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## INTRODUCTION TO LAW – 2018

# CAPACITIES AND RIGHTS OF THE LEGAL SUBJECT

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**Lecturer:** Justin Ramages

### **Outcomes:**

Upon the completion of this module, students should be able to:

1. Know what/who legal subjects are.
2. Explain what is meant by 'capacities' and discuss the different types of capacities.
3. Explain what a legal right is, with reference to
  - a. the basic elements of a legal right
  - b. the relationship between rights and duties;
  - c. two viewpoints of the legal system namely the (i) subject-state viewpoint and (ii) the subject-subject viewpoint
  - d. the "two-fold" relationship between subject and object, and subject and third parties;
4. Identify and discuss the different "kinds" of rights and explain how they are conferred on legal subjects.
5. Explain what an object is and discuss the categories according to which the objects of rights can be classified.
6. Recognise and discuss the different kinds of objects and rights in a problem-solving context.
7. Explain the importance of the Bill of Rights (Chapter 2) in the *Constitution of the Republic of South Africa, 1996* and very briefly list and explain the human rights entrenched therein. Students will be expected to refer to case law as discussed in class.
8. Identify and discuss the different generations of human rights with reference to the nature of the benefits and obligations arising under each generation of human rights. Students will be expected to refer to case law as discussed in class.

## GENERAL INTRODUCTION:

The module “Capacities and Rights of the Legal Subject” is incorporated in the **Legal Theory 1** course with the purpose of introducing the concept of “legal rights”. The focus of this module will mainly be on the operation of rights between persons. In other words, we will discuss the law in the subjective sense as a system of rights and duties that apply to and between legal subjects.<sup>1</sup>

We will begin this module by answering the question of “Who or what is a legal subject?” We will then discuss the different capacities of legal subjects. The law provides legal subjects with certain capacities according to which they are allowed to take part in the legal environment where individuals’ rights are to be respected, protected and promoted. Of course, this has an influence on the relationship between legal subjects, especially with regard to duties that arise by virtue of legal rights. The discussion of legal subjectivity and capacities of legal subjects will thus serve as background for the discussion of the meaning of “legal rights”.

During our discussions of legal rights, we will identify the basic elements of a right. We will furthermore address issues such as the extent and enforcement of rights. Different kinds of rights will be identified and explained in terms of both the private and public law spheres. In terms of the private law sphere we will examine the different kinds of subjective rights. In terms of the public law sphere we will discuss human rights with specific reference to the Bill of Rights contained in chapter 2 of *The Constitution of the Republic of South Africa of 1996*.

During lectures, reference will be made to case law as part of the discussion of the work. These cases **must** be referred to and applied in assignments, tests and examination answers.

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<sup>1</sup>Kleyn D, Viljoen F *Beginner’s Guide for Law Students* 3ed (2004) 112-113 (Juta Law, A Division of Juta & Co, Lansdowne, SA). Hereafter ‘Kleyn and Viljoen’.

## **A WHO OR WHAT IS A LEGAL SUBJECT?**

The term “legal subject” can be defined as a bearer of juristic competencies, subjective rights (with the inherent powers or entitlements) and legal duties.<sup>2</sup> In South African law there are two categories of legal subjects: (i) natural persons and (ii) juristic persons. All human beings are referred to as *natural persons* and are thus legal subjects. *Juristic persons*, however, can be defined as certain associations of natural persons, such as companies and universities.<sup>3</sup> They are viewed as entities and are also considered to be “persons” and thus legal subjects in terms of the law.

## **B CAPACITIES OF LEGAL SUBJECTS**

The law provides legal subjects (the bearers of rights and duties) with the ability (capacity) to participate in legal activities.<sup>4</sup> The content and purport of a legal subject’s capacities is very important since it determines the subject’s status, and therefore extent of participation, in the legal system.<sup>5</sup>

Not all legal subjects have the exact same capacities. There are four different types of capacities that legal subjects can have.

