

Children's right to participate: Implications for school discipline*

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OPSOMMING

Kinders se Reg om Deel te Neem: Implikasies vir Skool Dissipline

Die nuwe Kinderwet 38 van 2005** maak voorsiening vir addisionele regte wat die kind se grondwetlike regte ingevolge die Grondwet van die Republiek van Suid-Afrika, 1996 aanvul. Een van hierdie regte is die kind se reg om deel te neem aan verrigtinge wat hom of haar raak. Die inhoud van hierdie reg word bespreek met verwysing na *General Comment No 12* van die Verenigde Nasies se Komitee oor die Regte van die Kind. Verder word daar ook gefokus op Hart en Shier se onderskeie modelle om die vlak van kinders se deelname te meet. In die laaste instansie, word Lundy se model vir die implimentering van artikel 12 van die Konvensie op die Regte van die Kind gebruik om te verseker dat dit behoorlik geïmplementeer word. Die model fokus op die volgende vier faktore naamlik die skep van 'n ruimte waarbinne opinies gelug kan word, die geleentheid wat die kind gegee word om opinies te lug, 'n gehoor wat verplig is om te luister na die opinies van die kind, en laastens, die geleentheid om besluite te beïnvloed. Hierdie faktore word dan toegepas op, onderskeidelik, die strafgeoriënteerde- en herstellende geregtigheidsbenadering tot dissipline. Die gevolgtrekking word gemaak dat die herstellende geregtigheidsbenadering tot dissipline die mees gepaste benadering is om gevolg te gee aan die kind se reg om deel te neem.

1 Introduction

Children's rights are often divided into prevention, protection and participation rights. The right to be heard or the right to express views are some of the manifestations of the participation rights of children. One of the main points of contention in the children's rights debate pertaining to participation rights is to find a balance between, on the one hand, the child's lack of full autonomy and capacity, and, on the other, the recognition that the child is an active subject of human rights, with an own personality, integrity and ability to participate freely in society.¹

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** 'n Nie-amptelike vertaling van die Kinderwet 38 van 2005 is beskikbaar by www.vra.co.za (besoek op 2013-03-01) (Red).

1 United Nations Committee on the Rights of the Child *General Comment 12* 2009 "The right of the child to be heard" par 1; Lundy "'Voice' is not enough: conceptualising article 12 of the United Nations Convention on the Rights of the Child" 2007 *British Educational Research J* 928.

One of the important challenges children face in exercising their right to be heard is that they are first of all dependent on the cooperation of adults. Adults are reluctant to give effect to this right of children, because they are sceptical of children's capacity to contribute meaningfully to decision making and/or they are concerned that giving children more control would undermine their (the adults') authority and/or that the processes of giving effect to this right would be too time-consuming.² Secondly, there is a limited awareness of the content of the right to participate and its application.³

The aim of this article is, firstly, to discuss the content of the right to participate. Secondly, Hart and Shiers' models of participation will be discussed to assist in establishing the level of participation by learners. Thirdly, the implementation of this right will be discussed with reference to Lundy's proposed model for the implementation of article 12 of the Convention on the Rights of the Child. Lastly, the effectiveness of the retributive and restorative approaches to discipline in implementing and giving effect to the right to participate will be evaluated.

2 The International Standard Pertaining to the Right to be Heard

The right to be heard is one of the four general principles of the United Nations Convention on the Rights of the Child⁴ (UNCRC) The general principles should be considered in the interpretation and implementation of all the other rights contained in the UNCRC.⁵ This is an indication of the importance of this particular right, and it is thus essential to have a clear understanding of its content and ambit. Article 12 provides:

- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

2 Lundy 2007 *British Educational Research J* 930.

3 *Ibid.*

4 United Nations Convention on the Rights of the Child (CRC); adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 1989-11-20. Also available at <http://www2.ohchr.org/english/law/crc.htm> (accessed 2011-11-03).

5 *General Comment 12* par 2. The other general principles are: non-discrimination, the right to life and development, and the primary consideration of the child's best interests.

This right is also contained in expressions such as the “voice of the child”, “the learner’s voice”, “the right to express views”, “the right to participate” and the “right to be consulted”. This right is thus referred to in a number of ways, but, essentially, reference is being made to the same concept as contained in article 12 of the UNCRC.

South Africa ratified the UNCRC in 1995 and is therefore bound by its provisions. Further, it is obliged to ensure that national legislation is brought in line with its provisions. Yet, section 28 of the Constitution of the Republic of South Africa, 1996 (the Constitution) dealing with children’s rights in particular does not include the right to be heard. This position was rectified in the long-awaited Children’s Act⁶ (CA).

3 The Right to Participate in the South African Legal Context

3 1 The CA 38 of 2005

The section in the CA providing for the child’s right to participate came into operation on 1 July 2007. The CA does not use the same phrasing as the UNCRC, namely “the right to be heard” or “the right to express views”, but, instead, refers to the child’s right to participate.⁷ However, this is still in line with the provisions of General Comment No 12 of the United Nations Committee on the Rights of the Child, which provides that the UNCRC develop the concept “participation” over time. The term “participation”, according to General Comment No 12 describes:

[o]ngoing processes, which include information sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.⁸

The CA creates a number of rights not contained in the Constitution and provides that these rights are to supplement the rights which the child has in terms of the Bill of Rights.⁹ In addition it provides that:

[a]ll organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.¹⁰

Furthermore, the provisions of the CA are binding on natural and juristic persons, taking into account the nature of the rights and the nature of the

6 38 of 2005.

7 S 10 CA. Compare this section with article 12 CRC, which refers to the child’s right to express views and to be heard in specific proceedings.

8 *General Comment 12* par 3.

9 S 8(1) CA. See also s 10 (child’s right to participate); s 11 (rights of disabled and chronically ill children); s 13 (right to information on health care); s 14 (right of access to court).

10 S 8(2) CA.

duty imposed on them. Section 10 of the CA introduces one of the supplementing rights and provides that:

[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration.

It is therefore clear that the Department of Education, principals, educators and the school governing body are obliged to respect, protect and promote the child's participation rights in schools. The legislator has thus taken active steps to ensure that the state complies with its responsibility to ensure that effect is given to this right contained in the UNCRC.

3 2 Content of the Right to Participate in South Africa

To give effect to a right, it needs content. In terms of section 39(1)(b) of the Constitution, international law must be considered when interpreting the Bill of Rights. Therefore, in giving content to section 10 of the CA, reference will in particular be made to General Comment No 12 drafted by the United Nations Committee on the Rights of the Child.¹¹ The aims of this general comment are to strengthen states parties' understanding of article 12 of the UNCRC, to guide implementation of this right and to indicate the necessity for legislative and policy changes where appropriate.¹² It is clear from General Comment No 12 that article 12 of the UNCRC is complex and multifaceted. To ensure that all the facets of the South African right to participate are aligned with the international standard, all the elements of this right will be discussed with reference to the general comment.

3 2 1 "Every Child"

The term "every child" does not refer only to an individual child, but also to groups of children. Particular reference is made to marginalised children, such as disabled children and minority groups.¹³ The Constitutional Court warns that, even after thorough consultation, schools might still be at risk of acting unconstitutionally, because proper measures are not in place to accommodate the views of minority

11 A 43 CRC. See Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 639-640. The aim of the Committee on the Rights of the Child is to provide an international mechanism to monitor the implementation of rights by states parties. In addition, it is also responsible for drafting General Comments to promote the rights in the CRC and to assist states parties to implement the CRC.

12 *General Comment 12* par 8.

13 *General Comment 12* par 9-14, 87, 134(f).

groups.¹⁴ The tendency is often to accommodate the views of the majority, which might be detrimental, and even unconstitutional, from the minority's point of view. It is therefore advisable to take special care to ensure that the views of minority and marginalised groups in schools are heard.

Carrim¹⁵ warns against the impact of homogenisation of children in schools and legislation without recognising the differences between children and their lived worlds. These differences would include factors such as race, gender and class. The circumstances of all children are not the same, and cognisance should be taken of factors that have a profound impact on learners' schooling, such as child-headed households, domestic violence, "initiation ceremonies", and pregnancies. Since these learners' needs differ from those of other learners, special care should be taken to ensure that these marginalised learners' rights to participate is recognised and given effect to.

