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Artikels/Articles

Editorial

Special edition: Education Law in a Democracy

The quality of education has been the focus of much that has been written and spoken about the South African public school system over the past number of years. Commentators regularly express their concerns about deficiencies in the system, ranging from poor teaching, high drop-out rates and ineffective management. Education law specialists should use every occasion to make constructive contributions. This issue provides such an opportunity.

The year 2013 marks some significant attempts by the National Department of Basic Education to curb the apparent lack of service provision by many educators. Though not implemented yet, the signal is clear when the Minister announces the possible classification of education as an essential service, and the intention to install electronic monitors in schools in an attempt to ensure that educators arrive and leave on time. Critics of these measures rightly point out that they will not necessarily ensure the much needed elevation of the quality of teaching.

Part of the public school scenario are those schools where high quality education is the order of the day. Comparing well with any creditable international standard, these schools stand out as pillars of hope, annually turning out thousands of excellently prepared learners from all ethnic groups, ready to enroll for tertiary education to eventually serve the country.

This special issue of *De Jure* under the theme of "Education Law in a Democracy" was initiated and steered by members of the South African Education Law Association. In the topics covered, attention was given to a wide variety of focal points related to the application of the law in the education sphere. Authors moved beyond mere criticism of a cripple system. After extensive elucidations of the education theory and the legal framework within which education functions, suggestions and practical recommendations follow that have the potential to rectify, or at least partially mend certain deficiencies, if effectively implemented by the relevant authorities.

Various articles in this volume focus on the implications of the South African Constitution, fundamental rights and democracy for education. Within this category of articles, specific attention has been given to the rights and duties of stakeholders such as school principals, school governing bodies, parents and learners. Equality rights are emphasised in those articles focusing on gender and inclusive education. Language and labour rights are also analysed to demonstrate how they impact on respectively learners and educators.

Matters pertaining to the common law, such as delictual liability, contractual agreements in employment and fair procedures related to learner discipline have been elucidated in some articles. Valuable contributions from international scholars have been included, some in collaboration with South African co-authors. This international perspective includes discussions of the latest education law developments in Germany, the United States and the United Kingdom.

I thank all the reviewers for their contributions to meticulously assess the thirty manuscripts that were submitted, thus enabling us to put together an excellent volume, consisting of nineteen articles. The editorial board deserves a special word of appreciation: Proff Johan Beckmann (UP), Elda de Waal (NWU, Vaal Campus), Rika Joubert (UP), Pierre du Plessis (UJ), Marius Smit (NWU Potchefstroom Campus) and Dr Erika Serfontein (NWU, Vaal Campus). The secretarial assistance of Ms Marilize Cohen was outstanding, while the task of final technical editing was skillfully and comprehensively completed by Mss Claire-Alice Smith and Willemien Aukema-Heymans, thus ensuring this high quality special issue of *De Jure*.

Prof JP Rossouw
Guest editor

The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law

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OPSOMMING

Die Rol van die Howe om die Reg op Basiese Onderwys in 'n Demokratiese Suid-Afrika te Verwesenlik: 'n Kritiese Ontleding van Onlangse Onderwysregspraak

Hierdie artikel ontleed onlangse regspraak aangaande die reg op basiese odnerwys. Die "vier A-skema", wat deur 'n voormalige spesiale rapporteur op onderwys van die Verenigde Nasies voorgestel is en deur die Komitee op Sosiale-, Ekonomiese- en Kulturele Regte in sy *Algemene Kommentaar 13* ondersteun is, vorm die raamwerk vir die ontleding. Die vier A-skema omvat beskikbaarheid (*availability*), toeganklikheid (*accessibility*), aanvaarbaarheid (*acceptability*) en aanpasbaarheid (*adaptability*). 'n Kritiese ontleding van die regspraak dui aan dat daar probleme in die lewering van basiese onderwys in Suid-Afrika bestaan met betrekking tot elkeen van die vier verwante elemente. Sommige van die hindernisse het betrekking op die versuim om noodsaaklike vereistes soos infrastruktuur, skryfbehoeftes en vervoer te voorsien. Ander uitdagings hou verband met geskille rakende die magte van skoolbeheerliggame en skole teenoor die magte van provinsiale departementshoofde, lede van provinsiale uitvoerende komitees en, ten opsigte van nasionale beleid, die nasionale Minister van Basiese Onderwys. Die artikel wys dat litigasie 'n belangrike rol speel om die reg op basiese onderwys te verwesenlik, geskille te besleg en die toewysing van dienste en middele aan leerders te verseker. Die slotsom is dat die soms noodsaaklik en gepas is om die geregtelike roete wat binne 'n grondwetlike demokrasie beskikbaar is, te volg om die reg op basiese onderwys te verwesenlik.

1 Introduction

The delivery of the right to a basic education in a democracy is a task that engages all arms and spheres of government. Once the legislative framework has been established, the executive must ensure that the right is achieved through practical measures such as the provision of sufficient schools, classrooms, transport where necessary, properly trained teachers, appropriate learning materials and the delivery of teaching and assessment in an environment conducive to the endeavour. Due to constitutional and legislative mandates, the effective provision of a basic education requires a co-operative governance approach involving the national and provincial departments as well as a partnership with school governing bodies which are democratic, largely independent entities. In situations where the executive fails to carry out

its mandate or when there are disputes between the different spheres of school governance, the third arm of government may be engaged, namely the judiciary. This article evaluates recent case law developments regarding delivery of the right to a basic education. A number of important cases were brought before the superior courts during the years 2010 to 2012. These cases reveal a great deal about the progress and the impediments to fulfilling the right to a basic education. The "four A-scheme", established by the former UN Special Rapporteur on Education[1] and endorsed by the Committee on Social, Economic and Cultural Rights in its *General Comment 13*[2] is used in this article as the framework for the analysis: The four A-scheme comprises availability, accessibility, acceptability and adaptability. A critical analysis of the case law demonstrates that there are problems in the delivery of basic education in South Africa in relation to each of these four interrelated features. Some of the impediments relate to non delivery of essential ingredients such as schools, stationery, textbooks, teachers and transport. Other challenges relate to disputed powers of school governing bodies and schools versus those of the provincial head of departments, members of the provincial executive councils (MECs) and, with regard to policy, the national Minister of Basic Education. The article demonstrates that litigation, or in some cases, the threat of it, does play an important role in the realisation of the right to a basic education, through resolving disputes and ensuring the allocation of services and resources for learners. It is concluded that it is sometimes necessary and appropriate to use the judicial avenue which is available in a constitutional democracy towards the achievement of the right to a basic education.

2 The Nature of Basic Education

It is important to consider the meaning and ambit of the right to a basic education. In the matter of *The Governing Body of the Juma Musjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)*,[3] the judgment of the Constitutional Court threw a direct light on the nature of the right to basic education.

1 Katarina Tomasevski was the United Nations (UN) Special Rapporteur on the Right to Education from 1998 to 2004. She developed the 4 A-scheme and the UN Committee on Social, Economic and Cultural Rights (CESCR) adopted it in their *General Comment on the Right to Education*, issued in 1999. Tomasevski subsequently developed the scheme in her publications: See Tomasevski *Human Rights Obligations: Making education available, accessible, acceptable and adaptable* (2001); *Human Rights Obligations: The 4-A scheme* (2006).

2 CESCR *General Comment 13* (1999). UN Bodies such as the Committee on Social, Economic and Cultural Rights, and the Committee on the Rights of the Child issue *general comments* on a fairly regular basis. *General comments* provide an authoritative interpretation of the right contained in the articles of Conventions and they are valuable contributions to the development and application of international law. See further www.crin.org/NGOGroup/CRC/GeneralComments (accessed on 2012-03-12).

3 2011 7 BCLR 651 (CC).

Nkabinde J, who penned the judgment on behalf of a unanimous court, stated the following:

> It is important, for the purposes of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.[4]

The judgment furthermore refers to the provisions of section 3(1) of the South African Schools Act[5] (SASA) which makes school attendance compulsory for children from the age of 7 years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first. The judgment views this legal provision to be "following the constitutional distinction between 'basic' and 'further' education".[6]

The court's confirmation of the fact that the right to basic education is an immediately enforceable right, not subject to progressive realisation is of course fairly self-evident from the reading of the relevant section in the Constitution of the Republic of South Africa, 1996 (the Constitution) itself, and many authors have already interpreted it this way.[7] Nevertheless, there had been concerns that the court might prefer to opt for a narrower interpretation of the right.[8] Furthermore, in *Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo*[9] Moseneke DCJ stated that the power to decide on language policy in schools must be understood

4 Par 37.
5 84 of 1996.
6 Par 38. It would have been preferable if the judgment had not linked "basic education" so closely to s 3(1) SASA as the courts have yet to pronounce on whether the right of a child who is older than 15 years and beyond grade 9 is still entitled to enjoy and enforce his or her right to basic education. However, the judgment does not close the door on that debate.
7 Veriava & Coomans "The Right to Education" in *Socio-Economic Rights in South Africa* (2005) (eds Brand & Heyns) 60; Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 9.
8 Berger "The Right to Education under the South African Constitution" 2003 *Columbia LR* 614 638; Seleoane "The Right to Education: Lessons from Grootboom" 2003 *Law, Democracy and Development* 137 140-142; Woolman & Bishop in *Constitutional Law of South Africa* 2nd Edition, Original Service 11-07 (eds Woolman *et al*).
9 2010 2 SA 415 (CC).

> within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress.[10]

This reference to "progressively available and accessible" was concerning, but the context and the references to practicability and historical redress suggested that the court's reference to progressive availability and accessibility related to education in the language of the learner's choice,[11] and not to the right to a basic education in general.[12] The *Juma Musjid* judgment has now made it clear that the court's interpretation of the right to a basic education in section 29(1)(a) is that it is immediately enforceable, subject only to limitation in terms of section 36 of the Constitution.

However, the legal claim that the right to a basic education is immediately enforceable does not wave a magic wand. The delivery of basic education to all of South Africa's children, particularly in the context of the legacy of our apartheid history is a gargantuan challenge.[13] There are huge backlogs in infrastructure, there is an ever-increasing demand for more schools and classrooms amongst a socially and geographically mobile population, there are acute concerns about quality.[14] These are some of the issues that have caused litigants to prepare and bring court applications in recent years, and it is these efforts, and their role in the struggle for the right to a basic education that the remainder of the article considers and evaluates.

3 The Four A-scheme

The cases considered in this article are divided according to the interrelated and essential features of education to be provided to all children as set out by the United Nations Committee on Economic, Social and Cultural Rights concerning the right to education in their *General Comment 13*.[15] These form a useful benchmark against which to measure government's performance towards the realisation of the right to

10 Par 61.
11 S 29(2) Constitution.
12 S 29(1)(a) Constitution.
13 This description is used by Mbha J in *Governing Body of Rivonia Primary School v MEC for Education, Gauteng Province* [2012] 1 All SA 576 (GSJ) par 31. See further Fleisch *Primary Education in Crisis* (2007) 1-2; Spaull *A Preliminary Analysis of SACMEQ III South Africa* (2011) 1: "The strong legacy of apartheid and the consequent correlation between education and wealth have meant that, generally speaking, poorer students perform worse academically".
14 Woolman & Fleisch 114: "Hard as it may seem to believe this rich nation often finishes last when 45 to 50 developing nations are compared with one another". See further Bloch *The Toxic Mix: What is Wrong with South Africa's Schools and How to Fix It* (2009) 58-87; Taylor *Priorities for Addressing South Africa's Education and Training Crisis: A Review Commissioned by the National Planning Committee* (2011).
15 CESCR *General Comment 13* (1999).

education.[16] The four A-scheme is used as a framework for the analysis in this article because it embodies international law principles,[17] and although South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights,[18] the international law context remains an important consideration in measuring South Africa's performance regarding the fulfilment of the right to a basic education.[19] This is also relevant to a discussion of case law due to the fact that section 39(2) of the Constitution enjoins the courts, when interpreting a right in the Bill of Rights, to consider international law. Furthermore, a court must prefer any reasonable interpretation of the law that is consistent with the international law over any alternative interpretation that is inconsistent with international law.[20] *General Comments* issued by UN bodies have been utilised by the Constitutional Court.[21]

As explained in *General Comment 13*, availability requires that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.[22] Accessibility requires that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.[23] Acceptability has to do with the form and substance of education, including curricula and teaching methods.[24] This is where quality comes into the equation. Adaptability directs that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students[25] within their diverse social and cultural settings.[26]

When considering the appropriate application of the above-mentioned "interrelated and essential features" the *General Comment* proposes that the best interests of the student shall be "a primary consideration".[27] This is a child-centred consideration, and accords with the same principle in the Convention on the Rights of the Child, which has been ratified by

16 Malherbe "Education Rights" in *Child Law in South Africa* (2009) (ed Boezaart) 402.
17 Beiter *The Protection of the Right to Education by International Law* (2006).
18 The South African government signed the treaty on 3 October 1994, and although there have been many commitments to ratify, the UN ratification status chart 2012 reflects that it had not been ratified at the time of writing (*http:treaties.un.org/pages/viewdetails* (accessed 2012-12-17)).
19 Mbazira *Litigating Socio-Economic Rights in South Africa* (2009) 15.
20 S 233 Constitution.
21 See, for example, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 31.
22 CECSR *General Comment 13* par 6(a).
23 CECSR *General Comment 13* par 6(b). Accessibility has three overlapping dimensions: Non-discrimination, physical accessibility and economic accessibility.
24 CECSR *General Comment 13* par 6(c).
25 The word "student" is used in the *General Comment* and therefore repeated here, but in the remainder of this article the word "learner" is used in line with the terminology introduced by SASA.
26 CECSR *General Comment 13* par 6(d).
27 *Idem* par 7.

South Africa.[28] This is a weaker standard than set out in section 28(2) of the Constitution which asserts that "a child's best interests are of paramount importance in every matter concerning the child". Due to the "expansive guarantee" provided by section 28(2),[29] it is clear that this principle – which has also been interpreted by the Constitutional Court to be a self-standing right[30] – is a central feature in litigation relating to children's right to education. Its importance emerges from the first case to be discussed under the first A in the four A-scheme, namely availability.

3 1 Availability

In addition to making the important statement mentioned in the introduction of this article regarding the nature of the right to basic education, the *Juma Musjid* judgment also reflected the importance of section 28(2) of the Constitution – the child's best interests clause – in relation to the right to a basic education. The judgment links to availability of education. The school was a public school on private property, owned by the Juma Musjid Trust in KwaZulu-Natal. The trust permitted the school to occupy the property subject to a lease agreement between the school and the trust. The province and the trust, however, failed to agree on the terms of the lease. The trust then successfully applied to the High Court to evict the school from the premises. The matter was thereafter taken on appeal to the Constitutional Court by the governing body of the school.

The Constitutional Court found that although the responsibility for making available the facilities for education falls squarely within the remit of the MEC for Basic Education (and the MEC was found to have failed dismally in that duty), the trust, which had involved itself by allowing the school to operate on its premises also bore a negative responsibility not to impair the children's right to education. This, significantly, indicated recognition by the Constitutional Court of the horizontal application of the right to education.[31] However, the court found that the trust had acted reasonably, having made several attempts to solve the problems by engaging with the Department before seeking the eviction order. The Constitutional Court found that the court *a quo* had erred in finding that the trust owed no constitutional duty to the children, and also in granting the eviction without properly considering

28 Adopted by the UN General Assembly 1989-11-20, entered into force Sept 1990, ratified by South Africa 1995-06-16.

29 *Sonderup v Tondelli* 2001 1 SA 1171 (CC) par 29.

30 *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17.

31 The State's responsibility to fulfil any rights obligation, including the right to a basic education, applies vertically – operating between the individual rights bearer and the state. The horizontal application here refers to the responsibility that accrues to a private entity – the Trust – and the rights bearers.

the effects that its decision would have on the children's best interests.[32] Although the case ended with the children having to leave the Juma Musjid Primary School and being placed in alternative schools, the case has set a new level of protection required for children attending public schools on private property. This reflects the Constitutional Court's recognition of the importance of the right to a basic education. It further indicates how the judicial arm of government must be engaged through considering children's best interests when deciding on evictions from schools. In an interim order, the court enjoined the parties to attempt "meaningful engagement" to determine whether it was possible for the parties to reach agreement and thus render eviction unnecessary.[33] The parties were unable to reach agreement, and eviction was thus ordered, with a requirement that the children would all be placed appropriately in alternative public schools. Although the engagement was not fruitful, it was a significant indication that the court wanted the parties to find their own solution to the problem, if at all possible.

Availability of education is also an issue that was engaged in the case which is commonly referred to as the "mud schools" case.[34] Seven schools in the Eastern Cape had battled for almost a decade to get any attention from the provincial department about their severe infrastructure problems. Schools must be maintained in a condition that makes teaching and learning possible.[35] The schools faced problems of firstly, dilapidated mud buildings (in some cases roofs missing and classes being held in neighbourhood dwellings), secondly, no running water or sanitation and thirdly inadequate seats and desks for the number of learners attending school. The Legal Resources Centre in Grahamstown took up the matter on behalf of the seven schools, and the Centre for Child Law which acted in the public interest, and on behalf of other learners in schools similarly situated. The national Minister of Basic Education (in addition to the provincial MEC) was joined as respondent and the relief was framed to benefit not only the 7 schools but all schools suffering from similar infrastructure backlogs. The matter was settled, resulting in a far-reaching "memorandum of understanding" which pledged a total of R8.2 billion over a 3 year period, specific amounts earmarked for the 7 schools, a plan for infrastructure to be managed by

32 The court made reference to its earlier judgment *S v M (Centre for Child Law as amicus curiae)* 2007 2 SACR 539 (CC) which established the requirement that a court, when considering the sentencing of a primary caregiver, must pay specific attention to the best interests of the children in the weighing exercise.

33 South African courts have adopted "meaningful engagement" to force parties to find their own solutions in housing cases, such as *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road and 197 Main Street v City of Johannesburg* 2008 3 SA 208 (CC); *Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 BCLR 847 (CC).

34 *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/10. The memorandum of understanding between the parties was signed 2011-02-04.

35 Department of Basic Education *The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment* (2010) 9.

the national Department of Basic Education, undertakings about interim arrangements such as prefabricated buildings and the installation of water tanks. An important term of the agreement provides that if there should be a serious breach of the agreement, the parties can, giving two weeks notice, go back to court to force compliance. The Legal Resources Centre is monitoring compliance with the order. The interim measures have been put in place, but there has been some delay in the commencement of the long term plan. Thus far the parties have managed to keep the case out of court.

The "mud schools" litigation became necessary because repeated requests by the seven schools had fallen on deaf ears. Once faced with a legal challenge, however, the government saw fit to enter into a significant memorandum of agreement. This proves that sometimes litigation – in this matter the application went no further than an initial exchange of papers – plays the role of getting the attention of the executive. This is valuable where even repeated written requests can be ignored amongst the many competing claims and demands that the executive must deal with. The Minister acknowledged her responsibilities and, through her officials and representatives, responded with a plan which was subsequently reflected in the memorandum of agreement. Thus, whilst litigation is often seen as adversarial, it can open the door to an appropriate exchange with the executive, which results in improved access to the right to a basic education.[36]

Another infrastructure case which was settled during 2012 was Equal Education's application, launched by the Legal Resources Centre on their behalf, to force the Minister to draft norms and standards. After an initial demur, the Minister agreed to publish norms and standards as part of a court recorded settlement. The first draft was issued for public comment and has met with much criticism from the education sector, but nevertheless, the process of drafting standards is now underway.[37]

Impediments to availability of education also include the failure to provide educational materials and stationery. This was the theme of a matter in which the Centre for Child Law, represented by Legal Resources Centre, Grahamstown, entered as *amicus curiae*. In *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape*[38] the applicants successfully sought interim relief pending review of a procurement decision, namely that the Department would be interdicted from entering into any agreements with other stationery suppliers in relation to this particular tender. The tender related to the provision of school stationery for the 2011 school year to 2,380 schools, affecting 688,482 learners. Freedom Stationery had tendered but later learned that the

36 For a more detailed discussion on non-court centric approaches in the achievement of the right to a basic education see Isaacs "Realising the Right to Education in South Africa: Lessons from the United States of America" 2010 SAJHR 356 374-379.

37 See further http://www.equaleducation.org.za (accessed 2012-12-17).

38 Unreported (59/2011) [2011] ZAECBHC1 (2010-03-10).

tender had been cancelled due to no acceptable tenders being received, their tender having been rejected due to a shortcoming in their tax affairs. The Department had in the meanwhile concluded a contract with another service provider, bypassing the tender process, ostensibly because they were concerned about the fact that the school year had already started. Before the materials could be delivered, the urgent application was brought. The *amicus* argument was focused on ensuring that, whatever the outcome of the tender dispute which would ultimately be resolved by the review application in due course, the children should not be left without stationery as this was a critical part of the right to education. The *amicus* argued that the application for interim relief should be dismissed. Revelas J found that the problems were of the department's making, and she was not prepared to give an order that would appear to favour them.

The outcome of this matter was disappointing in two respects. Firstly, in response to the plea of the *amicus* that a plan should be made to ensure the children's stationery was delivered timeously, the judge stated that she assumed some interim plans had been made and that "charities could be approached for interim assistance in providing stationery". This is in stark contrast to the court's approach in another High Court matter where a provincial department of Education had failed to provide the basic provisions for children in a school of industries. In *Centre for Child Law v MEC for Education, Gauteng*[39] it was proposed by the legal representative for the MEC for Education that charities could be approached to provide sleeping bags to keep children warm who were living in parlous conditions in a school of industries run by the state. Murphy J's response to that was as follows:

> The respondent's further proposal, that efforts be undertaken to raise funds from the Red Cross and the non-governmental sector, is way off the mark and reflects its fundamental misunderstanding of its constitutional duty.[40]

In the *Freedom Stationery* case the court was apparently satisfied with a lower level of compliance with the constitutional standard regarding the provision of stationery.

Secondly, the judgment on the interim relief failed to properly balance the public interest (that is the children's interest) separately from the government's interest. The court could have followed a more creative approach and ensured that the children received their stationery immediately rather than having to wait for the outcome of the tender review. Quinot[41] argues that the interim relief was not necessary and that the court should have followed the approach of the Supreme Court of Appeal in *CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd*[42] and *Moseme Road Construction CC v King*

39 2008 1 SA 223 (T).
40 *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 227 D-E.
41 "Public Procurement" 2011 *Juta Quarterly Review.*

Civil Engineering Contractors (Pty) Ltd.[43] In these cases the court made it clear that not every error in the tender process will cause the courts to set decisions aside: "Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside the administrative action or not".[44] If the interim order had not been made government's contract to provide the stationery would have remained in place and the children would have received their stationery far sooner than they in fact did. This would not have prevented the irregularities from being investigated and dealt with.

The *Freedom Stationery* case illustrates that engagement of the courts may be ineffective unless the courts take a transformative, rights driven and child-centred approach. As the Constitutional Court has explained, when it comes to issues relating to children the courts should not see their role as merely resolving a dispute between parties, but as safeguarding the best interests of the child or children involved.[45]

A far more successful outcome was achieved in the Limpopo textbooks case,[46] which firmly captured the public imagination during 2012. Public interest law centre Section 27[47] brought an urgent application before the North Gauteng High Court, seeking a declaratory order that the failure by the Department of Basic Education to provide textbooks to schools in Limpopo was a violation of the right to basic education, equality and dignity, and an order directing the department to urgently provide textbooks for Grades R, 1, 2, 3 and 10, by no later than 31 May 2012 to the schools that had not yet received textbooks. This application was the culmination of efforts by the applicants through correspondence and meetings, to ensure that the Limpopo Department of Basic Education would provide the required textbooks. Kollapen J, citing the *Juma Musjid* case, found that children have an immediately realisable right to a basic education.[48] The court also found that textbooks are an essential component of quality learning and teaching,[49] and that the failure by the respondents was a violation of the right to a basic education.[50] The court granted the declaratory order, ordered the department to deliver the textbooks, and also ordered a "catch up" plan to set out various remedial measures such as the provision of extra classes.

42 [2011] ZASCA 13 (2011-03-20).
43 2010 4 SA 359 (SCA).
44 *CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13 (2011-03-20) par 29.
45 Per Sachs J in *AD v DW (Centre for Child Law as amicus curiae)* 2008 3 SA 183 (CC) par 55.
46 *Section 27 v Minister of Education* 2013 2 SA 40 (GNP).
47 There were two other applicants, the Dijannane Tumo Secondary School and Tandanie Msipopetu, a parent.
48 Par 21.
49 Par 22.
50 Par 32.

If buildings, water, sanitation, furniture and textbooks are all components of a basic education, what then can be said regarding teachers and other school staff members? This was the subject matter of another important case brought in 2012 by the Legal Resources Centre in Grahamstown, acting on behalf of the Centre for Child Law and several schools.[51] The applicants requested an order to compel the Department of Education to implement the 2012 post provisioning fully in the Eastern Cape Province. The application also requested that the 2013 post provisioning be declared by 30 September 2012 and implemented fully by 30 December 2012.

Post provisioning is the process that determines how many educators are allocated to specific schools. Due to the long standing failure by the Eastern Cape Department to establish and implement education posts in the Eastern Cape, substantive post remain vacant resulting in unsustainable pressure being placed on individual schools who have to, amongst other things, appoint teachers at their own expense where possible. Consequently, schools and learners are severely prejudiced and pressure is also placed on the entire education system.

The parties settled all of the issues for which the orders were sought, save the question whether the Department of Education was under a statutory obligation to declare the post establishment on non-teaching staff at public schools and to fill the posts. The applicants argued that in terms of relevant legislation the department is under an obligation to establish posts for non-teaching staff at public schools and fill the posts.

The court found that the department is obliged to declare posts establishment for both teaching and non-teaching staff in public schools and fill the posts. The court supported this finding with emphasis that the department would have budgeted for the posts. The court gave a detailed order in line with this finding.

The courts have thus demonstrated that included in the right to a basic education being available to children are the core components such as buildings, water, sanitation, furniture, text books, teachers and non-educator staff. Stationery should, of course, be part of this list, the *Freedom Stationery* judgment notwithstanding.

3 2 Accessibility

Accessibility refers to the child's ability to enroll and attend school.[52] A case about learner transport which was ultimately settled out of court links to this theme.

The application was brought to the North West Court in Mafikeng by 37 applicants and the Centre for Child Law, represented by the Legal

51 *Centre for Child Law v Minister for Basic Education Eastern Cape* [2012] 4 All SA 35 (ECG).
52 Malherbe 402.

Resources Centre.[53] The 36 applicants were the parents or caregivers of children who attend the Rakoko High School in Mabeskraal, North West. The families all live in Siga Village which is 25 km from Mabeskraal. The children previously attended a local school[54] within walking distance of their homes in Siga Village until it was closed down by the government in 2009, as part of the rural "rationalisation" process.[55] Since transport was not provided some of the learners' families could not afford the bus fare and had dropped out of school, whilst others struggled to eke out the transport costs from their meager income, mostly from pensions or grants. The relief sought in the application was the provision of adequate learner transport to learners, free of charge. The Centre for Child Law asked for the plans and programmes in the North West province for the provision of learner transport to be produced and for the details to be made public, so that learners and their parents could be made aware of their rights. The matter was settled, and a settlement agreement was made an order of court on 10 August 2011.

The agreement contained certain urgent interim measures, namely that the Department of Public Works and Transport, in conjunction with the Department of Education, were to provide learner transport for the children from Siga Village to their places of learning at Mabeskraal from 8 August 2011 for 3 months or until longer term measures are put in place, whichever occurred later. The transport was to be fully subsidised by the two departments and scheduled appropriately to the needs of the children.

The long term measures in the agreement were that the two departments, through a joint committee would prepare the necessary plans to ensure that learner transport, which shall be fully State subsidised and appropriately scheduled to cater for learners needs, would be provided to the children and to other learners similarly placed. The inter-departmental committee responsible for the development of a sustainable learner transport management plan would communicate with a nominated representative of the applicants, and would make copies of the plan available to the applicants upon its finalisation, and a meeting would be held to make the contents of the plan known to affected communities. The agreement also allows the applicants to contact the two departments to check on progress. If any terms of the agreement were not complied with, any party was permitted to approach the High Court on an expedited basis. Further settlement discussions were envisaged in the plan, relating to compensation, because of the

53 *Adam Legoale v MEC for Education, North West,* North West High Court, Mafikeng, case no 499/11, unreported.

54 JC Legoale Commercial School.

55 In the Affidavit filed on behalf of the Centre it was pointed out that the closure of public schools is regulated by s 33 SASA, which involves a consultative process with the school governing body. Closure of a rural school should be governed by the underlying principles set out in the *Report of the Ministerial Committee on Rural Education: A new vision for rural schooling*, which also requires a consultative process.

financial losses suffered during the time when the transport was not provided.

The *Siga Village* case like the *Mud Schools* case discussed above, is another far-reaching settlement agreement. Although it does not involve superlative sums of money as did the *Mud Schools* case, the *Siga Village* case has ensured that learner transport plans are in place and are properly communicated. The involvement of an institutional client brought gains for a wider group of children than the 36 applicants, but in this case the result was limited to the province. The trend towards settlement, if two cases can be said to represent a trend, is a welcome one. Although the launching of litigation had the effect in this case of focusing attention on the plight of learners (where previous written entreaties on their behalf had met with no effective response), it was appropriate that the provincial government engaged with the applicants to reach agreement, rather than battling the matter out in court.

A further case dealing with accessibility was a matter concerning the exclusion of pregnant learners. *Welkom High School v Head, Department of Education, Free State Province*[56] pertains to two cases brought separately to the Bloemfontein High Court, but joined due to their similarities. In both cases the girls were instructed to stay away from school due to their pregnancies. In the first instance a girl, D, became pregnant in January 2010. She attended school throughout her pregnancy but was told to leave school in September 2010, and to stay away until the beginning of the second term in 2011. This meant she would miss exams and be required to repeat her grade.

The second girl, M, attended Harmony High School. She became pregnant during October 2009. She attended school during her pregnancy in the first half of 2010, and gave birth during the July holiday. She returned to school and attended classes for the entire 3rd term and part of the 4th term. In October 2010 she was told to go home and that she would only be admitted to school the next year, she would miss her exams and be required to repeat grade 11.

The decisions to deny these girls access to education was based on the "pregnant learner policy" adopted by the school governing body of each school. These policies were in turn based on a national Department of Basic Education policy dated 2007 entitled "Measures for the prevention and management of learner pregnancies". In particular, both schools pointed to measure 22 which reads:

> However, it is the view of the Department of Education that learners as parents should exercise full responsibility of parenting, and that a period of absence of up to two years may be necessary for this purpose. No learner should be readmitted in the same year that they left school due to a pregnancy.

56 2011 4 SA 531 (FB).

The Provincial Department had, in response to complaints by the parents of the learners, replaced the schools' decisions with their own, and reinstated the learners. They relied on a Circular sent out in 2010 which clearly stipulated that a pregnant learner should return to school as soon as possible.

