes structure and order, the legislator plays an active role in the education system.

While *private law* prescriptions apply to horizontal educator-learner relationships, *constitutional law* encompasses administrative law, which is the *public law* area in which the school's actions will be dealt with. So all educational managerial actions have legal ground: the *school law* which is sourced from the SA Constitution, common law and case law. *Formal law*, on the other hand, contains the procedures to be followed when a rule has been contravened.

All persons (such as the learner) have legal subjectivity, affording them legal capacity to act or litigate, but which can be limited, *inter alia*, by age specifications. So the educator must be aware of this provision which safeguards the learner from abuse.

The Schools Act was brought into being in order to build an equitable education system. It comprises a preponderance of praiseworthy specifications, but, unfortunately fails to specify the maximum age at which the right to attend school terminates. Furthermore, as counterbalance to the fundamental learner rights enshrined in the SA Constitution, certain legal obligations, such as compliance with compulsory education, as well as submission to authority and discipline, appear to be acknowledged in the Schools Act, but should be presupposed as they are not mentioned emphatically in the SA Constitution.

Legal rights of learners, as enshrined in the SA Constitution, include the right to be educated at home, the right to procedurally fair administrative action and exemption from corporal punishment. However, according to the Schools Act it is the *educator's* duty to take action if the learner fails to obey the rules. It thus acknowledges the learner's legal duty to comply with school discipline.

These constitutional fundamental rights of the learner do not threaten the family's existence, because failure to intervene in private lives would, in fact, deny protection to women and children by perpetuating male domination and female subordination.

While South African common law defines the parent-child relationship in terms of *parental authority* over the child, in *public law* the Constitution provides for the learner's right to *parental care*, specifying that the child has a right to parental care. The SA Constitution also affirms that the State will fulfil all fundamental rights stipulated in the Bill of Rights, causing legal uncertainty concerning the practical implications. Nevertheless, the fundamental rights of South African learners are cast also in the mould of *second-generation rights*, implying that the State must take care of his socio-economic rights. A legal authority points out that this judicial duty is detrimental to the learner as he needs parental care when exercising his fundamental rights.

Invaluable, however, is the special provision made for the *child's best interest* as paramount in all matters concerning him.

In the application of the learner's fundamental rights, the *vertical* application imposes duties on the State and accords rights to the individual learner, while the *horizontal* application implies that private law relationships are also influenced by the SA Constitution in that it must conform to the SA Constitution, thereby protecting the individual from societal infringement of his rights.

In a comparison between German, American and South African entrenchment of legally approved fundamental rights, it is interesting to note that Germany (distinguishing between *Gründrechtsfähigkeit* and *Gründrechtsmündigkeit*) and the United States of America (applying the principle of *being sufficiently mature* or *being sufficiently intelligent*) do not require a *specific age* for the legal subject to exercise his fundamental rights. South African common law also recognizes the child's need of parental support and guidance, but it appears that the SA Constitution does not distinguish, as do the United States of America and German legal systems, between children able and children not able to exercise their fundamental rights independently.

Bearing in mind the growing concern of jurisprudence with the administration of justice and the best interests of the learner, South African educators must be made aware of current legal developments which have a direct impact on the educator-learner relationship.

This matter is addressed in the next chapter.