1. The first type, called *legal capacity*, can be described as a legal subject’s ability to bear rights and duties.<sup>6</sup> It is therefore essentially the same as legal subjectivity, because it is acquired through *being* a person. In other words, all legal subjects have legal capacity simply because they are recognised by the law as “persons with rights and duties”.
2. The second type, *capacity to act*, refers to a legal subject’s ability to perform juristic acts. Juristic acts are purposeful lawful acts to which the law attaches the consequences envisaged by the party or parties who performed them. Juristic acts create, amend and terminate rights and duties. Examples of juristic acts are the conclusion of a contract, the making of a will, the entering into a marriage etc. Contrary to the situation with legal capacity (where all legal subjects share the same capacity), not all legal subjects have the same capacity to act. Depending on factors such as a person’s age, mental health,

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<sup>2</sup>Davel CJ, Jordaan RA *PersoneregStudentehandboek* 2ed (1998) 3 (Juta& Co, Lansdowne, SA).Hereafter Davel and Jordaan.

<sup>3</sup>Kleyn and Viljoen 113.

<sup>4</sup> Legal activities include the making of a will, entering into a contract, getting married, the setting up of a company etc.

<sup>5</sup>Davel and Jordaan 1.

<sup>6</sup>Kleyn and Viljoen 113.

financial solvency etc, a person can have the capacity to act in terms of three categories:

a. *No capacity to act:*

Persons that fall into this category cannot perform a legally valid juristic act. Children under the age of seven (*infantes*) and insane persons are examples of legal subjects with no capacity to act.

b. *Limited capacity to act:*

Some legal subjects do not have the capacity to perform legal acts unless assisted by someone designated by the law. For example, a company cannot hire a new secretary by itself since it is merely an abstract entity. It has to be represented by people who are designated to hire new staff on behalf of the company.

c. *Full capacity to act:*

People with full capacity to act can perform all juristic acts themselves. People over the age of 18 and emancipated minors are presumed to have full capacity to act.

3. *Locus standi in iudicio* is the third type of capacity. This entails the capacity to be a party in court proceedings (for example the plaintiff or defendant). Although not all legal subjects can exercise their *locus standi in iudicio* by themselves, it does not mean that they are without this capacity.<sup>7</sup> Persons who cannot participate as a party themselves are usually assigned a curator *personae, bonae* or *ad litem* to represent them as parties in a trial.
4. *Accountability* is the capacity to be held accountable (or liable) for unlawful acts. It concerns the ability to distinguish between right and wrong<sup>8</sup> and to conduct one's actions accordingly. Persons who do not have this ability are considered to be *doli incapax*.

In terms of the above explanations of legal subjectivity, capacity and the four kinds of capacities, it is clear that all legal subjects have rights, but depending on their capacities, the content of their duties may vary.

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<sup>7</sup> Du Plessis L *An Introduction to Law* 3ed (1999) 137 (Juta & Co Ltd, Kenwyn). Hereafter 'Du Plessis, *An Introduction to Law*'

<sup>8</sup>Kleyn and Viljoen 115.

## **C RIGHTS IN CONTEXT**

### **1. Introduction:**

Before we go on to the discussion of what legal rights entail, it is necessary to place rights (and their correlating duties) into context. Rights and duties exist within the context of a legal system where legal subjects interact with one-another and with the State (Government). There are two aspects, or viewpoints, of a legal system that are important to keep in mind when we deal with rights and duties.<sup>9</sup>

The first aspect is the relationship between the subjects and the State (the subject-state relationship). This relationship can be described as a vertical relationship because the government or state authority is appointed “over” the people to enforce the law. It can furthermore be described as being unequal in the sense that government has more power than its subject(s).<sup>10</sup> It is thus a relationship governed in terms of public law. Rights in the public law sphere are referred to as *human rights*.