The *amici curiae*[57] in this matter strenuously argued that the Court should rule on the appropriateness of the policy, or at least direct the schools and the departments to redraft their policy in line with the Constitution. The Court resisted the temptation to do so, and Rampai J confined himself to the questions of legality and procedure, noting that he could find no legal avenue to address the questions of constitutionality. He accepted that the problem of the policy stems from the National Department's own "Measures for the prevention and management of learner pregnancies". However, as the National Minister had not been joined as a respondent, he could not make an order in this regard. He went as far as to set out the need for regulations to section 61 of SASA to regulate, specify and encode a national policy and uniform procedure on pregnant schoolgirls. He mentioned the relevant constitutional provisions that should be borne in mind, as well as the provisions of the Promotion of Equality and Unfair Discrimination Act,[58] and made some recommendations about what the regulations should contain. He urged (but could not order) the Minister to promulgate these regulations within 24 months of the order, or preferably sooner.

The Head of Department (HoD) of Education in the Free State appealed this decision. The Supreme Court of Appeal handed down its judgment on 28 September 2012.[59] The judgment focuses entirely on the exercise of administrative power and the principle of legality, and declines to make any findings regarding the constitutionality or lawfulness of the policy.

The court considered and rejected three arguments raised by the HoD. Firstly, the HoD argued that although the governing body has authority to adopt a code of conduct, it cannot adopt a code that has the effect of excluding learners. The HoD there contended that when his instruction to the school were challenged in court, he was entitled to launch a collateral challenge to the validity of the policy and the actions rising from it. The court found that such a collateral challenge could only be raised by a person or body threatened by coercive action by a public authority. The girls themselves might have been able to raise such a challenge, but the HoD was not at liberty to do so.[60] The second argument was that the court itself was obliged, in terms of section 172(1) of the Constitution to deal with the constitutional issues. The judgment stated that a court is only obliged to deal with the constitutional issue if

57 The Human Rights Commission and the Centre for Child Law.
58 Act 4 of 2000.
59 *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA).
60 Par 16.

it finds that issue to be relevant to the judgment. In such cases, the Minister responsible for the legislation must be joined as a party to the proceedings and there should be argument by the parties on that point. In this case, the court found that it was not necessary for the court to determine the question of constitutionality of the policy.[61] The third argument was that the HoD, as the employer of school principals, had the power to issue instructions not to implement and unlawful policy, and was in fact obliged to do so in terms of section 7(2) of the Constitution, if the policy was unconstitutional. The court found that the HoD could have requested the schools to rescind their pregnancy polices and when they refused to do so, he could have mounted a challenge in a court of law.[62]

In the final analysis, the Supreme Court of Appeal upheld the high court's reasoning that the HoD had no legislative power to determine or abolish the learner pregnancy policy, and could not replace their policy with his by overriding the decision of the school. The Supreme Court of Appeal did not find it necessary or appropriate to comment on the policy and did not remark on Rampai J's "suggestion" to the minister that she promulgate the regulations. At the time of writing, this case was headed to the Constitutional Court.

It is apparent from this case that, unless the Constitutional Court rules differently, or until the regulations are promulgated, pregnant girls remain at risk of being excluded from education during late pregnancy and after giving birth. This is an unsatisfactory state of affairs, and poses a real threat to accessibility. It is worth noting Rampai J's remarks that there are two groups of children affected by these decisions, the teenage mothers and their babies: "Perhaps the best gift that can be given to the two little babies of the two schoolgirls is to ensure that their mothers continue to learn, so that they can become better parents".[63] He called for an end to intolerance and moral prejudice against pregnant learners. According to the *General Comment*, accessibility means that education must be accessible to all, especially the most vulnerable, in law and in fact, without any discrimination on any prohibited ground.[64]

The focus in the *Welkom* case on the legality questions surrounding the relative powers of school governing bodies and Departments of Education is not new. Many cases have focused on governance questions, including several cases that have been brought regarding policies about education in the learner's preferred official language.[65]

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61 Par 20.
62 Par 22.
63 *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB) par 80.
64 CESCR *General Comment 13* par 6(b)(i).
65 *Laerskool Middelburg v Departementshoof, Mpumulanga Departement van Onderwys* 2003 4 SA 160 (T), *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA), *Seodin Primary School v MEC of Education, Northern Cape* [2006] BCLR 542 (NC),

In 2010 the Constitutional Court dealt with such governance questions in *Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo.*[66] The court found that the case concerned the right to learn in a language of choice and was not merely about the powers of the governing body. The Constitutional Court found that the HoD does have the power to withdraw powers of school governing bodies, but only where the school governing body ceases or fails to act[67] (which was not the case in the *Ermelo* matter), and in those circumstances the HoD must act on reasonable grounds and in a procedurally fair manner. The court went on to consider the broader scenario in and around the town of Ermelo with regard to the lack of education facilities. The court thus found that the decisions already made were of no force, and it made a supervisory order that the school governing body must reconsider its original position, taking into account the needs of the broader community, revise its language policy accordingly and report back to the Court.[68]

In *Hoërskool Ermelo* the Constitutional Court dealt squarely with the legality and procedural questions, but did so within a broader rights-based framework. Moseneke DCJ, who wrote the unanimous judgment, sketched the context of continuing deep inequality in our educational system, "a painful legacy of our apartheid history". The judgment recognises that Afrikaans is a "cultural treasure" but also records that indigenous languages have languished in obscurity, with the ironic result that the learners whose mother tongue is not English are fighting for the right to be educated in English.[69] The judgment frames the powers of the school governing body within a broader transformative agenda that must ensure the provision of basic education for all. Thus, the extensive powers of the school governing body do not mean that the HoD is precluded from intervening, on reasonable grounds.[70] This initially opened the door to a new judicial approach to the legality questions occasioned by disagreements between school governing bodies and

Hoërskool Ermelo v Head of Department of Education, Mpumulanga 2009 3 SA 422 (SCA).

66 2010 2 SA 415 (CC).

67 S 25 SASA. On this point, the Constitutional Court overruled the Supreme Court of Appeal case of *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA) which had held that under s 22(1) SASA a Head of Department is entitled to revoke any function of a school governing body, and if it did, then s 25 SASA (which requires the appointment of an interim committee to govern the school) would be applicable. The Constitutional Court in the *Hoërskool Ermelo* case found that whilst s 22(1) SASA does allow the revocation of any governing body powers, the powers are then to be exercised by the Head of Department, and not by a committee in terms of s 25 SASA.

68 In similar vein, Bray "Education Law" in Child Law in South Africa (2009) (ed Boezaart) 462 has argued that "a public school must, on the one hand, govern itself in the interests of the school and its learners, but, on the other, reconcile its internal interests with the external interests of the wider political and bureaucratic education hierarchy".

69 *Hoërskool Ermelo* parr 48-49.

70 *Hoërskool Ermelo* par 81.

HoDs regarding the exercise of powers. However, the early positive signs in the high court judgments have been dimmed by the Supreme Court of Appeal judgments in the appeals of the *Welkom* case (already discussed) and the *Rivonia Primary* case, which will be discussed under the next heading.

3 3 Acceptability

Acceptability – which might also be referred to by another A-word, "adequacy"[71] – is the major theme in a current case regarding the admissions policy and the question of capacity in a suburban primary school, namely Rivonia Primary School.[72] The four A's are interlinked, so the case also relates to availability and accessibility. By engaging with the question of capacity and class sizes, this case raises the issue of adequacy, or quality. But the case is also about availability because one of the questions posed by the case is whether the Department of Basic Education in the province is matching the demand to provide sufficient schools in the province, or whether functioning schools are being made to bear the brunt of the fact that there are insufficient schools. On the other hand, an equally important point raised by the case is that if the department can never be involved in decisions about capacity and admissions, patterns of privilege and impoverishment will continue, and these also link to quality.[73] It is these patterns that have been described by the Constitutional Court as "scars" that Apartheid has left behind in South Africa.[74]

The case in question is about a little girl who is referred to in the case simply as "the learner". The learner lives with her mother within the catchment area of the school. The dispute arose from the fact that the mother applied for the learner to be admitted to the school in grade 1. The admissions process resulted in the learner being placed at number 20 on the "A" waiting list.[75] The learner's mother appealed to the

71 See, however, Woolman & Fleisch 135. The authors add adequacy to the list of four "A"s, rather than using the term as interchangeable with acceptability.

72 *Governing Body of Rivonia Primary School v the MEC for Education: Gauteng Province* [2012] 1 All SA 576 (GSJ). A court order directed that no information that reveals or may reveal the identity of the child may be published.

73 On the theme of the continuing effects of apartheid on quality in the current education system see Spaull "South Africa remains a tale of two schools: one which is wealthy, functional and able to educate students, while the other is poor, dysfunctional, and unable to equip students with the necessary numeracy and literacy skills they should be acquiring in primary schools."

74 Per Moseneke DCJ in *Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) par 45.

75 The "A" waiting list is for children who live or whose parents work within the catchment area of the school, the "B" waiting list for those who live or whose parents work outside of that area.

provincial department of basic education, and on 2 February 2011[76] the department instructed the primary school to admit the child (who had been brought to the school on that day by her mother). According to the MEC, this decision was based on the "10th day statistics".[77] The school had determined that the intake of grade 1 learners must be no more than 120, but the department said that the school was not full to capacity. When the school principal refused to place the learner, a departmental official arrived at the school, informed the principal that the admission function delegated to her in terms of a circular had been withdrawn, and that he had assumed the admissions function, and duly admitted the learner. He walked the child to a classroom and directed that she be accommodated. Attempts to resolve the issue through dialogue failed and the matter ended up in court.

The matter was argued in the South Gauteng High Court in October 2011. The governing body argued that the department's decision to admit the learner was unlawful because it was inconsistent with the admissions policy of the school which determined that full capacity had been reached prior to the application being received. The department argued that the question of school capacity is not one which can legitimately be determined by the admission policy drawn up by an individual school governing body, but rather must be determined at a systemic level by the provincial education department so that public education resources of the province can be used in an efficient and fair manner. The governing body countered that the reason the school still has capacity according to the Department's assessment is that they have kept their class sizes lower than average through the building of extra classrooms and the hiring of additional staff, financed through the payment of school fees by the parents. Two separately represented *amici curiae*, Equal Education and the Centre for Child Law also made written and oral submissions. The *amici* submissions focused on the constitutional question of whether, on a proper interpretation of the statutory framework for admissions in line with the spirit, purport and objects of the Bill of Rights and with due regard to the rights to equality and education, the governing body of a public school has the sole power to determine the capacity of a school as part of its power to determine the admission policy of a school.

Taking a cue from the *Hoërskool Ermelo* case, the High Court judgment in the *Rivonia Primary* matter[78] contextualised the legality and procedural questions raised by the case within a broader discussion of the right to education. Mbha J described the right as "an empowerment right that enables people to realise their potential and improve their

76 The learner had been attending a private school since the start of the school year, 2011-01-12.
77 These statistics relate to the number of learners in the school on the 10th day of the new school year.
78 The judgment was handed down 2012-12-07.

conditions of living",[79] and related this to *General Comment 13.* [80] The judgment also drew on the *Juma Musjid* judgment, citing paragraphs that record historical educational segregation in South Africa, and the lasting effects that it has left in society.[81] Against this backdrop, the court set out the powers of school governing bodies, observing that SASA makes provision for an important, but limited role for school governing bodies which, across a range of functions, are subordinate to the HoD and the MEC.[82] The school governing body is empowered to determine a schools admission policy, but this must be done in a manner determined by the HoD.[83] The judgment stressed the fact that SASA places the obligation to realise the right of learners on the MEC and HoD,[84] and found that "[i]t would be extraordinary if the question of school capacity were to fall outside of the provincial education department when that department is statutorily bound by section 3(3) of the Act, to ensure that every child in the province can attend school".[85] Ultimately, the court found that the HoD erred in the manner in which he withdrew the admission function delegated to the principal, because this was done summarily, was widely couched and was unnecessary in the circumstances.[86]

The court thus made declaratory orders to the effect that a school governing body does not enjoy the unqualified power to determine a public school's admission policy, that the power to determine the maximum capacity of a school vests in the Gauteng department of education and not in the school governing body, and that the Gauteng department of education has the power to intervene with the school governing body's power to determine the admission policy of a public school, and that the MEC for Education, Gauteng, is the ultimate arbiter of whether or not a learner should be admitted to a public school.[87]

The court also paid attention to the issue of policy, finding that school capacity is a matter that should be determined in terms of norms and

79 Rivonia Primary par 26.1.
80 The judgment provides (par 28) this quotation from *General Comment 13*: "Education is both a human right in itself and an indispensible means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities".
81 *Juma Musjid* judgment par 42, cited in *Rivonia Primary* judgment par 27.
82 *Rivonia Primary* par 47.
83 *Idem* par 55.
84 *Idem* par 56.
85 *Idem* par 66.
86 *Idem* par 93.
87 The judgment is binding only in Gauteng, and the court makes the point (par 76) that the court found the applicants' dependence on the *Mikro* case and *Queenstown Girls High School v MEC, Department of Education, Eastern Cape* 2009 5 SA 183 (CK), primarily because of regulation 13(1)(a) of the Admission Regulations in Gauteng, which empowers the Head of Department to confirm or set aside the refusal of an admission of a pupil to a public school. This does not find application in the other provinces.

standards adopted by national and provincial governments. Mbha J observed that:

> [i]t would provide significant guidance to school governing bodies and provincial governments on the issues raised in this matter of the National Minister of Basic Education were to act in terms of section 5A read together with section 58C and promulgate norms and standards on capacity.[88]

Furthermore, the court pointed out that the power to take steps at a systemic level should be embodied in a carefully developed policy that sets out the objectives of the relevant provincial government in respect of capacity, and that this would also guard against the arbitrary use of remedial power.[89] Unfortunately, however, these suggestions amount to no more than recommendations as they are not included in the court order, because the national Minister of Basic Education was not a party to the litigation.

The High Court judgment was overturned on appeal.[90] The Supreme Court of Appeal decontextualised the case, rejecting the idea that the history of education during apartheid and its legacy in today's unequal education system had any relevance to the case at all. Focusing narrowly on the relative powers of the governing body and the HoD, the court found that the governing body has the sole power to determine admissions policy and that capacity – or the numbers of learners to be admitted – forms part of admissions policy.[91] The respondents' argument that the MEC is responsible for placing all children requiring education at a public school in a province, and therefore must have some say in the admission of learners, was given short shrift by the Supreme Court of Appeal. The judgment concluded that governing bodies have the power to determine school policies, including capacity, while provincial departments are responsible for the professional management of the schools and the administration of admissions. The Supreme Court of Appeal did, however, recognise that the Minister may set norms and standards on capacity – which she has not yet done – and that determination of the capacity will have to be done in accordance with such norms and standards once they are in place. Furthermore, the judgment stated that while the governing body has the power to determine the school's capacity, it also has a discretion to exceed that capacity, which discretion is to be exercised on rational and reasonable grounds.[92] At the time of writing this matter is also on its way to Constitutional Court.

Much of the litigation in education law has been about school

88 *Rivonia Primary* par 63.
89 *Idem* par 67.
90 *Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province* 2013 1 SA 632 (SCA).
91 Par 37.
92 Par 54.

governing body powers, which remains contested terrain.[93] At the heart of these disputes is the self-governance model which the law grants to school governing bodies,[94] struggling against the pressure for more places in public schools, particularly in highly urbanised provinces such as Gauteng and the Western Cape. The narrative of these debates will be taken further, and perhaps concluded, once the Constitutional Court has ruled in both the *Welkom* and *Rivonia Primary* cases.

3 4 Adaptability

Adaptability – the last of the four words in the A scheme – indicates that the State has a responsibility to ensure that policies and practices are inclusive of all children. This raises the question as to whether South Africa's education laws and policies are sufficiently flexible to respond to the needs of all learners, including those with disabilities. Thus, adaptability encompasses educational access for children with special needs.

This was the subject of the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.[95] The case was an important victory for children with severe or profound intellectual disabilities. The Forum provides schools, centres and other services for 1200 children with intellectual disabilities in the Western Cape, but receives no support or funding from the Department of Education. After years of attempting to engage with government about this, the Forum, represented by the Legal Resources Centre, decided to take their case to the courts and joined the national as well as the provincial government. The state argued that it provided education for children with moderate to mild intellectual disability (IQ levels of between 35 and 70) but did not bear the responsibility to immediately provide education for profoundly intellectually impaired children, and furthermore counsel argued that such children could not benefit from education. The applicants, to the contrary, demonstrated through internationally recognised research that such children do indeed benefit from education. The court found that the identified group of children had been marginalised and ignored, denied their right to basic education and had had their dignity infringed. The final court order was a supervisory order which directed the government to provide sufficient funds to organisations that provide services to these

93 *Laerskool Middelburg v Departementshoof, Mpumulanga Departement van Onderwys supra*; *Minister of Education, Western Cape Governing Body, Mikro Primary School supra*; *Queenstown Girls High School v MEC, Department of Education, Eastern Cape supra*; *Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo supra*; *Welkom High School v Head, Department of Education, Free State Province supra*; *Governing body of Rivonia Primary School v MEC for Education*, Gauteng Province *supra*.

94 Woolman & Fleisch 165 have advanced the view that although school governing bodies "may be (somewhat) exclusive in nature ... these schools also create the conditions for a certain form of democracy".

95 2011 5 SA 87 (WCC).

children to provide education, and to report on actions taken and to be taken in compliance with the ruling within 12 months of the judgment.[96]

4 Conclusion

This article has indicated that the courts have played an important role in the progress being made with regard to children's right to a basic education in South Africa. Measured against the interlinked principles of availability, accessibility, acceptability and adaptability, the case law of the past few years has shown some significant advancements. The courts have outlined state and private responsibilities to provide or, where the latter is concerned, at least not to hamper children's rights to basic education. Although the *Juma Musjid* case did not realise any direct benefits for the children whose rights were being fought for, it did set a precedent about the need for children's best interests to be considered in applications for eviction, and sent a strong message about the unqualified nature of the right to a basic education and government's as well as private parties' obligations in that regard. The *Mud Schools* case about infrastructural and provisioning impediments garnered a far-reaching out of court settlement agreement which indicates political will and an appropriate degree of accountability – though the *Freedom Stationery* case leaves the reader with a sense that greater judicial transformation is required in order to guard the interests of children, rather than merely settle disputes between the government and paid service providers. Other core components of availability on which the courts made important pronouncements during the period of review were textbooks, teachers and non teaching staff. The courts also demonstrated a willingness to fashion new remedies, such as the "catch up" plan in the textbooks case and the time framed order of the post provisioning case.

With regard to accessibility, the *Siga Village* case brought positive results for the 36 learners concerned as well as the other children in the province. *Hoërskool Ermelo* appeared to herald an encouraging move away from a narrow focus on legality or governance arguments about the powers of school governing bodies. Moseneke DCJ did not allow the *Hoërskool Ermelo* case to end with an answer to the question of school governing body powers, and directed the school governing body to look beyond the narrow needs of learners in the school and to consider the broader needs of all children needing to access education in the community. In the High Court judgments of *Welkom* and *Rivonia Primary* the same spirit was evident. Rampai J carved out a recommendation to the Minister for the drafting of regulations, despite her not being a party in the case, and he made his thoughts about the lawfulness and constitutionality of the learner pregnancy policy known, though he had little legal room to manoeuvre. In the *Rivonia Primary* High Court judgment, Mbha J decided that the MEC's duty to place all children

96 The order was handed down 2011-11-12.

needing education in Gauteng in schools necessarily implies a role for the executive in determining capacity, which is an aspect of admissions, previously considered the domain of school governing body. The Supreme Court of Appeal judgments, however, took the governance debates back to a pre-*Hoërskool Ermelo* discourse, divorced from context and focused narrowly on legality and procedural issues. The final pronouncements on the *Rivonia Primary* and the *Welkom* cases are not yet written, as an appeal to the Constitutional Court has been lodged in both cases and both will be heard in the first half of 2013.

Finally, the *Western Cape Forum for Intellectual Disability* case is an important victory for the growing awareness of the importance of adaptability. The supervisory nature of the order indicates that the court was prepared to play a transformative role, holding the executive to account.

The cases explored in these articles demonstrate that the fight for basic education in South Africa is a lively struggle. Civil society groups have demonstrated their willingness to play an active role in shaping the model. Litigation on children's rights to a basic education has been used to promote another important "A"-word: Accountability. In this regard the courts have played a significant role in shaping the contours of governance, as well as providing access to services. Although government performance is revealed to have been woefully inadequate in a number of the cases discussed, the settlement agreements indicate some political will – or enthusiasm to avoid far-reaching precedents – in what is arguably the most important challenge facing South Africa: The provision of an adequate basic education for all children.

Recognising situatedness and resolving conflict: Analysing US and South African education law cases

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OPSOMMING

Erkenning van Gesteldheid en Geskilbesleging: Ontleding van Onderwysreg Hofsake in die VSA en Suid-Afrika

Hierdie artikel voer aan dat hofbeslissings, veral die wat op die hoogste vlak gemaak word, nie die produk is van neutral regsbeginsels nie, maar heel dikwels van ideologie. Deur te verwys na sake soos *Morse v Frederick* and *Parents Involved in Community Schools v Seattle School District No 1* in die Verenigde State, sowel as *Mpumalanga Department of Education v Ermelo* in Suid-Afrika, toon hierdie artikel duidelik op hierdie verskynsel wat merkwaardiglik nie algemeen aanvaar word nie. In antwoord daarop, stel die outeurs 'n leerstuk van omstandigheidsbewustheid oftewel "*situational appreciation*", 'n leerstuk wat bewustheid van 'n besluitnemer se omstandighede in ag neem. Die omstandihede, of konteks, voorsien 'n verskaf 'n konsekwente maatstaf om die beslissende faktore in daardie Hoogste Hof- en Grondwetlike Hof uitsprake te identifiseer, verduidelik, en te bespreek. Daarby bespreek die artikel die invloed van kollegialiteit tussen regters in die hoogste howe, en beveel aan dat die Hoogste Hof in die Verenigde State en die Grondwetlike Hof in Suid-Afrika kollegialiteit beklemtoon om te verhoed dat skerp ideologiese verskille uitsprake beïnvloed, en te verseker dat uitsprake op grond van beginsels deur samewerking verwoord word. Hopenlik sal hierdie ontleding 'n noodsaaklike beskrywende en bepalende konteks verleen aan die uitsprake wat ons lewens voortdurend raak.

1 Situational Appreciation

1 1 Practical Wisdom and the Dominance of Situatedness

According to Gillies life's experiences imbue people with a type of knowledge that enables them to recognise some features of situations or issues as more important, salient, or relevant than others.[1] "Experience contributes to judgment by giving those who have seen many different situations 'an eye' for seeing what should be done and guides the process of deliberative specification."[2] This type of knowledge – known as

1 Gillies *Getting it right in the consultation: Hippocrates' problem; Aristotle's answer* 2005 *Occas Pap R Coll Gen Pract* 19 (www.ncbi.nlm.nih.gov/pmc/articles/PMC2560890 (accessed 2011-03-08)).

2 *Ibid.*

"practical wisdom" – differs from theoretical knowledge because a person is also required to recognise particulars, actively "sort the unsorted," and "differentiate the undifferentiated problem *within the domain of life* ...".[3] In this regard, practical wisdom is a step above theoretical or intellectual knowledge.

Bricker[4] builds upon this insight in the context of educational leadership. He argues that leadership development in the field of education should include the development of one's perceptual ability to pick out those features of a situation that can be salient for others. This comes from his recognition that perspectives in education law, especially those expressed in court cases, are informed by far more than theoretical legal principles. Instead, they are informed by what legal professionals know and see, and, by implication, who they are.[5]

Though Bricker uses the term "situational appreciation" in his writing, he ascribes a unique meaning to the phrase.[6] We use the term differently. We believe that it is important to recognise, highlight, reveal or "appreciate" the relative "situation" of a decisionmaker, as this provides a more practical and effective means of resolving conflict. Because it is more instructive to refer to a decisionmaker's relative situation than it is to refer to his or her situation in isolation, we adopt the term "situatedness." A person's "situatedness" is his or her highly-developed, highly-contextualised, environmentally-produced personal constitution as it exists in relation to the situations of others.

The United States Supreme Court and the South African Constitutional Court are by no means immune from this observation. A number of intrinsic and yet extra-legal factors could be considered when attempting to contextualise a particular judge's situation, such as social background, personal characteristics and life experiences. These contributing factors are best viewed not as contrasting or conflicting ingredients, but as elements that combine to form a judge's eventual policy preferences.

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3 *Idem* 21 (emphasis added).

4 David C. Bricker, *Character and Moral Reasoning: An Aristotelian Perspective* in K.A. Strike and P.L. Ternasky (eds.) *Ethics for Professionals in Education* 13-25 (1993).

5 See *idem* 14: "[I]n specific instances of moral debate, sometimes different judgments arise from differences between what people see, and sometimes what people see is inarguable for them because it is provided by an ability to grasp the salient feature that is partly constitutive of the kind of person they are".

6 Bricker uses the term "situational appreciation" to describe a person's proclivity to "appreciate" certain features of a "situation". See *idem* 15: "Being situationally appreciative is not like being a detective who hypothesises about a case on the basis of evidence. Instead, it is much like aesthetic appreciation; that is, it is a matter of letting the most striking feature of a situation catch one's eye much as we let the aesthetically prominent features of a painting capture our attention when we perceive beauty".

This perspective on judicial decision-making is best evidenced by the attitudinal model for judicial behaviour, which argues that justices of the US Supreme Court decide cases largely on the basis of their personal attitudes about social policy, and not on the basis of predetermined law, or precedent. As Segal and Spaeth assert, "ideological considerations have motivated the thrust of the [Supreme] Court's decisions since its inception."[7]

The other predominant model for judicial decision-making is the legal model, which argues that legal parameters – established legal doctrines, precedent, institutional customs and traditions – better explain judicial outcomes.[8] However, such legal considerations – textual interpretations, drafters' intent, the precedential cases that the court is said to consider when making decisions – fail to provide consistent and accurate explanations for Supreme Court decisions. As Bond and Smith point out, "the empirical evidence from analysing judges' behaviour supports the legal realist and attitudinal models of judicial behaviour."[9] It is clear that "evidence for the attitudinal model is stronger."[10] Therefore, a judge's personal attitudes about social policy – as constructed by his or her situational history – are the most determinative influences in his or her decision-making process. Therefore, the more advanced inquiry into judicial decision-making seeks to uncover the extent to which situatedness ultimately determines judicial behaviour. While some scholars argue that only *some* judicial decisions can be explained by personal policy preferences, others consider personal ideology to be a "strong but imperfect predictor of voting,"[11] or at least "relevant to judicial outcomes."[12]

This article focuses on the behaviours of judges sitting on a government's highest court. Because the highest courts in a national government are insulated from judicial review (and, in practice, insulated from legislative and executive review as well) situatedness is likely to be expressed the strongest by those judges who sit on a country's highest bench. To this extent, the conclusions authored here may not apply to intermediary or trial level courts without some difficulty. But when dealing with the decisions of courts of last resort, a judge's situatedness should be understood as the single most comprehensive explanatory tool available. Thus decisions that appear to deviate from a decision-maker's situatedness do not evidence a weakness in the explanatory power of a

7 Segal & Spaeth *The Supreme Court and the Attitudinal Model Revisited* (2002) 300.
8 Bond & Smith *The Promise and Performance of American Democracy* (2009) 571.
9 *Ibid*.
10 Farber & O'Connell *Research Handbook on Public Choice and Public Law* (2010) 39.
11 *Ibid*.
12 Cross *The Theory and Practice of Statutory Interpretation* (2009) 21.

judge's situatedness; instead, these decisions should be treated as evidence of an incomplete calculation of the judge's situatedness.[13]

Regardless of the strictness with which one adheres to the tenets of the attitudinal model, this article will show that the legal model and the legal doctrines of federalism, local control, interventionism, *stare decisis*, originalism, and living constitutionalism are wholly incapable of explaining the US Supreme Court's divergent outcomes in *Morse* and *PICS*, and the South African Constitutional Court's decision in *Ermelo*. Instead, situatedness provides the most viable explanation.

2 *Morse v Frederick*, *PICS* and the Illusion of Neutrality

2 1 *Morse v Frederick*

As the Olympic torch passed through Juneau, Alaska en route to the 2002 Winter Olympic Games in Salt Lake City, Utah, Joseph Frederick, a student at Juneau-Douglas High School, unfurled a 14-foot banner that read "BONG HiTS 4 JESUS".[14] His principal, Deborah Morse, had permitted the students to attend the torch relay as a school-approved social event. Morse quickly confiscated Frederick's banner and suspended him for ten days.[15] Not long thereafter, Frederick filed suit under 42 USC § 1983,[16] alleging that the Juneau School District Board of Education had violated his First Amendment rights.[17]

13 Sarat *The Blackwell Companion to Law and Society* (2004) 275 notes how "most observers [now] acknowledge the basic point that judges make 'law and policy' in the inevitable junctures of indeterminacy that punctuate adjudication." This was once a controversial tenet of the critical legal studies movement. It is the authors' belief that, over time, the integrity of explanatory concepts such as objectivity and neutrality will wane, and instead it will be acknowledged by most observers that "[l]egal reasoning and decision-making is anything but a neutral application of principles and is instead affected by dozens of biases on the part of legal professionals that depend on the personal ethical-political values they hold and the characteristics of the sociostructural context in which they were formed". See also Mathieu Deflem *Sociology of Law* (2008) 192.

14 *Morse* 551 US 397.

15 *Ibid*.

16 Title 42, Section 1983 United States Code (USC) provides, in pertinent part: "Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State …, subjects, or causes to be subjected, any citizen of the United States … to the deprivation of any rights, privileges, or immunities secured in by the Constitution and laws, shall be liable to the party injured in an action law, suit in equity, or other proper proceeding for redress …"

17 *Morse* 551 US 399.

2 1 1 Majority decision

The Roberts majority authored by Chief Justice Roberts and joined by justices Alito, Scalia, Thomas and Kennedy – the conservative majority in *Morse* – carved out a novel exception to established First Amendment jurisprudence. The majority used the language of *Tinker v Des Moines School District*, a landmark Supreme Court precedent that emphatically supported the right of free speech by students, to ultimately limit the protections offered by the First Amendment, restating that "First Amendment rights, *applied in light of the special characteristics of the school environment*, are available to teachers and students."[18] It then took advantage of a right-of-centre opinion handed down by the conservative wing of the 1986 Supreme Court, *Bethel School District v Fraser*.[19] Chief Justice Roberts focused on two issues that were developed by the *Fraser* court: First, the fact that the *Fraser* court was concerned about the *content* of the student's speech, and second, that the court plurality "also reasoned that school boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate.'"[20] Using *Fraser* as a channel for the local control principle, the Court subsequently held that Morse's restriction of Frederick's speech did not constitute a violation of the First Amendment.