3 2 2 "Of Such an Age, Maturity and Stage of Development as to be Able to Participate"

Section 10 of the CA provides that a child of such an age, maturity and stage of development, who is able to participate, has a right to participate. The UNCRC provides that a child who is capable of forming his or her own views has a right to express those views freely. States parties have to ensure that children have a say in matters that affect them. It is emphasised that the child is an individual bearer of rights and should not be regarded as a passive human being. Children should therefore not be deprived of the right to participate, unless it is clear that the child is incapable of forming his or her own views.¹⁶

General Comment No 12 provides that the child's age and maturity play a significant role in exercising this right.¹⁷ This part of the article refers, in the first place, to the child's capacity to form his or her own views, taking into account the child's age and maturity.¹⁸ Maturity is described as follows by the Committee on the Rights of the Child:

Maturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the

14 *MEC for Education: KwaZulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute* 2008 2 BCLR 99 (CC) par 82-83. In this case, a learner wore a nose stud in accordance with her Hindu religion, but contrary to the school rules. The school had drafted its code of conduct after thorough consultation, but it did not make provision for the views of minorities in the school, such as cultural or religious minorities.

15 Carrim "Modes of participation and conceptions of children in South African education" 2011 *Perspectives in Ed* 74-82.

16 Hodgkin & Newell 153.

17 *General Comment 12* par 9.

18 S 10 CA; a 12 CRC.

individual capacity of a child. Maturity is difficult to define; in the context of art 12, it is *the capacity of the child to express her or his views on issues in a reasonable and independent manner*. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of the child¹⁹ (own emphasis).

In view of the numerous factors contributing to a child's maturity, the capacity of every child should be determined on a case-by-case basis.²⁰ Factors influencing the child's capacity to form a view include information, experience, environment, social and cultural expectations, and levels of support.²¹

The fact that a particular issue can have a huge impact on the life of a child does not mean that the child should not be afforded the right to participate. Thus it is wrong to assume that children can only exercise the right regarding trivial matters. They must be able to exercise this right in every matter concerning them.²² States parties are therefore obliged to "assess the capacity of the child to form an autonomous opinion to the greatest extent possible".²³

However, despite being cautioned to take the capacity of the child into consideration, it is also emphasised that the child's right to express views should not be limited unduly. The point of departure should not be that children lack the required capacity, but rather that they do have the required capacity to participate. There should be no onus of proof on the child to show that he or she does have the required capacity.²⁴

Therefore, the Committee on the Rights of the Child discourages states parties from setting any age limitations on the child's right to be heard, and the committee itself also refrained from introducing any age limitations.²⁵ It is emphasised that the child's right to be heard is "anchored in the child's daily life from the earliest stage". Even very young children who are unable to express their views verbally should be granted the opportunity to demonstrate their understanding, choices and preferences through other means such as drawings. Other nonverbal forms of communication such as facial expressions and body language should also be recognised as valuable means of expressing views and opinions.²⁶ In General Comment No 7 on early childhood, it is provided as follows:

To achieve the right of participation requires adults to adopt a child-centred attitude, listening to young children and respecting their dignity and their individual points of view. It also requires adults to show patience and

19 *General Comment 12* par 30.

20 *Idem* par 29.

21 *Idem* par 29.

22 *Idem* 12 par 29.

23 S 10 CA; a 12 CRC.

24 *General Comment 12* par 20.

25 *Idem* par 21.

26 *Idem* par 21.

creativity by adapting their expectation to a young child's interest levels of understanding and preferred ways of communicating.²⁷

It can be argued that the child is unable to understand the complexity of a situation, but the Committee on the Rights of the Child warns that "it is not necessary that the child has a comprehensive knowledge of all aspects of the matter affecting her or him". Only a "sufficient understanding" is required to be capable of forming own views.²⁸ This might create uncertainty and decision makers' subjective interpretation whether the child has "sufficient understanding" can be problematic. However, Lundy²⁹ emphasises that it is not the child's capacity that determines his or her right to voice an opinion, but rather the ability to form a view, mature or not.

Although the point of departure is that children have the necessary capacity to express their own views, there is still the obligation on the decision maker to give such capacity due weight.³⁰ The child's capacity thus has an impact on the weight accorded to the child's views. Although the child expresses a view, it should still be evaluated by the decision maker with due regard to the age, maturity and stage of development of the child.³¹ This will also influence the response or communication to the child on how the child's views influenced the outcome of the process.³²

Hence, although age, maturity and development normally play a significant role in determining the child's legal capacity, the child's capacity does not necessarily influence the child's right to be heard to the same extent. Thus, although a child might, for instance, not have the necessary legal capacity to conclude a contract or give permission for medical treatment, it does not mean that the child does not have the right to participate in the decisions pertaining to the issue if it concerns him or her. However, the weight accorded to the views expressed will differ, depending on the seriousness of the issue and the capacity of the child.

It is also important to keep track of the child's evolving capacities and adjust the weight accorded to the views expressed accordingly.³³ Article 5 of the UNCRC refers to the rights, responsibilities and duties of parents, members of the extended family, the community, legal guardians and other people legally responsible for the child, to provide appropriate direction and guidance to the child in exercising his or her rights. They

27 United Nations Committee on the Rights of the Child *General Comment 7* 2005 "Implementing child rights in early childhood" par 14(c); see also Bragg "'But I listen to children anyway!' – teacher perspectives on pupil voice" 2007 *Educational Action Research* 505-518 on the process of including learners' voice in a UK school with learners aged between 5 and 11 years; Linington, Excell & Murris "Education for participatory democracy: a Grade R perspective" 2011 *Perspectives in Ed* 36-45.

28 *General Comment 12* par 21.

29 Lundy 2007 *British Educational Research J* 935.

30 *General Comment 12* par 20.

31 *Idem* par 28.

32 *Idem* par 45.

33 *Idem* par 31.

have the responsibility to supplement the child's lack of knowledge, experience and understanding. However, as the child gains the necessary knowledge, experience and understanding, the direction and guidance given to the child should be transformed into reminders and advice. The child should thus be afforded the opportunity to grow his or her capacity to participate and be given the opportunity to exercise such capacity increasingly more independently.³⁴

The importance of recognising the child's right to participate is further highlighted in section 31 of the CA, which deals with major decisions involving children by a person holding parental rights and responsibilities, normally the parents.³⁵ It provides explicitly that, as far as decisions which might constitute a significant change in the education of the child are concerned, or which have an adverse effect on the child or the general well-being of the child, due consideration must be given to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

Since the definition stipulates that "participation" involves ongoing processes, which include information-sharing and dialogue, it can be argued that, if a child is capable of sharing information and taking part in a discussion, such child has a right to participate.³⁶

3.2.3 "Has a Right to Participate"

To involve children in decision making and to allow them the opportunity to voice their opinions are pedagogically sound and advisable techniques.³⁷ The CA and the UNCRC frame it as an indispensable right and not a favour afforded to children.³⁸ Thus, to neglect to afford children, or to refuse children, the opportunity to participate would be a violation of a constitutional right. Children would therefore be at liberty to approach the court to enforce this right. In this regard, the CA provides that a child who is affected by, or involved in, a matter that needs to be adjudicated, and who is of the opinion that any right in the Bill of Rights or any of the additional rights contained in the CA have been infringed or are threatened, can approach a competent court for relief.³⁹

In addition, children should be empowered to participate, and adults have a responsibility to create a suitable environment to enable children

34 *Idem* 84-85.

35 See s 18 CA on parental rights and responsibilities.

36 *General Comment 12* par 5.

37 Wolhuter & Steyn "Learner discipline at school: A comparative educational perspective" 2003 *Koers* 68 532-5333.

38 S 10 CA; a 12 CRC.

39 S 15(1), (2)(a) CA. S 152(b)-(d) CA: others who may approach the court if the child's right to participate is infringed or threatened are anyone acting in the interest of the child or on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interests of, a group or class of persons; and anyone acting in the public interest.

to participate.⁴⁰ Views should be expressed freely; therefore, children should not be intimidated or manipulated to express views against their will. They should further be informed that participation is voluntary and that they can withdraw their participation at any stage.⁴¹

3.2.4 “In Matters Concerning the Child”

Section 10 of the CA provides that the child’s right to participate can be exercised “in any matter concerning that child”.⁴² This is in line with section 28(2) of the Constitution, which refers to the paramountcy of the best interests of the child in “every matter concerning the child”. The Committee on the Rights of the Child states that this condition should be understood in a broad sense. Thus it will include matters and issues not expressly mentioned in the UNCRC. However, it should not be regarded as so wide as to include a general political mandate. It is recognised that to give effect to this right will help to “include children in the social processes of their community and society”. In addition, it acknowledges that children may add valuable perspectives and experiences to decision making, policy making, and preparation of laws and other measures.⁴³

An analysis of section 28(2) of the Constitution reveals that the Constitutional Court considered the phrase “every matter concerning the child” in a broad sense as well and included matters affecting individual children as well as matters affecting groups of children. In addition, the court also addressed issues where children are directly affected by the matter as well as matters where children are only indirectly affected.⁴⁴ It is argued that the same broad approach should be applicable in exercising the right to participate.

