

**KEEP IT
CONSTITUTIONAL**



Episode 05

BALANCING RIGHTS

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The Keep It Constitutional campaign is a 20-part series brought to you by the Foundation for Human Rights. The campaign aims to provide South Africans – particularly learners – with an introduction to the Constitution and its contents. The campaign consists of animated episodes, audio episodes, and lesson plans.

For more information visit www.keepitconstitutional.co.za.

The lesson plan is designed to assist educators and group leaders lead an introductory session on the Constitution. Educators can follow the lesson plan word-for-word, but may improvise as desired.



Episode 5:

BALANCING RIGHTS

Time required	45 minutes
Learning objectives	<ul style="list-style-type: none">• Everyone in South Africa has rights, but these rights sometimes conflict• Sometimes, when rights conflict, it is necessary to limit rights• When rights are limited, they must be limited to the minimum extent possible• Some rights are so important that they cannot be limited, except in exceptional circumstances
Resources	<ul style="list-style-type: none">• Keep It Constitutional animation series: Episode 5 OR• Keep It Constitutional radio series: Episode 5• Handouts for learners, included at the end of this document



Introduction

Time required 2 minutes

Educator:

The Constitution gives everyone in South Africa a range of rights. Can anyone name some of these rights?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers could include: the right to life, the right to food, the right to education, the right to freedom of expression, freedom of religion, the right to healthcare, the right to a healthy environment, the right to dignity, the right to equality, the right to privacy, the right to vote, the right not be enslaved, amongst others.

Educator:

Are rights absolute or can they be limited? This means, are rights protected in all circumstances, or are there occasions when rights can be limited or somehow ignored?

ADVICE TO EDUCATORS

Allow learners to respond.

Answer should be: Yes, they can, but this can't happen without a good reason.

Educator:

Rights can be limited, but only when very particular circumstances have been met. We'll talk about what exactly needs to happen for rights to be limited but, for now, what is important is that you know that rights aren't absolute. Sometimes our rights might be limited because our rights and other people's rights might interfere with each other.





PLAY VIDEO/RADIO EPISODE

Time required 5 minutes



GUIDED DISCUSSION

Time required 13 minutes

Educator:

There are two important aspects to balancing rights. In our everyday lives, sometimes our rights will impact the rights of others, and we need to think about how this works. We also need to think about the process that allows the government to limit our rights, and what needs to happen for this to be done constitutionally.

So, let's think about ourselves first. We know that we all have rights – and you might have heard people say that with rights, come responsibilities. Whatever else your responsibilities might be, the most important responsibility is that you respect other people's rights in the same way that you want them to respect yours.

But what does it actually mean to 'respect' people's rights? It is important to think about what it would mean to 'respect' different rights, and to have your different rights respected. In groups, think about a general idea of 'respecting rights.' What does it mean to you to have your rights respected? As part of this process, provide 5 synonyms for respect. When you've done this, provide specific examples of what it would mean to have 3 different rights respected.

ADVICE TO EDUCATORS

Allow learners 3 minutes to discuss in groups of 4 or 5, and 3 minutes for the groups to report back.

If necessary, assist the learners by naming some of the rights mentioned earlier in the lesson – which may include: the right to life, the right to food, the right to education, the right to freedom of expression, freedom of religion, the right to healthcare, the right to a healthy environment, the right to dignity, the right to equality, the right to privacy, the right to vote, the right not be enslaved, amongst others

Rather than having a correct answer, this exercise is intended to prompt the learners to think about different rights, and how these rights manifest in the world.

Educator:



So, ensuring that we respect other people's rights, and have our rights respected, is really important. But we also saw in the video that sometimes rights can be limited. There are a few ways that this can happen. Sometimes rights have an in-built limitation, and there is also a clause in the Constitution – section 36 – which allows for the limitation of rights.

An example of an in-built limitation would be the right to freedom of expression. The right to freedom of expression is an important right. Being able to express yourself is important for lots of reasons. What might some of these reasons be?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers could include that it is important to be able to tell the government what you think, to be able to share information, to be able to hold the government to account, to share your opinions with others.

Educator:

So, for all of these reasons, the Constitution protects the right to freedom of expression. But this right isn't without limitation. The right to freedom of expression that we have in the Constitution says that there is no protection for some particular categories of expression. Specifically, it says that propaganda for war, incitement of imminent violence, and advocacy of hatred that is based on race, ethnicity, gender or religion is excluded. Why do you think that the right is limited in this way?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers should revolve around the fact that everyone has rights, and sometimes people's rights interact. Try to get the learners to think about the role of dignity and the way that the limitation might protect the dignity of people threatened.

Educator:

So, some rights can be limited because of how they are phrased in the Constitution.

But, actually, almost every right in the Constitution can be limited, because there is a clause in the Constitution that applies to all other rights. This clause, section 36,



that tells us about what should happen when rights are limited. In terms of this clause, rights in the Bill of Rights can only be limited in a way that can be justified in an open and democratic society, based on human dignity, equality and freedom. There are a few different factors that the courts need to consider:

The first one of these that we'll look at is that rights can only be limited when they are limited in a way that is general and applicable to everyone. This means that laws can't target a specific person. Imagine if they did! What would this be like?