2 1 2 Justice Thomas' Choice

Justice Thomas' opinion employed an originalist interpretation of the First Amendment. "In my view," Thomas wrote, "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools."[21] The logical progression of Thomas' opinion ultimately led him to support the proposition that local administrators should have control over their schools. "Historically," he declared, "courts reasoned that only local school districts were entitled to [make judgment calls] about what constitutes substantial interference and appropriate discipline."[22] This use of originalism in *Morse*, however, did not wed him to the local control principle. His faithfulness to this principle will be examined later in this article.

2 1 3 A Tempered Concurrence from Justices Alito and Kennedy

Justice Samuel Alito, joined by Justice Anthony Kennedy, wrote a separate concurrence designed to moderate the conservatism of the plurality opinion. Instead of glossing over *Tinker* and manipulating its language, their concurring opinion reaffirmed the right of students to

18 *Idem* 403 (quoting *Tinker* 393 US 506).
19 *Bethel School District v Fraser* 478 US 675 (holding that the First Amendment permits a public school to punish a student for giving a lewd and indecent, but not obscene, speech a school assembly).
20 *Morse* 551 US 404 (quoting *Fraser* 478 US 683).
21 *Idem* 410-11 (Thomas J concurring).
22 *Idem* 421 (Thomas J concurring).

freely express commentary concerning political or social issues.[23] While the opinion does undercut *Tinker* to some extent, it is grounded in the interest of student safety, not in the principle of local control.[24] Because Alito and Kennedy found a different legal vehicle to reach their ends – the interest of student safety – they did not find themselves in need of explicitly advocating the local control principle.

2 1 4 Different Means to a Familiar End: Justice Stephen Breyer's Support of Local Control

The third concurring opinion in *Morse* was rendered by Justice Stephen Breyer, who believed that the Court should have refrained from addressing the First Amendment issue.[25] Instead, Breyer wrote that the Court should have found that Principal Morse was protected by qualified immunity.[26] Regardless of its form, Breyer's opinion essentially supported an outcome that favoured local control.[27]

2 1 5 The Liberal Dissent

The liberal dissent in *Morse*, authored by Justice John Paul Stevens and joined by Justices David Souter and Ruth Bader Ginsburg, combined a "Greatest Hits" collection of quotations from famous Supreme Court free speech cases with a concise attack on the political underpinnings of the majority opinion. Stevens constructed a compendium of case citations and quotations that outlined the dire need for the judiciary to overpower local assessments of free speech standards.[28] "To the extent the Court defers to the principal's ostensibly reasonable judgment," he wrote, "it abdicates its constitutional responsibility."[29] According to Stevens, the First Amendment demands that the judiciary intervene in local practices, because the Court has a "responsibility" to preserve the protections contained in the Constitution.[30] This responsibility includes not only a duty to oversee public school districts that adopt unconstitutional policies, but also a duty to regulate those purely legislative bodies who seek to constrain constitutional rights.[31] As a whole, Stevens drafted a virtual manifesto for the necessity of constitutional interventionism, circumscribing not only the judgments of local officials but also the "alien" legal doctrines that the majority contorts to support its ideological

23 *Idem* 422 (Alito J concurring).
24 *Idem* 425 ("Speech advocating illegal drug use poses a threat to student safety that is just as serious [as actual violence].") (Alito J concurring).
25 "Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary." *Idem* 425 (Breyer J concurring).
26 *Idem* 429.
27 "Qualified immunity applies here and entitles Principal Morse to judgment on Frederick's monetary damages claim because she did not clearly violate the law during her confrontation with the student." *Idem*.
28 *Idem* 441-444 (Stevens J dissenting).
29 *Idem* 441 (Stevens J dissenting).
30 *Idem* (Stevens J dissenting).
31 *Idem* note 6 (Stevens J dissenting).

outcome.[32] This article will later examine how the liberal wing's fidelity to interventionism is ultimately superseded by its policy-making agenda.

2 2 *Parents Involved in Community Schools v Seattle School District No 1*

On the final day of its 2006-2007 term, the US Supreme Court delivered the Roberts Court's most provocative decision yet in *Parents Involved in Community Schools v Seattle School District No 1*. Two public school districts – Seattle, Washington and Jefferson County, Kentucky – had voluntarily adopted student assignment plans that took into account a student's race, so as to ensure that each school's racial makeup fell within a predetermined range.[33] Because the assignment plans required that each school obtain a racial composition that was balanced in this regard, not every student was able to attend his or her first choice school.[34] Parents of students who had been denied their top choice filed suit, arguing that assigning students to different public schools on the basis of race violated the Fourteenth Amendment constitutional guarantee of equal protection.[35]

2 2 1 Chief Justice Roberts' Plurality Opinion

The most successful product of Chief Justice John Roberts' plurality opinion, joined by Justices Scalia, Thomas, and Alito, is its articulation of a strict scrutiny standard that would frustrate, if not ultimately invalidate, *any* future race-conscious remedial programs.[36] Because the conservative bloc's respective situatedness disfavours race-conscious integrationist mechanisms, the plurality struck down the efforts of local school administrators, and in the process eschewed the principle of local control, instead employing an expansive reading of the constitutional protections at play. Ultimately, this required the conservative wing to utilise an interventionist mechanism.

The Roberts' opinion employed a number of legal strategies in order to achieve its ends. Not only did the plurality lean heavily on conservative

32 *Idem* 442 (Stevens J dissenting).
33 *PICS* 551 US 701 709-710.
34 *Idem* 713, 716.
35 US Constitutional Amendment XIV § 1 states "No State shall …deny to any person within its jurisdiction the equal protection of the laws".
36 To satisfy Roberts' strict scrutiny test, K-12 school districts would have to show that their racial classification systems are narrowly tailored to achieve a compelling state interest. This requires a number of novel procedural hurdles: (1) districts would have to show that they considered and rejected plans with a narrower focus; (2) that the plan is only implemented for a limited time; (3) that the plan is to be reviewed periodically; (4) that the plan does not unreasonably harm the rights of third parties; (4) the district cannot set a numerical quota or a goal that results in a *de facto* quota; (5) the district cannot have a separate admissions committee to evaluate minorities; and (6) the district cannot have different numerical cut-offs in admitting minority candidates. See *PICS* 551 US 701 720-732 (plurality opinion).

Supreme Court decisions such as *Adarand Constructors Inc v Pena*,[37] but it choose to address the weighty influence of the landmark *Brown v Board of Education*[38] case. By selecting *Brown* and its progeny as the appropriate adjudicatory framework, the plurality was forced to weave its position through the Fourteenth Amendment. In order to do so, the opinion decontextualised the language of *Brown* in order to create the appearance that the petitioners in *Brown* would somehow smile upon its use of precedent.[39] Though Justice Roberts acknowledged that "[t]he parties and their *amici* debate which side is more faithful to the heritage of *Brown*," he offered absolutely no evidence to explain the ideological backflip that would be required for the proponents of *Brown* to ever decry the inclusion of more non-white students into the best public high schools available.[40]

2 2 2 Justice Thomas's Concurrence

Notable in Thomas' analysis is his distrust for the principle of local control. "I am unwilling to delegate my constitutional responsibilities to local school boards," Thomas wrote, because he questioned "whether local school boards should be entrusted with the power to make decisions on the basis of race."[41] Indeed, Thomas found that in this context, relying on local "elites" to pursue legitimate policy created the opportunity for an ironic outcome.[42] Of course, the integrity of this proposed principle is itself overwhelmed by the irony that accompanies Thomas' insistence that the judiciary enforce the Fourteenth Amendment in order to restrain those who seek to achieve racial balancing. Altogether, by employing an a contextual interpretation of the

37 *Adarand Constructors Inc v Pena* 515 US 200 (1995). *Adarand* supplies the modern conservative standard for evaluating race-conscious classification systems. It stands for the proposition that federal courts must scrutinise affirmative action programs on the basis of strict scrutiny. Interestingly, the *Adarand* court was "never confronted with the issue of diversity as a compelling interest" and yet it is often used today to stand as a judicial barrier to race-conscious programs. Daniel *Diversity in University Admissions Decisions: The Continued Support of* Bakke 2003 *J of Law and Ed* 69 73.

38 *Brown v Board of Educators* 347 US 483.

39 *PICS* 551 US 701 746-48 (plurality opinion). Justice Roberts disregards the shockingly uneven allocation of educational resources that first motivated the petitioners in *Brown*, and instead focuses on the abstract ideal of racial neutrality, stating that "[i]t was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954". *Idem* 746. This legal sanitation excuses Roberts from addressing the stark inequalities that would persist absent the assignment plans.

40 Indeed, "Robert Carter, a retired judge of the Court of Appeals for the Second Circuit, and other members of the *Brown* legal team complained that their briefs had been misrepresented by Roberts and that the Court decision had misinterpreted the meaning of that 1954 unanimous decision". Daniel, *An Essay: Not So Much a Counterpoint as a Call for Change: The Decision of* Parents Involved in Community Schools v Seattle School District No. 1 *and Its Impact on America's Schools* 2008 *Ed L Rep* 511 524-525.

41 *PICS* 551 US 701 782 (Thomas J concurring).

42 *Idem* 780 (Thomas J concurring).

Fourteenth Amendment, Justice Thomas is ultimately forced to discredit the principle of local control.

2 2 3 Justice Kennedy's Ambiguous Compromise

Though Chief Justice Roberts authored the plurality opinion, it is Justice Kennedy's concurring opinion that is known as the controlling decision in *PICS*. Kennedy's concurrence sought to provide a working compromise between the two ideological endpoints. In crafting this compromise, Kennedy first eschewed the harsh strict scrutiny standard employed by the plurality, in part by stating that the plurality opinion "impl[ies] an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."[43] Then, Kennedy made a formal entry of his position with regard to the principle of local control: "To the extent the plurality opinion suggests the Constitution mandates that state and local authorities must accept the status *quo* of racial isolation in schools, it is, in my view, profoundly mistaken."[44] Yet in order to provide balance to his opinion, Kennedy went on to criticise the dissent's unbridled acceptance of racial classification plans, suggesting that precedent forbade such a lenient standard.[45] Kennedy then employed precedents and *stare decisis* by highlighting the "fundamental difference" between *de jure* and *de facto* segregation cases in the Court's jurisprudence.[46] Kennedy also leaned on precedents in order to balance his support for the ideals that underlie the student assignment plans with the constitutional protections that, in his mind, forbid such "crude" race-based classifications.[47] Instead, he put his faith in the local "creativity of experts, parents, administrators, and other concerned citizens" but instructed them that they cannot allocate government "benefits and burdens on the basis of racial classifications".

In sum, Kennedy's opinion employed principles of federalism,[48] as well as an expansive interpretation of the Fourteenth Amendment, in order to craft a compromise that reflected the nature of his own situatedness as the "swing vote" on the Court.

2 2 4 The Interventionists Espouse Local Control

The first dissent, penned by Justice Stevens, made no explicit mention of the principle of local control. Instead, Stevens appealed to the Constitutional guarantees granted by the Fourteenth Amendment and

43 *Idem* 787-88 (Kennedy J concurring).
44 *Idem* 788 (Kennedy J concurring).
45 *Idem* 791 (Kennedy J concurring).
46 *Idem* 794-795 (Kennedy J concurring).
47 *Idem* 798 (Kennedy J concurring).
48 "'Federalism,' as developed in the United States, is the system in which power to govern is shared between the national and state governments and where federal and state officials may respectively have powers that are once co-extensive and overlapping." Daniel & Pauken *The* PICS *Decision – Academic Freedom v Federalism: Consider the Constitutional Implications*, 2008 *Temp Pol & Civ Rts LR* 111 133.

articulated by *Brown*'s progeny.[49] Citing a string of cases that support the use of remedial race-base classifications,[50] Stevens held high the mantle of *Brown*, and used *stare decisis* to deride the plurality's position.[51]

The second dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, began with an incendiary appeal to federalism: "[In the past, the Court has] understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so."[52] In support of this proposition, Breyer recounted the well-developed relationship between federal courts and the US school districts that they governed during the era of aggressive integration: "[T]he Court left much of the determination of how to achieve integration to the judgment of local communities."[53] The dissent also relied on precedent authored by its ideological ancestors. Quoting *Swann v Charlotte-Mecklenburg Board of Education*,[54] the opinion related how "School authorities are traditionally charged with broad power to formulate and implement educational policy[.]"[55] Reliance on this legal principle echoes throughout the dissent. Perhaps the most powerful appeal to this principle came at Breyer's conclusion, as he asked "And what of respect for democratic local decision-making by States and school boards?"[56]

In addition, Breyer emphasised the original intent of the Fourteenth Amendment,[57] and, like Justice Stevens, relied heavily on the doctrine of *stare decisis* with regard to *Brown*.[58] Finally, Breyer made one final thrust by employing historical context and even national ideals as a principled legal medium for expressing his opinion: "And what of the long history and moral vision that the Fourteenth Amendment itself embodies?"[59] Combined, this collection of legal strategies forcefully conveyed a finely tuned and unapologetic position.

2 3 The Consistency of Ideology – The Conservative Approach

The divergent opinions of Justices Roberts and Thomas in *Morse* and *Parents Involved* cannot be adequately explained by a model that suggests that justices make decisions by applying neutral principles of law. Instead, a much more comprehensive explanation is revealed through an appreciation of each Justices' ideological situatedness.

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49 See generally *ibid* 793-804 (Stevens J dissenting).
50 See *idem* 801-803 (Stevens J dissenting).
51 See *idem* (Stevens J dissenting).
52 *Idem* 803 (Breyer J dissenting).
53 *Idem* 804 (Breyer J dissenting).
54 *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1.
55 *PICS* 551 US 701 804-806.
56 *Idem* 866 (Breyer J dissenting).
57 See *idem* 829-830 (Breyer J dissenting).
58 See eg *idem* 866. See also *idem* 867-868 (Breyer J dissenting).
59 *Idem* (Breyer J dissenting).

To begin, *Parents Involved* demonstrates how justices of varying situations strategically use contextual information. For example, Chief Justice Roberts focused on facts from the *Parents Involved* record that highlight the individual, as opposed to the group. Roberts explained how when petitioner Crystal Meredith moved to the school district, "she sought to enroll her son … in kindergarten for the 2002-2003 school year."[60] And though young Joshua's school was "only a mile from his new home," he could not be placed there because it "would have an adverse effect on desegregation compliance."[61]

The conservative justices in *Morse* exercised their powers of judicial review in order to protect school administrators on the basis of federalism. And yet in *Parents Involved*, both Roberts and Thomas found themselves disabusing this very notion. Justice Thomas attacked the principle of local control to such an extent that he quoted the Federalist Papers as saying "If men were angels, no government would be necessary,"[62] only to embrace the principle of local control in *Morse*,[63] to condemn judicial usurpation of such control,[64] and to defend the ability of school administrators to make their own judgment calls.[65]

Stare decisis also fails to provide a consistent explanation for the disparity in conservative reasoning between *Morse* and *Parents Involved*. In *Morse*, the conservative majority touted the precedential value of *Fraser* and *Hazelwood School District v Kuhlmeier*,[66] only to disregard the powerful *Tinker* precedent and to instead invent a novel interpretation of its landmark language. Similarly, and in perhaps the most alarming display of this duplicity, the plurality in *PICS* went so far as to quote *Brown* in order to disable its precedential power.[67] Thus, the plurality in *PICS* treated conflicting legal structures such as *Brown* as mere potholes on the road to policy making.

As made clear by both the conservative and liberal justices in *PICS*, judicial restraint is not the exclusive province of either ideology. The doctrinal discrepancy between *Morse* and *PICS* demonstrates that although conservative justices are typically referred to as the esteemed protectorates against judicial activism, they may in fact be "the most eager to trump legislative majorities[.]"[68] Recently, the conservative wing has "rejected congressional efforts to regulate the influence of individual or corporate wealth on the political process, breathed new doctrinal life into the Second Amendment" and, as demonstrated in *PICS*, "insisted on near or total colour-blindness in race cases."[69] All of

60 *Idem* (plurality opinion).
61 *Idem* (plurality opinion).
62 *Idem* 782 (Thomas J concurring).
63 See *Morse* 551 US 421 (Thomas J concurring).
64 *Idem* (Thomas J concurring).
65 *Idem* (Thomas J concurring).
66 *Hazelwood School District v Kuhlmeier* 484 US 260.
67 *PICS* 551 US 701 746-48 (plurality opinion).
68 Siegal *Interring the Rhetoric of Judicial Activism* 2010 *DePaul LR* 583 583.
69 *Ibid*.

these actions required interventionist judicial activism. As Professor Neil Siegal points out, this reality illustrates that conservative justices do not in fact "typically defer to the government" or exhibit a "limited view of the role of courts in vindicating individual rights,"[70] but are instead just as human as liberal justices, and thus just as likely to be guided by their ideological predispositions when rendering decisions.

2 4 The Consistency of Ideology – The Liberal Approach

In *Regents of the University of California v Bakke*,[71] Justice Harry Blackmun wrote that "In order to get beyond racism we must first take account of race. There is no other way. And in order to treat someone equally, we must first treat them differently."[72] This liberal ideology has persevered from the majority opinion in *Swann* to the minority dissents in *PICS* and through dozens of cases in between. Seeing this consistency in ideology, the doctrinal manoeuvring demonstrated by the liberal justices between *Morse* and *PICS* cannot be explained by any neutral principle of law.

Liberals also selectively chose those contextual circumstances that help further their agenda. While the conservatives in *PICS* avoided a deep contextual analysis of the social conditions that brought about the use of the assignment plans in Seattle and Jefferson County, the liberal dissent focused with great interest on the history surrounding the plans. For example, where Chief Justice Roberts simply described how school administrators in Seattle had adopted the race-conscious plan "in an attempt to address the effects of racially identifiable housing patterns on school assignments,"[73] and how as a result of the plan, more non-white students had been placed in the city's top public high schools, the liberal dissent explained these same circumstances in a far more alarming manner. Such context was deemed "critical,"[74] and apparently so much so that Justice Breyer included throngs of demographic data in order to paint a contextualised picture.[75] History supports Breyer's outcome to such an extent that he included an appendix detailing the racial trends of both school districts.[76] Employing a drastically different approach than the plurality, Breyer summarised the racial history of Seattle since World War II[77] and provided the racial percentages for the Jefferson County school district since 1956.[78] Indeed, his opinion uses the word "history"

70 *Ibid*.
71 *Regents of the University of California v Bakke* 438 US 265.
72 *Idem* 407 (Blackmun J concurring). In his ideological retort almost 30 years later, Chief Justice Roberts penned the conservative equivalent of Justice Blackmun's position in stating: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *PICS* 551 US 701 748 (plurality opinion).
73 *PICS* 551 US 701 713 (plurality opinion).
74 *Idem* 804 (Breyer J dissenting).
75 *Idem* 805-06 (Breyer J dissenting).
76 *Idem* (Breyer J dissenting).
77 *Idem* 807 (Breyer J dissenting).
78 *Idem* 814 (Breyer J dissenting).

no less than twenty-four times.[79] This wealth of context provides Breyer with a powerful means of framing and furthering his position.

Most significantly, the liberal wing's contradictions across *Morse* and *PICS* cannot be adequately explained by the doctrine of federalism. Where the liberal wing advocated fidelity to an expansive First Amendment interpretation in *Morse* – one that works to upend the localised policies of school administrators – it then seamlessly adopted a position in *PICS* that not only affirms, but in fact *encourages* a policy of local control.

Mirroring the conservative justices' approach to decision-making, the liberal justices remain similarly undeterred by *stare decisis*. Though proud declarants of precedents that represent liberal victories, the liberal justices are quick to abandon former decisions that reach conflicting ideological ends. In *PICS*, Justice Breyer went to great lengths to articulate how a contextual history of the Fourteenth Amendment and *Brown* supported a decision in favour of the school districts. Yet in finding precedential support for this conclusion, Breyer leapt entire decades of Supreme Court jurisprudence, writing off *Adarand* and its progeny as 5-4 decisions and condemning the past twenty years of racial classification cases as wrongly decided. From an analysis of this jurisprudence, one fact becomes clear: the sole constant in the liberal decision-making formula is not a legal methodology, but a results-driven policy predisposition that seeks to further a liberal agenda.

This evidenced observation, that situatedness prevails over legal mechanics in judicial decision-making, is not unique to the American legal system. And unfortunately, sharply divided high court decisions are not either. These two realities produced a controversial decision in 2009, as a high court sitting some 8,000 miles away from the US Supreme Court demonstrated how situatedness can be applied, especially when the prospect of social progress hangs in the balance.

3 Situational Appreciation in *Mpumalanga Department of Education v Ermelo*

After being forced by the provincial department of education to admit 113 black 8th graders who required instruction in English, the Afrikaans school known as *Hoërskool* Ermelo brought suit in the Pretoria High Court in 2007.[80] Thus began the journey behind *Mpumalanga Department of Education v Ermelo*, a landmark case in modern times that concerned the right of a South African to receive an education in the official language of his or her choice in a public school.[81] The case is remarkable for a

79 *Idem* 803-69 (Breyer J dissenting).
80 See Jansen *Knowledge in the Blood* (2009) 288 n 43.
81 *Mpumalanga Department of Education v Hoërskool Ermelo* 2009 1 ZACC 32 (CC).

number of reasons, but perhaps most importantly because it stands as one instance of where the act of being selective on the basis of language was ultimately found to be unacceptable.[82] Though white parents rallied against the admission of the black students,[83] the values of the South African Constitution remained resilient. And so equity, practicability, and the need for a redress of the historical "scars"[84] of apartheid – together, the means by which the Constitution assessed language policy – ultimately compelled the transformation of *Hoërskool* Ermelo from a single-language public school into a two-language public school.[85]

3 1 Exclusion in the Aftermath

The Ermelo case captured the efforts of the South African judiciary to address school placement in South African society. Apartheid had not spared South Africa's public school system, and though *de jure* segregation had been outlawed with the passage of the 1996 Constitution, de facto segregation still lingered. So when black parents tried to remedy a massive school overpopulation crisis by attempting to enroll their students in neighbouring traditionally white schools, it came as no surprise when the embers of racial tension flamed anew.

School overpopulation had been a growing problem in Ermelo, a town of about 40,000 in the far eastern province of Mpumalanga. In response, the Department of Education ("DOE") identified *Hoërskool* Ermelo, a majority-white, Afrikaans-language school, as a school with space available to help remedy the emerging crisis.[86] *Hoërskool* Ermelo was built for 1,200 students, and yet its enrollment stood at 589.[87]

The governing board of *Hoërskool* Ermelo – comprised of parents of Ermelo students and members of the local community – responded by asserting the school's right to only instruct in Afrikaans.[88] By law, a governing board "exercises defined autonomy over some of the domestic affairs of [a] school,"[89] and thus has the power to select a language policy. When the DOE pushed back, Ermelo's board responded with appeasement: while refusing to admit the black students, Ermelo would provide space at an unused building – a nearby laundry facility – for 113 stranded black students.[90] Parents of the stranded students and the DOE felt that this compromise was insufficient, and the DOE responded by flexing its administrative muscles. The department displaced Ermelo's governing body and established an interim governing committee that immediately changed the school's language policy to one

82 See Woolman & Fleisch 79.
83 *Idem* 209.
84 *Ermelo* par 45.
85 See Woolman & Fleisch 78.
86 See Minow *In Brown's Wake* (2010) 174.
87 See Woolman & Fleisch 206.
88 See Minow 174.
89 *Ermelo* par 56.
90 *Ibid*.

that offered instruction in both Afrikaans and English.[91] Outrage ensued, and Ermelo's administrators challenged the action by filing suit in the North Gauteng High Court in Pretoria,[92] asking for an urgent interim order that would set aside the DOE's decision and restrain the department's newly-created interim committee from altering Ermelo's single-language policy.[93]

3 2 In the Courts

In Pretoria, the full bench of the North Gauteng High Court dismissed the school's application for review, but permitted the school to appeal this decision.[94] In ruling against the school, the High Court stated that the Ermelo governing body had "unreasonably refused" to review its language policy.[95] Under section 22 of the Schools Act, an unreasonable refusal would allow the DOE to revoke the governing body's power to autonomously determine its own language policy.[96] From there, section 25 of the Schools Act gave the DOE the ability to transfer this power to an interim committee.[97] The High Court refrained from qualifying its conclusions, offering no condolences to the Ermelo administrators.

The governing board appealed. The reviewing court, the Supreme Court of Appeal, found that the power to withdraw functions under section 22(1) and (3) of the Schools Act may be exercised *only* in relation to those functions allocated to a governing body by the terms of section 21.[98] That is to say that unless a function was first allocated to Ermelo's governing body as prescribed by section 21, the DOE could not revoke and subsequently control that function. The Court of Appeal then surveyed case law in order to determine which functions were or were not allocated under section 21. The Court's list was limited to the following:

> [M]aintaining and improving school property, buildings and grounds; determining the extra-mural curriculum of the school and choice of subject options; purchasing text books and other educational materials or equipment; paying for services to the school; providing an adult basic education and training class or centre; and other functions consistent with the Schools Act and any applicable provincial law.[99]

Language policy was missing.

Thus, according to the court, section 21 did not delegate the power to set language policy to a provincial department of education.[100]

91 *Ibid*.
92 *Ibid*.
93 *Ermelo* par 28.
94 *Idem* par 29.
95 *Idem* par 31.
96 *Ibid*.
97 *Ibid*.
98 *Ibid* par 34.
99 *Ibid*.
100 *Ibid*.

Therefore, the DOE could not have legally revoked and assumed a power that it had never been delegated in the first place. Instead, the Supreme Court of Appeal found that section 6(2) of the Schools Act exclusively vested the power to determine language policy in Ermelo's governing body.[101]

The case was appealed to the South African Constitutional Court, where a majority of the justices believed that the outcome should hinge not on the content of the school's language policy, but rather on whether the DOE had properly exercised its administrative power.

Writing for a unanimous court, Deputy Chief Justice Dikgang Moseneke first outlined the explicit education policies contained in the South African Constitution. As Moseneke described, "section 29(1) entrenches the right to basic education and a right to further education which, through reasonable measures, the state must make progressively accessible and available to everyone."[102] Next, Moseneke focused on the "crucial provision" for the case – section 29(2) – which provides that:

> 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.[103]

In explaining the interplay of this constitutional language, Moseneke noted that a public school's governing body has primary power to determine its language policy; however, such power must be exercised "subject to the limitations" laid down by "the Constitution and the Schools Act or any provincial law."[104] At this juncture the Court disagreed with the Supreme Court of Appeal and found that under section 22 of the Schools Act the DOE *did* have the power to revoke the governing body's function of setting a language policy.[105] However, the exercise of the DOE's power had been "vitiated by [the] procedural

101 *Ibid*.
102 *Idem* par 47. S 29(1) Constitution provides as follows: "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".
103 S 29(2) Constitution.
104 *Idem* par 61. Indeed, not subjecting this power to the limitations of the Constitution and the Schools Act could result in "an insular construction [that] would in certain instances frustrate the right to be taught in the language of one's choice and therefore thwart the obvious transformative designs of section 29(2) of the Constitution". *Ibid* par 77.
105 *Idem* par 61.

unfairness"[106] through which the DOE had appointed the interim committee, and through which the interim committee had established the revised language policy.[107]

So while the DOE was authorised to withdraw a school's language policy "on reasonable grounds,"[108] it nevertheless had lacked the legal ability to dissolve Ermelo's governing body. According to the Court, the two provisions at hand – one that spoke to the DOE's power to withdraw a school's language policy and another that permitted the DOE to dissolve a local governing body – in effect "regulate two unrelated situations and may not be selectively or collectively applied" in order to achieve a purpose not authorised by the Schools Act.[109] That is, "Section 22 regulates the withdrawal of a function, but only on reasonable grounds. Its purpose is to leave the governing body intact but to transfer the exercise of a specific function to the [DOE] for a remedial purpose."[110] In essence, although the DOE had these two independent powers, it "unlawfully conflated the requirements of section 22(1) and of section 25 by withdrawing the function and at the same time establishing an interim committee under section 25."[111] Simply put, the DOE had no power to establish the interim committee. In turn, the interim committee therefore did not have the requisite power to fashion the new language policy for the school.[112] Thus, the DOE's imposition of the new language policy had been unlawful.

Yet in almost the same breath, the Court exercised its constitutional ability to "make any order that is just and equitable"[113] and directed the now-restored Ermelo governing body to "reconsider" its single-language policy "in the light of the considerations set out in this judgment."[114] In other words, given that the demand for English instruction in the Ermelo community was likely to increase, the Court ordered the school administrators to take the black community's interest into account by revisiting the school's language policy.[115] The Court also charged the Ermelo administrators with pursuing means of accommodating the

106 *Ibid.*
107 *Ibid.*
108 *Idem* par 71. A contrary construction of this DOE power would "in certain instances frustrate the right to be taught in the language of one's choice and therefore thwart the obvious transformative designs of section 29(2) of the Constitution". *Ibid* par 86.
109 *Idem* par 88.
110 *Ibid.*
111 *Idem* par 93.
112 *Idem* par 93.
113 *Idem* par 96.
114 *Idem* par 98.
115 See Minow 174.

inevitable influx of new students who would wish to enroll the following year.[116]

3 3 Situatedness Expressed Through Procedure

Though the Constitutional Court in *Ermelo* focused on the language differences or preferences between whites and blacks, its members were certainly well aware of the fact that such language differences were the products of a highly racialised social structure. Indeed, it is difficult to separate the linguistic history of South Africa from the history of the black struggle against apartheid. Though Afrikaans and English are but two of eleven official languages recognised by the South African government,[117] the language of Afrikaans is not simply a regional dialect in South Africa. Genetically and structurally a Germanic language with roots in 17th century Dutch,[118] it is instead a language that, during the black struggle against apartheid, "became linked with White power politics" and was traditionally known to black South Africans as the "language of the oppressor."[119]

This political dimension to language had particular significance in the context of South African schools. As the ancestors of the Europeans that had first colonised the country, whites in South Africa benefited from a history of discriminatory treatment. This treatment extended to South Africa's public schools, where white public schools were reserved for relatively affluent whites. While these institutions were well-funded – either by their respective communities or by the government – black public schools were poorly resourced and funded stingily by the apartheid government.[120] When apartheid began in 1948, Afrikaner nationalism dominated, and the Afrikaner majority subsequently imposed the Afrikaans language on black public schools. This language policy was famously rejected by the Soweto riots, which forced the withdrawal of Afrikaans as a medium of instruction in black schools.[121]

Thus it could be argued that Ermelo's language policy provided a race-neutral means of excluding black students. Yet it could also be argued that the policy represented the solemnisation of the South African Constitution's recognition of eleven languages. According to the Court, though South African educational policy was traditionally determined by local administrators,[122] "the usual reliance on decentralised control ... hit a limit [in *Ermelo*], as the racial impact of local governance ... was unacceptably unresponsive to the needs of black students."[123] Although

116 *Ibid.*
117 See Rodrigo *Topics in Language Resources for Translation and Localisation* (2008) 91.
118 *Ibid.*
119 Fardon & Furniss *African Languages, Development and the State* (1994) 100.
120 See *Ermelo* par 46.
121 See Fardon & Furniss 100.
122 *Idem* 175.
123 *Ibid.*

the Constitutional Court emphasised the principle of legality and the importance of the proper exercise of administrative law, the Court's ultimate order is most accurately viewed as a reflection of the racial context of the dispute. On the surface, the Court pays little attention to the racial overtones of the case: when summarising the position taken by the DOE, the Court wrote "[The DOE] contend[s] that the core of the dispute is the appropriateness of the school's language policy which in effect has a disparate impact of excluding learners who choose to be taught in English. On the facts of this case, these are exclusively black learners."[124] Yet with the exception of this statement and two introductory remarks made in passing,[125] the Court does not employ any race-conscious language in deciding *Ermelo*.