Lundy⁴⁵ avers that the starting point in determining whether a matter affects children is to ask them and not to decide on their behalf. To ensure that children are included in all matters affecting them, it is also necessary to involve them at each stage at which decisions are made in education. These stages include, in the first place, instances where the decisions have an impact on an individual learner; secondly, instances

40 *General Comment 12* par 23, 34, 132.

41 *Idem* par 132 & 134(b).

42 Compare this section with a 12 CRC, which provides that the child’s views should be considered in all matters “affecting” the child.

43 *General Comment 12* par 12 & 27.

44 Children or groups of children were directly affected in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T); *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 10 BCLR 973 (SCA); *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T); *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC). Children were indirectly involved in the case of *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) and *S v M* 2007 2 SACR 539 (CC).

45 Lundy 2007 *British Educational Research J* 931.

when school and classroom policies are being developed; and, thirdly, instances when provincial or national policy or legislation pertaining to education is determined. It is further stressed that it is not a once-off process, but one that requires consistent and ongoing arrangements to ensure effective implementation.

3 2 5 “In an Appropriate Way”

Section 10 of the CA provides that the child has “a right to participate in an appropriate way”. Thus children cannot express their views on their own terms and in an improper way. The right to express views is accompanied by the responsibility to express them in an appropriate way, which would then include expression of views in a suitable forum. This is in line with section 16 of the CA, which provides that “every child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state”.

The UNCRC provides that the child’s right to be heard in judicial and administrative proceedings must be exercised in a manner consistent with the procedural rules of national law.⁴⁶ Hence, views must be expressed in accordance with the provisions of the legislation, and with due recognition of the constitutional rights of others. This, therefore, includes the procedures laid down in a school’s code of conduct, on condition that those provisions are constitutional and do afford learners a proper opportunity to participate.

Children can also express their views directly or through a representative or an appropriate body. If the child is represented, proper care should be taken to ensure that the child’s views are conveyed correctly.⁴⁷

3 2 6 “Views Expressed by the Child Must be Given Due Consideration”

To merely listen to the child is insufficient. The Committee on the Rights of the Child uses quite strong terms to emphasise the level of engagement with children so as to be in a position to give due weight to their views. This includes the fact that the views of the child “have to be seriously considered”;⁴⁸ that this is a continuous process of “intense exchange between children and adults”;⁴⁹ that the process should not be “tokenistic”;⁵⁰ and that the “participation should be meaningful”.⁵¹

Although the engagement must be serious and sincere, adults are not obliged to make every decision in accordance with the wishes of the

46 A 12(2) CRC.

47 *General Comment 12* par 36.

48 *Idem* par 28.

49 *Idem* par 13.

50 *Idem* 132.

51 *Idem* 88.

child. Children's views are just one of the factors to be taken into account in decision making. Despite the fact that children's views are given due weight, other factors might still outweigh their views, resulting in children not accomplishing what they want.⁵² It is said that "children must be given their say, but they do not always [have to] get their way".⁵³

It is also important to understand that every situation, and the children involved in the situation, is unique, and, therefore, the extent of participation and the consideration given to the views of children will differ in each case. Different degrees of participation are appropriate for different children and different situations. Thus the question arises as to what the minimum requirement for participation would be so as to be in line with the constitutional imperative. In what follows, Hart and Shiers' models of participation will be discussed to assist in evaluating the level of participation by learners.

3.3 Levels of Participation

Hart⁵⁴ has developed a "ladder of children's participation" in an attempt to measure the authenticity of youth involvement in community-based activities. He indicates that the bottom three rungs are indicative of non-participation and are at the lowest level, that is, manipulation,⁵⁵ followed by decoration⁵⁶, and, in the third place, tokenism.⁵⁷ These three rungs are considered to be equal to non-participation and would not pass constitutional muster.

From rungs four to eight are different degrees of participation, with assigned, but informed, participation⁵⁸ at number four, followed by consulted and informed participation,⁵⁹ adult-initiated, shared decisions

52 Shier "Pathways to participate: openings, opportunities and obligations. A new model for participating in decision-making, in line with article 12 of the United Nations Conventions on the Rights of the Child" 2001 *Children & Society* 113.

53 Leach in Shier 2001 2 *Children & Society* 113.

54 In Varney "Splitting the ranks: youth as leaders, labourers and learners in US public space participation projects" 17 *Children, Youth and Environments* 650-651; in Shier 2001 *Children & Society* 109.

55 In Shier 2001 *Children & Society* 109 – "Children do or say what adults suggest they do, but have no real understanding of the issues, OR children are asked what they think, adults use some of their ideas but do not tell them what influence they have had on the final decision".

56 *Idem* 109 – "Children take part in an event, e.g. by singing, dancing or wearing T-shirts with logo's on, but they do not really understand the issue".

57 *Idem* 109 – "Children are asked what they think about an issue but have little or no choice about the way they express those views or the scope of the ideas they can express".

58 *Idem* 109 – "Adults decide on the project and children volunteer for it. The children understand the project and know who decided they should be involved and why. Adults respect their views".

59 *Idem* 109 – "The project is designed and run by adults but children are consulted. They have a full understanding of the process and their opinions are taken seriously".

with children participation,⁶⁰ child-initiated and directed participation,⁶¹ and, at the highest level, child-initiated, shared decisions with adult participation.⁶²

The aim is to facilitate opportunities where everyone can participate in an authentic way, avoiding the categories indicated as non-participatory. Further, the aim is not necessarily to ensure that children are participating at the highest level of their competencies. Rather, it is a matter of allowing them the opportunity to participate at different levels. The child must also be in a position to choose freely whether he or she wants to participate.⁶³

Shier⁶⁴ builds on Hart's "ladder of children's participation" and arrives at an alternative model with five levels. He asks three questions on every level to assist in gauging the level of participation, and where to improve. If the answer is "Yes" to a particular question, one can then move to the next question. The questions answered in the affirmative on each level indicate how much progress has been made at a particular level.

Level 1: Children are listened to. What this level entails is that, if children express views of their own accord, the responsible adults will listen to their views with due care and attention. The three questions are as follows: Are you ready to listen to children? Do you work in ways that enable you to listen to children? Is it a policy requirement that children must be listened to?

Level 2: Children are supported in expressing their views. On this level, adults are committed to taking positive steps to elicit children's views and to support them in expressing those views. However, there are no guarantees that the views of the children will be taken into account to influence decisions. The questions for this level are the following: Are you ready to support children in expressing their views? Do you have a range of ideas and activities to help children express their views? Is it a policy requirement that children must be supported in expressing their views?

Level 3: Children's views are taken into account. In this instance, children's views are not only elicited, but are also taken into account in decisions. To be in line with the provisions of article 12 of the UNCRC, decision makers should at least reach level three and be able to answer the following questions in the affirmative: Are you ready to take children's views into account? Does your decision-making process enable you to take children's views into account? Is it a policy requirement that

60 *Idem* 109 – "Adults have the initial idea but children are involved in every step of the planning and implementation. Not only are their views considered, but they are also involved in taking the decisions".

61 *Idem* 109 – "Children have the initial idea and decide how the project is to be carried out. Adults are available but do not take charge".

62 *Idem* 109 – "Children have the ideas, set up the project, and invite adults to join with them in making decisions".

63 *General Comment 12* par 22.

64 Shier 2001 *Children & Society* 110-116.

children's views must be given due weight in decision making? Educators and school governing bodies should ensure that they can answer the above nine questions in the affirmative before they implement practices and policies. Shier is of the opinion that if they are unable to do that, they do not meet the minimum requirements for giving effect to the child's right to participation in terms of article 12 of the UNCRC.⁶⁵

Level 4: Children are involved in decision-making processes. On this level, a transition is made from mere consultation to active participation in decision making. The children are involved in the processes of making actual decisions. The relevant questions are the following: Are you ready to let children take part in your decision-making processes? Is there a procedure that enables children to take part in decision-making processes? Is it a policy requirement that children must be involved in decision-making processes?