ADVICE TO EDUCATORS

Choose a child from the class. Ask the class to imagine that Parliament had made a law that prohibited that child (use their name) from going out at night. This new law, called the [Insert the child's name] law, meant that [insert the child's name] would have to be home by 4pm every day, and could not leave the house again before 7am.

Ask the class if this would be fair? Ask if it would be fair even if Parliament had decided that the [Insert the child's name] law was in that child's best interests? What sort of rights does the class think would be threatened by this law?

Answers could include: The right to freedom of association, the right to freedom of movement, the right to dignity, the right to equality. Learners should justify their answers.

Now ask the class if the situation would be different if the government introduced a curfew for everyone under the age of 18, and there was a really good reason – perhaps the country was at war. Do you think that this might be more justifiable?

Answers should be that it applies to everyone in a particular category, not just to specific people. You may also push the learners to note that there is an important reason for the restraint, rather than just the whim of some decision-maker.

The second important thing that needs to be looked at is whether the limitation is for a good reason. What do you think could be good reasons to limit people's rights?

ADVICE TO EDUCATORS

Allow learners to respond.



Answers could include that it is protect other rights, that there is an important government purpose, that is reasonable in a society.

Educator

Another important aspect is that any limitation must be consistent with the core values of South Africa – dignity, equality and freedom. This last part sounds a bit confusing, doesn't it, so let's break it down.

For a right to be limited in a way that meets the requirements of our democratic society, we need to look at the kind of right that is being limited. This is important – some rights can be limited without there being a lasting impact, but if, for example, your right to life, or your ability to access healthcare, is limited, it might have serious ramifications. We'd need to consider why the right is being limited, and why whether the reason we are limiting it actually realises the purpose. So, for example, for our example with all under 18s having a curfew, if the concern was about safety at night because of fighting, we'd have to consider whether the curfew did this. What do you think?

Finally, we have to think about whether there is a way to achieve the purpose of the limitation in a way that has less impact upon rights. For example, if the concern was safety at night, and the limitation that was proposed was that under 18s were never allowed out, do you think that this would make sense? A more limited rule might serve the purpose, right?

Section 36 is a really important part of our Constitution. It protects us by providing standards that must be met by anyone trying to limit our rights – including the government. Remember, the Constitution applies to the government, so anything that the government wants to do in the country, including limiting our rights, must align with the Constitution.



GROUP EXERCISE

Time required 22 minutes

(10 minutes of discussion in groups, 10 minutes of discussion in class)

ADVICE TO EDUCATORS

Divide the class into 6 groups and distribute the scenarios. There are three scenarios – allow each scenario to be discussed by 2 of the groups.

Each scenario requires the group to consider either competing rights or how section 36 could be applied.

Provide each group with their problem from Appendix 1, and the selected sections of the Constitution for the specific problem that the group is addressing, found at Appendix 2. Each scenario includes some note for educators, to assist the learners.

Allow each group to discuss for 8 minutes, then combine the groups who are discussing the same scenario, for 5 minutes, allowing them to discuss together and come up with a final answer, that they will present to the class. Finally, allow 3 minutes for each scenario to be presented.



Scenario 1

The government wants to build a new dam to provide additional drinking water to people in Cape Town. The area that has been chosen for the dam is home to several thousand people. These people will have to be moved in order for the dam to be completed. Some of them claim that their right to housing and right to property is being violated. The government claims that this right can be limited.

Discuss whether there is a legitimate government purpose, how important the purpose is, and whether the legitimate government purpose does actually violate rights. Discuss whether there are any competing rights that the government might be trying to serve. Apply section 36 to the violated rights and determine whether the government action might be fair. What additional steps might the government have to take to ensure that the matter is fairly dealt with?

ADVICE TO EDUCATORS

Should the group be struggling to answer the question, advise them to think of the following steps:

- What rights are involved?
 - If they are really struggling, you can assist them by identifying the right to housing, the right to property, the right to water
- Do any of the rights have internal limitations?
- Can they apply the general limitations clause?

Allow the learners the space to come up with their own answers. Ultimately, the answer should focus on the legitimate government purpose of trying to ensure that everyone has the right to access water, that the government can expropriate – take – property, but may have to pay compensation. The learners could consider whether the right to housing is unfairly removed, or whether the state has to take steps to help people find new housing.



Scenario 2

Thabo has a chronic kidney problem. He needs regular treatment from the hospital, sometimes as often as three times a week. He doesn't have medical insurance and can't afford the treatment. The ongoing treatment is really expensive, and because Thabo requires it so often, it prevents other people receiving treatment, placing their lives in danger. The hospital – a government hospital – decides that it can no longer provide the treatment to Thabo. This will have massive ramifications for Thabo's life, and may result in his death.