Altogether, the Constitutional Court crafted a grand and somewhat ambiguous compromise: while the familiar tenets of local control would be preserved in procedural form, the Constitution's ambitious spirit of equality would nevertheless be vindicated. By concluding that the interests of Ermelo's current students and their parents must be balanced by the interests of the broader community and by the integrationist ideals of the Constitution itself, the Court ultimately exhibited its ability to use procedural neutrality as a means of reforming South Africa's public schools.

In *Ermelo* – just as in *Morse* and *PICS* – situatedness determined the outcome. And there is little to suggest that the power of situatedness on courts of last resort is waning. In the end, this is an unfortunate result. Not just for the parties and judges directly involved in the all-or-nothing decision-making process, but also for those who subscribe to the policy preferences of the minority faction of the court. Though situational appreciation provides a means of explaining and predicting judicial behaviour, it does not offer a means of remedying the polarising consequences of such behaviour. But this polarisation is by no means inevitable. One former judge, now a legal scholar, advocates a process that helps "create the conditions for principled agreement," a process that offers a means of preventing divisive outcomes that beget controversy.

4 Collegiality and the Resolution of Conflict

"[C]ollegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions," writes Judge Harry T. Edwards in "The Effects of Collegiality on Judicial Decision Making."[126] In short, collegiality is a means of influencing a decision-maker's

124 *Ermelo* par 38.

125 The Court relates how "Apartheid has left us with many scars" and that "The cardinal fault line of our past oppression ran along race, class and gender." *Idem* par 45.

126 Edwards *The Effects of Collegiality on Judicial Decision Making* 2003 *U Pa LR* 1639 1640-1641.

situatedness by "allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another" in order to alter a judge's situation, which ultimately "helps ensure that results are not preordained" by each judge's policy preferences.[127]

Edwards does not deny the powerful effect that situatedness plays in the judicial decision-making process. In fact, he builds his argument for collegiality in response to this reality. According to Edwards, who served as the Chief Judge of the US Court of Appeals for the District of Columbia Circuit for seven years, ideological policy preferences can be transcended through the "crucial variable" of collegiality in order to find "the best answer (not the best 'partisan' answer) to the issues raised" in a particular case.[128]

However, Edwards is clear in limiting the applicability of his collegiality argument to the US Courts of Appeals, and he does not attempt to extend his proscriptions for good judging to the United States Supreme Court.[129] He refrains from making this analytical leap for a number of reasons. First, he notes that decisions in the US's highest court are most often "very hard" cases that require the exercise of discretion. Second, he recognises that lower appellate courts are constrained far more by high court decisions. Third, he states that because the Supreme Court sits *en banc* for every case, collegiality on the high court no doubt operates very differently than it does in intermediary appellate courts.[130] These distinguishing features are no less true for South Africa's Constitutional Court.

Nevertheless, Edwards' recommendations identify a highly practical and immediately useful formula for combating the influence of situational predispositions. Thus, where situational appreciation helps explain and predict the ideologically-fractured outcomes of high court judicial behaviour, collegiality offers a means of avoiding this behaviour's polarising consequences.

5 Conclusion

This article has endeavoured to exhibit a more accurate description of judicial decision-making, and to demonstrate the determinative power that situatedness wields. By eschewing the fictions of doctrinal restraints and the mechanical application of "neutral" principles of law, the analyses of the contradictory legal positions opined in *Morse* and *PICS*

127 *Idem* 1645.
128 *Idem* 1643, 1649.
129 "I limit my own observations on collegiality to the circuit courts, because it is what I know best and, also, because I am inclined to believe that the differences between the Supreme Court and circuit courts may be too substantial to generalise from one to the other." *Idem* 1644.
130 *Ibid*.

illustrate the ease and consistency with which the doctrine of situational appreciation can be applied to cases. And as evidenced by *Ermelo*, decisions are not produced by a formalistic adherence to compulsory legal prescriptions, but are very much influenced by situational conditions. It is this appreciation for context, for situation, that can provide an accurate and consistent means of identifying, explaining, and addressing the true determinants of those court decisions that direct our shared future.

The effectiveness of legal remedies in education: A school governing body perspective

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OPSOMMING

Die Doeltreffendheid van Regsmiddele in Onderwys: 'n Skoolbeheerliggaam se Perspektief

Na bykans 'n dekade van grondwetlike regsontwikkeling, word howe steeds versoek om geskille tussen skoolbeheerliggame en hul onderskeie provinsiale onderwysdepartemente by te lê. Alhoewel verskeie redes hiervoor uitgelig kan word, fokus hierdie artikel op aangeleenthede wat betref die Staat en skoolbeheerliggame se besorgdheid aangaande die voorsiening van gehalte-onderwys in die taal van keuse ingevolge artikel 29(2) van die Grondwet. Die doeltreffendheid van regsmiddele in hierdie verband, word aan die hand van drie prominente hofsake, naamlik *Laerskool Middelburg, Laerskool Mikro* en *Hoërskool Ermelo* ondersoek. Vir die doeleindes hiervan, is 'n dokumentêre navorsingsontwerp en hermeneutiese benadering binne 'n kwalitatiewe dimensie in die kleine gevolg om die ervaring van minstens twee persone wat verbonde is aan elk van die skole en betrokke was by elke hofsaak, te bekom. Die resultate van die studie dui daarop dat taal oor die algemeen 'n polities-gedrewe aangeleentheid is, dat regsmiddele inderdaad – met verloop van tyd – verligting en sekerheid bring en dat howe wél die korrekte forum is vir geskilbeslegting wat betref onderwysaangeleenthede.

Congratulations! The court has just ruled in your favour. The easy part was winning the case. Now for the tricky part – getting the other party to pay up.

1 Introduction

After more than a decade of constitutional jurisprudence, courts are constantly requested to intervene between schools' governing bodies (SGBs) and their respective provincial departments of education (PDoEs) in order to remedy issues of conflict between them. Although various reasons for such education litigation can be outlined, this article contemplates only those issues pertaining to the State's and SGBs' concern regarding the provision of quality education to all learners in the language of choice in accordance with section 29(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

The medium of instruction is selected since litigation in this regard seems to be fruitless. Malan,[1] Malherbe[2] and the *Federasie van Afrikaanse Kultuurverenigingе* (Federation of Afrikaans Cultural Associations),[3] for example, show that courts' verdicts only bring relief in the short run. They do not stop PDoEs to continuously pressurise schools to change their language policies. Despite their theoretical value, legal remedies have, thus, proved to be inadequate in practice.[4] This led to, as pointed out by Malan,[5] the realisation that the previously devoted confidence of SGBs in the capability of the law and courts to guard their position, in determining their own language policies, is unjustified.

In view hereof, this article attempts to answer the following question: Are legal remedies provided by courts effective in remedying the battle between SGBs and PDoEs over, specifically, the language policies of schools?

In providing an answer, a brief background is provided, the right to education in the language of choice is analysed, the legal status of SGBs and PDoEs in South Africa is discussed, and the legal remedies available to them, are addressed. To illustrate this, three prominent court cases namely *Middelburg,*[6] *Mikro*[7] and *Ermelo*[8] concerning the right of SGBs to establish the language policy of schools in terms of section 6(2) of the South African Schools Act[9] (the Schools Act), in which courts were requested to remedy the situation, is scrutinised throughout. In order to establish the effectiveness of the three court verdicts, we added a small qualitative research dimension to obtain the perspectives of the three SGBs involved, regarding the relief obtained. The article ends with significant recommendations.

1 "Die Grondwet, onderwysowerhede en die pad vorentoe vir Afrikaanse skole" 2010 *T vir Geesteswetenskappe* 262.
2 "Taalregte in Suid-Afrikaanse skole (tydelike verligting van onverpoosde druk)" 2006 *TSAR* 197.
3 "The Federation of Afrikaans Cultural Associations welcomes the *Mikro* Judgement" 2005 http://vryeafrikaan.co.za/lees.php?id=272 (accessed 2013-02-15).
4 The Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) parr 65, 81-2 outlined that constitutional remedies are, especially with regard to socio-economic rights ineffective as they often amount to sheer declarations.
5 2010 *T vir Geesteswetenskappe* 262 260.
6 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).
7 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 10 BCLR 973 (HHA).
8 *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 JOL 23349 (SCA).
9 84 of 1996.

2 Research Angle of Incidence

First and foremost, this article follows a documentary research design,[10] since the authors drew on documentary resources and took an investigative stance while cross-examining the particular texts.[11] Moreover, we did not only attend to *what is written and how a particular concept is expanded*, but also to *what is implied and/or not written*.[12]

Lastly, we underpin the article by following an hermeneutical approach.[13] Such an approach refers to reading written text or content for the sake of an interpretive appreciation while considering context and original purpose meticulously. The concept *text* is broadened to incorporate, among others, in-depth interviews.[14] Therefore, we added a small qualitative dimension to our investigation in order to obtain the current perspectives of the three SGBs involved,[15] regarding the relief obtained.

The small qualitative dimension comprised of conducting telephone interviews with at least two people who were involved in each school's court case, whether part of the SGB or of the legal advice.[16] The rationale for choosing telephone interviews lies in the fact that the authors of this article were interested in using a cost-effective way of gaining a fresh perspective on each of the selected cases by reporting on the outcomes of the remedies and court orders.[17] The interviewer guarded against causing the schools any harm or anguish by (1) explaining to each participant what the research entailed; (2) inviting each participant to take part; and (3) acknowledging each participant's consent or refusal.[18] The possible disadvantage of open-ended questions that form part of telephone interviews[19] was negated by the fact that the participants were all familiar with the relevant court case.

10 Green & Browne *Research design* 38 in *Principles of social research* (2005) (eds Green and Browne).
11 Rapley *Doing conversation, discourse and document analysis* (2007) 111.
12 *Ibid*.
13 Babbie & Mouton *The practice of social research* (2001) 30-31. Merriam *Qualitative research. A guide to design and implementation* (2009) 32-33. Neuman *Social research methods. Qualitative and quantitative approaches* (2011) 101. The theory dates back to the 19th Century.
14 Merriam 33.
15 *Middelburg*, *Mikro* & *Ermelo*.
16 In the end, we interviewed eight persons. The interviews took 42-75 minutes each. One of the three schools was hesitant in the beginning; the other two grabbed the opportunity.
17 Rapley *Doing conversation, discourse and document analysis* (2007) 20. In general, written documentation of a school's perspective on the extent to which a court order, for example, was executed, is not readily available.
18 Rapley 24.
19 Neuman 338.

3 Background

The language of instruction in multilingual countries remains a problem. In South Africa, specifically, Malherbe[20] opines that the constitutional protection of languages seems not to be worth much as government is neglecting its duty to uplift the status[21] of the nine official indigenous languages in particular, while mother-tongue education remains only to be ideal words.

4 The Right to Education in a Language of Choice

The right to education is globally recognised as a fundamental, socio-economic human right[22] as it provides a means to human empowerment, political participation, quality of life and equal access to public services.

Because of its social value, the right to education, together with the right to education in a language of choice, is guaranteed and protected by the Constitution[23] through section 29. With regard to section 29(2), Visser[24] accentuates that the right to education in the language of a learner's choice is a qualified right. He accordingly cautions that, although this right creates specific expectations with learners, they must always bear in mind that its nature and scope may be bespoke by internal qualifiers and its application limited,[25] when applicable.[26] They must, moreover remember that it does not extend to each and every public school where reasonably practicable.[27] Learners must also recognise that it does not present them with a right to a single-medium

20 "Taal in skole veroorsaak nog 'n slag hoofbrekens: Regspraak" 2010 *TSAR* 610.
21 S 6(2).
22 Bray "Macro issues of Mikro Primary School"2007 *Potchefstroom Electronic LJ* 2; Roach "Crafting remedies for violations of economic, social and cultural rights" in *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) (ed Squires) 111-126.
23 Various other sections provide for language and language rights: ss 6, 30, 31, 35(3)(k), 185, 186 and235 Constitution.
24 "Legality and legal reform in the public sector" 2006 *TSAR* 360.
25 *Reasonably practicable* – the Constitution requires education authorities to provide education in the language of choice in public schools *where this is reasonably practicable.* Given the range of official languages (11 – s 6), the Constitution provides this internal limitation to the right. Whether or not it is reasonable practicable, a consideration of various factors is needed, such as language usage, practicality, expense, regional circumstances and balancing the needs and preferences of the population (s 6(3)(a)).
26 Bray 2.
27 *Mikro* par 31.

public school albeit the fact that it may have momentous potential for the realisation of such schools.[28]

Fleisch and Woolman,[29] concurrently, offer the opinion that single-medium public schools may exclude learners from schools if they have access to another school offering adequate instruction in their chosen language. Where this right is, however, denied, Barry[30] points out that the State *via* its responsible education authority, carries the onus of providing a reasonable and objective justification for its denial. This is essential as (a) the Norms and Standards in Public Schools[31] place significant constraints on the ability of single-medium schools to turn down learners, who prefer and will benefit from, instruction in another language[32] and (b) no language should be forced upon learners nor should they unreasonably be deprived of the opportunity to use their language(s) of choice.[33] These Norms and Standards make explicit what is meant by the phrase *where reasonably practicable* as a qualifier in terms of section 29(2) of the Constitution) as it determines that it is reasonably practicable to provide education in a particular language of learning and training if at least forty learners in a particular grade within Grades 1-6 or thirty-five learners in a particular grade within Grades 7-12 request instruction in a specific language at a particular school.

5 The State's Obligation to give effect to the Right of Education in a Language of Choice

Bray[34] highlights that section 29(2) endows learners with a right against the State; bestowed with the enormous responsibility of realising it in practice, *per se*. This is due to the fact that significant authority over public schools is vested in national and provincial spheres of government.[35] As such, the State is primarily responsible for all public schools and thus obliged to afford the best feasible outcome by utilising the various educational alternatives[36] accessible to them in a *bona fide*

28 "Language rights in education: the international framework" 9-22 in *Multilingualism, Education and Social Integration* (2003) (eds Cuvelier, Du Plessis and Teck); *Laerskool Middelburg* 173B, 173F; Kriegler J in *Ex parte Gauteng Provincial Legislature,* moreover, suggested that the State will no longer support public institutions that privilege one way in the world over another. For those who insist on education in their language of choice, the Constitution, through s 29(3) provides the right to form independent schools out of their own resources.

29 "On the constitutionality of single-medium public schools" 2007 *SAJHR* 66.

30 *Schools and the law: A participant's guide* (2006) 48.

31 GN 1701 in *GG* 18546 of 1997 as promulgated by SASA and the National Education Act.

32 Fareed & Waghid "In defence of deliberative democracy: challenging less democratic school governing practices" 2005*SA Jof Ed* 27.

33 Malherbe 191.

34 Bray 9.

35 "Democracy, social capital and school governing bodies in South Africa" 2008 *Ed and the Law* 55; Barry 23.

36 S 29(2) Constitution.

manner. Seeing that the State can be held accountable by the community for the outcomes[37] of its actions, Malherbe[38] urges government to reconsider what may be judged to be educationally feasible while, as outlined by Cheadle *et al,*[39] paying attention to the important factors of reasonableness, equal education opportunities and the necessity of redressing past imbalances. PDoEs, must also, as outlined by Bray,[40] explore ways of sharing scarce resources and providing alternative language maintenance programmes at schools and/or in school districts which cannot be provided with and/or offer additional languages of instruction.

The responsibility of the State to consider all reasonable educational alternatives was coupled by the court in the *Mikro* case[41] with its obligation to transform the whole education system and develop a uniform system in line with constitutional principles and the needs of a newly democratic South African nation.[42] Barry,[43] however, contends that the State alone cannot carry these responsibilities since only the education system as a whole can reasonably be expected to provide education in all official languages.[44]

The important role of all citizens in protecting and giving effect to individual rights was highlighted by the Constitutional Court in *S v Manamela*[45] by showing that it does not only depend on State action, but also on the conduct of all fellow citizens. Honoré,[46] similarly, argues that everyone is incited to treat others as responsible agents as it promotes individual and social well-being by preserving social order, encouraging good behaviour and creating a sense of personal character and identity that is valuable for its own sake.

Visser[47] demonstrates that there are at least four key role-players involved in exercising direct control over education, namely PDoEs, principals and educators, as well as SGBs. SGBs were, accordingly, created within the parameter of the principles regarding the decentralisation of power, to govern schools in partnership with the State.[48] As such, the Schools Act aims at upholding the rights of all learners, parents/caregivers and educators and promoting their

37 Visser & Loubser 28.
38 Malherbe 192.
39 *South African Constitutional Law: The Bill of Rights* (2002) 540.
40 Bray 15.
41 Parr 3-4.
42 Bray 15.
43 Barry 49.
44 This is particularly so when the implications these rights have for educational planning, the provision of sufficient resources and the availability of qualified educators are taken into account.
45 2000 3 SA 1 (CC) par 100.
46 Quoted by Visser & Loubser *Thinking about law: Essays for Tony Honoré* (2011) 26.
47 Visser 360.
48 Preamble SASA.

acceptance of responsibility for the organisation, governance and funding of schools as equal educational partners.

The creation of SGBs is regarded by Woolman and Fleisch[49] as a lineation of a fourth level of democratic government as a unique political institution. Bray,[50] to the contrary, opines that SGBs do not form part of the spheres of government or state organs working within the sphere of public education. Because of this disagreement, the position of the State and SGBs needs further clarification.

6 The Status of PDoEs and SGBs

SGBs were created by the Schools Act, stipulating their functions while also providing a useful framework in terms of which school education must function and be managed in obtaining the objectives of the Constitution.[51] As juristic persons, schools via their SGBs are, moreover, obliged to exercise their statutory functions[52] in the best interests[53] of their schools and learners.

SGBs are, *inter alia,* considered to be sites of representative (a first step towards self-governance, according to Woolman and Fleisch),[54] participatory and direct democracy. As such, SGBs possess the authority to take community-based decisions[55] on, for example, the developing of school language policies. As a result, SGBs can be seen as popular means for political participation as they in many respects reflect the most important interactions that citizens may have with the State and possess the potential to be the foundation of social cohesion[56] among South Africa's diverse population.

In granting parents/caregivers and learners who live together and know schools and their surrounding environment best, the opportunity to make decisions regarding the education of the youth, participatory democracy is enhanced. Woolman and Fleisch,[57] accordingly, regard the Schools Act to represent the ideal for the creation and maintenance of social capital. They base their finding on the fact that such decisions have the potential of creating trust, loyalty, friendship, kinship and commitment to shared objectives.

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49 47.
50 16.
51 In *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par 44 the court found: "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law ... derives its force from the Constitution and is subject to constitutional control".
52 Ss 20, 21 SASA.
53 S 20(1)(a) SASA.
54 59.
55 Visser 360; Fareed & Waghid 25.
56 The cornerstone of economic stability – Chipkin & Ngqulunga "Friends and family: social cohesion in South Africa" 2008 *J SA Studies* 65.
57 59.

In itself, SGBs should thus be allowed to operate with a considerable degree[58] of independence from PDoEs – they have a legal status and capacity of an unchallenged nature separate from State departments.[59] This viewpoint was underscored by the Supreme Court of Appeal[60] in stating that SGBs, although subject to the Constitution,[61] the Schools Act[62] and any other provincial law, are not part of the governmental hierarchy and are not, in relation to their functions, subject to any executive control by the national, provincial or local spheres of government. It was, correspondingly, found that the PDoE had no power, without any justification, to infringe the SGB's right to adopt its own language policy.[63] Adding to this, Woolman and Fleisch[64] state that SGBs are not mere extensions of PDoEs. They are rather unique establishments governing public schools as self-governing institutions without undue influence by government, in contrast with the duty of principals to manage schools as a direct delegate of the various heads of department.[65]

However, since SGBs were created by the Schools Act, they are not constitutionally mandated establishments. As a result, their functions can be altered and even eliminated[66] by the State through the promulgation of legislation.[67] This must, conversely, be done with great care as the court indicated in the *Mikro* case[68] that the State must be able to justify its actions in each case. In the absence of the latter, courts will regard its actions as arbitrary and in violation of constitutional and statutory provisions.[69] In protecting the community from arbitrary state actions, Grote,[70] however, emphasises the practical importance of independent courts being able to apply the ideal of rule of law,[71] thus controlling administrative matters by way of judicial review.[72] Altering the functions

58 Schools remain subject to overall control (management and governance) by the national education government in the sense that they must comply with national and provincial norms and standards (Bray 17).
59 Bray "Autonomy in school education in South Africa: a legal perspective" 256 in *Autonomy in education* (2000) (eds Berka *et al*).
60 *Mikro supra* parr 20, 22.
61 Ss 2, 8, 33, 39,195, 237.
62 Ss 5, 6.
63 *Mikro* par 43.
64 49.
65 S 16 SASA.
66 S 22(1) SASA; Woolman & Fleisch 55.
67 Thus, changing the balance of power between SGBs and National Government.
68 *Mikro* parr 33, 34.
69 Woolman & Fleisch 66.
70 "Public law in transformation" 2004 *SA Public Law* 514.
71 The ideal of rule of law constitutes one of the core principles of contemporary constitutionalism.
72 The review of administrative actions is inherent in the jurisdiction of courts. Since it has also been constitutionalised by s 33 Constitution, the enforcement of administrative law in courts has largely become a constitutional matter (Hoexter *Administrative law in South Africa* (2008) 463).

of SGBs through legislation is considered by Bray[73] as a way to counteract the self-governance of public schools,[74] thus not only infringing upon their legal personality, but also opposing the constitutional ideal of transforming education and allowing for democratic participation in this sphere.

Visser,[75] moreover, shows that because of the close link between PDoEs and SGBs in providing public education, any decrease in the functions of SGBs will automatically lead to an increase in the functions of PDoEs. The same author, however, cautions that more powers cannot merely be allocated to PDoEs in light of numerous existing illegal and irregular actions by education officials. Visser[76] rather calls on PDoEs to develop a culture of respecting the legal powers and functions of SGBs in order to serve everybody in South Africa fairly.[77]

Looking at the other side of the coin, Fareed and Waghid,[78] cautions that the State, primarily responsible for public education, cannot be expected to be merely an onlooker. It has to guard against SGBs misusing their statutory powers to, for example, unfairly discriminate against learners by way of their language policies.[79] The same authors,[80] nevertheless, point out that, although the Constitution does not provide a guaranteed right to single-medium schools, it does not prohibit the existence of such schools. It rather recognises a multiplicity of school language policies. The aim is, thus, not to bring about uniformity or create a homogeneous society, but to ensure that language is not used for purposes of exploitation, oppression, abuse or exclusion.[81]

In view of this, it is essential to take note of the Constitution providing for principles of cooperative government and intergovernmental relations.

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73 18.
74 Eg s 20 – changing SGBs' powers to recommend and appoint educators; Education Law Amendment Act causing confusion and alarm about the role of the SGB and the HOD in learner suspension and expulsion.
75 360.
76 363.
77 S 195(1) Constitution.
78 65.
79 *Laerskool Middelburg; Ermelo*; s 9 Constitution.
80 66.
81 Sachs "A Bill of Rights for South Africa: areas of agreement and disagreement" 1989 *Columbia HR LR* 27.

7 Cooperative Governance and Intergovernmental Relations

Public schools, along with PDoEs[82] act as institutions/functionaries performing a public function[83] as they are responsible for providing public education in an impartial, fair, equitable, transparent, competitive and cost-effective manner[84] in terms of legislation.

As organs of State,[85] PDoEs and public schools via their SGBs must adhere to the basic democratic values and principles governing the public administration[86] as they are, as emphasised in the *Ermelo* case[87] always required to act within the confines of the law. They are, moreover, bound to the constitutional principles of cooperative governance and intergovernmental relations,[88] which have, as referred to by Barry,[89] considerable consequences for the conduct of public schools and for their relations with one another.

In this regard, the Constitution, section 41(1)(e) and (h), makes provision for respect towards the status, powers and functions of government in all spheres, as well as for cooperation in mutual trust and good faith. Section 41(1)(h)(ii) and (iii), moreover, require of government agencies to assist, support, inform and consult one another on matters of common interest. It is, accordingly, important that SGBs and PDoEs fully understand one another's different legal powers and levels of responsibility, inspire confidence in one another's ability to make sound, objective and timeous decisions, consult with one another and detain themselves from infringing on one another's terrain.[90]

Practice, in stark contrast, unfortunately does not mirror effective cooperation. This could be ascribed to the close link between SGBs and the State leading to the distinction between their functions being blurred, resulting in extensive tension at school level. Various authors attribute

82 Provincial education departments (organs of State) form part of the executive authority of government, bestowed with the power to apply national policy on a provincial level (Hoexter 6).
83 S 239 Constitution comprehensively defines a state organ as "any institution exercising public power or performing a public function in terms of any legislation is an organ of state".
84 Barry 29.
85 *Mikro* par 20.
86 SGBs perform typical administrative actions in the management and governance of public schools.
87 *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 JOL 23349 (SCA).
88 Ss 41, 195 Constitution.
89 29.
90 Visser 365.

this to the State not respecting SGBs,[91] thus illegally intruding in SGB-functions[92] while disrespecting the law, as well as the rights of SGBs and learners[93] to legislation providing little scope for decisions by SGBs,[94] and to attempts aimed at merely pursuing parents/caregivers to accept financial responsibility for education. It is in view of these discrepancies that SGBs and PDoEs are obliged to consider carefully whether existing legal remedies can effectively combat existing conflict between them.

8 Legal Remedies in Education

The *ubi ius ibi remedium*-principle in South African law entails a legal remedy existing for every right.[95] This involves that the existence of a legal right implies the existence of an authority (judiciary, acting as the *natural guardian* of individual rights[96]and as *administrators of justice*)[97] with the power to grant a remedy whenever a right is infringed.[98] As such, legal remedies[99] protect rights by providing legal subjects the opportunity to enforce their rights.

Pertaining to the right to receive education in a language of choice, Bray[100] stresses that, when this right has been infringed upon, it grants not only administrators of public education the powers to implement this right, but also the judiciary to administer justice impartially and without fear, favour or prejudice in line with section 165 of the Constitution. With regard to the rights of SGBs to compile language policies, courts therefore have the authority to reprimand PDoEs when opting to act in a bureaucratic and heartless fashion against SGBs.[101]

Since establishing an appropriate and effective remedy for the breach of a right remains a challenge,[102] South African courts have been allocated wide remedial powers to grant remedies in, especially, socio-economic rights cases to which the right to education belongs. Courts

91 Malherbe.
92 Beckmann "The emergence of self-managing schools in South Africa: devolution of authority or disguised centralisation of power" *J of Ed and the Law* 154.
93 Malan 263.
94 Woolman & Fleisch 47.
95 Kleyn & Viljoen *Beginner's guide for law students* (2007) 120; Labuschagne *Trilingual student law lexicon* (2004) 597.
96 Sachs 28; Grote 531.
97 S 165 Constitution.
98 Currie & De Waal *The new constitutional and administrative law* (2007) 196.
99 See Currie & De Waal 192: Legal remedies are about what can be done if an unjustifiable infringement of rights has transpired.
100 11.
101 De Vos "Constitutional Court cleverly "solves" eviction dilemma – or not?" 2010 http://www.constitutionallyspeaking.co.za/constitutional-court-cleverly-solves-evictionsdilemma (accessed 2010-03-02).
102 Budlender "The role of the courts in achieving the transformative potential of socio-economic rights" 2007 *ESR Review.*

may, *inter alia,* grant *appropriate relief*,[103] including a *declaration of rights*[104] and may make any order that they deem *just* and *equitable*.[105] They may even develop new, effective and innovative remedies if needed when constitutional rights are infringed.[106] To be effective, Chenwi[107] proposes that remedies must be capable of promoting social transformation and of enhancing participatory democracy, transparency and accountability. To obtain this, the Constitutional Court[108] shows that courts need to consider the interests of all who may be affected by their orders (a wider public facet) and not only that of the parties to the litigation.

According to section 34 of the Constitution,[109] everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, in another independent and impartial forum. By referring to *disputes that can be resolved by the application of law,* this section provides for administrative actions of a judicial nature.[110]

It is, however, important to take cognisance of the fact that disputes between organs of state are subject to the constitutional principles of cooperative governance. As a result, state organs are obliged to settle intergovernmental disputes between them by means of procedures provided for that purpose, and to exhaust all other remedies (thus

103 With regard to what *appropriate relief* entails, in the absence of a clear description in the Constitution, the Constitutional Court in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) parr 98-99 concluded that it is left to the courts to decide in any particular case. This implies that the Constitution permits a flexible approach to remedies.

104 Roach 113.

105 S 38 Constitution.

106 *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) par 69.

107 "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia road and others v City of Johannesburg and others*" 2009 *Constitutional Court R* 371.

108 *Hoffmann v South African Airways* 2001 1 SA 1 (CC).

109 In *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par 21, this right was interpreted as the corollary of the first aspect of rule of law, which is the State's obligation to provide mechanisms allowing citizens to resolve their disputes. In *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) par 22, it was viewed "as the right of access to a court as foundational to the stability of an orderly society as it ensures peaceful, regulated and institutionalised mechanisms to resolve disputes. As such, the right of access to court is a bulkwark against vigilantism and the chaos and anarchy which it causes". In *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) par 61, as an express constitutional recognition of the importance of resolving social conflict by means of impartial and independent institutions. It was also stated that the sharper the potential of a social conflict, the more important it is that disputes are resolved by courts.

110 *Kollabatschenko v King NO*2001 4 SA 336 (C); *Baramoto v Minister of Home Affairs* 1998 5 BCLR 562 (W).

avoiding legal proceedings)[111] before approaching a court to resolve such a dispute.[112] In debating the applicability hereof on disputes between PDoEs and SGBs regarding the determination of language policies for public schools, the Supreme Court of Appeal in the case of *Mikro*, found such a dispute not to be of an intergovernmental nature and, consequently, not limited. The reason held for this finding was that SGBs are not subject to the executive control of national or provincial education authorities. In support, Barry[113] contends that public schools cannot be barred from instigating legal proceedings against a PDoE under circumstances involving unlawful State conduct, while SGBs conform to statutory requirements.