Neither the UNCRC nor the CA prescribe that children should be involved in decision making, but merely that their views should be considered and given due weight. The South African Schools Act⁶⁶ (SASA) provides that children should be consulted in drafting the code of conduct. However, SASA does not prescribe the frequency or extent of consultation or that the views of the learners should be given due weight.⁶⁷ In addition, if a child is suspended, the suspension will only be enforceable once the learner has been given the opportunity to make representations to the school governing body.⁶⁸ Again, no guidelines are provided to ensure that school governing bodies, which consist mainly of lay persons, and sometimes even illiterate people, and not experts in children's rights, properly afford learners the opportunity to participate in accordance with the constitutional standards.⁶⁹ Section 23(2)(d) of SASA makes provision for learners from grade eight and higher to be members of the school governing body. This affords only older learner representation in decision-making powers through representatives. However, section 32(2) curbs their decision-making power by providing that minors on the school governing body are not allowed to vote on any resolutions which impose liabilities on the school or third parties.⁷⁰ In

65 *Idem* 113.

66 84 of 1996.

67 S 8(1) SASA.

68 S 9(1) SASA.

69 Van Wyk "Perceptions and practices of discipline in urban black schools in South Africa" 2001 *SA J of Ed* 200; Karlsson "The role of democratic governing bodies in South African schools" 2002 *Comp Ed* 332; Van Wyk "School governing bodies: the experiences of South African educators" 2004 *SA J of Ed* 50-54; Mashau, Steyn, Van der Walt & Wolhuter "Support services perceived necessary for learner relationships by Limpopo educators" 2008 *SA J of Ed* 415.

70 Thus the minors will not be able to, for instance, impose a fine on a misbehaving learner, vote on the amount of damages due to the school by a learner who vandalised the school or decide on the appointment of a social worker, from school funds, to deal with learners with disciplinary problems.

some schools, learners are not even allowed to take part in these discussions.⁷¹

Shier⁷² highlights the following advantages of children being involved in decision making as opposed to merely being consulted: the quality of service provision improves, children's sense of ownership and belonging increases, self-esteem increases, and empathy and responsibility increase. In this way, the groundwork for citizenship and democratic participation is laid, which thus helps to safeguard and strengthen democracy. He contends that the above-mentioned advantages can really only be achieved on level four – except for better service delivery, which can also be attained at the lower levels.

Level 5: Children share power and responsibility for decision making. Shier⁷³ points out that the distinction between levels four and five is rather a matter of degree. Although children can be actively involved in decision making on level four, they might still be without real power, because they might have the minority number of seats in a meeting. Therefore, to achieve level five fully, requires an explicit commitment on the part of adults to share their power. The decision to share power will be based on the risks and advantages of doing so. In addition to power sharing come the responsibilities for those decisions, which must be borne by the children as well. This model, however, recognises the need to ensure that children are not burdened with responsibilities they do not want to carry, or are unable to carry, owing to their developmental stage. It further recognises that adults are more likely to deny children developmentally appropriate degrees of responsibility than force them to take on too much responsibility. Adults should thus rather be cautioned to weigh up the possible risks and benefits of allowing children to take part in decision making and to be prepared to give children the opportunity when a suitable one arises. The guiding questions are: Are you ready to share some of your adult power with children? Is there a procedure that enables children and adults to share power and responsibility for decisions? Is it a policy requirement that children and adults share power and responsibility for decisions?

Shier's⁷⁴ model differs from Hart's model, in particular as regards the existence of a level where children make decisions on their own without reference to adults. This normally occurs when children act independently and manage themselves. It is not relevant for Shier's model, since his model focuses specifically on the interaction between adults and children. Shier also proposes this model as a useful tool for those working with children in order to develop action plans to improve child participation.

71 Phaswana "Learner councillors' perspectives on learner participation" 2010 *SA J of Ed* 106.

72 Shier 2001 *Children & Society* 114.

73 *Idem* 115.

74 *Idem* 115-116.

Thornberg⁷⁵ adds another dimension to child participation in negotiations and warns against “pseudonegotiation of non-conflict”. Here, the impression is created that there is negotiation and dialogue, but the fact of the matter is that there was no conflict to begin with. Thus, drafting classroom rules which include no bullying, no talking, no running and no teasing are agreed upon by everyone. However, there are no conflicting views and therefore no real negotiation is necessary. He also refers to “pseudo-negotiation as a deceptive game of school democracy”. Here, the starting point is one of conflicting opinions and the issue is brought to a formal class or school meeting, but the issue is not handled in an authentic, negotiable and democratic way, but in a non-negotiable and assertive way. Thus opinions which are not in line with the views and proposals of the educator receive no attention or consideration during the meeting. Educators dismiss opposing proposals by not allowing any discussion on the proposal, verbally dismiss the proposal outright or ask questions creating doubt such as “Do you really think that will work?”, accompanied by expressions of doubt in their voice and body language. Thornberg⁷⁶ states that it is very unusual to find instances where learners are actually able to carry out changes to existing school rules. Most of the explicit school rules are non-negotiable. It is therefore argued that rules pertaining to contentious issues, such as dress codes and hair styles, are determined by adults, or, if learners are involved, through pseudo-negotiations. However, he found that rules that are open to change are those related to learners’ play activities during breaks, such as rules on play activities. Educators are also sometimes open to temporary deviations from certain rules, but, again, it is in their discretion to allow these in this power asymmetry.⁷⁷

The above-mentioned models indicate that there are different measures to determine whether actual participation is taking place. These models should enable educators to gauge their own preparedness to allow children to participate in a constitutionally compliant way.

4 Implementation of the Right to Participate

As was mentioned above, the right to participate has many manifestations – such as the “right to be heard”, “the child’s voice” and “the child’s right to be consulted”. From the discussion thus far it should be clear that this right is quite complex and is multifaceted. Lundy,⁷⁸ however, cautions that these references to article 12 of the UNCRC run the risk of diminishing the full ambit of this right, and of consequently not affording children the full benefit of this right. Thus, the “right to be heard” can create the impression that it is sufficient to give children an opportunity to voice their opinions, but that there is no duty actually to

75 Thornberg “Rules in everyday school life: teacher strategies undermine pupil participation” 2009 *Int J of Children’s Rights* 403-404.

76 *Idem* 403-404.

77 *Idem* 403-404.

78 Lundy 2007 *British Educational Research J* 930.

listen to them and give their views due weight. This is further illustrated by the fact that article 13 of the UNCRC, which deals with the child's right to freedom of expression, is separated from article 12 dealing with the child's right to be heard. The latter right is not about providing children with a right to self-determination or merely to voice their opinion, but is concerned with the involvement of children in decision making.⁷⁹ Owing to the risk of unduly diluting the content of the right to participate, measures should be in place to ensure that, in implementing this right, attention is given to all its dimensions.

To counter the possible dilution of this right, Lundy⁸⁰ proposes a new model to conceptualise the right. She is of the opinion that the two key elements of the right are the right to express a view and the right to have the view given due weight. She avers that, to implement article 12, attention should be given to four factors, namely space, voice, audience and influence.⁸¹ In what follows, Lundy's model for implementing this right will be discussed with reference to the guidelines provided by General Comment No 12 and other relevant sources. In addition, the effectiveness of the retributive and restorative approaches to discipline in order to implement and give effect to the right to participate, will be evaluated.

4 1 Space: Children Must be Given the Opportunity to Express a View

"Space" refers to the fact that all children, including marginalised learners, must be given the opportunity to express their views, and in a safe environment. It should therefore be an enabling environment that encourages children to speak freely and voluntarily on matters affecting them.⁸² School programmes should be child-friendly and should provide "interactive, caring, protective and participatory environments" which will prepare children for "active roles in society and responsible citizenship within their communities".⁸³ The aim is to create a space where the self-esteem of learners can be built and to prepare them to take responsibility for their own lives.⁸⁴

79 Hodgkin & Newell 150.

80 Lundy 2007 *British Educational Research J* 933. Lundy also alludes to the interrelatedness of human rights and their impact on the interpretation given to the different rights, in particular non-discrimination (a 2 CRC, s 9 Constitution), best interests of the child (a 3 CRC, s 28(2) Constitution), the right to guidance (a 5 CRC), the right to seek, receive and impart information (19 CRC), and protection from abuse (a 19 CRC, s 28(1)(d) Constitution).

81 *General Comment 12* par 132-134.

82 *Idem* par 134(f); Lundy 2007 *British Educational Research J* 933-935.

83 *General Comment 12* par 114.