The second aspect is the relationship between the subjects of a society (the subject-subject relationship). This relationship can be described as horizontal, because it is mostly constituted by interaction between persons (among each other) mostly on an equal basis. The subject-subject relationship can fall in the spheres of both private law, where the rights of a legal subject are called subjective rights, and public law (human rights).

In what follows, we will discuss the basic elements of rights (and duties) and we will identify and discuss different kinds of rights.

## **D THE BASIC ELEMENTS OF A RIGHT – ILLUSTRATING THE RELATIONSHIP BETWEEN RIGHTS AND DUTIES**

A (legal) right is an interest conferred and protected by the law to the benefit of right-holder.<sup>11</sup> The existence of a right presupposes two relationships: (i) a relationship between the legal subject and a legal object, and (ii) a concurrent relationship between the legal subject and other legal subjects (private law) or the state (public law).<sup>12</sup> This

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<sup>9</sup> Du Plessis, *An Introduction to Law* 138.

<sup>10</sup> In terms of this aspect the importance of human rights is evident. Since the State has more power, it is necessary that the subjects are protected from unjust State conduct. See below the notes on human rights.

<sup>11</sup> Hutchinson D Wille's *Principles of South African Law* 8ed (1991) 38.

<sup>12</sup> Kleyn and Viljoen 116.

two-fold relationship will be further illustrated and explained in the discussion of subjective rights below.

There are 6 basic elements of legal rights which illustrate the correlation between rights and duties, as well as the relationships that are present when a legal right exists.

These elements are:

1. A *title which gives rise to or confers the right* – i.e. the fact or event that vests the right in the subject of the right.
2. The presence of a *subject of the right* – i.e. a person who holds the right.
3. The *inherent power* conferred on the subject of the right with regard to the object of the right.
4. The *object of the right* – i.e. the thing to which the right relates.
5. The presence of a *subject of the duty* – i.e. a person who is under an obligation in terms of the correlating right.
6. The *corresponding duty* – i.e. the obligatory conduct of the subject of the duty.

## **E THE CLASSIFICATION OF LEGAL OBJECTS AND SUBJECTIVE RIGHTS**

### 1. Legal Objects

Legal objects are 'things' with value in which legal subjects can acquire rights. In other words, when a legal subject has a right to something (the legal object), there is a *legally protected relationship* between the subject and the object to the extent of the entitlement. Legal objects can be divided into the following different categories.

#### *(a) Corporeal Things*

"Things" are concrete and tangible objects such as a motor car, money, cattle, furniture, a house, etc.<sup>13</sup> Things are subdivided into two categories, namely (i) movable things and (ii) immovable things. Ownership of movable things are transferred by delivery of the thing, while ownership of immovable things are transferred by registration in the deeds office in the name of the new owner.<sup>14</sup>

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<sup>13</sup> Du Plessis, *An Introduction to Law* 138.

<sup>14</sup> Du Plessis, *An Introduction to Law* 138.

### *(b) Performances*

A performance is an act by someone else, which can amount to giving something (*dare*), doing something (*facere*) or not doing something (*non facere*).<sup>15</sup> Usually, contracts or delicts give rise to obligations to give, do or not do something.<sup>16</sup>

### *(c) Intellectual (immaterial) Property*

The term “intellectual property” refers to creations of the human mind.<sup>17</sup>

### *(d) Aspects of Personality*

A legal subject’s reputation or good name (*fama*), dignity, honour or self-worth (*dignitas*) and physical integrity (*corpus*) are all aspects of that legal subject’s personality.<sup>18</sup>

### *(e) Personal Immaterial Property (?)*

According to *Neethling*, there is a fifth category of legal objects that pertain to a legal subject’s ability to earn or to be creditworthy.<sup>19</sup>

## 2. Subjective Rights:

### *(a) A Two-fold Relationship:*

A subjective right can be defined in terms of a twofold relationship. On the one hand, it is a “legally supported claim by a legal subject to a legal object by virtue of which the subject acquires particular powers regarding the object” (i.e. the subject-object relationship), and on the other hand, it is “a relationship between the subject and third parties by virtue of which the third parties are legally obliged to respect the subject’s claim to the object”<sup>20</sup> (i.e. the subject-third parties relationship).