While discussing constitutional remedies, Currie and De Waal,[114] moreover, point to the general rule when applying the Constitution that constitutional relief must be sought as a last resort. Despite the fact that most cases in administrative law do not engage the Constitution, Hoexter[115] maintains that the three cases under discussion[116] were indeed of a constitutional nature in view of the fact that they involved the violation and/or threatening of the constitutional right of being taught in a language of choice. As such, it gave the respective SGBs, having specific interests in the matter, a standing in court.[117]

It was, accordingly, found in the matter of *Laerskool Gaffie Maree*[118] that the PDoE, as an administrator, can be required by courts to comply with its expressed or implied duties. By subjecting State action with regard to education to judicial control, Grote[119] shows that it, *inter alia*, contributes to a higher acceptance of legitimacy concerning their actions by state organs, as well as to a broader acceptance of their decisions by the public. The principle of legality and the suitable exercise of administrative powers by a PDoE was also a concern in the matter of *Hoërskool Ermelo.* The court, accordingly, condemned the illegal actions of the PDoE by suspending the principal, withdrawing the functions of the SGB and determining the school's language policy against the wishes of the SGB. It was, equally held in the matter of *Laerskool Middelburg* that the PDoE acted unlawfully in changing the school's language policy, contrary to the best interests of the learners involved.

111 *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 BCLR 156 (CC); *MEC for Health v Treatment Action Campaign* 2002 10 BCLR 1028 (CC).
112 S 41(1)(h)(vi), (3), (4) Constitution.
113 31.
114 191.
115 463.
116 *Middelburg, Mikro* & *Ermelo.*
117 Currie & De Waal 191.
118 *Laerskool Gaffie Maree v MEC for Education, Training Arts and Culture, Northern Cape* 2003 5 SA 367 (NC) par 13.
119 531.

By applying section 33 of the Constitution and specifically section 6(2)(d) of the Promotion of Administrative Justice Act,[120] the High Court in *Mikro*[121] found that an error of law indeed existed as the PDoE was not entitled to oblige the SGB unilaterally to accept a new language policy for their school. Since courts are reluctant to enter the sphere of the executive authority when administrators act in good faith,[122] the court did not make an order regarding costs. In support of this, Currie and De Waal[123] stress the fact that constitutional remedies should be progressive, in the best interests of the community and aimed at building capacity, which an award for damages is not. Awards are, hence, only made against officials whose actions were grossly irregular or blameworthy.

9 The Qualitative Dimension of the Article

Since the main aim of providing remedies is to justify the Constitution and to prevent further infringements of rights,[124] as pointed out in the beginning of the article, we obtained the perspectives of the three SGBs[125] in order to establish whether the remedies the courts provided indeed met this aim. In this regard, we conducted telephone interviews with those participants from the respective school who consented to taking part in the qualitative research phase of the article.[126]

We authors drew up a question matrix that consisted of four main questions:

(1) The first question reflected on the court orders/remedies and had five sub-questions.
(2) The second question reflected on looking back on the case and had nine sub-questions.
(3) The third question reflected on the current situation and had nine sub-questions.
(4) The final question reflected on whether the trouble and effort had been worth the school's while.

During the eight telephone interviews, the interviewer asked the same questions to all the participants.

120 3 of 2000. Ss 6-9 PAJA focus on the scope of, the procedures for and the remedies in judicial review proceedings.
121 *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 3 SA 504 (C). This reasoning was upheld in the SCA.
122 Hoexter 508, 466 – Judicial review is mainly designed for setting aside unlawful action.
123 196.
124 *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) par 27.
125 *Middelburg, Mikro & Ermelo.*
126 Eight participants from the three schools took part in the interviews. No recordings were made; the transcripts of these telephone interviews are available from the second author of this article.

Table 1: Participant responses to five questions concerning legal remedies

	Middelburg	*Mikro*	*Ermelo*
Do courts still have influence?	A qualified yes: wheels of justice take too long for the good of public education.	The dragging of feet could indicate that strikes are more effective.	Unsure.
	Yes, I believe in the rule of law.	Yes, we function by the rule of law.	Yes, the rule of law is the only way.
Was the court order effective?	Yes, after nine years.	Yes, but not immediately.	Yes, it provided certainty.
Did the PDoE offer support through textbooks and/or sources?	They sent some textbooks at a late stage, but no sources.	They did an unrealistic assessment of learners' needs.	They promised educators and textbooks. Nothing materialised.
Was it worth all the trouble and effort?	Undoubtedly, yes.	Yes, absolutely.	A profound "yes".
What is your current relationship with the PDoE?	Good.	Mutual respect.	Good.

10 Middelburg Primary School – Report on Telephone Interviews

Originally, although it was clearly a politically-driven matter, in 2002 the school was encouraged that the court rejected the PDoEs allegations and accepted their *bona fides*. However, one participant reported feeling much like an empty shell, since after the court had pronounced its verdict, the matter simply dragged on for *too long* – it took nine years before the finances were resolved (2002 to 2011). It appeared as if the PDoE did not take note of the court order in the least: they did not adhere to any of the delivery dates. In order to carry on the school's education in the best interests of also the new learners who needed schooling in English, the Afrikaans-speaking parents/caregivers who were paying school funds had to carry the cost of R2 million in order to appoint the necessary educators until the end of 2009: the SGB appointed one in 2003; two in 2004; three in 2005; four in 2006; five in 2007; and so on. In the middle of 2005, the PDoE promised back pay for seven educators. Yet, they only started remunerating the school in October 2009 when they paid R1 million. They paid the balance of R985,000 in October 2011. Moreover, nothing came of the large numbers of isiZulu/Sesotho learners who would, according to the PDoE, need English tuition in the Middelburg area.

Half of the original English learners who enrolled in Grade 1 completed their Grade 7 year at Middelburg Primary School. Even though the principal and staff members went to much trouble to make sure that all learners felt secure and at ease, true integrated learner engagement still takes place only on the soccer field when they train and play matches, since these primary school isiZulu/Sesotho and Afrikaans/English learners clearly prefer home language conversations.

Middelburg Primary School is a parallel-medium school, with a tendency of more and more English home language parents/caregivers now sending their children to the school. Growing numbers of Afrikaans-speaking learners who enroll at this school have necessitated the building of a new classroom for their Grade Rs.

Although the school feels the court order itself was effective, they are convinced that public schools should be weary of trusting their and PDoE and even the national Department of Education's promises.

11 Mikro Primary School – Report on Telephone Interviews

This SGB was fully prepared when the case went to court, although it did everything in its power not to take the legal route. Even the day before the case actually commenced, they requested and got a discussion with the Member of the Executive Council (MEC), hoping to come to some kind of workable agreement. However, during the discussion it was clear that the MEC preferred taking the matter to court. When the verdict came in favour of the school, it was evident that the court underlined the seriousness of the matter.

Towards the end of the school year, after having inquired about the department's late delivery on the court order, the PDoE fulfilled their promises concerning the English learners who joined the Afrikaans as medium of instruction school. They appointed and paid one educator; delivered school tables/chairs towards the middle of the year; and sent a number of textbooks just before the end of the year. The SGB had to use Afrikaans-speaking parents/caregivers' paid school funds to ensure instruction in the best interests of also the new learners who required English instruction. This led to a cash flow problem which the SGB counteracted by planning functions to make money. In addition, perhaps with the exception of classroom space that was available, the school did everything possible to ensure that the new learners fitted in well.

According to all the responses from the telephone interview that one of the authors held with Mikro Primary School participants, this was unmistakably a politically driven issue. Moreover, the noise made by the ANC supporters at the court unnerved the school representatives.

Mikro Primary School is convinced that the court case was not a waste of time for the following reasons: (1) the school and its parents/caregivers must set an example to their learners and the learners would question the example if it appeared that the school and its community were not willing to stand up for what they said they believed in; (2) the school had gained recognition for being principled; and (3) schools *can* make a difference as long as the principle is uncompromised and the process followed is 100 % correct.

12 Ermelo High School – Report on Telephone Interviews

One of the participants in the telephone interviews held the opinion that the court order provided guidance as to how SGB's should proceed. A legal opinion of a participant was that the court did not justify sufficiently what it meant with the phrase that the SGB needed to *show a greater responsibility towards the community*. Likewise, the court did not define the concept *community*. In this regard, the school community lost, since, according to the Schools Act,[127] an SGB firstly stands in a trusting relationship towards *the school* – not the community. Secondly, the SGB needs to act in the best interests of *the school* – not the community. Therefore: what was the point of politicising a case for the sake of a handful of learners when the bigger dilemma lay with 1300 other places unavailable to learners who needed to enrol at high school level in that area?

The school gave effect to the court order within the specified six weeks of the court order, by (1) holding a meeting with the community as they saw it; (2) holding a meeting with the parent/caregiver community; and (3) adjusting the language policy – maintaining Afrikaans as medium of instruction, while accommodating English learners in order to support their PDoE. The PDoE made the affidavit at the court concerning how they plan to handle the increasing demand for education in English as medium of instruction.

The SGB not only made some of their own teaching posts available to appointing educators for the learners who needed teaching in English as medium of instruction, but also used Afrikaans-speaking parents/ caregivers' paid school funds to ensure instruction in the best interests of all the learners at their school. A few of the English learners who joined Ermelo High School in 2007 are finishing off Grade 12 at the end of 2011.

13 Conclusion

The article does not concur with the opinion that the faith that SGBs had concerning the court's capability to guard their function to determine

127 Ss 16(2), 20(1)(a).

public schools' language policies has diminished. SGBs' faith in courts is rather supported by empowering and even broadening the execution of their functions by providing guidance and surety for future accomplishments.

Although *Mikro* was sceptic at first about having the matter litigated in court, all eight participants reported their confidence that courts were eventually the proper forum to effectively remedy issues of conflict between them and their PDoEs. Reasons for the latter can be found in the fact that all the participants realised the court's affirmation of the seriousness of each school's battle. The schools' trust in the legal system and rule of law was furthermore confirmed by appreciating courts' inclination to litigate public school education matters objectively.

All three court cases confirmed the autonomy of an SGB as a functionary by respecting their significant role in the governance of public schools. Thus, SGBs need not be afraid of litigation although, for court remedies to be effective in practice, careful preparation combined with perseverance (nine years in the case of *Middelburg*) is essential.

Although the literature review indicated that court verdicts only bring relief in the *short run*, the qualitative research pointed out the opposite. While the three schools experienced immediate relief after the courts' orders, they soon realised that they needed the loyalty towards the school and determination of their Afrikaans-speaking parents/caregivers to carry them especially financially through the painstaking time. This had to be in place until the respective PDoE complied with the court sanctions.

Flowing from *Ermelo*, the most recent court case in this regard, that placed emphasis on the role of SGBs to take the needs of their broader community into account when considering their school's language policy; it has become obvious that the playing field has changed:

> (1) SGBs must seriously consider parallel language as medium of instruction at their schools.
> (2) Section 16(2) – which refers to an SGB to *stand in a position of trust towards the school* – and section 20(1)(a) – which obliges a public school to *promote the best interests of the school* – must be revisited in order to extend the SGBs responsibilities towards also taking into account the needs of the broader community.
> (3) Courts must define terminology they read into statutes: for example, the term *community* and the phrase *needs of the community* in the *Ermelo* case, as these aspects were left dangling in the air.
> (4) Alternatively, courts must show extreme caution when interpreting education statutes while deciding on matters that fall within the function of SGBs, as this may contribute to again creating tension by blurring the distinction between their functions and that of the State.

In sum, the legal remedies provided by courts are indeed effective in remedying the battle between SGBs and PDoEs concerning the language policies at public schools.

Are fixed-term school governing body employment contracts for educators the best model for schools?

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OPSOMMING

Is Vastetermyndienskontrakte vir Opvoeders in Beheerliggaamposte die Beste Model vir Skole?

Weens departementele begrotingstekorte en groeiende behoeftes in skole is dit vandag algemene praktyk dat skoolbeheerliggame aanstellings uit skoolfondse finansier. Indien 'n beheerliggaam 'n aanstelling maak, is die skool die werkgewer, en nie die tersaaklike departement van onderwys nie. Die belangrikste gevolg hiervan is dat arbeidswetgewing, en nie net wetgewing spesifiek uitgevaardig vir die onderwys nie, die werksverhouding reguleer. Uit FEDSAS se omgewingsontleding van ledeskole blyk dit dat 28% van opvoeders en 52% van nie-opvoeders deur beheerliggame aangestel word. 'n Groot persentasie van hierdie aanstellings is vir 'n vaste tydperk en beheerliggame voer verskeie redes aan waarom dit die beste model is. Daar is geen statutêre beperkinge op die sluit van termynkontrakte nie, en in die meeste gevalle is dit weens praktiese oorwegings die enigste opsie vir skole. Begrotings word jaarliks opgestel en goedgekeur, waarná 'n beheerliggaam die aantal poste vir die volgende jaar vasstel. Versuim om 'n vastetermynkontrak te hernu was nog altyd 'n omstrede aangeleentheid. Indien daar gedurende die dienstermyn 'n verwagting van 'n voortdurende verhouding geskep is, sal die versuim om die kontrak te hernu ooreenkomstig artikel 186(1)(b) van die Wet op Arbeidsverhoudinge op ontslag neerkom. Die tydperk van afwagting is uit die aard van die saak 'n stresvolle tydperk vir die opvoeder wat gepaard gaan met werkonsekerheid en finansiële bekommernis wat 'n nadelige invloed op die opvoeder se onderrig kan uitoefen. Hierdie artikel ondersoek die aard en wenslikheid van diensooreenkomste tussen skool beheerliggame en opvoeders en kom tot die gevolgtrekking dat die vastetermynkontrak nie teenoor die reg van die opvoeder gestel behoort te word nie, maar dat daar na die praktiese oorwegings binne skole en die beste belang van leerders gekyk word binne 'n raamwerk van goeie beheer en bestuur.

1 Introduction

Due to departmental budget constraints and schools' growing needs, it is currently common practice for School Governing Bodies (SGBs) to finance additional staff appointments out of school funds.[1] Since the

1 S 20 SASA: "(4) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3(1) of the Educators' Employment Act, 1994."

quality of an education system cannot exceed the quality of its educators; as set out in the McKinsey Report on World School Systems;[2] SGBs invest a lot of money in additional educators in order ensure that quality education is provided.

When a governing body appoints additional staff members, the public school, and not the relevant department of education, acts as employer.[3] The most important consequence of such appointments is that the employment relationship is governed by labour laws[4] instead of by merely the Employment of Educators Act[5] as is the case with educators employed by the State. As employer, the school, via its SGB, thus has to comply with all the requirements set by labour legislation.

Before any appointments can be made, governing bodies must determine their schools' particular needs as well as the extent of available funds. In this regard, it is important for SGBs to take note of the requirements contained in section 20(4) to (10) of the South African Schools Act (SASA). These requirements can be briefly summarised as follows:

(i) Section 20(4) – a school may establish additional posts for educators.
(ii) Section 20(5) – a school may establish additional posts for non-educators.
(iii) Section 20(6) – persons who are employed in any of the aforementioned posts must comply with the employment requirements set in any other applicable law. (Persons who are appointed as educators must for example hold the required qualifications.)
(iv) Section 20(7) – persons can only be employed as educators if they have been registered as such with the South African Council of Educators.
(v) Section 20(8) – persons who are appointed must be employed in compliance with the basic values and principles envisaged in section 195 of the Constitution of the Republic of South Africa, 1996 (the Constitution). Factors that should be taken into account when making appointments include the candidate's ability, the principle of equity, the need to redress past injustices, as well as the need for representivity.

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2 McKinsey & Company *How the world's best performing school systems come out on top* (2007) 43 available online at http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_ School_Systems_Final.pdf (accessed 2010-02-17).

3 Even though the governing body is often informally referred to as the employer, or people often speak of governing body appointments, staff or posts, s 20 SASA clearly provides that the school, and not the governing body, is the employer. The governing body is merely an organ of the school as juristic person. Also see s 3(4) of the Employment of Educators Act 76 of 1998 (EEA).

4 The Labour Relations Act 66 of 1995 (LRA); the Basic Conditions of Employment Act 75 of 1997; the Compensation for Occupational Injuries and Diseases Act 130 of 1993; the Occupational Health and Safety Act 85 of 1993; the Unemployment Insurance Act 63 of 2001; the Employment Equity Act 55 of 1998; the Skills Development Act 97 of 1998, and the Skills Development Levies Act 9 of 1999.

5 76 of 1999.

(vi) Section 20(9) – when presenting the annual budget for parents' approval, the governing body must provide sufficient details with regard to any envisaged additional posts, the estimated costs relating to such additional posts, as well as the manner in which such costs will be met/ covered.
(vii) Section 20(10) – The State is not liable for any act or omission flowing from the school's contractual responsibility as the employer in respect of staff employed by the school additional to the state's establishment.

2 Appointments Made by School Governing Bodies

SGBs may appoint additional educators[6] and non-educators (for example administrative staff, terrain staff or sports coaches). These appointments may be made for an indefinite period of time or fixed-term.[7] SGBs may also employ a person to work less than 24 hours per month, for example a sports coach, who coaches only five hours per week. This employee category is excluded from several labour laws.

2 1 Permanent Appointments

Through such an appointment, the governing body commits itself for an indefinite period of time. Such an employment relationship may be terminated on three grounds only, namely misconduct by the employee, the incompetence or unsuitability of the employee, or the employer's operational requirements. The employment relationship could also be contractually terminated when the employee reaches retirement age.

2 2 Fixed-term Appointments

This type of employment contract is entered into for a fixed period of time only, for example a specific school year. Fixed-term appointments are particularly suitable in cases where the future availability of funds is not a foregone conclusion. Through such a contract, the governing body commits itself for a particular period of time to receive the educator into service and to pay a particular amount of remuneration. The employment relationship ceases to exist at the end of the contract period.

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6 As per the definition in s 1 EEA, "educator" means "any person who teaches, educates or trains other persons, or who provides professional educational services, including professional therapy and education psychological services, at any public school ...".
7 The non-renewal, or renewal on less favourable terms, of a fixed-term employment contract constitutes a dismissal in terms of s 186 LRA if a reasonable expectation was created with the employee that the contract would be renewed.

In order to ensure that all parties fully understand their exact rights and responsibilities, it is of the utmost importance that all employees have written contracts.[8] The Basic Conditions of Employment Act[9] should form the basis of such a contract, with specific adaptations to suit the education sector.

3 FEDSAS Environmental Analysis

From the FEDSAS[10] environmental analysis of member schools, it appears that 27,45 % of educators and 52,44 % of non-educators in South African public schools are appointed by SGBs.[11] A large number of these appointments are for a fixed term, usually a particular academic year.

The distribution of educator and non-educator posts in FEDSAS schools* is as follows:

	Number of educators		% educators		Number of non-educators		% non-educators	
	Dept	SGB	Dept	SGB	Dept	SGB	Dept	SGB
Gauteng	378	130	74,41	25,59	199	122	61,99	38,01
KZN	1 114	549	66,99	33,01	470	522	47,38	52,62
Limpopo	588	230	71,88	28,12	186	209	47,09	52,91
Mpumalanga	739	294	71,54	28,46	169	247	40,63	59,38
North West	507	245	67,42	32,58	141	211	40,06	59,94
Northern Cape	656	179	78,56	21,44	324	161	66,80	33,20
Eastern Cape	375	128	74,55	25,45	102	143	41,63	58,37
Free State	2 148	556	79,44	20,56	579	716	44,71	55,29
Western Cape	852	472	64,35	35,65	300	286	51,19	48,81
Total	7 357	2 783	72,55	27,45	2 470	2 617	48,56	51,44

*Based on survey responses regarding the number of posts at each school

The table above shows that more than 70 % of educators are remunerated by the Education Department, while the majority of non-educator posts (51 %) are paid by SGBs. Just under 80 % of the educators in the Free State are remunerated by the Education Department, while the highest percentage of educators who are paid by SGBs are employed in the Western Cape.

8 FEDSAS has standard contracts for all possible forms of appointment that are available to members free of charge.
9 75 of 1997.
10 Federation of Governing Bodies of South African Schools.
11 FEDSAS *FEDSAS Environmental Analysis* (2009) 8.

There are no statutory restrictions on concluding fixed-term contracts,[12] and, in most cases, practical considerations render it the only option for schools. School budgets are drafted and approved on an annual basis in terms of section 38 of SASA. This is done after the Provincial Education Department has published the post establishment for the next year,[13] following which the governing body determines the number of posts for the next year. Beforehand, the governing body must determine the school's particular needs as well as the extent of its available funds for staff salaries and remuneration. SGBs need to consider all the above-mentioned factors before deciding on the terms of the employment contracts, as remuneration might constitute one of the most expensive items on the budget. As the number of learners, the departmental post establishment and income might differ from year to year,[14] SGBs may not be able to enter into long-term employment agreements.

4 The "Renewal" of Contracts and the Legitimate Expectation

Consequently, most SGBs have adopted the practice of entering into fixed-term employment contracts only, and merely "renewing" them when possible for the next year. In strict technical terms, the contract is not renewed, a new contract is rather entered into for a following fixed term. However, the problem arises when an educator's contract is not "renewed". Awaiting the renewal or not of an employment contract, is a very stressful period for the educator as it leads to job and financial insecurity which may also have a negative effect on the educator's performance in the classroom. Such an educator is however not without remedy.

The termination of an employment contract under certain circumstances, such as summary dismissal for serious misconduct, has always been regarded as dismissal.[15] However, the definition of a dismissal in the Labour Relations Act[16] (LRA) provides that termination of employment without notice also constitutes dismissal. Until recently, an employer could terminate the services of employees by merely giving them notice for the period required by the employment contract, legislation or a collective agreement. The employer was not required to provide a valid and fair reason, or to follow fair procedure.[17] In terms of

12 Grogan *Workplace Law* (2010) 189.
13 See *FEDSAS v MEC for Basic Education* (unreported case 60 of 2011 in the Bisho High Court of the Eastern Cape, Bisho, delivered on 2011-02-22, available at http://www.fedsas.org.za/downloads/8_44_2_FEDSAS%20v%20MEC%20EASTERN%20CAPE.pdf (accessed 2013-03-20)).
14 SGBs should also avoid retrenchment procedures in light of the matter *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC).
15 Du Plessis & Fouche *Practical Guide to Labour Law* (2008) 266.
16 66 of 1995.
17 S 8(6) Shops and Offices Act 41 of 1939

the definition, however, an employer is now obligated to comply with the requirements of substantive and procedural fairness.[18]

Failure to renew a fixed-term contract has always been a controversial matter. A fixed-term contract is entered into for a specific period and is based on the principles of the law of contract. Such a contract automatically terminates upon the expiry of that period. However, the Industrial Court refused to accept this principle in the case of the automatic renewal of a fixed-term employment contract, and based its decision on the continuous nature of the employment relationship.

The Industrial Court[19] found that it is, essentially, about a legitimate expectation.[20] If, during the term of employment, an expectation of a continuous relationship has been created, failure to renew the contract would constitute dismissal. In *South African Veterinary Council v Greg Szymanski*,[21] Cameron J stated that mere confusion is no basis for a legitimate expectation.[22] To substantiate his decision, Cameron referred the judgment of Heher J in *National Director of Public Prosecutions v Phillips*,[23] namely that "the law does not protect every expectation but only those which are 'legitimate'". The requirements for an expectation to be legitimate were set to be as follows:[24]

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';
(ii) The expectation must be reasonable;[25]
(iii) The representation must have been induced by the decision maker;[26] and
(iv) The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.[27]

With regards to an expectation being reasonable, Van Niekerk[28] states that there is no single factor that defines what is reasonable in every case and that the test applies to determine the existence of the reasonable expectation is an objective one and requires an examination of all relevant factors.

18 S 193 LRA.
19 *Administrator Transvaal v Traub* (1989) 10 ILJ 823 (A).
20 See the definition of "legitimate expectation" in *Administrator Transvaal v Traub* (1989) 10 ILJ 823 (A).
21 Supreme Court of Appeal unreported case 79/2001 (2003) ZASCA 11 (2003-03-14).
22 Par 18: "Still less can misinterpreting the words or actions of an authority give rise to a legitimate expectation".
23 2002 4 SA 60 (W) par 28.
24 Par 28.
25 *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 756I-757B.
26 *Attorney-General of Hong Kong v Ng Yuen Shiu* (1983) 2 All ER 346 (PC) 350h-j.
27 *Hauptfleisch v Caledon Divisional Council* 1963 4 SA 53 (C) 59E-G.
28 Van Niekerk *Unfair Dismissals* (2008) 21.

5 Labour Relations Act 66 of 1995

The vagueness and confusion with regard to the legitimate expectation was finally addressed with the drafting of the LRA. Section 186(1) of the LRA defines "dismissal" as follows:

> 'Dismissal' means that:
> (a) ...
> (b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it ..."

Consequently, an employer (public school) is effectively dismissing an employee (educator) if the employer does not renew a fixed-term contract, although an expectation has been created that the contract would indeed be renewed, or if the employer does renew the contract, but on less favourable conditions than before.[29]

However, Cameron J warned in the *National Director of Public Prosecutions* case that it is worth emphasising that the reasonableness of the expectation operates as a pre-condition to its legitimacy. The first question is factual, namely whether the expectation sought to be relied on, is reasonable in all circumstances. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose.[30]

The SGB is however bound by a number of external factors to employ educators on a more permanent basis, and should always act in the best interests of the school on the other hand. This could include the duty to contract the best possible educators for as long as possible.

A fixed-term contract does not offer the best job security for the educator, and the annual uncertainty and negotiations may have a negative effect on the educator's morale and performance.

On numerous occasions, the courts considered the non-renewal of fixed-term contracts, and without exception demanded that the employees prove that they had had a reasonable expectation that the contract would be renewed. For example, an expectation is created if contracts are automatically renewed every year; if employees are promised that they will have jobs the following year, or if forward planning is linked to a person instead of a post.

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29 In *SARPA obo Bands v SA Rugby (Pty) Ltd* [2005] 2 BALR 227 (CCMA) the commissioner ruled that the relevant factors such as contractual provisions, undertakings by the employer, past practices and the reason for entering into the agreement must be considered.

30 Supreme Court of Appeal unreported case 79/2001 (2003) ZASCA 11 (2003-03-14) par 21.

If such employees are then not re-appointed, they may refer an unfair-dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

6 Dispute Resolution

The employer is obligated to maintain discipline, promote stability and job security, as well as to ensure the fair and equitable treatment of all employees. If there is a dispute between the SGB and the employee, the internal process must be followed before any external procedures can take effect.

6 1 Internal Process

In terms of the Constitution, everyone has the right to fair labour practices.[31] This right is further qualified in the LRA, more specifically by stating that everyone has the right not to be unfairly dismissed.[32] This includes the non-renewal of a fixed-term contract.[33]

For a dismissal to be fair, the employer must ensure that the process is both substantively and procedurally fair.[34] Substantive fairness deals with the reason for dismissal. In terms of the LRA, there are but three valid grounds for dismissal, namely:

(a) a fair reason related to the employee's conduct;
(b) the employee's incapacity or incompetence; or
(c) the employer's operational requirements.

The fairness of the reason for dismissal is determined based on the facts of the matter as well as the suitability of dismissal as sanction.

In order to determine whether the dismissal has taken place in accordance with a fair procedure, the relevant *Code of Good Practice*,[35] issued in terms of the LRA, should be taken into account.

The Code is a general one, and does not distinguish between different employer types or sizes.[36] It is not a law that has to be strictly complied with, but merely serves as the employer's guide. Primarily, the employer is responsible for discipline in the workplace, and therefore, certain guidelines for conduct in the workplace are needed, as well as provision for a fair procedure to deal with discipline. The key principle in this Code

31 S 23(1) Constitution.
32 S 185 LRA.
33 S 186(1) LRA.
34 Even if the dismissal complies with any notice period contained in a contract of employment or a law regulating the employment relationship.
35 Sc 8 LRA.
36 Van Jaarsveld & Van Eck *Principals of Labour Law* (2002) refers to the fact that the key principal of the *Code* is that employers and employees should treat one another with mutual respect, with the premium being placed on both employment justice and the efficient operation of the business.

is that employers and employees should treat one another with mutual respect. While employees should be protected from arbitrary sanction, employers are entitled to satisfactory conduct and work performance from their employees.[37]

The fairness of the procedure is determined based on the guidelines in the Code.

In cases where the dismissal is not automatically unfair, the employer must prove that the reasons for dismissal relate to the employee's conduct or capacity, or are based on the operational requirements of the employer. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.[38]

6 2 External Process

The principal difference between governing body appointments and departmental posts is that two different dispute resolution forums apply. All disputes within the Education Department are referred for adjudication to the Education Labour Relations Council (ELRC). Disputes between SGBs and governing body appointees must be referred to the CCMA. The external dispute process with regard to governing body posts is regulated by the LRA.

Section 191 of the LRA deals with disputes regarding unfair dismissal. In short, the procedures are as follows: If the fairness of a dismissal is disputed, the dismissed employee may refer the dispute in writing to the CCMA within 30 days of the date of dismissal.[39]

If the employee shows good cause at any time, the dispute could also be referred after the 30-day period has already lapsed. The employee must serve a copy of the referral on the employer. The CCMA must first attempt to resolve the dispute through conciliation. Only thereafter, the CCMA may certify that the dispute remains unresolved. If 30 days have expired since the referral, and the dispute remains unresolved, the CCMA must arbitrate the dispute at the request of the employee. Employees could request arbitration only if they allege that the reason for dismissal is related to their conduct, suitability or capacity; if they allege that the employer made continued employment intolerable, or if they do not know the reason for dismissal.[40]

Section 192 of the LRA provides that, in any dismissal proceedings, the *onus probandi* (burden of proof) to establish the existence of the

37 Sch 8 par 1(3) LRA.
38 Sch 8 par 2(4) LRA.
39 CCMA form LRA 7.11 is used for referral, and is available at the CCMA offices or http://www.ccma.org.za (accessed 2013-03-20).
40 This is an informal process in which the party is assisted by a CCMA commissioner to try to settle the matter. No legal representation is permitted during this step.

dismissal rests upon the employee. If the existence of dismissal is established, the burden of proof is reversed: Then, the employer must prove that the dismissal is fair.[41] If a dismissal is found to be unfair, the employer may be ordered to pay compensation[42] or to reinstate the employee.[43]

7 What Should the Employer do to Prevent an Expectation from Being Created?

The management of fixed-term contracts is the school principal's responsibility, and the governing body must adopt the necessary policy to create the framework within which the principal could do so.[44] This includes that there must be good administrative systems in place for staff management. The governing body could take the following decisions or steps:

(a) Governing bodies should adopt a policy stating that no contract will be 'automatically renewed'.
(b) Governing bodies should adopt a policy stating that all fixed-term contracts terminate on 31 December every year. (The exception is where governing bodies have enough funds to enter into longer-term contracts.)
(c) Available posts must be advertised only following the adoption of the next year's budget. (This advertisement may be internal, external or both.)
(d) Employment contracts should be entered into annually by not later than November for the ensuing year.
(e) The governing body and principal may not make any promises to any employee, and vacancies should be filled only after due process has been followed.
(f) Forward planning must be linked to posts and not persons.
(g) The payment advice must clearly indicate how many months are left before the contract term expires.
(h) The principal must regularly meet with all staff, and policy, contract terms and advertisements must form part of the agenda.
(i) If the school's budget and funds allow longer-term contracts, and the particular post is an essential and ongoing post at the school, the governing body should seriously consider entering into such longer-term contract.