84 Lundy 2007 *British Educational Research J* 933-935; see also Sonn, Santents & Ravau "Hearing Learner Voice in health promoting schools through participatory action research" 2011 *Perspectives in Ed* 93-104 on the application of participatory action research in the Learner Voice Project. The methods included different activities such as learners taking photos of their

Unfortunately, children might be exposed to the risk of violence, exploitation or other negative consequences if they exercise their right to express their views. Consequently, special precautions should be taken to ensure measures are in place to protect children wishing to express their views. Child-protection strategies should therefore be in place, recognising the risks faced by some groups and the additional barriers some children have to conquer to obtain help and voice their opinions.⁸⁵

A safe space, conducive to exercising the right to participate, is created by properly preparing the child by informing him or her of the right to be heard, of the impact of his or her views on the outcome, and of the right to be heard in person or through a representative, and of the consequences of this choice.⁸⁶

The Committee on the Rights of the Child encourages a dialogue with the child, rather than a one-sided examination.⁸⁷ However, if a hearing is necessary, the child should be prepared adequately by the decision makers with regard to how, when and where the hearing will take place and who the participants will be. The child's views on these issues have to be taken into account as well.⁸⁸

In sum, a safe environment would therefore be free from intimidation, hostility, insensitivity or any inappropriate conduct that is not in line with the child's age and maturity. The provision of adequate, child-friendly information, adequate support for self-advocacy, appropriately trained staff, and child-friendly venues for hearings or alternative processes are means to ensure a safe space where the child will be able to express his or her view.⁸⁹

4.1.1 Retributive Discipline and the Creation of a Space Conducive to Expressing Views

A number of authors discuss the main features of the retributive approach to discipline as follows:⁹⁰ In retributive discipline, attention is given to the establishment of rules and to adherence to due process. The creation of rules and accompanying punishment for transgressions are the only prevention strategies. Retributive discipline is thus rather reactive in nature and focuses on reactive actions for dealing with

environment and school to help them voice their concerns and views. In the process, learners were able to come to terms with difficult social issues and to voice their opinions and frustrations.

85 *General Comment 12* par 134(h).

86 *Idem* par 41.

87 *Idem* par 43.

88 *Idem* par 41.

89 *Idem* par 34.

90 Hopkins "Restoring justice in schools" 2002 *Support for Learning* 145; Cavanagh "Creating schools of peace and non-violence in a time of war and violence" 2009 *J of School Violence* 68-70; Reimer "An exploration of the implementation of restorative justice in Ontario public schools" 2011 *Can J of Educational Administration and Policy*.

misconduct that has already occurred. The focus is on being consistent and on observing rules, rendering it an inflexible process. Misbehaviour is defined as the breach of school rules or as "letting the school down". The main aim of the process is to determine who is to blame and who is guilty of what misconduct, that is, in finding out what happened and what the learner did. An adversarial process is followed and the relationships are also adversarial in nature.⁹¹ Once a learner has misbehaved, the role of the learner, or of other learners, is to give evidence to determine guilt and not to provide views on how to solve the problem. To determine a suitable and consistent punishment is part of the main focuses of the retributive approach.

It is argued that an adversarial process and retributive system are not really suitable for creating a child-friendly space conducive to eliciting the views of children. Cavanagh⁹² found that learners who are in a retributive disciplinary system at school experience it as confusing, inconsistent, pointless, lacking in continuity, and a quick fix. Such learners are of the opinion that the system does not afford them the opportunity to talk and does not assist them in resolving problems so that they can be re-integrated into the school community and feel safe. They are of the opinion that the system plunges them into trouble rather than helping them to resolve their problems. The learners experience the system as being characterised by the determination of blame, by the destruction of relationships and by a general feeling of lack of control, or limited control, over most aspects of their lives. In addition, they feel that they are not accountable for their choices. Cavanagh⁹³ also found that labelling, shaming and name-calling are often used by educators who employ the retributive approach to discipline. Punishment often includes physical pain or other forms of unpleasantness.

Taking all the above into account, it would be fair to conclude that the space created in a retributive environment is not really child-friendly or inviting, or one that is created to ensure an environment conducive to the expression of personal views.

The Committee on the Rights of the Child agrees with these observations and states as follows:

Respect for the right of the child to be heard within education is fundamental to the realisation of the right to education. The Committee notes with concern continuing authoritarianism, discrimination, disrespect and violence which characterise the reality of many schools and classrooms. Such environments are not conducive to the expression of children's views and the due weight to be given to these views.⁹⁴

91 S 8(6)-(9) SASA. The procedures prescribed for a disciplinary hearing are very similar to those of a criminal trial, which is hostile in nature.

92 Cavanagh 2009 *J of School Violence* 68.

93 *Idem* 68.

94 *General Comment 12* par 105.

One of the consequences of an authoritarian approach also evident in schools is that learners are often not even consulted on the drafting of the code of conduct. This role of learners, parents and the school governing body is often usurped by educators, who one-sidedly formulate it.⁹⁵ In these instances, there is no space for learners to participate in the process, let alone participate in a safe space.

4 1 2 Restorative Discipline and the Creation of a Space Conducive to Expressing Views

Unlike the retributive approach, the restorative approach does not focus on adherence to rules, but is imbedded in values such as interconnectedness, respect, inclusion, responsibility, humility, honesty, mutual care, sharing, courage, empathy, trust, forgiveness, dependability, self-control, self-discipline, acceptance, responsibility, accountability, love and non-domination.⁹⁶ There is no single definition of restorative justice, but restorative justice practitioners are *ad idem* that these values are the building blocks for the development of restorative processes in order to make things as right as possible for those affected by harm.⁹⁷

Restorative justice principles can be used on a preventative level as well as in reaction to misconduct. In addition, they can be employed in formal processes pertaining to misconduct, in informal responses to less serious instances of misconduct, as well as in everyday management of behaviour in class.⁹⁸ A whole-school approach proves to be the most successful in changing the school's culture from punitive to restorative. Therefore, on a prevention level, time will be spent on the development of a culture that supports the development of positive relationships in the school. This can be achieved through the development of emotional intelligence, character education, values education, conflict-resolution education, widespread use of restorative language in school, sound behaviour and relationship management strategies, adults modelling positive relationships, support for staff's emotional health and well-being, and systems that support parent involvement.⁹⁹

Amstutz and Mullet¹⁰⁰ are of the opinion that conflict-resolution education focuses on finding a fair and acceptable solution to a problem,

95 Mncube "Democratisation of education in South Africa: issues of social justice and the voice of learners" 2008 *SA J of Ed* 83-84.

96 Amstutz & Mullet *The Little Book of Restorative Discipline for Schools. Teaching Responsibility; Creating Caring Climates* (2005) 25. Pranis *The Little Book of Circle Processes* (2005) 24; Pranis *Can J of Educational Administration and Policy* 5.

97 Reimer 2011 *Can J of Educational Administration and Policy* 5.

98 Warren & Williams *Restoring the Balance 2. Changing Culture through Restorative Approaches: the Experience of Lewisham Schools* (2007) 7.

99 Warren & Williams 10-11. Reimer 2011 4 *Can J of Educational Administration and Policy* 6. Conflict-resolution education teaches learners skills to help them solve problems actively and non-violently.

100 Amstutz & Mullet 20.

while the restorative justice approach “adds the additional layer of working on the relationship that was harmed or deterred”. It is therefore clear that the aim of a restorative approach is to build and reaffirm relationships on a prevention level, and to repair and rebuild relationships on a reactive level. Developing the necessary social and emotional skills necessary for learners to build and maintain positive relationships is therefore a critical aspect of this approach.¹⁰¹ The creation of a safe environment and of flourishing relationships for the whole school is the point of departure of a restorative approach to discipline.

On a reactive level, the restorative approach defines misbehaviour not as the breach of rules, but as emotional, mental and/or physical harm done to another person or group, by a person or group. Thus, it is mainly concerned with the violation of relationships. The focus in this approach is on problem solving by expressing feelings and needs and exploring avenues to meet those needs in the future. The process aims at developing empathy for the needs of both the offender and those adversely affected by the actions of the offender so as to ensure caring climates to support healthy communities.¹⁰²

It would be fair to conclude that children would most probably feel safe in an environment where the focus is on building and repairing relationships. To communicate and express views is an important building block in establishing and maintaining relationships. Therefore, a clear alignment exists between the child's right to participate and the restorative approach.

4 2 Voice: Children Must be Facilitated to Express Their Views

“Voice” implies that children must be facilitated to give their opinions. Thus it must be made easy and possible for children to express their views. First, this can be done through adults spending sufficient time on understanding the issues.¹⁰³ Those working with children should adapt the environment and working methods according to the child's capacities. Children should be empowered to convey their views. Thus enough time and resources should be made available to ensure that children are properly prepared and have the necessary confidence and opportunity to contribute their views. The children's different ages, levels of development and capacity should be kept in mind. This will have a direct impact on the level of support provided for every child.¹⁰⁴ Secondly, learners should be provided with child-friendly documentation and information on the issue at hand.¹⁰⁵ Thirdly, the necessary capacity

101 *Idem* 10.