### *(b) Patrimonial and Non-patrimonial Rights:*

All subjective rights can be identified as either patrimonial or non-patrimonial rights.<sup>21</sup> Patrimonial rights are those rights which have objects with a determinable monetary

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<sup>15</sup> Du Plessis, *An Introduction to Law* 138. See also Kleyn and Viljoen 116.

<sup>16</sup> Kleyn and Viljoen 116.

<sup>17</sup> Du Plessis, *An Introduction to Law* 138. See also Kleyn and Viljoen 117.

<sup>18</sup> Du Plessis, *An Introduction to Law* 138. See also Kleyn and Viljoen 117.

<sup>19</sup> Du Plessis, *An Introduction to Law* 145. See also Kleyn and Viljoen 117.

<sup>20</sup> Du Plessis, *An Introduction to Law* 140.

<sup>21</sup> Du Plessis, *An Introduction to Law* 145.

or material value. Non-Patrimonial rights are those rights with objects that are of sentimental value only.<sup>22</sup>

(c) *Absolute and Relative Rights:*

To determine whether subjective rights apply absolutely or relatively regard must be had to a difference in operation of rights. While an absolute right prevails against everyone, a relative right only prevails against a particular person (debtor). An example of an absolute right is the right of ownership (see the discussion of real rights below). An example of a relative right is a personal right (see the discussion of personal rights below).

3. Kinds of Subjective Rights:

Rights are classified in terms of the objects that they relate to. Therefore the type of subjective right that an individual has in a particular instance depends on the object of that subjective right. The classification of subjective rights into categories thus correlates with the categories of legal objects and can be identified as follows:

a. *Real Rights:*

Prescribed Case Law:

*Kain v Kahn* 1986 (4) SA 251 (C)

Real rights are rights with respect to things.<sup>23</sup> The branch of private law that regulates the law regarding real rights (and things) is called property law. Ownership of property (*ius in re sua*) is the most comprehensive right because of the nature of the concept of “ownership”. All other real rights are limited rights in the sense that they are “rights to the things of others” (*ius in re aliena*).<sup>24</sup>

There are two ways in which one can acquire real rights. The first is *original acquisition* and the second is *derivative acquisition*.

i. Original Acquisition:

Original acquisition of real rights takes place when there is no previous owner of the things which is to be acquired, or where a previous owner need not co-operate in the transfer of the right. In situations where there is no previous owner, real rights are

<sup>22</sup> Du Plessis, *An Introduction to Law* 145.

<sup>23</sup> Du Plessis, *An Introduction to Law* 142. See also Kleyn and Viljoen 117.

<sup>24</sup> Du Plessis, *An Introduction to Law* 142.



acquired by means of *occupatio*. This means that ownership is acquired through appropriation, i.e. by taking physical control of a previously unowned thing with the intention of becoming the owner.<sup>25</sup> In situations where there was indeed a previous owner, the acquisition of a real right can take place by means of *accessio* or by means of *prescription*. *Accessio* takes place when two corporeal things are combined in such a way that one thing (the accessory thing) becomes a component of the other (the principal thing).<sup>26</sup> Prescription is the process whereby rights are acquired (acquisitive prescription) or lost (extinctive prescription) by the lapse of time. Acquisitive prescription takes place if a person possesses an object openly as if she were the owner thereof for an uninterrupted period of 30 years.<sup>27</sup>

ii. Derivative Acquisition:

Derivative acquisition takes place when an owner of a thing agrees to transfer ownership or some other real right to another person. In the case of *movable things*, a transfer of rights occurs once possession of the thing is delivered from the transferor of the right to the transferee of the right. The requirements for possession is, first, that one must have physical control of the thing (*detentio*) and, second, that one must have the intention to hold the thing for one's own benefit (*animus possedendi*). Possession furthermore has two elements: a mental element and a physical element. The mental element of possession is established by agreement between the parties. The physical element of possession can be established by either actual or constructive (or fictitious) delivery. Actual delivery simply entails the actual handing over of the thing to the transferee. Constructive delivery takes place when, although a thing is not (or cannot be) moved from one person to another, the circumstances are such that the control of the thing nevertheless vests in the transferee.