Discuss what rights are involved here and consider whether the hospital, which represents the government, has a legitimate reason to deny Thabo treatment. What elements should the hospital be thinking of?

ADVICE TO EDUCATORS

Should the group be struggling to answer the question, advise them to think of the following steps:

- What rights are involved?
- Do any of the rights have internal limitations?
- Can they apply the general limitations clause?
- If the government had unlimited resources, could the situation be different in relation to Thabo's treatment?

Allow the learners the space to come up with their own answers. The learners will have to weigh Thabo's rights to life and healthcare with other people's rights to healthcare and should consider the fact that the government – including people at hospitals – have to make difficult decisions using the scarce resources that are available.



Scenario 3

Denise attends a private religious school. The school believes strongly that physical punishment is an important part of education. One day, Denise is late for school. The principal of the school notices her walking in the school gates late, and calls Denise to her office, where she will be punished. Denise refuses, knowing that she will receive physical punishment. The principal is enraged, and demands that Denise comes to the office, or she will be expelled. Denise refuses.

Denise claims that her rights are being violated in a number of ways. However, the principal claims that the right to religion enables schools to punish children however they want.

Discuss what rights Denise might claim. Have these rights been violated? Does the principal have relevant rights?

ADVICE TO EDUCATORS

Should the group be struggling to answer the question, advise them to think of the following steps:

- What rights are involved?
 - If they are really struggling, you can assist them by identifying the rights of children, the right to dignity, the right to religion, the right to be free from cruel and unusual punishment.
- Do any of the rights have internal limitations?
- Can they apply the general limitations clause?

Allow the learners the space to come up with their own answers. Answers should cover whether the right to religion is unlimited, or whether there are limits. Answers should cover some of the rights that are available to children – including the right to be free from abuse. The learners should also consider whether Denise’s right to education is being properly respected.



Conclusion

Time required 1 minute

Educator:

Rights are a fundamental part of our country. But this isn't as straight forward as we might think – when people live together, we have to act with respect and consideration for other people's rights. This doesn't mean that our rights should be undermined, or that we shouldn't have the right to enforce our own rights. It does mean that we need to consider how our rights are balanced with other people's rights, and to recognise that our rights are not unlimited.



HANDOUTS FOR LEARNERS



Scenario 1

The government wants to build a new damn to provide additional drinking water to people in Cape Town. The area that has been chosen for the dam is home to several thousand people. These people will have to be moved in order for the dam to be completed. Some of them claim that there right to housing and right to property is being violated. The government claims that this right can be limited.

Discuss whether there is a legitimate government purpose, how important the purpose is, and whether the legitimate government purpose does actually violate rights. Discuss whether there are any competing rights that the government might be trying to serve. Apply section 36 to the violated rights and determine whether the government action might be fair. What additional steps might the government have to take to ensure that the matter is fairly dealt with?



SCENARIO 1 - Important sections of the Constitution

Section 10 - Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 25 - Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section—
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.



(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Section 26 - Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 36 - Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.



(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.



Scenario 2

Thabo has a chronic kidney problem. He needs regular treatment from the hospital, sometimes as often as three times a week. He doesn't have medical insurance and can't afford the treatment. The ongoing treatment is really expensive, and because Thabo requires it so often, it prevents other people receiving treatment, placing their lives in danger. The hospital – a government hospital – decides that it can no longer provide the treatment to Thabo. This will have massive ramifications for Thabo's life, and may result in his death.

Discuss what rights are involved here and consider whether the hospital, which represents the government, has a legitimate reason to deny Thabo treatment. What elements should the hospital be thinking of?



SCENARIO 2 – Important sections of the Constitution

Section 10 – Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12 – Freedom and security of the person

(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.

Section 27 – Health care, food, water and social security

(1) Everyone has the right to have access to—

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Section 28 – Children



(1) Every child has the right—

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that—

- (i) are inappropriate for a person of that child's age; or
- (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

- (i) 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;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.



Section 36 - Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.



Scenario 3

Denise attends a private religious school. The school believes strongly that physical punishment is an important part of education. One day, Denise is late for school. The principal of the school notices her walking in the school gates late, and calls Denise to her office, where she will be punished. Denise refuses, knowing that she will receive physical punishment. The principal is enraged, and demands that Denise comes to the office, or she will be expelled. Denise refuses.

Denise claims that her rights are being violated in a number of ways. However, the principal claims that the right to religion enables schools to punish children however they want.

Discuss what rights Denise might claim. Have these rights been violated? Does the principal have relevant rights?



SCENARIO 3 – Important sections of the Constitution

Section 10 – Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12 – Freedom and security of the person

(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.

Section 15 – Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—

- (a) those observances follow rules made by the appropriate public authorities;
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising—

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or



- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Section 28 – Children

(1) Every child has the right—

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that—

- (i) are inappropriate for a person of that child's age; or
- (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

- (i) 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;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.



Section 29 – Education

- (1) Everyone has the right—
- (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
- (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

Section 36 – Limitation of rights

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