Grogan argues as follows:

41 Once again, fairness refers to substantive and procedural fairness, as discussed above.
42 A maximum of 12 months' compensation may be granted for unfair dismissal, and 24 months' for an automatic unfair dismissal. Also see s 193 LRA.
43 If the relationship of trust between the parties has however been irrevocably harmed; the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or if it is not reasonably practicable for the employer to reinstate or re-employ the employee, such order shall not be issued after the parties have been heard.
44 The FEDSAS website www.fedsas.org.za (accessed 2013-03-20) contains a number of documents on this topic.

> The case law indicates that a number of circumstances favour acceptance of employees' claims that they expected fixed-term contracts to be renewed. The two most obvious considerations are past practises and prior promise. Logic indicates that the more frequent an employer has renewed a fixed-term contract in the past, the more reasonable is the employee's expectation that the employer will continue to do so in future. This is not to say that an employer is not permitted to renew a fixed-term contract; it merely becomes more likely that repeated renewals would reinforce the impression that the employment relationship has de facto become permanent – and also lend credence to the employees' claim that they viewed the relationship as permanent.[45]

8 Conclusion

Governing bodies are clearly hesitant to commit to long-term employment contracts. Fixed-term contracts certainly hold certain benefits for employers, but they also have a number of disadvantages. The most important arguments in this regard are set out below:

The benefits are:

(1) Fixed-term contracts allow employers to get rid of employees more easily if the 'reasonable expectation' is properly managed, without having to go through any procedures prescribed in the LRA for misconduct or poor work performance.
(2) Employers work with the available funds in a budget, which is annually approved and adopted.
(3) Employers never need to follow dismissal procedures in the case of retrenchment due to operational requirements, and, therefore, also do not have to pay severance packages.
(4) Schools know (or should know) how many departmental posts are available for the following year, and can budget and plan accordingly.

The disadvantages are:

(1) In the longer term, employees' work performance and morale may be affected by their insecurity about their jobs and income.
(2) Fixed-term employees may not necessarily be as loyal as permanent employees.
(3) Employers must manage the process meticulously and guard against creating expectations.
(4) Usually, the labour turnover is higher for temporary employees than for permanent employees, resulting in a frequent intake of new employees or a very young workforce.

From a labour law perspective, one could argue that the fixed-term contract is the best model for SGBs.[46] However, the most important

45 Grogan *Workplace Law* (2010) 190.
46 Grogan 189: "The use of fixed-term contracts obviously provides an easy way for employers to evade statutory provisions pertaining to dismissals and employment security." In *Biggs v Rand Water* [2003] 24 ILJ 1957 (LC) 1961A-B, the court stated: "S 186(b) was included in the LRA to prevent the

question that needs answering certainly is what would be in the school and the learners' best interests. The governing body stands in a position of trust towards the school, and must serve the interests of the school when appointing additional staff. This adds a whole new dynamic to the labour law perspective and labour law arguments.

The argument that the governing body prefers to make only fixed-term appointments due to uncertainty about sufficient funds is not entirely sound, as the LRA does in fact provide for dismissal due to operational requirements based on finance. There is no reason for a school to be treated differently from a business. Often, businesses have no indefinite income guarantees. However, this does not prevent them from making full-time appointments. One should however take note of the *Buthelezi v Municipal Demarcation Board*[47] judgement in the Labour Appeal Court, where the court made it very clear that employers may not retrench employees for operational reasons if they are on fixed-term contracts, and that, if they do so, they may be liable to contractual claims for damages for the balance of the contract period. In practice, this will mean that all educators on fixed-term contracts will have absolute protection against any retrenchment for the full period of their contracts.

The argument that the Department's post provisioning to the school may change, which may result in too many staff at the school, with parents having to bear the extra costs, seems to have merit. However, the LRA provides for this, and employers may dismiss employees in the case of restructuring. (The reason, therefore, does not relate to a budget deficit.) This argument must now be read against the backdrop of the McKinsey report.[48] Although it may be convenient for the employer (school governing body) to enter into fixed-term contracts, it is not necessarily in the school's best interests, as the most valuable asset in the classroom is indeed the teacher. Therefore, all governing bodies should attempt to appoint the best educators, and remunerate them as best they can. Governing bodies should invest in their educators by exposing them to further training and development opportunities, and pension and medical benefits should be considered to make these posts as attractive as possible and to retain educators.

Trying to keep labour within the school context as cheap as possible each year is irresponsible and does not serve the school's interests. The nature of the fixed-term contract should therefore not be juxtaposed with the educator's rights, but the practical factors within the school and the best interests of learner education must be considered. This should in no way be purported as a blanket rejection of fixed-term contracts in a school context, but the rationale behind these contracts must be

unfair practice of keeping an employee on a temporary basis without any employment security until it suits the employer to dismiss such an employee without any unpleasant obligations imposed on employers by the LRA in respect of permanent employees".

47 [2004] 25 ILJ 2317 (LAC).

48 McKinsey & Company *op cit*.

considered. Several schools appoint excellent educators for many years on a fixed-term basis, even allowing these educators pension-fund benefits. Therefore, proper governance and management seem to be the key to responsible decisions about the nature of employment contracts at a particular school.

Former president Nelson Mandela said that education is the most powerful weapon that you can use to change the world: "Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor; that a son of a mineworker can become the head of the mine; that the child of farm workers can become the president of a country."[49]

The core business of any education institution is to educate, and this can only take place if there is an educator to do the work. SGBs should therefore do everything possible to minimise any negative influence on the education process, including uncertainty about contracts.

SGBs should therefore debate the effectiveness and appropriateness of fixed-term contracts or permanent contracts for educators, and consider all the factors at the specific school. If they do decide to enter into fixed-term contracts, they must consider the length of the contracts, and are not necessarily bound by a specific financial year. The SGB must then ensure that the process and management of these contracts are in place and in line with the human resource policy of the school, and that regular feedback is given at SGB meetings.

It is always easier to appoint employees than to dismiss employees. Therefore, the governing body must ensure a proper appointment process, but also a good management system to control and manage educators – the school's most important assets – appropriately and in the school's best interests.

49 Available online at http://www.brainyquote.com/quotes/keywords/education.html (accessed 2011-03-04).

Legislation and policies: Progress towards the right to inclusive education

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OPSOMMING

Wetgewing en Beleid: Vooruitgang na die Reg tot Inklusiewe Onderwys

Die doel van enige onderwysstelsel is die voorsiening van gehalte onderwys aan alle leerders, afgesien van hulle vlak van onderwys. Die ontwikkeling van wetgewing en beleid het baie aandag ontvang en dit weerspieël die Suid-Afrikaanse regering se verbintenis om die diversiteit in die leerderpopulasie te verseker. In lyn met die regering se verantwoordelikheid om beleid te ontwikkel en die transformasieprogram te lei, is die witskrif ontwikkel wat spesifiek gerig is op leerders met leerprobleme. Inklusiewe onderwys kan suksesvol wees indien ons erken dat onderwys die gesamentlike verantwoordelikheid van ouers, onderwysers, kurrikulumkundiges en die gemeenskap is. Inklusiewe onderwys vir almal soos vervat in beleid en wetgewing loop die risiko om eksklusief vir baie leerders in Suid-Afrika te word. Die artikel fokus op die vraag of Suid-Afrika werklik gevorder het in sy belofte van inklusiewe onderwys vir almal deur die daarstel van beleid en wetgewing.

1 Introduction

The objective of any education system is one of providing quality education for all learners, regardless of their educational level and all learners deserve nothing less than a quality education and training that would provide them with opportunities for lifelong learning, the world of work and meaningful participation in society as productive citizens.

For years the traditional education system worldwide has provided special education and related services to students with disabilities. As the educational, social, political and economic needs of society underwent rapid change, it became increasingly evident that these traditional ideas of schools and classrooms were becoming outdated. The effectiveness of current education systems was questioned, and as a result thereof, the concept of "inclusive school practices" was widely discussed as a philosophical basis for development of one education service delivery system to serve all learners.

Inclusive education has evolved as a movement that seeks to challenge exclusionary policies and practices. It can be regarded as part of a wider struggle against the violation of human rights, and unfair discrimination. It seeks to ensure that social justice in education prevails. It is generally agreed that inclusive education has its origins in the human

rights pronounced in the Universal Declaration of Human Rights in 1948 which states in relevant part: [1]

> Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.
> ...
> Education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms.

Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that everyone has the right to education, including adult education. This right has both a positive and negative dimension as was recognised by the Constitutional Court in *Ex parte Gauteng Provincial Legislature*[2] in which the court stated, with relevance to the interim Constitution:

> Section 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.

Our policy of "building an inclusive education and training system"[3] is centrally situated within the agenda of education for all, the millennium goals, the Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities.[4] Furthermore it is fundamentally subscribed by the Constitution.[5] Inclusion is fundamentally about assuring access, permanence, quality learning and full participation and integration of all children and adolescents, particularly for members of disadvantaged and poor societies, those with disabilities, those who are homeless, those who are workers, those living with HIV and Aids and other vulnerable children. Protection against discrimination based on culture, language, social groups or individual differences is an inalienable human right that must be respected and fostered by education systems.[6]

2 What is Inclusive Education?

Many definitions of inclusive education have evolved throughout the world. It ranges from extending the scope of ordinary schools so that they can include a greater diversity of children to a set of principles which

1 Art 26 Universal Declaration of Human Rights, GA Res 217, UN Doc A/810 (1948).
2 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) 9.
3 Department of Education *White Paper on Special Needs Education: Building an Inclusive Education and Training System* (2001) (*White Paper 6*).
4 *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48/96 (1993).
5 Constitution of the Republic of South Africa, 1996.
6 UNESCO *Salamanca Statement and framework on special needs education* (1994).

ensures that the student with a disability is viewed as a valued and needed member of the community in every respect.[7]

Inclusive education in the South African context is defined as a learning environment that promotes the full personal, academic and professional development of all learners irrespective of race, class, gender, disability, religion, culture, sexual preference, learning styles and language.[8]

In White Paper 6 inclusive education is characterised as:[9]

> (1) Acknowledging that all children and youth can learn and that all children and youth need support;
> (2) Accepting and respecting that all learners are different in some way and have different learning needs which are equally valued and an ordinary part of our human experience;
> (3) Enabling education structures, systems and learning methodologies to meet the needs of all learners;
> (4) Acknowledging and respecting differences in learners whether due to age, gender, ethnicity, language, class, disability or HIV status;
> (5) Changing attitudes, behaviour, teaching methodologies, curricula and the environment to meet the needs of all learners;
> (6) Maximising the participation of all learners in the culture and the curricula or educational institutions and uncovering and minimising barriers to learning;
> (7) Empowering learners by developing their individual strengths and enabling them to participate critically in the process of learning; and
> (8) Acknowledging that learning also occurs in the home and community, and within formal and informal modes and structures.

The inclusion of learners with special education needs or learning barriers, into mainstream classes, is part of a universal human rights movement. It has therefore become imperative to create equal opportunities for all learners to learn and succeed.

In 1996 the South African Schools Act[10] (SASA) legislated that public schools must admit all learners and must attend to their educational needs without any unfair discrimination. White Paper 6 describes the Ministry of Education's commitment to providing educational opportunities for all learners so that all learners benefit from schooling.

SASA alerts us to a shift from the past – a shift that views all children has equal rights to education that fits their needs.[11] This shift to nuclide all learner's needs suggested a system of education which recognises that

7 Sandkull "Strengthening inclusive education by applying a rights-based approach to education programming" (Paper presented at ISEC Conference Glasglow 2005).
8 Department of Education 2007 *Quality education for all: Report of the National Commission for Special Needs in Education on Training (NCSNET) and the National Committee on Education support Services* NCESS.
9 *White Paper 6* 15.
10 84 of 1996.
11 South African Schools Act No 84 of 1996 (SASA).

there are children who have barriers to learning and that these barriers go beyond disabilities.

3 Inclusive Education Internationally

Inclusion has been directly advocated since the Universal Declaration of Human Rights in 1948 and has been acted at all phases in a number of key UN declarations and conventions.[12]

These include:

(1) The 1948 Universal Declaration of Human Rights which ensures the right to free and compulsory elementary education for all children.
(2) The 1989 UN Convention on the Rights of the Child, which ensures the right to receive education without discrimination on any grounds.
(3) The 1990 World Declaration on Education for All (Jomtien Declaration), which set the goal of Education for All (EFA).
(4) The 1993 UN Standard Rule on Equalization of Opportunities for Persons with Disabilities, which not only affirms the equal rights of all children, youth and adults with disabilities to education, but also states that education should be provided in "an integrated school setting" as well as in the "general school setting."
(5) The 1994 Salamanca Statement and Framework of Action on Special Needs Education, which requires schools to accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions.
(6) The 2000 World Education Forum Framework for Action, Dakar, EFA and Millennium Development Goals, which stipulates that all children have access to and complete free and compulsory primary education by 2015.
(7) The 2001 EFA Flagship on the Right to Education for Persons with Disabilities: Towards Inclusion.
(8) The 2005 UN Disability Convention which promotes the rights of persons with disabilities and mainstreaming disability in development.

It is estimated that more than 300 participants, representing 92 governments and 25 international organisations, met in Salamanca in 1994 under the auspices of UNESCO and the Spanish Government to further the objectives of Education for All.[13] The Salamanca Statement on Principles, Policy and Practice in Special Needs Education was drawn together with the Draft Framework for Action.[14] The statement proclaims five principles that reflect the rights in respect of education that are enshrined in the Universal Declaration of Human Rights and the United Nations Standard Rules on Equalisation of Opportunities for

12 UNESCO *Guidelines for Inclusion: Ensuring Access to Education for All* (2005) 13 - 14.
13 Ainscow, Farrell & Tweedle; UNESCO *Education for All Global Monitoring Report* (2005).
14 Peters *Inclusive education: An Education for all strategy for all children* (2004); UNESCO *Education for all global monitoring report* (2005).

Persons with Disabilities.[15] These include the following:

> (1) Every child has a fundamental right to education, and must be given the opportunity to achieve and maintain an acceptable level of learning;
> (2) Every child has unique characteristics, interests, abilities and learning needs;
> (3) Educational systems should be designed, and educational programmes implemented, to take into account the wide diversity of these characteristics and needs;
> (4) Those with special educational needs must have access to regular schools, which should accommodate them within a child-centred pedagogy capable of meeting these needs;
> (5) Regular schools adapting this inclusive orientation is the most effective means of combating the discriminatory attitudes, creating welcoming communities, building inclusive society, and achieving education for all; moreover they provide an effective education to the majority of children, and improve efficiency and, ultimately, the cost-effectiveness of the entire educational programme.[16]

Many countries in the world have adopted an inclusive education philosophy and are committed to its implementation. What remains questionable is whether all these countries implement and interpret inclusive education the same way.

4 Inclusive Education as a South African Policy

In 1996, South Africa adopted a ground-breaking Constitution which legally entered the basic human rights of all people. The Constitution legislated that all people are equal and thus have equal rights, including the fundamental right to basic education prohibiting unfair discrimination "against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age disability, religion, belief, language and birth".

The Constitution further provides a special challenge to all of us by requiring that we give all learners the fundamental right to basic education addressing the imbalances of the past by focusing on the key issues of access, equity and redress.[17]

Section 5 of SASA makes provision for all schools to be full-service schools by stating that public schools may not administer any test related to the admission of a learner to a public school. Full service schools are defined as schools that will be equipped and supported for the full range of learning needs among all our learners. In building capacity of these schools, special emphasis will be placed on inclusive education, which

15 United Nations Universal declaration of human rights. United Nations *Standard rules on the equalisation of opportunities for persons with disabilities*.
16 UNESCO *Salamanca 5 years on: A review of UNESCO activities in the light of the Salamanca Statement and Framework for Action on Special Needs Education* (1999).
17 Ss 9, 29(1).

includes flexibility in teaching and the provision of education. In determining the placement of a learner with special education needs, the head of department and principal must take into account the rights and wishes of the parents of such learner, taking into account what will be in the best interest of the learner.

Section 12 of SASA outlines how this should happen by stating that the Member of the Executive Council must, where reasonably practicable, provide education for learners with special education needs at ordinary public schools by providing relevant educational support services for such learners and taking all reasonable measures in ensuring that physical facilities at public schools are accessible to disabled persons.

In this transformation process, South Africa has embraced inclusive education as the vehicle of change.

Since a democratic dispensation was introduced in South Africa in 1994, the country has been in the process of social, political, economic and educational transformation aimed at developing a more inclusive society.[18]

Policy development has received a lot of attention and reflects the commitment of the South African government to address the diversity in the learner population and provide a continuum of support within a democratic South Africa. International guidelines such as The Universal Declaration of Human Rights, The United Nations Convention on the Rights of the Child, the standard rules on the equalisation of opportunities for disabled persons and the World Conference on Education for All provide an overall framework of policy development.[19]

Relevant government initiatives include:

(1) The White paper on Education and Training in a Democratic South Africa.
(2) The South African Schools Act.
(3) The White Paper on an Integrated National Disability Strategy.
(4) The National Commission on Special Educational Needs and Training and the National Committee on Education Support Services.
(5) White Paper 6: Building an Inclusive Education and Training System.
(6) Guidelines for Full-service/Inclusive Schools.

At the beginning of 1997, the National Commission on Special Needs in Education and Training (NCSNET) and National Committee for Education Support Services (NCESS) were appointed to investigate and make recommendations on all aspects of special needs and support services in South Africa. White Paper 6 outlines how the system should transform itself to accommodate the full range of learning needs and establish a caring and humane society.[20]

18 Lomofsky & Lazarus "South Africa: First Step in the Development of an Inclusive School System" 2001 *Cambridge J of Ed* 303 317.
19 *Ibid*.

In the case *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*[21] the focus was on the rights of severely and profoundly intellectually disabled children in the Western Cape.

This is one of the first court cases which involved children with disabilities. In the court papers the parties were *ad idem* that children with severe or profound intellectual disabilities are able to benefit from education and training and the applicants (Western Cape Forum for Intellectual Disability) made it clear in their papers that this view has long been internationally accepted.

The policy and practice of the respondents (Government of South Africa and Government of the Province of the Western Cape) infringes the rights of these children in respect of their rights to education, their rights to equality, the right to human dignity and their right to protection from neglect and degradation.

White Paper 6 outlines the government's intervention strategy aimed at ensuring that children who experience various barriers to learning and development have access to quality education. It presents a vision which recognises the rights of all South African children to an equitable education, reflecting the Constitutional rights to human dignity and quality education. Inclusive education is described in White Paper 6 as one:

> (1) Acknowledging that all children and youth can learn and that they need support;
> (2) Enabling education structures, systems and learning methodologies to meet the needs of all learners;
> (3) Acknowledging and respecting difference in learners, whether due to age, gender, ethnicity, language, class, disability or HIV status;
> (4) Acknowledges that learning occurs in the home, the community, and within formal and informal structures;
> (5) Changing attitudes, behaviour, teaching methods, curricula, and environment to meet the needs of all learners;
> (6) Maximising the participation of all learners in the culture and curriculum of educational institutions, and uncovering and minimising barriers to learning.

This policy has outlined six strategies for establishing inclusive education and training system. As Francis and Muthukrishna[22] explain an

> important proposal made in White Paper 6 relates to the need for changes in the general education system so that learners experiencing barriers to learning can be identified early and appropriate support provided.

This is reiterated in the first point of the long-term goal:

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20 *White Paper 6*.
21 2011 JDR 0375 (WCC).
22 Francis & Muthukrishna "Able voices on inclusion/exclusion: A people in their own words" 2004 *Int J of Special Ed* 110.

> 4.4.1 Our long-term-goal is the development of an inclusive education and training system that will uncover and address barriers to learning, and recognise and accommodate the diverse range of learning needs.[23]

The first strategy is the implementation of a national advocacy and information programme in support of the inclusive model. The second strategy is the conversion of special schools into resource centres. The inclusive education policy proposes converting these schools into resource centres as part of its integrated strategy.

The staff members of these schools are to be gradually integrated into District-Based Support Teams to support Institutional and Level Support Teams and neighbourhood schools.

The third strategy of this policy is the establishment of full service schools. White Paper 6 argues for the need to establish thirty "full service schools" in South Africa as part of its short term goals.[24] Physical infrastructure improvements were being completed in twelve of these schools. So far not one of the thirty schools are fully established. The *Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Full Service Schools*[25] defines a full service school as a mainstream school which provides quality education for all learners by meeting the full range of learning needs in an equitable manner.[26]

It is envisaged that full service schools will provide education for regular learners as well as those with disabilities in an inclusive setting, with there being support for those with disabilities within a regular classroom. Provincial and Educational Departments have thus far trained 800 district officials and educators of full service and special schools in the implementation of the SIAS Strategy.

The 20 year time frame, for the implementation of the key interim steps, was initially as follows:

> 2001-2003 Expand the above in line with lessons learned from initial implementation.
> 2009-2021 Expand provision to reach targets.[27]

The fourth strategy is the establishment of District Based Support and Institutional Support Teams. The Department of Education holds the belief that barriers to learning and development can be reduced by strengthening the education support services. The policy proposes the establishment of District Based Support Teams which comprise staff from provincial, district, regional and national offices and from special

23 *White Paper 6* 45.
24 Ibid.
25 Department of Education 2005.
26 Department of Education *Conceptual and operational guidelines for full-service schools* (2005).
27 *White Paper 6*.

schools.[28] The Support Teams were formed and had started to provide support services to special school resource centres.

The Education White Paper 6 also proposes the establishment of support teams at school level. The primary function of these teams is to co-ordinate learner and teacher support.

The fifth strategy is the general orientation and introduction of management, governing bodies and professional staff to the inclusive education model and the targeting of early identification of disabilities for invention in the Foundation Phase.

The sixth strategy is the mobilisation of approximately 300,000 disabled children and youth of compulsory school-going age who are outside the school system. All these strategies are still only on paper. None of the strategies were implemented in full.

The ratification of the Convention on the Rights of Persons with disabilities by the South African Government in 2007 places an obligation on the system to recognise the right providing equal opportunity to life-long learning for all in an inclusive education system at all levels without discrimination.[29] The Convention further places an obligation on Government to ensure that persons with disabilities are not excluded from the general education system on the basis of disability, and that they can access an inclusive, quality and free primary, and secondary education on an equal basis with others in the communities in which they live.

Inclusive education as a new reality in South Africa brings along major philosophical shifts for the entire education system. The new policy adopts an ecosystem perspective which suggests a shift away from location problems within the learners and locates them in all the systems that act as barriers to learning. These include the family, the school and aspects of community functioning.[30] In addition, it suggests a shift from focusing on the category of disability to the level of support needed by the learners identified during assessment.[31]

The "human rights foundation"[32] of inclusive education suggests that the parent of a learner experiencing barriers to learning should have a substantial say in decision as to where their child is educated.[33] Linked to this, is a shift from the Special Education Act, which encourages the

28 White Paper 6.
29 Green & Engelbrecht *An Introduction to inclusive education. Responding to the Challenges of Inclusive Education in Southern Africa* (1948) 2-9.
30 Hay 2003.
31 Department of Education *Conceptual and operational guidelines for full-service schools* (2005).
32 Hay 135.
33 Hay "Implementation of the inclusive education paradigm shift in South Africa education support services" 2003 *SA J of Ed* 135-138.

segregation of designated groups of learners, to the SASA, which enables all learners to go the neighbourhood schools. The ratification of the Convention on the Rights of Persons with Disabilities by the South African Government in 2007 places an obligation on the system to recognise the right of persons with disabilities to education and to realise the right through providing equal opportunity to life-long learning for all in an inclusive education system.

Further, inclusive education suggests a shift away from the structural arrangements that were meant to deliver a segregated system of education.[34] The conversion of special schools into resource centres and the establishment of District-Based Support Teams, as well as Institutional Level Support Teams is an example of such a shift. Inclusive education calls for a shift from functionalism to radical structuralism. This shift entails moving away from racist, disability, sexist and classist-assumptions to non-racist, non-disability, anti-class and non-sexist assumptions.[35]

5 Progress towards the Right to Inclusive Education

White Paper 6 clearly states the intention of achieving inclusion rather than mainstreaming or integration.[36] It notes at the same time, however, that belief in, and providing support for, a policy of inclusive education are insufficient to ensure that such a system will successfully be translated into practice. Consequently, a strategy to meet the needs of students with disabilities in the interim was articulated in White Paper 6.

In 2005 the National Department of Education developed National Strategy on Screening, Identification, Assessment and Support (SIAS Strategy). This is directed at determining the nature and level of support required by learners with special education needs and also outlines the procedures to ensure that all learners with level 4 and 5 (learners who require moderate and high levels) of support such as learners who are disabled and receive social security grants, are admitted to schools and receive the necessary support.

Between June and October 2008 several further documents were published to assist with the implementation of the inclusive education vision. These included:

(1) Making explicit the role of the district based support teams;[37]

34 Naiker *An investigation into the implementation of outcomes-based education in the Western Cape Province* (Doctoral thesis 2000 University of the Western Cape) 110.
35 *Ibid*.
36 *White Paper 6*.
37 Department of Education *Conceptual and operational guidelines for the implementation of inclusive education: District-based support teams* (2005).

(2) The practicalities of the establishment of full-service schools;[38]
(3) The adaption of curriculum to meet the needs of diverse learners;[39]
(4) A clear management plan for the first phase of implementing inclusive education;[40]
(5) The practicalities of transforming special schools to resource schools;[41] and
(6) Guidelines for teachers at both regular and special schools for inclusive learning programmes.[42]

All these documents were taken a step further in the publishing of the *Guidelines for Full Service Schools*, but still no real action was documented for the proper implementation of all these plans, mentioned in the documents above.

While some aspects of the implementation of the 20 year plan are behind schedule, steps are being taken to progress this initiative. Examples would be the appointment of additional staff to resource schools and the documentation noted above.[43]

In the *Guidelines for Full-service/Inclusive Schools*, a follow up document on Education White Paper 6 criteria or minimum standards that a school must comply with to be considered an inclusive/full-service school, are provided.[44] The objective of the guidelines is to explain the main principles of full-service schools, describe their characteristics, outline the Institutional development, while building links with different partners at all levels of support.

Within Adult Education (AET) and Further Education and Training (FET), institutions will also be selected and developed to become full-service educational institutions. In building capacity of these schools, special emphasis will be placed on inclusive principles, which include flexibility in teaching and learning and the provision of education support to learners and educators. The guidelines further state that the first cohort of full-service schools will become examples of good practice and will chart the way for all schools/institutions to ultimately become inclusive institutions.

38 Department of Education *Conceptual and operational guidelines for the implementation of inclusive education: Full-service schools* (2005).
39 Department of Education *Curriculum adaptation guidelines of the Revised National Curriculum Statement* (2000).
40 Department of Education *Framework and management plan for the first phase of implementation of inclusive education: Managing the transition towards an inclusive education system* (2005).
41 Department of Education *Conceptual and operational guidelines for the implementation of inclusive education: Special schools as resource centres* (2005).
42 Department of Education *Guidelines for inclusive programmes* (2005).
43 Maher *Inclusive education a decode after democratisation: The Educational needs of children with disabilities in KwaZulu-Natal*. (PhD Thesis 2007 Auckland University of Technology).
44 Department of Basic Education *Guidelines for Full-service Schools* (2010).

The Guidelines provides criteria as minimum standards that a school/ institution must comply with to be considered an inclusive/full-service school/institution. The guidelines are not restricted to schools in the General Education and Training (GET) brand but are also applicable to further and higher education and training institutions, guiding them on what steps they should take in recognising and addressing the diverse learning needs of their learners. Adult basic education programmes, as well as early childhood development centres should also be part of this development process while building links with different partners at all levels for support. Furthermore, they are designed to provide a practical framework for education settings to become inclusive institutions.

6 Challenges of Inclusive Education in South Africa

Policy content is one of the critical pillars on which policy implementation is based. It is regarded a crucial factor in establishing the parameters and directives for implementation although it does not determine the exact course of implementation.[45]

The success or failure of policy depends on the support the policy generates among those who are affected. Christie states that though policy makers may prefer the emphasise structural changes, they cannot sidestep human agency and its influence on policy outcomes.[46]

Inclusive education studies also assert that strong support at all levels of the department of education is one of the key strategies to the successful implementation of inclusive education.[47] *Education White Paper 6* commits itself to the establishment of strong education support services in South Africa. One of the key strategies towards the attainment of this goal is to involve people in the support service field who can support the implementation. This can be done through the establishment of district-based support as central part of the strengthening of education support services.

Policy implementation studies have shown that the success of any policy rests on the capacity to implement.[48] In the South African context, capacity is regarded as a strategic entry point to the development and implementation of education policies.

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45 Brynard & De Coning *Policy Implementation. Improving public policy: from theory to practice* (2006) 180-213.

46 Christie *Changing schools in South Africa: Opening the door of learning* (2008).

47 See also Hay *Implementation of the inclusive education paradigm shift in South Africa education support services* 2003 *SA J of Ed* 135-138.

48 Makoa "Aids Policy in Lesotho: Implementation challenges" *African Security R* 2004 71-77.

Inclusive education with its focus on transforming all aspects of the education system requires a systemic approach to the analysis of capacity which includes individual, school, district, province and national levels. This assumes a systemic approach that can investigate the capacity of policy-makers and implementers to implement inclusive education policy.

The capacity of individuals to perform their functions forms the basis for any success. What constitutes an individual's capacity to perform functions effectively in an inclusive education system? White Paper 6 and the *Guidelines for Full-service/Inclusive Schools* expect individual educators to have skills or expertise to identify barriers to learning; to support learners in the classroom; to collaborate with-other support providers; to determine the levels of support needed by learners; and to adapt the curriculum to meet the needs of all learners.[49]

Teachers and schools are expected to cope with large-class sizes, students from diverse cultural and linguistic backgrounds, developmental variations of students' skills, social problems, and what teachers view as unacceptable behaviour. To impact on this it is suggested that teachers need to be well organised, have expert skills, have routines well established and be adaptable to ever-changing factors and condition in the regular classroom.[50]

Schools should be at the centre of support that must focus on increasing the capacity of individual schools to support the participation and learning of an increasing diverse range of learners.[51] In this approach, all role players are encouraged to share and build on their existing knowledge in order to increase inclusivity in all aspects of the school.[52] This all indicates that the context of change and inclusive education implies a redefinition of the tradition isolated roles-of teachers in mainstream schools to a more collaborative role in the accommodation of diversity in inclusive classrooms. More importantly White Paper 6 or the current implementation of government policy makes no provision for disabled children to be catered for by special schools at present. Government only said that their objective is to ensure, at an unspecified time in the future, that disabled children are catered for by special schools. Moreover, the furthest that government goes at this stage is to say that children "may be able to access support" at special schools. They do not indicate what form this support will take, when it will occur, where it will be provided and to what extend it will be provided. So for the foreseeable future the SIAS strategy will continue to be employed.