The transfer of a real right in *immovable things* occurs through the *registration* of the transfer in the Deeds Office in the name of the new owner.

b. *Personal Rights*:

A personal right can also be referred to as a right of performance or a legal claim. Personal rights are thus rights with respect to performances by third parties. Personal rights differ from the other categories of rights in the sense that the twofold relationship

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<sup>25</sup>Van der Walt AJ, Pienaar GJ *Introduction to the Law of Property* 3ed (1999) 113. Hereafter Van der Walt and Pienaar.

<sup>26</sup>Van der Walt and Pienaar 116.

<sup>27</sup>Van der Walt and Pienaar 131.

between subject-object and subject-and-third parties is somewhat intertwined. This follows from the fact that the performance to which the subject has the claim is dependent upon the performing of the third party. In other words, it can be argued that the subject has a claim against the third party to perform. Note that the subject does not have a claim on the debtor as person – persons are not legal objects. The difference between a real right and a personal right is that with real rights one has a right to “that which is *mine*”, and with personal rights one has a right to “that which is *due to me*.”<sup>28</sup>

The following are examples of how personal rights may be acquired:

- i. Contract: A contract is an agreement entered into with the intention of creating legal obligations.<sup>29</sup> People enter into contracts to create legally binding rights and duties. A valid contract therefore creates personal rights.
- ii. Delict: Rights and obligations in terms of delicts (unlawful acts) arise through the operation of the law. A delict is a wrongful act committed by a person who causes harm to another person or to their property. In terms of delicts a personal right to be compensated by the wrongdoer for the harm and/or damage done is conferred and protected by the law.
- iii. Judgment of a Court: In criminal court cases, where a person was found guilty of a crime, a personal right is conferred on the State for example the payment of a fine. In civil cases a personal right is conferred on the successful party.
- iv. Legislation: Statutes can place obligations on legal subjects. Examples will be given in class.

*c. Intellectual Property Rights:*

As mentioned earlier intellectual property are the products of creative human skill. Intellectual property rights are acquired with the creation of intellectual property and entails that others have a duty to refrain from any infringement on the rights.

*d. Personality Rights:*

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<sup>28</sup> Du Plessis, *An Introduction to Law* 147.

<sup>29</sup> Christie RH *Contract* in JA Joubert (Ed) LAWSA Vol 5 (1) (1994) par 124.

As mentioned earlier under the discussion of aspects of personality, personality rights entail a person's right to a good name, dignity and physical integrity. People have the duty to refrain from infringing on the *fama*, *dignitas* and *corpus* of one another.

*e. Personal Immaterial Property Rights: (?)*

Personal immaterial property rights entail the duty to refrain from conduct that infringes upon, or negates a legal subject's personal immaterial property, such as the ability to earn.

*Table 1*

<b>Legal Object</b>	<b>Legal Subject</b>	<b>Example</b>
Thing	Real Right	Ownership (rights)
Performance	Personal Right	Delict
Intellectual Property	Intellectual Property Right	Copyright
Aspects of Personality	Personality Right	Right to a good name
(Personal Immaterial Property)	(Personal Immaterial Property Rights)	(Right to earn an income)

## F HUMAN RIGHTS

### 1. *Introduction:*

Human rights stem from the principle that each human being has inherent dignity due to the fact of their “humanness”. Kleyne and Viljoen<sup>30</sup> refer to the inherent dignity in terms of our “humanness” as “the core of humanity”. It may not be infringed upon and it must be respected, protected and promoted by *everyone*.