102 *Idem* 25-32; Zehr *The Little Book of Restorative Justice* (2002) 32-36.

103 Lundy 2007 *British Educational Research J* 935.

104 *General Comment 12* par 134(e).

105 Lundy 2007 *British Educational Research J* 935.

should be built to elicit the views of children through child-led organisations.¹⁰⁶ Student organisations should therefore be encouraged to perform a constructive, participatory role in education.¹⁰⁷ Fourthly, adults should be trained to overcome their resistance to children's involvement in decision making.¹⁰⁸ Fifthly, younger children should be encouraged to participate through fun-filled activities.¹⁰⁹

With regard to student representation, Carrim¹¹⁰ warns against the danger of learners giving up "their own voices", with it then being assumed that the representatives will speak on their behalf. Moreover, research indicates that representatives often revert to speaking with "their own voices" and not those of their constituents. He avers that representation can result in an exercise of marginalisation and silencing of particular groups.¹¹¹ Therefore, special care should be taken to ensure that representatives are held accountable to those that they represent.

It should be highlighted that a clear distinction must be made between the child giving evidence and the child expressing his or her own views. The right to be heard deals with the right to express one's own views, and this right is afforded even to young children. General Comment No 7 on Implementing child rights in early childhood provides that:

[y]oung children should be recognised as active members of families, communities and societies, with their *own concerns, interests and points of view*¹¹² (own emphasis).

The concept of voice is thus different from merely relating what happened when misconduct occurred or testifying about events at a disciplinary hearing. It is about children's own views and about expressing their own needs. Processes must therefore be in place to ensure that this is as easy as possible for children to do.

4 2 1 Retributive Discipline and the Facilitation of Children's Opportunities to Voice Their Opinions

South African and international research indicates that learners are of the opinion that effect is not given to their right to participate in schools, since they are not involved, or are rarely involved, in rule-making, not even through the school council. They are also of the opinion that this

106 *Idem* 935.

107 *General Comment 12* par 113.

108 Lundy 2007 *British Educational Research J* 935.

109 *Idem* 935.

110 Carrim 2011 *Perspectives in Ed* 76-77.

111 See also Wyness M "Children representing children: participation and the problem of diversity in UK youth councils" 2009 *Childhood* 535-552 who expresses the same concerns.

112 *General Comment No 7* par 5.

situation will not change any time soon.¹¹³ They claim that there are normally no agreed procedures to challenge the fairness, necessity, relevance, ambiguity or inconsistency of rules. Furthermore, even if appeal procedures exist in school rules, it is often futile to appeal decisions of educators. They maintain that appeals, in even informal disciplinary matters or other issues in school, are seldom successful, because successful appeals would undermine the authority of the educators.¹¹⁴ It is clear that learners exposed to a retributive approach to discipline are not often afforded the opportunity to express their views. Those in a position of authority normally make the decisions without consulting the learners, and, if they are consulted, it is largely tokenistic in nature.

However, despite the lack of formal structures for learners to participate and voice their opinions owing to seemingly arbitrary authority, they acknowledge that they resort to other measures such as rule-breaking, strikes or other collective action to show solidarity with learners who have been punished. They also resort to rebellion, arguments with educators and challenging authority. Thus, in an effort to participate, and despite limited resources, they will still try to voice their opinions and so have an impact on the school's culture.¹¹⁵

Since educators are in an ideal position to facilitate the process of expressing views, their attitudes can easily influence learners' perceptions on whether they can voice their opinions freely. Educators shouting at learners and imposing corporal punishment negatively impact on learners' willingness and ability to express their views. Further, these actions do not encourage a two-way dialogue and do not facilitate the process of eliciting the views of learners.¹¹⁶ Learners often feel uneasy about questioning things and, in particular, the behaviour of educators, because they (the learners) are often accused of being cheeky or emotionally difficult if they do. Questions and comments by learners can also be construed as an attempt to undermine the authority of the educator. This inhibits learners from exercising their right to voice their opinions.¹¹⁷

Educators prefer to deal with disciplinary problems in a speedy and effective way by using, for instance, punishment. They are often under

113 See international research on this topic in Canada in Raby "Frustrated, resigned, outspoken: students' engagement with school rules and some implications for participatory citizenship" 2008 *Int J of Children's Rights* 83-84, 86; in Northern Ireland in Lundy 2007 *British Educational Research J* 929; in Sweden in Thornberg 2009 *Int J of Children's Rights* 395, 407-409; in the UK in Wyness 2009 *Childhood* 535-552; and in South Africa in Carrim 2011 *Perspectives in Ed* 77-78.

114 Raby 2008 *Int J of Children's Rights* 84-86.

115 Raby 2008 *Int J of Children's Rights* 86-87.

116 Lundy 2007 *British Educational Research J* 935; Hopkins 2002 *Support for Learning* 145; 2011 *Can J of Educational Administration and Policy* 4; Cavanagh 2009 *J of School Violence* 68-70.

117 Lundy 2007 *British Educational Research J* 934-935.

considerable pressure to complete the curriculum and believe that they do not have enough time to spend on lengthy disciplinary processes.¹¹⁸ Most educators find it difficult to take some time to remain impartial, ask sufficient and appropriate questions, listen, invite suggestions from learners, and allow learners to put forward their own suggestions on how to deal with disciplinary problems.¹¹⁹

The South African Schools Act¹²⁰ prescribes the establishment of a representative council of learners, from grade eight and higher, and the involvement of learner representatives on school governing bodies. It can therefore be argued that learners are not without recourse, and that formal structures exist to enable learners to voice their opinions and concerns. However, research indicates that, despite the existence of these structures, instances of internal¹²¹ exclusions are still prevalent in many schools, because learners are often not really afforded the opportunity to participate. Learners are sometimes not informed of meetings, are treated as guests with no say, are not allowed to take part in discussions, other than those directly involving learners, or are even explicitly requested to leave school governing body meetings when serious and controversial matters are discussed. Some educators are reluctant to recognise the representative council of learners as the only legitimate student body at schools, and are not keen on learners and parents taking decisions themselves. Parents on the school governing body, particularly in the rural areas, are reluctant to enter into discussions with minors during meetings.¹²² In some instances, particularly in black schools, representative councils of learners have been perceived as “troublemakers” and as potential threats that need to be treated with caution. Furthermore, in some schools, members of representative councils of learners are appointed by the educators or the school management team and are not elected by the learners, which can cast doubt on their standing in the school to represent the interests of learners. In addition, it is argued that learners do not have the capacity to contribute to discussions, are not mature enough, are not needed on the school governing body, should not be burdened with the responsibility of being a school governing body member, and that their role is to listen to discussions on behalf of the other learners and to report

118 Amstutz & Mullet 12.

119 Warren & Williams 14.

120 S 11 and 22(2)(d) CA.

121 “Internal exclusion” describes a situation where people are included in forums, but their views are dismissed, and, in reality, they are excluded from the decision making or activities of the forum; see also Mncube 2008 *SA J of Ed* 80; Phaswana 2010 *SA J of Ed* 107.

122 Heystek “Learner representatives in the governing bodies of secondary schools” 2001 3 *Acta Academica* 217, 207-230; Mncube 2008 *SA J of Ed* 77-90; Mabovula “Giving voice to the voiceless through deliberative democratic school governance” 2009 *SA J of Ed* 226-230; Carr & Williams “Representative council of learners” 2009 *SA J of Ed* 76-77; Mabovula “Revisiting Jurgen Habermans’s notion of communicative action and its relevance for South African school governance: can it succeed?” 2010 *SA J of Ed* 5-10; Phaswana 2010 *SA J of Ed* 105-122.

back to the learners on what the school governing body decided, even though they were not part of the decision-making process. Therefore, they do not always receive the same access to documents used in school governing body meetings as the other stakeholders.¹²³ It is thus clear that there is much resistance to accepting learner representatives, and that this impacts negatively on learners' right to participate.

SASA further provides for the appointment of an intermediary to assist child witnesses who have to testify at a disciplinary hearing.¹²⁴ This is indeed a positive step in the direction of facilitating the process of testifying. However, the decision to appoint an intermediary and the criteria to be used in this process have proven to be complex.¹²⁵ Unfortunately, the Act does not provide any guidance in this regard and it is left to the discretion of members of the school governing body, who are mostly laypersons, to decide whether or not it is necessary to appoint an intermediary. Thus, although a mechanism exists to help learners to testify under less stressful circumstances, implementation is lacking owing to the absence of legislative guidance. In addition, the aim of the appointment of the intermediary is only to ensure that the witness is not exposed to undue mental stress while testifying, and is not a process designed to ensure that the child's own views will be elicited.