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49 Department of Basic Education *Guidelines for Full-service/inclusive Schools* (2010).

50 Knight "Towards inclusion of Students with special educational needs in the regular classroom" 1999 *Support for Learning* 3-7.

51 Ainstow *Understanding the development of inclusive schools* (1999).

52 Dyson & Forlin *A theoretical framework for inclusive schools. Perspectives on learning difficulties* (1999) 1-14.

As to when some of the affected children may be admitted to special schools, government says that they will only be admitted if they are able to "acquire sufficient skills" or if they "achieve the minimum outcome and standards linked to the grade of education". Admission to a school will be on the basis of an assessment of a child's level of educational need. Children who fall inside levels 4 and 5 of the SIAS strategy will be admitted to special schools. It is clear that when policies are implemented there will be children with severe intellectual disabilities who will be excluded from the schooling to be provided. It is necessary to adopt an holistic approach for severely disabled children, to enable them to develop their ability and potential to the fullest extent.

Education White Paper 6 regards parental involvement, community partnership and intersectoral collaboration as the key in the implementation of inclusive education. This depends on various individuals' capacities to perform their tasks effectively. Parental involvement depends on the parent's ability to make a meaningful contribution to the preventing, identification and removal of barriers to learning.[53] In the light of the discussion above the following questions could be asked:

(1) How suitably qualified are the educators and Institutional level Support Team members in performing the identified functions?
(2) Do parents/institutional & Level Support Team members/educators/ School Governing Bodies/district officials have the skills to perform the identified functions?
(3) What are all the role-players' understanding of inclusive education?

Despite the commitment to transformation and inclusivity of policy makers, as well as at the wider societal level, traditional conservative attitudes and practices still prevail at the school- and classroom levels. As a philosophy, the concept of inclusive education in the South African context embraces the democratic values of equality and human rights, and the acceptance and recognition of diversity.[54] Racially entrenched attitudes towards those who are "different" influence the way in which diversity is regarded. Children with disabilities as well as those from poverty-stricken households are viewed by both teachers and learners as "different". Teachers are unable to grasp the fact that their own attitudes towards diversity contradict basic human rights and equitable access to education.[55]

School principals' roles as leaders in managing change should create a climate of collaboration. Because of a lack of institutional capacity both in administrative systems and suitable leadership, and a culture of

53 Christie *Changing schools in South Africa: Opening the Door of Learning* (2008).
54 Swart & Pettipher *Changing roles for principals and educators. Promoting learner development preventing and working with barriers to learning* (2001) 30-44.
55 Peters, Johnstone & Furguson "A dis-credibility rights in education module for evaluating inclusive education" 2005 *Int J of Inclusive Ed* 139-160.

support and collaborative partnership between teachers as well as between teachers, learners and parents are almost non-existent.

Lessons from policy implementation research show that the education system can provide good policy, education support, and resources and build the capacity of participants to implement the policy, but if attitudes have not changed, the implementation will fail.[56] Attitudes and beliefs of school staff[57] students, parents and the local community have an impact on the school's effectiveness in implementing inclusive educational practices.

While the attitudes of the teachers, parents and learners are critical in most research, it is argued that the attitudes and beliefs of school principals towards inclusive education is the key factor to successful implementations at school level.[58]

Policy documents recommend a community based approach as a strategy for developing inclusive school communities. Community involvement is identified by teachers and parents as problematic, leaving the school with the sole responsibility for the education of a large number of learners. The active involvement of the community in collaborative partnerships with teachers and a mutual recognition of each other's needs are therefore almost non-existent. No effort has been made to build on the strengths of existing community support systems and other existing assets in the school to develop a unique community based support system.[59]

Research has shown that the curriculum stands out as a key issue when working with schools and education in addressing the needs of learners.[60] The National Commission on Special Needs in Education and Training and National Committee on Education Support Services argue that, in an education system, the curriculum needs to be accessible and responsive to the needs of all learners.[61]

The Guidelines of Full-service schools indicate that this must be a flexible curriculum to accommodate different needs and styles. It further indicates that inclusive schools should know how to differentiate the curriculum and educators must understand that inclusive education is a fundamental principle of the Curriculum and Assessment Policy

56 McLaughlin *Listening and Learning from the field: Tales of policy implementation. International Handbook of educational change* (1998) 70 84.
57 Forlin "Diversity and Inclusivity" Paper presented at the SAALED Conference, Johannesburg South Africa 2004.
58 Praisner.
59 Reiser *Checklist and Notes on what School Policy on Disability, Equality and Inclusion should cover* 2008 Disability Equality in Education London.
60 UNESCO *Changing Teaching Practices: Using Curriculum Differentiation to Respond to Student's Diversity.*
61 Department of Education *Quality education for all: Report of the National Commission of Special Needs in Education and Training (NCSNET) and the National committee on Education Support Services (NCESS)* (1997).

Statement of 2010. But again there are no signs or examples of any positive development or establishment of full-service schools.

The report further suggests that in order to enable schools to accommodate the diversity in the learner population, overall curriculum transformation is required. This includes the review of different aspects of the curriculum such as the learning environment, learning programmes, teaching practices, capacity of teachers, assessment of the learning outcomes, equipment, medium of teachers, assessment of learning outcomes, equipment, medium of teaching and learning, and the nature of support provided to enable to the learning programme.

White Paper 6 policy limits the meaning of curriculum to what is learned, how it is delivered, what resources are used; the pace of teaching and the time frame for the completion of the curriculum and assessment.

Inclusive Education emphasises the right of all learners to gain access to the curriculum. This means ensuring that the curriculum is responsive to the needs of all learners. The curriculum is therefore a critical variable for the effective implementation of inclusive education. Some key questions that must be asked are:

(1) Are teachers able to implement the curriculum effectively?
(2) Do classroom environments enable teachers to implement this approach?
(3) Do lessons build on the diversity of student's experiences?
(4) Are changes made to the curriculum for students who experience barriers to learning?

The South African Schools Act alert us to a shift from the past – a shift that views all children as equal with equal rights to education that fits their needs. This shift to include all learners' needs suggest a system of education which recognises that there are children who have barriers to learning and that these barriers go beyond disabilities.

The Department of Education's defence is that they are in the process of implementing White Paper 6 and the SIAS strategy.[62] The defence of the Department of Education indicates the shortcomings in South Africa. The SIAS diagnostic instrument enables the foundation phase teachers to identify disabled learners, but after this phase there are still many shortcomings.

The most important shortcoming is that the system for full-service schools, special schools and inclusive schools, are not fully operational yet. A further shortcoming is that policy has not been converted into legislation. Specific legislation (like the American Individuals with Disabilities Act) must be promulgated. SASA only refers to a few articles aimed specifically at special schools and learners. SASA is insufficient to

62 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 JDR 0375 (WCC).

address all the complexities and unique needs of inclusive education. The policy of White Paper 6 must be converted into legislation. Then the Department of Education must budget to satisfy legislation, and then parents can take government to court to enforce the rights of their children with disabilities.

7 Conclusion

Inclusive education can be a success if we recognise that education is the joint responsibility of parents, teachers, curriculum advisors and the community. A community-based approach to inclusion is a central feature of inclusive schools. Belonging and support, which are basic human rights, are being turned into rights that have to be earned. Inclusive education for all as enshrined in policies and legislation runs the risk of becoming exclusive for many in South Africa, especially the poor. If the emphasis is on testing and benchmarking of schools, it leaves little room for partnerships and inclusion. Social and educational transformation is not delivered by democratic elections and policy visions alone. It needs to be won in complex and concerted engagement with social, political and economic forces, in which the development of new policies is simply one step.

Enhancing the recognition and acceptance of the basic rights of all South African children to be accommodated in inclusive school communities involves an acknowledgement of the complexity of the dynamic interaction between societal as well as contextual factors and the continuous development and evolvement of supportive and collaborative inclusive communities on all levels of the education system.

The promise of strategic planning within the Department of Education to ensure that the management of inclusive education is recognised and addressed at all levels of service delivery, must now become a commitment to drive the process of building inclusive education in the district, province and country.

Inclusive education is not an end in itself, but a means to an end, that of the realisation of an inclusive society.

Learners' religious-cultural rights: A delicate balancing act*

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OPSOMMING

Leerders se Godsdienstig-kulturele Regte: 'n Delikate Balanseertoertjie

Suid-Afrikaanse openbare skole konfronteer die uitdaging om duidelike riglyne te ontwikkel wat die grondwetlik-beskermende regte van alle godsdienste en kulture respekteer en eer. Die Suid-Afrikaanse Skolewet 84 van 1996 verwag van skoolbeheerliggame om 'n Gedragskode vir Leerders daar te stel wat streng onderworpe is aan die Grondwet van die Republiek van Suid-Afrika, 1996.[1] Die reg van groepe om hul godsdiens te beoefen en hul kultuur te geniet moet in lyn wees met die bepalings van die Handves van Menseregte, en dit impliseer dat daar nie onbillik inbreuk gemaak mag op die reg op vryheid van godsdiens en kultuur nie.[2]

In die Verenigde State van Amerika verskaf die federale Grondwet op 'n beperkte wyse beskerming vir leerders se vryheid van godsdiens en kultuur op skool. Die beskerming geld solank die uitoefen van sulke regte nie inmeng

* The terms *learner(s)* and *student(s)* are used interchangeably in the article: in South Africa a school-going person is a *learner*; in the United States of America (USA) a school-going person is a *student*.

** The authors acknowledge the publication of a previous article written by De Waal, Mestry and Russo "Religious and cultural dress at school: a comparative perspective" 2011 *Potchefstroom Electronic LJ* 64. This is a follow-up, relying on the same South African case law, and encompassing some of the discussion presented in the *Potchefstroom Electronic LJ* article. Obviously, the legislation/guidelines/regulations remain constant.

1 South African Schools Act 84 of 1996 (SASA); s 16(1) SASA assigns the professional management of a public school to the principal acting under the authority of the provincial Head of Department of Education (HoD); s 16(3) SASA assigns the governance of such a school to the School Governing Body; SA Constitution.

2 SA Constitution, Chapter 2 ss 7-39; note also the case that considered whether an amendment to SASA that prohibited corporal punishment at schools violated the rights of parents of children at independent schools who, in line with their religious convictions, had consented to its use and where the Court dismissed the parents' appeal. *Christian Education South Africa v Minister of Education* [2000] 4 SA 757 (CC) (*Christian Education*) par 36 points out the importance of the right to freedom of religion, belief and opinion "in the open and democratic society contemplated by the Constitution" especially the Preamble, ss 36(1), 39(1)(a) SA Constitution. The Court also noted that "[t]he right to believe or not to believe, and to act or not act [accordingly] ... is one of the key ingredients of any person's dignity" and that "religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights".

met die bestuur van die skool en die regte van ander leerders nie.[3] Met die Grondwetlike Hof van Suid-Afrika wat diverse godsdiens- en kultuurregte op openbare skole erken, ontstaan daar spanning tussen die menings wat betref die menseregte van leerders wat uit verskillende godsdienstige en kulturele agtergronde afkomstig is en skoolamptenare se verantwoordelikheid om veilige en gehalte skole te bedryf. In hierdie artikel ondersoek die outeurs hierdie spanning en die implikasie daarvan op skoolbeleid vir Suid-Afrikaanse openbare skole.

1 Introduction

Driven by the fact that, at an international level too, South Africa is well-known for cultural, ethnic and religious diversity, education authorities are now seen to be attempting to maintain public school practices that do not, among others, intrude on learners' legal rights.[4]

Two of the most widely used South African school documents feature the significance of the religious-cultural dimension of a South African learner.[5] The preamble to the South African Schools Act[6] (SASA) provides:

> Whereas this country requires a new national system for schools which will ... provide and advance our diverse cultures ... [and] uphold the rights of all learners [and] parents ...

The Guidelines for Codes of Conduct[7] provide, *inter alia*:

> The Code of Conduct must...
> Item 1.3 reflect the ... human rights ... which underpin South African Society ...
> Item 1.4 set a standard of moral behaviour for learners ...
> Item 1.9 contain a set of moral values, norms and principles which the school community should uphold ... [and]
> Item 3.2 [t]his policy shall be directed to the advancement and protection of the fundamental rights of every person ...

The need for a strategy according to which public schools can start crafting milieus that allow learners, among others, to experience *a sense of security* and feel at ease with expressing their religious-cultural uniqueness is imminent.[8] A management area that brings to light the tension between these two demands is learner dress codes. Although the

3 393 US 503.
4 De Waal, Mestry & Russo "Religious and cultural dress at school: a comparative perspective" 2011 *Potchefstroom Electronic LJ* 64; *National Guidelines on School Uniforms GG* 28538 of 2006-02-23 item 2 (*Guidelines on Uniforms*) s 2.
5 SASA; *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners GG* 18900 of 1998-05-15 (*Guidelines for Codes of Conduct*).
6 84 of 1996.
7 *GG* 18900 of 1998-05-15.
8 De Waal "Random drug-testing: the duty to act against learners who use drugs" 2007 *Acta Academica* 229; De Waal *et al* 64.

South African Court declared in 2007 that policies that fail to accommodate a learner's religious and cultural practices result in unfair discrimination, the South African media continue to report incidents where learners have alleged that school managers have infringed on their fundamental rights by imposing dress codes that limit the expression of their religious-cultural beliefs.[9] In a recent incident, a Cape Town School Governing Body suspended a 15-year-old learner, Odwa Sityata, for a week for not trimming his dreadlocks which were against school regulations.[10] Not willing to take a firm stance, a spokesperson for Western Cape Education Minister, Donald Grant (Western Cape MEC), was quoted as saying that:

> [t]here was no clear constitutional issues at stake, no previous case law has explicitly dealt with the issues of Rastafarianism – it has rather avoided this specific issue. In two previous cases, the courts ordered the children to return to school on administrative grounds.[11]

Moreover, speaking from the Claude Leon Foundation Chair in Constitutional Governance at the University of Cape Town, a constitutional critique points out the sad state of affairs that the spokesperson was apparently not aware of *the well-established rule of precedent* which holds the courts to previous judgments.[12] Even sadder would be the possibility of the Western Cape MEC choosing not to react, due to a looming election and politically self-serving reasons.[13]

A previous article, "Religious and cultural dress at school: a comparative perspective",[14] pointed out that the South African debate has certainly heated up specifically regarding two questions related to learner conduct codes:[15]

> (a) Are restrictions contained in learners' dress codes at schools valid rules that aim at sustaining non-violent and organised learning environments?

9 *The Star* (2004-01-23) 3 reported on a 13-year old Muslim learner who was told to remove her headscarf because Sir John Adamson High School's Code of Conduct prohibited it; *Beeld* (2008-01-20) 8 reported on a learner who was told to shave the beard he had grown as proof that he had memorised the *Quran* or enrol at another school.

10 Originally reported by *Mail & Guardian Online* (2011-03-10) available at http://mg.co.za/article/2011-03-10-pupil-school-face-off-over-dreadlocks (accessed 2011-03-12).

11 *MEC for Education, KwaZulu-Natal v Pillay* 2007 1 SA 474 (CC) (*Pillay CC*).

12 De Vos "Dreadlocks at school must be allowed" available at http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed (accessed 2012-03-01); see the discussion of *Pillay* as an example of the rule of precedent *infra*.

13 *Ibid*.

14 De Waal *et al* 65.

15 De Waal *et al* 65.

(b) Are restrictions in learners' dress codes infringements on learners' constitutional rights to freedom of religion, human dignity, equality, and/or speech and expression?[16]

After the 2007 Constitutional Court decision, rather than diminishing, the tension at public schools concerning dress code regulations and religious-cultural requirements of learners' beliefs is escalating. This article provides a closer examination of policies, laws and litigation to convey the responsibility school officials bear to accommodate religious-cultural beliefs of their learners.

At the same time, the article provides a brief comparative law method, defined as a distinctive, methodical and legal systems approach, which aims at acquiring new knowledge and understanding of the specific topic by virtue of similarities and differences.[17] Such similarities and differences will be gleaned by likening the South African approach concerning learners' legal religious-cultural rights to that of the United States where it would be relevant.

The structure of the article comprises presenting a bird's eye view of South African public schools' learner dress codes by addressing diversity and freedom of expression; unfair discrimination; reasonable accommodation under the Promotion of Equality and Prevention of Unfair Discrimination Act;[18] human dignity and freedom of expression; and applying rights to freedom of expression. In the next instance, the focus turns to the United States (US) approach as an example of foreign jurisdiction. From the analysis of (1) the South African legal context related to learner dress codes and (2) the US approach, the authors followed a comparative law method in order to draw implications for South African educators and School Governing Bodies as they seek to balance learners' constitutionally protected rights and to maintain safe

16 S 15(1) SA Constitution which stipulates that all people have the right to "freedom of conscience, religion, thought, belief and opinion"; s 10 SA Constitution which stipulates everyone's dignity as being part of their very nature ("inherent") and their right to have it esteemed and kept safe from harm ("respected and protected"); s 9 SA Constitution which stipulates the following: Everyone is equal before the law and has the right to equal protection and benefit of the law; Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken; The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including… Religion, conscience, belief, culture; Discrimination on one or more of the grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair. s 16(1) SA Constitution which stipulates that all people have the right to freedom of expression.

17 Venter, Van der Walt, Van der Walt, Pienaar, Olivier & Du Plessis *Regsnavorsing: metode en publikasie* (1990) 211.

18 4 of 2000 (Equality Act).

learning environments for all learners.[19] Specific recommendations are made to support schools in framing and implementing policies that would not infringe on learners' legal rights to religion/culture expression. This article closes by contemplating what South African schools and their educators must do to ensure the protection of learners' religious-cultural rights.

2 Learner Dress Codes at South African Public Schools

In South Africa, litigation pertaining to dress codes at public schools has emerged with a few significant court judgments rendered in the last ten years,[20] unlike the US where few judgments have been handed down concerning student uniforms and constitutionally protected religious-cultural expression.[21] Moreover, the South African Minister of Education has provided Guidelines on Uniforms, including information to support public schools in establishing dress codes that do not infringe on learners' constitutional rights.[22] For the purposes of this article, the Guidelines on Uniforms' first two headings have been selected and grouped together below since they are specifically relevant to South Africa.[23]

2 1 Religious-Cultural Diversity and Freedom of Expression

At an official level, the Department of Education is seen to be serious about supporting public schools in the aim of protecting learners' constitutional rights.[24]

With regard to the custom of South African learners wearing some form of school uniform, the Guidelines on Uniforms boast three significant sub-sections: [25]

> 29(1) A school ... dress code should take into account religious and cultural diversity ... [and] ... accommodate learners whose religious beliefs are compromised by a uniform requirement.

19 This article is a follow-up on *Religious and cultural dress at school: a comparative perspective* that was published in the 2011 *Potchefstroom Electronic LJ* 63-96.

20 De Waal *et al* 65; *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (C) (*Antonie*); *Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (N) (*Pillay High Court*); *MEC for Education, KwaZulu-Natal v Pillay* 2007 1 SA 474 (CC) (*Pillay CC*).

21 Thomas, Cambron-McCabe & McCarthy *Public school law – teachers and students' rights* (2009) 133-134.

22 Guidelines on School Uniforms item 2; also specifically item 29 where the document has five headings that are divided into eight sub-paragraphs; De Waal *et al* 67.

23 De Waal *et al* 68.

24 *Guidelines on Uniforms* item 2.

25 *Idem* item 29(1)-(3).

> (2) If wearing ... attire ... is part of the religious practice of learners..., schools should not, in terms of the SA Constitution, prohibit the wearing of such items.
> (3) A uniform policy may … prohibit items that undermine the integrity of the uniform … such as a T-shirt that bears a vulgar message ...

Connecting the Department of Education's standpoint on religious-cultural aspects as reflected in the above-mentioned three sub-sections to a constitutional perspective, Currie and De Waal[26] call attention to the importance of not regarding freedom of religion, belief and opinion on its own. It is preferable to read the latter in conjunction with the equality clause, which forbids the State to discriminate against, among others, any religious-cultural group.[27] In this regard, a close examination reminds the reader that the South African fundamental right to freedom of religion embraces both *a free exercise* and *an equal treatment* element.[28]

Taking it one step further, the Court indicated in *Taylor v Kurtstag* the likelihood of applying the legal right to freedom of religion, belief and opinion horizontally.[29] Horizontal application would then signify the right as not only accruing to groups, but also to individual persons' conduct.[30]

The Constitutional Court's first call to apply the direct horizontal provisions of the SA Constitution occurred in *Khumalo v Holomisa*.[31] With the applicants relying on their right to freedom of expression, the Court noted this right as a significant one, combining to form "both democracy and individual freedom".[32] Additionally, the Constitutional Court distinguished the issue of human dignity as it bestows value not only on an individual's sense of pride, but also on society's appraisal of the value of the individual as being applicable to the right to freedom of expression.[33]

In this sense, law must discover a proper equilibrium between these two constitutional interests of the right to freedom of expression and respect for human dignity.[34]

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26 Currie & De Waal *The Bill of Rights handbook* (2006) 338; s 15 SA Constitution.
27 S 9(3) SA Constitution that specifies religion, conscience, belief and culture as grounds that could constitute unfair direct or indirect discrimination.
28 Currie & De Waal 338; De Waal *et al* 69-70.
29 2005 1 SA 362 (W): the applicant tried stopping publication of a notice that would ex-communicate him from the Jewish faith; the application was dismissed.
30 *Idem* par 45, stating that religion rights are applicable directly horizontally.
31 2002 50 SA 401 (CC): a well-known politician sued the applicants for defamation that arose from a published article; the applicants lost their appeal.
32 S 16 SA Constitution; *Direct application* occurs when testing the allegation that an aspect of the common law is inconsistent with the SA Constitution; *Khumalo v Holomisa* par 21.
33 *Khumalo v Holomisa* par 27.
34 De Waal *et al* 70.

As pointed out in a previous article, the *generous approach to standing that courts apply in fundamental rights litigation* is regarded as an advantage of applying horizontal provisions directly, making it more appealing to file suit concerning alleged infringements of fundamental rights in the future.[35] This could then also point to more frequent litigation regarding school-related issues.

One should, however, not forget that all South African fundamental rights can be limited by the State by the so-called limitation clause.[36] In this regard, in section 36(1) the SA Constitution specifically states that all fundamental rights "may be limited ... to the extent that the limitation is reasonable and justifiable in [a] ... democratic society based on human dignity, equality and freedom". Yet determining the legitimacy of such limitation needs to take into account what the nature of the right is; how important the purpose of the limitation is; what the nature and extent of the limitation comprise; what the relationship between limitation and purpose is; and whether means are available that would imply less restriction.

Up till now, other than would be expected and as pointed out before, South African courts do not appear to be inclined to "limit the right to freedom of religion, belief and opinion"; preference is given to "broadening/widening the scope of the right".[37] It thus follows that the courts, however, do not treat every practice/habit that claims to be linked to exercising the freedom of religion, belief, conscience and thought as if it is such.[38] This stance should reassure public schools especially that courts will not allow practices that disrupt school and/or classroom activities.[39]

Beliefs alone are unable to cause mischief.[40] While this statement would imply that *thought control* would always be unacceptable, a definite need exists to differentiate between embracing a belief and voicing it publically.[41] At public school level, this need to differentiate may give rise to valid reasons why a specific practice must be limited. An example would be that of learners who want to hold a religious-cultural school event in an attempt to convince other learners to join their religious-cultural endeavours.

While the limitation of specific practices at public school level may legitimately be justified, these schools also face the significant challenge of being seen to be fair and consistent when applying their dress codes.

35 *Idem*; Currie & De Waal 50-51.
36 S 36 SA Constitution.
37 De Waal *et al* 70-71; Currie & De Waal 341; *Christian Education* where the court adds the possibility of not just *restricting* but also broadening or widening the scope of this right.
38 *Ibid*.
39 *Guidelines for Codes of Conduct* item 4.5.1 & 5.2.
40 Currie & De Waal 344.
41 *Ibid*.

2 1 1 Learners' Religious-Cultural Rights: Fair and Consistent Protection

The SA Constitution stands firmly in its efforts to strive not to discriminate *unfairly* against any person concerning any grounds:[42] Seventeen of these grounds are listed in section 9(3), with religion and culture among them. Reminiscent of this, the SA Ministry of Education underscores the SA Constitution as being unequivocal on equality.[43]

In *Pillay v MEC for Education, KwaZulu-Natal and Others* (*Pillay Eq Court*), the Durban Equality Court heard the complaint of a mother who acted in support of her daughter, Sunali, regarding a nose stud that she wore under supervision of her mother after the September 2005 school holidays.[44] The school's dress code prohibited the wearing of a nose stud. Although the school's Code of Conduct had been drawn up in consultation with the school community and school officials had allowed some learners religious exemptions from these provisions, the school did not regard Sunali's request for exemption to constitute a legitimate claim.[45] The mother approached the court in search of an interdict that would prevent the principal from violating what she regarded as her daughter's right to be protected against discrimination due to her religion and/or culture.[46] At the same time, the mother also applied for a court order to require supervision of the school's "progress ... [in achieving] the goal of transformation".[47]

The Durban Equality Court ruled that the way in which the school's dress code – which prohibited the wearing of nose studs – had been written was *prima facie* discriminatory; but not *unfair* discrimination. This Court noted that the school had followed the correct procedures, acting within the framework of its authority, and adhering to the provisions of acting reasonably and fairly at all times.[48] The magistrate therefore warned the learner that not observing the school's dress code in this regard would result in disciplinary measures being taken.

Although at face value *Pillay Eq C* attended to important issues such as following correct administrative procedures, acting *intra vires* and being

42 S 9(3) SA Constitution.
43 *Manifesto on Values, Education and Democracy* (2001); De Waal *et al* 72.
44 Originally brought in the Durban Equality Court, hearing scheduled for 2005-09-29 as Case *AR* 791/05 (*Pillay Eq C*).
45 *Pillay High Court* par 24: learners, parents and educators representing the racial, religious and cultural groups in South Africa formed part of the process; *Pillay CC* par 7, 12: Mrs Pillay wrote a letter to the principal in which she pointed out that the nose stud was worn as "a personal choice and tradition" and not for religious reasons.
46 *Pillay High Court* par 1(a).
47 *Idem* par 1(b) where Mrs Pillay asked the Durban Equality Court to issue an order that would guide the MEC for Education, KwaZulu-Natal, to monitor the Durban Girls High School's advancement in reaching a higher level of transformation.
48 This part of the Durban Equality Court's finding in *Pillay Eq Court* is also mentioned in par 13 of *Pillay CC*.

fair, the court did not address what requirements the school should have met to be considered acting reasonably.

2 1 1 1 Pillay Eq C's Appeal

When the mother appealed the matter, the High Court found that the school's Code of Conduct undercut the ideals of religious-cultural symbols.[49] Moreover, the High Court questioned the perspective that the school's learners could develop religious-cultural practices not being worthy of the same protection that other rights or freedoms were afforded.[50] The High Court referred to foreign case law when it pointed out how critical it was for schools (1) to protect others' religious and cultural rights or freedoms, and (2) to respect minority groups.[51]

In emphasising that *substantive equality* involves appreciation for the fact that equality takes account of differences, the High Court implied that *learners who are not similarly situated should not be treated alike*.[52] For that reason, the High Court found the school's Code of Conduct to be an example of *a major contemporary form of unfair discrimination*.[53]

The *Pillay* High Court concluded:

(a) The school's argument, that the Pillays had accepted the Code of Conduct when they enrolled their daughter, was not relevant, since fundamental rights and freedoms can never be waived.[54]
(b) Allowing plain round studs or sleepers as earrings, but not as nose studs, constituted an illegality.[55]

49 *Pillay High Court*.
50 *Idem* par 35.
51 *Multani v Commission Scolaire Marguerite-Bourgeoys* (2006) SCC 6; this supported the decision of the authors to include foreign case law in this article; Accommodating this learner to wear the nose stud would illustrate exactly this point; *Pillay High Court* par 35.
52 *Idem* par 41; De Waal *et al* 72-73.
53 *Pillay High Court* par 47, where the High Court pointed out that the *formal equality* approach of this school did not consider "actual social… disparities or material and significant differences between groups and individuals and which [ignored] the historical burden of inequality which the SA Constitution seeks to overcome, [neglecting its] deepest commitment"; *Idem* par 54, where this court described the specific provision of the *Code of Conduct* that bans nose studs from the school grounds (*Idem* par 3) as one that could not be trusted, relied upon or respected.
54 *Idem* par 23.
55 *Idem* par 25-26, 34, where the High Court pointed out that treating all female learners symmetrically equal was reminiscent of the case *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 132: "Equality means equal concern and respect across difference … not … the elimination of or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self … At the very least [equality] … affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment … it celebrates the vitality that difference brings to any society".