Human rights are used in the public law sphere to protect individuals from State power in particular. Given the extensive scope of government authority, there must be made provision for the protection of the fundamental rights of the State’s subjects.<sup>31</sup> In South Africa, provision for the protection of human rights is made by including a Bill of Rights in Chapter 2 of our supreme law, the Constitution.<sup>32</sup> The implication of constitutionalism is that everyone in South Africa, including government, must respect, protect and promote human rights in line with the constitutional values of human dignity, equality and freedom.<sup>33</sup>

### 2. *International recognition of Human Rights*

After the gross violation of human rights during the Second World War, it became clear that the protection of human rights in terms of international law has become a necessity. Subsequently, many countries entrenched human rights in their constitutions to ensure the protection of human rights. The international community responded to the need to protect human rights by the founding of the United Nations (UN) in 1945 with the purpose to promote international peace and to protect human rights. In 1948 the UN adopted the *Universal Declaration of Human Rights*, which lists the basic rights of each individual throughout the world. In 1966 the *Declaration of Human Rights* was supplemented by the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

Conventions aimed at the protection of specific groups of people have also been instituted by the UN. In 1979 the UN adopted the *Convention on the Elimination of all*

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<sup>30</sup>Kleyne and Viljoen 244.

<sup>31</sup>Du Plessis L *Introduction to Law* 158.

<sup>32</sup>The Constitution of the Republic of South Africa of 1996. Hereafter ‘the Constitution. In s 2 explicitly confirms that the Constitution is the supreme law and that any law or conduct inconsistent with it is invalid.

<sup>33</sup>Section 1 of the Constitution.

*Forms of Discrimination against Women* and in 1989 the UN approved the *International Covenant on the Rights of the Child*.<sup>34</sup>

Regional systems developed to protect human rights in certain regions. In Europe, almost all the states ratified the European Convention on Human Rights of 1950. In South, North and Latin America the so-called Inter-American system was developed. In Africa the Organisation of African Unity adopted the African Charter on Human and Peoples' Rights in 1981.

Although there are International and Regional recognition and protection of human rights, the infringement of rights are in the first instance to be addressed in the country where it happened. It makes sense for practical reasons, but there are also Public International Law issues involved. Although countries/states are part of an international community where there are shared interests, every state has sovereign power within its own territory which has to be respected. For example, the rights violations in South Africa during the Apartheid era were not directly and summarily stopped by the international community, because the South African government claimed that it was an internal (or domestic) issue. The international community expressed their disapproval in a less direct manner by the implementation of sanctions against South Africa's participation in or at certain international occasions (like the Olympic Games). The disapproval of the international community expressed in that way has put much pressure on the South African government to review their political orientation. Fortunately, South Africa became a democratic state with a system of Constitutionalism in 1994. This led to the entrenchment of the Bill of Rights that gives human rights in South Africa the status of supreme law.

### *3. The Constitution and the Bill of Rights*

The Constitution consists of 14 chapters with 243 sections all-in-all. Chapter 2 contains a list of human rights and is known as the Bill of Rights. Although we are mainly concerned with the Bill of Rights for purposes of this module, we can only understand the Bill of Rights as a part of the Constitution as a whole.<sup>35</sup> The Bill of Rights should thus always be read and interpreted in the context of the Constitution as a whole, and the principles of democracy and constitutionalism must be borne in mind.

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<sup>34</sup>Kleyn and Viljoen 245-246.

<sup>35</sup> Currie I, De Waal J *The Bill of Rights Handbook* 5ed (2006) 1 (Juta & Co, Wetton, SA). Hereafter 'The Bill of Rights Handbook'.