It can thus be concluded that the retributive approach to discipline does not really facilitate a constructive process for ensuring that learners are in a position to voice their opinions. Although some formal structures may exist which allow learners to voice their opinions, numerous structural stumbling blocks exist, rendering the process of eliciting learners' views ineffective.

4 2 2 Restorative Discipline and the Facilitation of Children's Opportunities to Voice Their Opinions

On a preventative level, the values and philosophy of restorative justice are imbedded in learners. This is done through, among others, class

¹²³ Mncube 2008 28 *SA J of Ed* 82-83; Phaswana 2010 *SA J of Ed* 106, Nonguno in Phaswana 110; Mabovula 2009 *SA J of Ed* 226-230; Mabovula 2010 *SA J of Ed* 5-10; Carrim 2011 *Perspectives in Ed* 75-77.

¹²⁴ S 8(7)-(9) SASA.

¹²⁵ In the criminal justice system, the high courts and the Supreme Court of Appeal have had to pronounce on a number of occasions on the interpretation, practical implementation, and application of the section in cases of mentally challenged witnesses, on the proper balance between the interests of the child and the interests of the accused, and on the constitutionality of the provision. See *Klink v Regional Court Magistrate* 1996 BCLR 402 (SE); *S v Mathebula* 1996 4 All SA 168 (T); *S v Nagel* 1998 JOL 4098 (T); *Stefaans v S* 1999 1 All SA 191 (C); *S v Francke* 1999 JOL 4451 (C); *S v T* 2000 2 SACR 658 (Ck); *S v Hartnick* 2001 JOL 8576 (C); *S v Malatji* 2005 JOL 15716 (T); *Motaung v S* 2005 JOL 16071 (SE); *Dayimani v S* 2006 JOL 17745 (E); *Van Rooyen v S* 2006 JOL 16675 (W); *S v Mokoena* 2008 5 SA 578 (T); *Ndokwane v S* 2011 JOL 27316 (KZP); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC).

meetings and consultation to give content to the values which underpin the restorative justice approach. Circles are conducted to address the problems of the school community and to reintegrate suspended learners into the classroom. On a responsive level, restorative conferences, classroom conferences, individual intervention, peacemaking circles, victim-offender mediation, restorative discussions, mini conferences, restorative thinking plans, reconnection meetings, small-group support, peer mediation and other methods are used to address instances of harm. The method employed will depend on the seriousness of the offence and the circumstances of each case. There are thus different programmes, methods and practices for utilising restorative justice principles, and these are collectively termed “restorative practices”.¹²⁶

However, the key components of restorative practices are non-negotiable and include the child’s participation on a voluntary basis. Another important aspect of restorative practices is that the child receives support and information throughout the process and be able to take part in the process in an age-appropriate way.¹²⁷ The aim of the process is to determine what happened, what the consequences and harm caused by the conduct are, what should be done to solve the problem, what was learnt from it and what can be done differently in the future. These aims thus address feelings and require action to set wrongs right.¹²⁸

The restorative approach can be implemented through a thorough process facilitated by educators that engages those involved in a process of discussion and negotiation. Educators are thus required to use a process that makes it easy for children to express their views and voice their opinions. This approach is thus in line with the implementation of the child’s right to participate and meets the implementation requirement of voice.

4 3 Audience: The View Must be Listened to

“Audience” requires that the views of children must be listened to. Children should have an opportunity to communicate their views to an identifiable individual or body that has the responsibility to listen to the views of the child or group of children.¹²⁹ In addition, children’s views should be treated with respect. Adults should also be encouraged to provide children with opportunities to take the initiative in creating new ideas and activities.¹³⁰

¹²⁶ Reimer 2011 *Can J of Educational Administration and Policy* 30; Cavanagh 2009 *J of School Violence* 65-66; Warren & Williams 10; Amstutz & Mullet 46-72.

¹²⁷ Zehr 22-25.

¹²⁸ Zehr 38; Amstutz & Mullet 32.

¹²⁹ Lundy 2007 *British Educational Research J* 937.

¹³⁰ *General Comment 12* par 134(c).

4 3 1 Retributive Discipline and the Audience Children Receive to Voice Their Opinions

Children are of the opinion that their views are not listened to at school.¹³¹ Even if it is clear what the views of children are, there is no guarantee that their views will be communicated to adults, or, if they are communicated, that adults will accept their views and give effect to them.¹³²

Even learner representatives often feel that their views are not heard. It is also clear that adult members of the school governing body do not regard learners as equal partners in school governance. Such members are of the opinion that, since learners are children, they should be treated as such. Therefore, members of the representative council of learners are often not invited to school governing body meetings, and are only allowed to take part in discussions predetermined by the adults.¹³³ Mabovula¹³⁴ reports that, in his research, a respondent stated, in response to what the role of members of the representative council of learners is, that such members are those learners who are elected to represent other learners and are not there to raise complaints of dissatisfaction all the time. They are only allowed to raise certain issues, with the permission of the school management team, and are only expected to report back on what decisions were taken by the school governing body.

Alderson¹³⁵ found that tokenistic or “decorative” participation by learner representatives has as much or even more of a negative impact in schools than in schools that do not have a representative council of learners. It is thus clear that an authoritarian and retributive disciplinary approach is not really compatible with the concept of audience.

It is also clear that the retributive approach to discipline does not really afford learners a proper audience. Most schools in South Africa apply a retributive approach to discipline.¹³⁶ Therefore, effect is not given to the majority of learners' right to an audience.

4 3 2 Restorative Discipline and the Audience Children Receive to Voice Their Opinions

In a restorative approach, conflict and wrongdoing are recognised as interpersonal conflict which creates opportunities for teaching and

131 Lundy 2007 *British Educational Research J* 936.

132 Lundy 2007 *British Educational Research J* 934, 937; Wilson “Pupil participation: comments from a case study” 2009 *Health Ed* 92-93.

133 Mabovula 2009 *SA J of Ed* 226-230; Mabovula 2010 *SA J of Ed* 5-10; Carrim 2011 1 *Perspectives in Ed* 75-77.

134 Mabovula 2009 *SA J of Ed* 226-230; Mabovula 2010 *SA J of Ed* 5-10.

135 In Lundy 2007 *British Educational Research J* 938.

136 South African Human Rights Commission *Report of the public hearing on school-based violence* 2008 http://www.sahrc.org.za/sahrc/cms/publish/cat_index_26.shtml (accessed 2008-04-08) 21.

learning. Therefore, everyone with a stake in the matter is involved in communicating and cooperating with one another to address the harm caused by the wrongdoing. The objective of the process is to effect reconciliation and to acknowledge responsibility for choices. Special attention is given to relationships and the achievement of mutually desired outcomes. Thus everyone involved must be satisfied with the outcome.¹³⁷

To achieve these objectives, the facilitator of the restorative process has an obligation to listen carefully to the needs and proposals of all those involved in the process. In addition, care must be taken to ensure that everyone involved in the process pays attention to the contributions of the others. This is indeed one of the strengths of the restorative process, that is, it is structured in such a way that everyone involved receives a proper audience.¹³⁸

In a study conducted in a Canadian school, one of the educators responded as follows regarding the impact of a restorative approach to school discipline. "I've learned patience, learned listening, learned that everybody just wants to be heard."¹³⁹ This approach thus has the potential to teach educators to really listen to learners and to give effect to their right to participate.

4 4 Influence: The View Must be Acted upon, as Appropriate

Since due weight should be given to the views of the child, proper measures should be in place to assess the capacity of the child. If the child is found to have the required capacity in the circumstances, the decision maker "must consider the views of the child as a *significant* factor in the settlement of the issue" (own emphasis).¹⁴⁰ Influence therefore entails that appropriate action should be taken concerning the views of the child. The real challenge is thus not only to convince adults to listen to the views of learners, but also to take those views seriously. Learners should thus have a fair opportunity to persuade decision makers to include their views in the final outcome of the issue.

Children often complain that they give their views, but are never told what becomes of them.¹⁴¹ Article 12 of the UNCRC does not explicitly provide that the child has a right to receive feedback on the outcomes of the process, and on how his or her views were interpreted and used in decisions made.¹⁴² However, General Comment No 12 includes the right to feedback as an integral part of the child's right to be heard and participate. The extent of the consideration given to the child's views, as

137 Zehr 24-28; Amstutz & Mullet 30.

138 Amstutz & Mullet 30.

139 Reimer 2011 *Can J of Educational Administration and Policy* 32.

140 *General Comment 12* par 44.