The Bill of Rights contains sections 7-39 of the Constitution. Sections 8, 36-39 do not contain rights. They are operational provisions. Section 8 deals with the application of the Bill of Rights. Section 36 is known as the 'limitation clause' since it regulates the limitation of rights in specific circumstances. According to s 37 a state of emergency may be declared under exceptional circumstances, in which certain rights may be suspended for the duration of the emergency. Section 38 makes provision for the enforcement of human rights in that legal subjects may approach a competent court to enforce their rights. The last section in the Bill of Rights, s 39, contains provisions regarding the interpretation of the Bill of Rights. The content of these operational sections will be discussed in more detail during lectures.

Below is a list of the rights that are contained in the Bill of Rights. The rights that are underlined will be the focus point for this course.

**NOTE:**

- *There is no hand-out material for these underlined rights. The Constitution should be considered your source because all these rights are contained in the Bill of Rights.*
- *The prescribed case law for the Human Rights section is:*
  - ***Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC), and***
  - ***Christian Lawyers Association of SA v Minister of Health 1998 4 SA 1113 (T).***
- *The PowerPoint presentations used during lectures will be the only additional source of information (apart from the Constitution) regarding these underlined rights.*

1. Section 9 – Equality
2. Section 10 – Human Dignity
3. Section 11 – Life
4. Section 12 – Freedom and security of the person
5. Section 13 – Slavery, servitude and forced labour
6. Section 14 – Privacy
7. Section 15 – Freedom of religion, belief and opinion
8. Section 16 – Freedom of Expression

9. Section 17 – *Assembly, demonstration, picket and petition*
10. Section 18 – *Freedom of Association*
11. Section 19 – *Political Rights*
12. Section 20 – *Citizenship*
13. Section 21 – *Freedom of Movement and Residence*
14. Section 22 – *Freedom of trade, occupation and profession*
15. Section 23 – *Labour relations*
16. Section 24 – *Environment*
17. Section 25 – *Property*
18. Section 26 – *Housing*
19. Section 27 – *Health care, food, water and social security*
20. Section 28 – *Children*
21. Section 29 – *Education*
22. Section 30 – *Language and Culture*
23. Section 31 – *Cultural, religious and linguistic communities*
24. Section 32 – *Access to information*
25. Section 33 – *Just administrative Action*
26. Section 34 – *Access to courts*
27. Section 35 – *Arrested, detained and accused persons*

#### 4. *Generations of Human Rights*<sup>36</sup>

Human rights are divided into three categories. These categories are called 'generations'.

##### a. First Generation Rights:

These rights are also known as civil and political or 'blue' rights. It provides a shield for legal subjects to protect themselves against unlawful interference by the state. These rights are a means of limiting state power and fostering democracy by providing protection against oppressive rule. These rights impose a duty on the state to refrain from doing things of an oppressive nature. First generation rights are directly enforceable against the state. Examples of first generation rights are the rights to

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<sup>36</sup>Kleyn and Viljoen 247.

equality (s 9), life (s 11), privacy (s 14), freedom of religion, belief and opinion (s 15) and freedom of expression (s 16).

b. Second Generation Rights:

These rights are also known as socio-economic rights, aspirational rights or 'red' rights. Rather than requiring the state to refrain from acting, these rights actually oblige the state to take positive action. Rights in this category act as a sword in the hand of individuals compelling the state to distribute its resources in a just and equitable manner so as to benefit all members of society. Second generation rights are often regarded as being "aspirational" because they are not always directly enforceable against the state. This is because the enforceability of this generation of rights usually depends on the resources which are available in or to the state. Examples of second generation rights are the rights to have access to housing (s 26), education (s 29) and health care (s 27).

c. Third Generation Rights:

This generation of rights is also known as group rights or 'green' rights. The protection of these rights has only emerged as a priority in recent years. Third generation rights seek to protect groups of individuals and often relate to the protection and preservation of the planet for the benefit of future generations. An example of a third generation right is the right to a clean and healthy environment (s 24). This right places a positive duty on the state to promote and protect a healthy environment.

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\* Acknowledgement: Notes compiled by Ms Liezel Niesing