141 Lundy 2007 *British Educational Research J* 938.

142 Shier 2001 *Children & Society* 113.

well as the consequences thereof, should be explained to the child. This is a measure designed to hold adults accountable and to ensure that the views of the child are not regarded merely as another formality in the process, but are considered with the necessary sincerity. In an effort to promote transparency, the Committee on the Rights of the Child recommends that this measure should be enforced by legislation. This information might "prompt the child to insist, agree or make another proposal" or to appeal. Thus, provision should be made for follow-up processes or other activities where appropriate.¹⁴³

4 4 1 Retributive Discipline and the Influence of Children on Outcomes

Lack of influence is unfortunately one of the major stumbling blocks in schools, according to learners. They are of the opinion that the issues they are allowed to influence are predetermined by adults, and that they (the learners) do not really have the opportunity to raise and bring their own issues to the table.¹⁴⁴

Furthermore, as far as discipline is concerned, those affected by the misconduct are not involved in the disciplinary process. The focus of the process is on the offender and not the victim. The principal, educator or disciplinary committee deals with the situation. Victims of misconduct are represented by those in a position of authority and are mere spectators in the process, often experiencing a sense of powerlessness. They are at best only expected to provide evidence to find the offender guilty and have no influence on the outcome of the process.¹⁴⁵

Sometimes, there are channels available to express views, but the adults responsible for carrying the message further do not do so or carry only a diluted message forward. For instance, members of representative councils of learners complain that the educators responsible for speaking on their behalf in other structures in schools do not properly represent them and their views, and decide what, and what not, to communicate to the management of the school; thus such members' influence is limited. Although not true of all schools, learners also complain that educators deliberately obstruct their participation by delaying decisions and participation. This is done by insisting that they wait for school governing body meetings to take place or by insisting on the compulsory use of English in meetings. The latter often presents problems for many learners for whom English is often their second language. In addition, they do not have direct access to the school governing body. In some instances, they must obtain the permission of the school management team before they may raise an issue at a school governing body meeting. It is clear, therefore, that unequal power relations between adults and

¹⁴³ General Comment 12 par 33, 45, 134(a), 134(i).

¹⁴⁴ Lundy 2007 *British Educational Research J* 934; Mabovula 2009 *SA J of Ed* 226-230; Mabovula 2010 *SA J of Ed* 5-10; Carrim 2011 *Perspectives in Ed* 75-77.

¹⁴⁵ Hopkins "Restorative justice in schools" 2002 *Support for Learning* 17 145.

learners are still playing a major part in learners' ability to participate and have an influence on outcomes. Some openly acknowledge that learners are only tolerated on the school governing body because it is government policy. Furthermore, owing to cultural practices and traditions, learners are in no position to command power or influence.¹⁴⁶

It is also clear that, although learners may be consulted on rules and regulations, such learners are not taken seriously by adults. In this regard, one boy acknowledges the consultation, but remarks, "They treat us like children and don't take us seriously."¹⁴⁷

Educators, on the other hand, complain that members of representative councils of learners do not always attend school governing body meetings, and that they only attend those meetings that will benefit them.¹⁴⁸ Wilson,¹⁴⁹ however, found that learners are uninvolved because they are of the opinion that they are unable to influence decisions – so they then choose not to be involved in the process.

On the other hand, in some settings, children complain about "consultation fatigue". They often respond to requests to hear their views, but protest that nothing tangible changes in their everyday lives.¹⁵⁰ Thus, consultation in these circumstances does not result in influence and are thus not compatible with the right to participate.

4 4 2 Restorative Discipline and the Influence of Children on Outcomes

The centre of attention in the restorative approach to discipline is the repair of social injury or harm. To put things right implies addressing not only the harm, but also the causes. Thus the concern is with the needs of all involved. However, the focus will fall, first and foremost, on the victim's needs. The approach also facilitates the reintegration of the offender and victims, where necessary, into the community and recognises them both as valuable members of society.¹⁵¹

Those affected by the misconduct are part of the whole process and must therefore have the opportunity to give their opinions as to how they think the harm might be repaired. Since they are part of the process, they experience first-hand their influence on the decisions that are being made. In addition, the process of negotiation and discussion continues until everyone involved is satisfied with the outcome. This does not mean that, once a wrongdoer has apologised for harm caused, everything is forgiven and everyone continues with their lives. The process includes

146 Mncube 2008 *SA J of Ed* 82-90; Phaswana 2010 *SA J of Ed* 105-122; Mabovula 2009 *SA J of Ed* 226-230; Mabovula 2010 *SA J of Ed* 5-1; Carrim 2011 1 *Perspectives in Ed* 75-77.

147 Carrim 2011 *Perspectives in Ed* 77-78.

148 Mabovula 2010 *SA J of Ed* 6.

149 Wilson 2009 *Health Ed* 93-95.

150 Lundy 2007 *British Educational Research J* 934, 937.

151 Zehr 22-32; Amstutz & Mullet 25-32.

being held accountable for one's actions. In the restorative approach, accountability is not equated with punishment, but is more interested in finding a solution to the harm caused and with the obligation on the part of the wrongdoer to make things as right as possible. However, it does not exclude punishment.¹⁵²

By employing a restorative approach, effect is given to the right to give one's own opinion on what the outcome of a decision or process should be. The focus is on what should be done to address the needs of the victim as well as the offender.¹⁵³ For example, the victim of bullying should have an opportunity to narrate the impact of the bullying. In addition, he or she should be afforded an opportunity to make recommendations on how these concerns and needs can be addressed. In doing that, the child not only has an opportunity to voice his or her opinion, but is also heard and has an opportunity to influence the outcome of the proceedings.

5 Conclusions and Recommendations

The right to participate is a multifaceted concept, and, in order to respect this right, all its elements should be present. There is a real risk of unduly diluting this right to one of merely listening to children without affording them the opportunity to voice their own opinions and to take part in decisions in an age- and developmentally-appropriate way.

Hart's and Shiers' models provide practical guidance that helps to evaluate the level of participation afforded to children. In implementing Shier's model of participation, level three must be reached to ensure that the international standard laid down in article 12 of the UNCRC is complied with. Thus children should not only be listened to, but should also be supported in expressing their views – and these views should be taken into account in decision making. It is also conceded that the international standard does not require children to be part of the decision-making process or to share in the power and take responsibility for decision making, represented by the last two levels of his model. However, Shier indicates that these last two levels will be beneficial for children, in the sense that they will improve service delivery, build self-esteem, create a sense of belonging, increase empathy and responsibility, and lay a proper foundation for citizenship and democratic participation.

In applying Lundy's model for the implementation of article 12, it is clear that the retributive approach to discipline does not meet any one of the four criteria laid down, because it does not create a safe space, children are not really afforded an opportunity to voice their opinions, there is no real audience, and children have no real, or hardly any, influence on the outcomes of decisions.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

In contrast, the point of departure in the restorative approach to discipline is the building of relationships and the creation of a safe space for children to voice their opinions. In addition, facilitators of the restorative approach have an obligation to listen to the views of children and to give them a proper audience. Moreover, children with a stake in a matter have a real opportunity to be part of the whole process and can influence the outcome of the decisions taken.

It is thus clear that the restorative approach to discipline satisfies all the criteria for respect of the right to participate. In addition, it also satisfies the two upper levels of Shiers' model for participation, namely involvement in decision making and sharing power and responsibility for decision making. Thus children are not only afforded the full benefit of the proper implementation of the right to participate, but will also have the added benefits of participation alluded to by Shier.

Some of the deficiencies in SASA were also highlighted. It is clear from the discussion above that the current provisions of SASA do not facilitate the proper implementation of the child's right to participate. The necessary amendments should therefore be made to ensure that children's rights to participate is duly recognised in the drafting of a code of conduct. In addition, the child's right to participate must also be given due regard in any strategies for the prevention of misconduct employed by the school, in classroom-management strategies, in any reactive strategies for dealing with less serious instances of misconduct, and in any formal action for dealing with serious instances of misconduct. It is also important that all the children involved in a situation be afforded an opportunity to participate and voice their opinions. Care should thus be taken to ensure that the focus is not only on the perpetrators, but also on all learners in the school.

It is therefore argued in conclusion that the restorative approach to discipline is the most appropriate approach to follow to ensure the proper implementation of the right to participate. It was also illustrated that the retributive approach to discipline is not conducive to the implementation of the child's right to participate. It would thus be possible for a child exposed to a retributive disciplinary approach to argue that such approach is unconstitutional and should be changed to make provision for the learner's right to participate. The legislator, school governing bodies and educators thus have to revisit current legislation, policies and practices to ensure that these will pass constitutional muster if challenged on the ground of the child's right to participate.