(c) Failure of the Code of Conduct to treat the respondent's daughter differently from other female learners at the school denied her the advantage and chance of benefiting from her culture and of practising her religion.[56]

As pointed out previously, the *Pillay* High Court verdict raises the concern, among others, of whether the obvious display of religious-cultural beliefs by wearing specified clothing could be regarded as being treated uniquely different from other religious-cultural customs such as the unrestricted exhibit of religious symbols, disciplinary measures associated with religious beliefs as were tested in *Christian Education* or public affirmation of faith at school.[57]

2 1 1 2 The *Pillay* Case at the Constitutional Court

Not satisfied that the case had received the attention it deserved, the respondents of the High Court *Pillay* case applied for leave to appeal directly to the Constitutional Court.[58] The chief argument revolved around the applicants' claiming that (1) the High Court had gone astray in describing the matter as an equality claim under the Equality Act; (2) the school's Code of Conduct took equal effect on all religions; and (3) the Code of Conduct had been developed by consulting the relevant parties at school extensively.[59]

Furthermore, two applicants asked the court to take into account that the learner would no longer be enrolled at the school when judgment was handed down and that the National Department of Education had published new guiding principles that appeared after this case had come to the fore.[60] In the written submission these two applicants indicated their concern that the High Court's ruling had the potential of bringing about significant consequences for South African public schools with substantial cultural diversity.[61]

In reaction to the school officials' claim, the mother, Pillay, grounded her submission on the argument that the school's Code of Conduct did not make provision for *reasonable accommodation*.[62] Such a provision would have permitted an even-handed balance between the conflicting interests of the school and her daughter's safeguarding a South Indian

56 *Idem* par 42.
57 De Waal *et al* 74-76; Mawdsley, Cumming & De Waal "Building a nation – religion and values in the public schools of the USA, Australia and South Africa" 2008 *Ed and the Law* 96.
58 MEC for Education KwaZulu-Natal, Thulani Cele the School Liaison Officer, Anne Martin the principal of Durban Girls' High School, and Fiona Knight the Chairperson of the School Governing Body.
59 4 of 2000; in this case the applicants applied and received approval to bypass the Supreme Court of Appeal.
60 *Guidelines on Uniforms*.
61 Written Submissions on behalf of the Governing Body Foundation (*amicus curiae*) 71; *Pillay CC* par 71; De Waal *et al* 73.
62 *Christian Education* par 42: in some cases the community, such as a school, must take positive measures and even incur extra hardship while allowing all persons to participate and enjoy all their rights equally.

family tradition and culture. In their response, the school officials argued that allowing the learner to wear the nose stud would necessarily affect discipline and education at their school negatively.[63]

The Constitutional Court deliberated on the application of three explicit factors:[64]

> (a) The effect that a Constitutional Court order could have at everyday school level – this Court found that all its orders would be practically relevant since the Department of Education's guidelines function without any binding observance purported.[65]
> (b) The prominence of the matter – this Court found the issue to be of significance concerning the security that schools afford religious/cultural groups.[66]
> (c) The intricacy of the matter – this Court found the differences between the approaches of the South African judiciary and those of foreign judiciaries to underline the difficulty of handling such matters.[67]

The Constitutional Court initially identified whether the alleged discrimination resulted from the Code of Conduct that prohibited the wearing of the nose stud or from the school's denial of an exemption to the Code. Although both sides presented arguments, the Court maintained that it was a combination of the Code of Conduct *and* the refusal to grant an exemption.[68] Specifically, the Court noted that the Code did not contain a process for learners to seek an exemption, and it then banned the wearing of a nose stud, requiring the learner to ask for an exemption. According to the Court, "a properly drafted code which sets realistic boundaries" and which indicates a route when applying for and granting exceptions, is the appropriate manner to promote a character of *reasonable accommodation* at South African schools.[69]

2 2 Unfair Discrimination

In examining for the first time what amounts to *unfair discrimination* under the Equality Act, the Constitutional Court took up the question of whether there was a comparator (another group that was treated better than Sunali) for assessing discriminatory treatment.[70] In this case, the Court held that an appropriate comparator did exist – "learners whose

63 *Pillay CC* par 96.
64 *Idem* par 32; De Waal *et al* 73-74.
65 *Pillay CC* par 30 where the Constitutional Court noted that "the strongest obligation that exists on governing bodies is that they must 'consider' the guidelines". The court further commented that such a requirement to consider guidelines "hardly alters the 'legal landscape' as schools might consider the guidelines and lawfully decide to adopt exactly the same provision" as the policy challenged.
66 *Idem* par 33.
67 *Idem* par 34-35.
68 *Idem* par 36.
69 *Idem* par 38.
70 S 1 Equality Act: discrimination is defined as "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds

sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised".[71] The Court then articulated a critical point in defining unfair discrimination: the standard personified by the Code of Conduct was not neutral, but imposed middle-of-the-road and historically privileged types of ornamentation... at the expense of alternative and previously barred types.[72] In this regard, a warning is therefore sounded that when the norms of Codes of Conduct prove not to be neutral, such documents can infringe the constitutional rights of learners.

Under the Court's stance, Sunali was required to show that her religious or cultural beliefs or practices had been impaired and, furthermore, that it was unfair.

In *Pillay*, the Constitutional Court grappled with alleged discrimination on both religion and culture grounds, noting that they represent distinct, but overlapping grounds. For simplicity, the Court distinguished the two grounds by stating that *religion* relates to individual faith and belief while *culture* involves practices and convictions developed by communities.[73] The Court emphasised the difficulty of separating religion and culture, since both inform each other. For the purposes of interpreting culture under the Equality Act, however, the Court found Sunali to be part of South Indian Tamil and Hindu groups that are characterised by a blend of religion, language, geographical origin, ethnicity and creative tradition.[74]

2 2 1 The Importance of Cultural Rights

The language of the Court provides insight into the importance of cultural rights in South Africa, as well as the all-encompassing nature of these rights. Particular phrases are compelling in delineating the concept: "every individual is an extension of others," "inter-dependence of the members of a community" and "importance of community to individual identity and hence to human dignity".[75] One of the most powerful statements proclaimed:

> Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple

benefits, opportunities or advantages from any person on one or more of the prohibited grounds".

71 *Pillay CC* par 44.

72 *Ibid*.

73 Amoah & Bennett "The freedoms of religion and culture under the SA Constitution: do traditional African religions enjoy equal treatment?" 2008 24, 1-20, expressing their concern that traditional African religions are not treated equally when they do not possess the characteristics of non-African religions (i.e. western religions); *Pillay CC* par 47.

74 *Pillay CC* par 50.

75 *Idem* par 53.

> association; it includes participation and expression of the community's practices and traditions.[76]

The Court went on to caution that culture is not a unified entity, but differs from person to person. That is, individuals will adhere to selected aspects of their culture; not everyone will conform to the same practices. At school level, the concern would be whether learners are merely pretending to hold specific religious-cultural beliefs and customs or whether such beliefs and customs are a serious aspect of who they are.

2 2 1 1 Did the Nose Stud Constitute a Significant Practice?

The Court then addressed the issue whether the nose stud constituted a significant religious-cultural practice. While individuals claiming protection for religious practices must profess sincerely held beliefs, no such test exists for cultural practices.[77] The Court, however, stated that both the objective and subjective evidence in this case did, in fact, show that the contested jewellery held religious and cultural significance for Sunali.[78] Specifically, Sunali decided to wear the nose stud to mark her physical maturity, as her mother and grandmother did when they were young women. She continued to uphold this family and cultural tradition when threatened with removal from school, suffering poor treatment from other learners and focused media attention. However, expert testimony established that the nose stud is not mandatory in the Hindu religion or culture, although it is viewed as a significant and valued practice.

In the next instance, the Court confronted the issue whether the Equality Act and the SA Constitution protected voluntary religious-cultural practices. Typically, laws are nullified when they force individuals to make hard choices between their faith and abiding by a law. The Court argued, however, that there are other reasons than avoiding hard choices, since religious-cultural traditions are protected because they are fundamental to human distinctiveness and therefore to human dignity which is, in turn, essential to equality.[79] In promoting the constitutional values of human dignity, equality and freedom, the Court ruled that a necessary element is respecting voluntary religious-cultural practices of all individuals. The fact that people choose freely rather than through an obligated sentiment merely increases the importance of a

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76 *Ibid*.

77 This "sincerely held belief test" is central in the United States for claimants challenging discrimination based on their rights to free exercise of religion (*Wisconsin v Yoder* 406 US 205). Individuals, however, cannot use the free exercise of religion clause of the US Constitution to avoid complying with criminal law (ie use of drugs in a religious ceremony) *Employment Division v Smith* 494 US 872.

78 While the Court noted that the nose stud involved both religion and culture, this would not always occur since they are "very different forms of human association and individual identity"; *Pillay CC* par 60.

79 *Pillay CC* par 62.

tradition to their independence, their distinctiveness and their dignity.[80] Furthermore, the Court noted that protecting voluntary practices affirms the constitutional commitment to diversity.

Public schools, especially, should be seen as committed to promoting religious-cultural diversity by protecting the religious-cultural practices of, among others, their learners.

2 2 2 Fair versus Unfair Discrimination

Finding that Sunali had suffered discrimination based on both religion and culture under section 6 of the Equality Act, the Constitutional Court turned to the question of whether this was *unfair discrimination*.[81] Assessing fairness under the Equality Act includes a greater number of factors than under section 9 of the SA Constitution.

The Court noted that respondents' attempting to prove that specific discrimination is fair under the Equality Act must be judged by (1) the context; (2) the nine specific factors listed in the Act; and (3) "whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned."[82] The Court noted that a key element of the unfairness determination was the place of *reasonable accommodation* in the Equality Act.

The Court made two points:

(a) The Equality Act indicates that not taking steps to accommodate the needs of people reasonably founded on race, gender or disability will result in unfair discrimination.

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80 *Idem* par 64; also *Alabama and Coushatta Tribes of Texas v Trustees* 817 F Supp 1319, holding that Native American students' wearing of long hair was a sincerely held religious belief protected under the First Amendment of US Constitution even though it was not a mandatory tenet of their belief, but was rooted in traditional Native American religion.

81 *Pillay CC* par 69.

82 S 13(3) Equality Act lists the following factors:
(a) Whether the discrimination impairs or is likely to impair human dignity;
(b) the impact or likely impact of the discrimination on the complainant;
(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether the discrimination is systemic in nature;
(f) whether the discrimination has a legitimate purpose;
(g)) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstance to –
(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
(ii) accommodate diversity; *Pillay CC* par 69.

(b) The factors identified in section 14(3)(i)(ii) include whether reasonable steps have been made to accommodate diversity.[83]

Although the Court had articulated the various dimensions of reasonable accommodation for religion under the SA Constitution, in *Pillay* the Court defined what it means to provide reasonable accommodation under the Equality Act.

2 3 Reasonable Accommodation under the Equality Act

From the specific language of section 14(3)(i)(ii), the Court stated that reasonable accommodation would constantly be a significant aspect "for the determination of the fairness of discrimination".[84] The Court cautioned that reasonable accommodation is not the sole determining factor; other factors listed in section 14(3) must also be considered. Whether accommodation is required will depend on the character of the case and the character of the interests implicated.[85] Considering the specific facts of Sunali's case (a rule that was neutral on its face, but that disadvantaged certain groups), the Court ruled that fairness demanded reasonable accommodation, which required the school to make an exception to its Code, depending on how important the nose ring was to Sunali and the problem this would pose to the school.

Although Sunali did not testify in court, the Court concluded that sufficient evidence existed to substantiate the importance of the nose stud to her cultural or religious identity:[86] she persisted in wearing it when faced with disciplinary action, when subjected to ridicule from others, when faced with declining grades and when confronted with the stress of publicity. Although the school argued that the violation of Sunali's rights was less because the nose stud was a cultural, rather than a religious practice, the Court emphasised that what was applicable was not whether a tradition was religious or cultural, "but what its significance was to the person concerned".[87]

Public schools should, therefore, consider the significance of the religious-cultural traditions of their learners carefully when revising their Codes of Conduct and/or reviewing learners' requests for accommodation.

83 Equality Act; *Pillay CC* par 72.
84 *Pillay CC* par 77.
85 *Idem* par 78.
86 *Idem* par 88: the Court regarded this as a pivotal question.
87 *Idem* par 91; *see* Consent Decree *Iacono v Groom* (No 5:10-cv-00416-H ED North Carolina 2011-06-06), agreeing to reinstate a student suspended for wearing a nose ring; school board also agreed to change *Student Dress Code* to provide exemption for students based on sincerely held religious beliefs with no determination that practice was central to religious doctrine.

2 3 1 Sunali's Request: An Undue Burden on the School?

In examining whether the school would suffer an undue burden in accommodating Sunali, the Court went to great lengths to stress the importance of school rules and to reinforce that this decision did not address the constitutionality of school uniforms, but rather exemptions to uniform policies. The evidence did not persuade the Court that granting Sunali's request would have interfered with school discipline and safety. She had worn the nose stud for two years with no apparent impact on discipline or the quality of education. Nor did the Court find the school's concern about the possible consequences of permitting the nose stud exemption convincing. The Court found no merit in the school's "slippery slope scenario."[88] Only sincerely held religious and cultural practices are protected: the exemption of some practices does not mean all practices must be honoured; any practice creating an unreasonable burden can be denied accommodation.

Moreover, based on the Court's ruling, schools should value the fact that learners can now have the courage to express their religious-cultural beliefs, since this would indicate that as a country, South Africa is moving closer to becoming the society visualised in the SA Constitution.

2 4 Human Dignity and Freedom of Expression

In *Pillay,* the Constitutional Court described a vital element of individuals' freedom and dignity as claiming esteem for the distinctive collection of superfluities which they practise freely, noting religious-cultural choices as examples.[89] Making the choices out of one's own free, will augment the importance of customs or rituals to peoples' independence, distinctiveness and self-esteem.[90] Moreover, exercising one's right to religion and culture forms a fundamental part of one's right to freedom of expression.[91] Although the Schools Act does not explicitly provide for freedom of expression, other rights designated in the Act are inextricably linked to this constitutional right.[92]

An earlier court case sheds additional light on learners' expression rights. In *Antonie*, a learner faced up to a School Governing Body resolution to suspend her for five days.[93] This fifteen-year-old Grade 10

88 *Pillay CC* par 107 where the Constitutional Court maintained that the school's argument that a ruling in favour of *Pillay* had *the necessary consequence* of more learners showing up at school with dreadlocks, body piercings, tattoos and loincloths had *no merit*. The Court referred to the phrase "parade of horribles" as O'Connor coined it in *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 911.

89 *Pillay CC* par 64.

90 *Ibid*.

91 *Idem* par 94 where the Constitutional Court pointed out that the female learner's right to convey her religion and culture formed an essential part of her right to freedom of expression.

92 *Guidelines for Codes of Conduct*.

93 *Antonie* 738.

learner became interested in a variety of religions and converted to Rastafarianism. Part of expressing her newly-found religious conviction was sporting a dreadlock hairstyle. She started wearing this hair-style, but covered it with a black cap for the sake of her school rules. The School Governing Body charged her with serious misconduct for disregarding the school rule that necessitated hair below the collar to be tied up. She was found guilty and therefore suspended from school for five days.

In the *Antonie* case, an aspect that deserves attention from educators is that, despite the fact that the applicant was no longer at school when she filed suit, her lawyer contended that the suspension had caused her name to be blemished and her permanent record to have been affected negatively.[94] The Court concurred with the learner's lawyer and ruled in her favour: the suspension was set aside.[95] It was possible that the five day suspension had had a negative effect both on her development and her career; it was also possible that the punishment had infringed her dignity and self-esteem. In the final analysis, the Court mentioned the official guidelines for adopting a Code of Conduct as a basis for its ruling and highlighted the fact that "human dignity is a constitutional right".[96]

2 5 The Application of the Right to Freedom of Expression

The *Antonie* Court also commented on the application of the right to freedom of expression: as a constitutional right it would, for example, take effect on a school's dress code for learners.[97] In this regard, this Court indicated freedom of expression to embrace choosing clothing and hairstyles by ruling freedom of expression as entailing more than just freedom of speech:[98] ... [It] ... includes the right to ... wear ... [and] ... is extended to ... outward expression as seen in clothing selection and hairstyles.[99]

Others have argued that *expression* should include each deed by which an individual tries to express feeling, conviction and/or objection.[100]

Across the globe, freedom of expression is viewed as a condition critical to the nurturing of a democratic society.[101] The issue is how to

94 De Waal *et al* 78.
95 *Antonie* 738.
96 Guidelines for Codes of Conduct item 4.3 privacy, respect and dignity; s 10 SA Constitution, guaranteeing everyone's "inherent dignity and the right to have their dignity respected and protected." *Pillay CC*: "In reversing the [learner's] suspension the High Court … reasoned that to enforce the school's Code of Conduct in a rigid manner without considering the expressive nature of the dreadlocks" would bring it into conflict with the SA Constitution.
97 S 16(1) SA Constitution: "Everyone has the right to freedom of expression".
98 De Waal *et al* 79.
99 *Antonie.*
100 Currie & De Waal 363.
101 Van Vollenhoven, Beckmann & Blignaut "Freedom of expression and the survival of democracy: has the death knell sounded for democracy in South African schools?" 2006 *J of Ed* 40 120.

achieve a balance that protects the human dignity of individuals and permits the smooth operation of government institutions.

3 The United States Approach as an Example of a Foreign Jurisdiction

The United States' established jurisprudence regarding the pre-eminence of freedom of expression in its constitution sheds light on how balance can be achieved. The government, including schools, must have a compelling justification to restrict individuals' speech. The United States Supreme Court's landmark decision in *Tinker v Des Moines Independent School District*[102] established American students' constitutional right to express themselves at schools. In that case, students were punished for wearing black armbands to school to protest against the Vietnam War. School officials had forbidden this for fear of classrooms being disrupted. The Supreme Court ruled that indistinguishable anxiety concerning disorder was not sufficient to surmount the right to freedom of expression, also noting that educators must show more than an aspiration to circumvent the uneasiness that always goes with unpopular points of view to limit students' expression rights.[103]

In the US, courts protect student expression as long as it does not "materially and substantially interfere" with the operation of the school.[104] Yet it is not an absolute right. The United States Supreme Court has broadened the categories of unprotected speech over recent decades. Vulgar, lewd and indecent expression can be punished; defamatory expression (spoken and written false statements) can be banned; inflammatory expression designed to incite or threaten upheaval is not protected; and expression advocating illegal activity can be prohibited.[105] The SA Constitution identifies unprotected expression that overlaps with US court rulings. Specifically, section 16(2) of the SA Constitution states that protection does not extend to "(a) propaganda for war; (b) incitement of imminent violence; (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

Additionally, in the United States the *type of forum* in which expression occurs is important in assessing whether it is protected. If the expression is viewed as being *school sponsored*, school officials can place limitations on it.[106] For example, educators can restrict the expression published in a school-sponsored newspaper as long as the restriction is based on legitimate pedagogical concerns. School officials have the right to

102 393 US 503.
103 *Idem* 508 & 509.
104 *Ibid*.
105 *Bethel School District No 403 v Fraser* 478 US 675; *Texas v Johnson* 491 US 397; *Gooding v Wilson* 405 US 518; *Morse v Frederick* 127 S Ct 2618.
106 *Hazel School District v Kuhlmeier* 484 US 260.

disassociate themselves from speech that appears to represent the school. However, the US Constitution still protects student expression that represents private/personal views unless it poses disruption at school.

As the Constitutional Court continues to delineate expression rights under the SA Constitution and learners' rights to religious and cultural expression under the Schools Act, School Governing Bodies will face the challenge of balancing concerns for school discipline and order with learners' constitutional rights.

4 Recommendations

Legal precedent undoubtedly sanctions learners who have the need to express their religious-cultural beliefs that clash with existing dress codes. The superlative example in South Africa would be that of the Constitutional Court's decision in *Pillay* that clearly defines learners' rights under the Equality Act regarding religious-cultural practices. The challenge to schools is thus clear: treat all learners fairly, making allowances for exemptions from requirements that may infringe religious-cultural practices. School incidents reported post-*Pillay*[107] indicate the need for greater attention to ensuring that schools treat all learners fairly.

As pointed out before, schools need to be made aware of the Constitutional Court's ruling that school rules need to provide accommodation for dress customs that cater for the expression of specific religious-cultural groups.[108] Even more urgent is the fact that the Department of Education needs to be seen as reacting by making resolute efforts in getting schools to pay attention to the *contentious matters* of supporting schools to develop rules that will accommodate learners' expressing religious-cultural beliefs.[109]

The following points should be considered in framing and implementing policies that have the potential for infringing on rights related to religion/culture:

(1) *Seek input from everyone willing to contribute to the debate.* Their support is not only crucial in implementing policies, but also in bringing matters to the forefront that may have the potential to impinge on a particular religion and/or culture. As can be seen in the *Pillay* decision, however, consultation does not immunise the school from challenges to its policies. The Constitutional Court noted that several individual societies maintain traditionally imbalanced power relationships or traditionally distorted population groups, increasing the possibility of local resolutions infringing on the rights of destitute groups.[110] To counter this concern, schools must

107 Such as reported by *The Star* (2004-01-23) and *Beeld* (2008-01-20).
108 De Waal *et al* 78; *Pillay CC* par 38.
109 De Waal *et al* 78.
110 *Pillay CC* par 83.

attempt to involve the broad community to gain greater representation of diverse perspectives in the construction of the School Code.

(2) *Avoid falling into the trap of developing neutral Codes of Conduct*. The standards of such codes frequently put so-called middle-of-the-road and even *historically privileged practices* into effect.[111] In fact, the biggest threat to such dress policies, as reflected in a case in Texas, involving rosary beads, is the charge of being vague and over-broad.[112] As pointed out before, phrases such as *this includes ... but is not limited to ...* would indicate a school's willingness to accept that its code cannot foresee all circumstances that may occur.[113] In such situations, courts tend to defer to educators when dealing with otherwise well-crafted policies. As reflected in the litigation discussed in this paper, whether in South Africa or the USA, the fact-specific nature of disputes about dress codes becomes readily apparent.

(3) *Include a clear process for requesting exemptions in dress code policies*. Who does the learner contact to request an exemption? On what basis will exemptions be granted? What should the learner's petition for an exemption include? How will the *centrality* of a learner's religious and cultural practices be assessed? When will the school notify the learner of the decision? What is the appeal process if a school denies a request?

(4) *Note that educators can restrict practices that will be disruptive to the school process*. As the US Supreme Court noted, however, it must be more than a fear of disruption. In the *Pillay* case, school officials argued that the nose stud posed a threat of disrupting the educational process. Yet, Sunali wore the nose stud for two years with no apparent impact on learners' education. What may be most difficult when school leaders attempt to make accommodations is to move out of the comfort of their own culture and recognise that a practice that seems different, exotic or even bizarre can be included and honoured without damaging the educational environment. As the Constitutional Court noted, "our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation."[114]

5 Conclusion

In affording religious-cultural practices legal protection, courts in South Africa weigh the appropriate balance between the rights to freedom of religion and culture and the State's duty, as carried out by school officials, to maintain safe and orderly learning environments at public schools. The South African Constitutional Court, in recognising learners' protected rights to human dignity, equality and freedom, has held that learners must be permitted to apply for exemptions from school policies that interfere with their religious or cultural practices:

(1) Educators must ensure that policies do not include blanket prohibitions that unduly impinge on learners' rights.

111 De Vos where he points out that such a code is hardly ever *neutral*.

112 *Chalifoux v New Caney Independent School District* 976 F Supp 659. The federal district court upheld the wearing of rosaries, noting it as "pure speech", an unconstitutional restriction on a sincerely held religious belief, and it did not pose any disruption to the school.

113 De Waal *et al* 89.

114 *Pillay CC* par 92.

> (2) Educators must be mindful of the Constitutional Court's warning regarding efforts to make reasonable accommodations:
> The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the 'mainstream' to swim freely in its waters.[115]

How far? Although part of the solution has already been imbedded in this article, the distance public schools need to go would be as far as it takes to avoid *the slippery slope scenario* of ignoring the *bona fide* religious-cultural practices of South Africa's public school learners.[116] If school practices were to stop infringing on the religious-cultural rights of learners, the first step in complying with human dignity, equality and freedom as guaranteed by the SA Constitution would have been taken.

This article has focused on Codes of Conduct and the importance of ensuring that these codes do not unfairly discriminate against learners. Yet, conduct codes represent only one aspect of supporting and promoting equality and freedom in South African schools. As school officials work to provide leadership in inculcating important social values surrounding ethnic diversity, they must also be aware of what messages are embedded in the curriculum, instructional practices and organisational structures at school. Are these various aspects of schooling designed primarily to reflect mainstream and historically privileged forms of schooling? Do all learner groups feel valued? Do some learners feel excluded or marginalised? Do students see aspects of their religion and culture recognised, respected, or celebrated? Do schools encourage learners to freely express their opinions and beliefs? In fact, unexamined school practices in many arenas may be causing unfair discrimination for learners. School officials can use the factors for assessing discrimination specifically stipulated in the Equality Act to begin a dialogue with the school, the parents/caregivers and the community regarding whether unfair discriminatory practices exist. Relying on the Equality Act, an entry point for such a dialogue could be "whether the discrimination impairs or is likely to impair human dignity".[117] When human dignity is threatened, learners are unlikely to grow and develop to their full potential. Human dignity would certainly be a powerful lens for school officials to use in examining pluralism and learners' freedom in South African schools.

Let us celebrate religious-cultural diversity at school level through policy and procedure!

115 *Idem* par 76.
116 *Idem* par 107.
117 S 14(3)(a) Equality Act.

Search and seizure of learners in schools in a constitutional democracy: A comparative analysis between South Africa and the United States

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OPSOMMING

Deursoeking en Beslaglegging van Leerders in Skole in 'n Grondwetlike Demokrasie: 'n Vergelykende Ontleding van Suid-Afrika en die Verenigde State

In hierdie artikel word die regsraamwerk wat die effektiewe bestuur van deursoeking en beslagleggingsaksies rig, gebruik om die reg van leerders op privaatheid in gevalle van onredelike deursoeking en beslaglegging van leerders se besittings in Suid-Afrika te vergelyk met die Verenigde State.

In Suid-Afrika mag 'n skoolhoof of die persoon aan wie hierdie gesag gedelegeer is, 'n groep leerders of die besittings van 'n groep leerders lukraak deursoek vir enige gevaarlike voorwerp of onwettige dwelmmiddel, mits daar 'n billike en redelike vermoede bestaan.

In die Suid-Afrikaanse reg word die begrippe deursoeking en beslaglegging nie duidelik gedefinieer nie. Hoewel daar riglyne gepubliseer is wat die bestuur en voorkoming van dwelmmisbruik in skole rig, word deursoeking van leerders tans oorgelaat aan eie oordeel wat van een geval tot die volgende gebruik word. Deursoeking noodsaak 'n mate van skending van die reg op privaatheid van leerders of hulle besittings.

Daar is 'n belangrike verskil tussen Suid-Afrika en die Verenigde State wat betref die vryheid om 'n individu te mag deursoek. In die Verenigde State mag 'n skoolhoof nie 'n groep leerders deursoek as daar 'n redelike vermoede bestaan dat een van hulle 'n moontlike oortreding begaan het nie. Indien daar 'n redelike vermoede bestaan dat 'n individuele leerder 'n moontlike oortreding begaan het, mag slegs daardie leerder deursoek word.

In die artikel word onderwysers gemaan dat elke situasie waartydens deursoeking of beslaglegging betrokke is van mekaar verskil en dat 'n presedent moeilik gevolg kan word. Nuwe hofuitspake en verskillende

omstandighede noodsaak verskillende optredes. Die doel met deursoeking en inbeslaglegging van leerders se besittings moet verband hou met die handhawing van goeie orde en dissipline by 'n skool en nie met die toepassing van strafreg nie.

1 Introduction

Law enforcement and education authorities as well as substance abuse researchers are in agreement that the nature and extent of illicit drug trafficking, consumption and associated problems have all increased dramatically since the 1990s. During this period South Africa has experienced major political and social transformation and the forging of trade and other links with some African countries and the rest of the world. The current increase in drug abuse is a disturbing phenomenon which causes a reprehensible escalation of insecurity at some schools.[1]

The issue of substance abuse in South African schools is far more urgent than is generally realised. Society in general ignores the accompanying dangers of addiction, aggression, and violence which threaten the very existence of the secure school environment. The South African Government, in recognition of the serious threat posed by substance abuse in schools, amended the South African Schools Act to include provision for random search and seizure exercises and drug testing in schools.[2]

The aim of this article is to investigate the right to privacy of the learners against unreasonable search and seizure exercises by exploring the legal framework that guides effective management of both search and seizure and of substance abuse in public schools in South Africa in comparison with the United States.

This article consists of two sections. The first section examines recent legislative action that focuses specifically on deterring substance abuse in schools in South Africa. It commences with a discussion of the National Policy on Drug Abuse in schools that was published in 2002, followed by the legislative actions resulting from this first attempt of the National Department of Education to manage the problem in South African schools. It also attempts to strike a legal balance between the learner's right to privacy and the security of the greater school community. The second section deals with the practical implementation of the legal provisions on search and seizure exercises and drug testing in schools in the United States. It briefly addresses perspectives from the United States on search and seizure exercises to provide guidance on their management in South African schools.

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1 National Department of Education *The National policy on the management of drug abuse by learners in public and independent schools and further education and training institutions* (2002) par 1.

2 S 8A South African Schools Act 84 of 1996 (SASA) provides for random search and seizure and drug testing in schools.

2 Search and Seizure Exercises in South African Schools

2 1 Introduction

The Ministry of Education in South Africa considers a safe and disciplined learning environment one of the critical elements to the successful delivery of quality education and recognises the role played by substance abuse in undermining this.[3] Evidence indicates that school communities are particularly vulnerable and substance abuse among learners is on the increase in both rural and urban, primary and secondary schools.[4]

2 2 The Learners' Right to Privacy

The Constitution of the Republic of South Africa,[5] 1996 provides for the right to privacy for everyone which includes the right not to have:

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communication infringed.

The right to privacy affords a greater intensity of protection to personal activities within the sanctum of the home. Where individuals engage in communal activities, such as education, the intensity of this protection diminishes. In *Mistry v Interim Medical Council of South Africa*[6] the Constitutional Court stressed that the more public an undertaking, the more attenuated would any corresponding claim to privacy be in respect of an activity.

Furthermore, the right to privacy, like all rights, is not absolute. In some instances, it is reasonable and justifiable for society to intrude into the personal and private realm of the individual.[7] If the school, therefore, wishes to search learners periodically in order to prevent dangerous weapons or contraband being brought onto the school premises, it must do so in terms of legislation.

2 3 Searches in South African Schools

The South African Schools Act,[8] (SASA) declares[9] all schools as drug free zones.[10] SASA clearly states that no person may bring a dangerous object

3 Department of Education par 1.
4 Medical Research Council of South Africa *The Second South African National Youth Risk Behaviour Survey* (2008) 14.
5 S 14 Constitution.
6 *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC).
7 S 36 Constitution.
8 84 of 1996 s 8A.
9 S 8A SASA.
10 S 8A SASA.

or illegal drug onto school premises or have such object or drug in his or her possession on school premises or during any school activity.[11] The principal or his or her delegate may, at random, search any group of learners, or the property of a group of learners, for any dangerous object or illegal drug, if a fair and "reasonable suspicion" has been established.[12] By its very nature, searches and drug testing are an invasion of privacy and may infringe the constitutional and personal rights of learners.

It should therefore not be the first point of intervention. In South Africa, there is no empirical evidence or justification yet for routine random testing of learners, to reduce drug usage.[13] In terms of SASA, drug testing may only be done where there is "reasonable suspicion" that a learner is using drugs.[14] Testing must be implemented as part of a structured intervention or relapse prevention programme in an environment that is committed to safeguarding personal rights relating to privacy, dignity, and bodily integrity according to school policy, medical/treatment procedures, and ethical guidelines.

Although, at first glance, it seems to be a fact that search and seizure exercises and drug testing of learners would entail an unlawful infringement of their right to privacy, section 7(3) of the Constitution reminds us that this right is subject to the limitations referred to in section 36, generally known as the limitation clause.

Section 36(1) stipulates that the rights in Chapter 2 of the Constitution are not absolute, but may be limited in certain circumstances. 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 under consideration,
(d) The relationship between the limitation considered and its purpose, and
(e) The consideration of less restrictive means for achieving the purpose.

11 S 8A (1) SASA.
12 S 8A (2) SASA.
13 Alexander & Sughrue (Paper delivered at the SAELA conference in 2009 in Mpumalanga) argue that in the US "[t]here is considerable debate as to whether random drug testing has any meaningful impact on discouraging learners from initiating use or from continuing use of illicit drugs". There is concern by professional organisations that drug testing learners should be discouraged until "its safety and efficacy can be established and adequate substance abuse assessment and treatment services are available". While there are a number of case studies and a few that are more comprehensive, there is little in the way of controlled studies that would offer the data and analysis that are needed to better inform the public and policymakers about the effectiveness of random search and drug testing.
14 S 8A(3)(iii) SASA.

Section 8A of SASA is a law of general application, in that it applies to all schools and is aimed at safeguarding the interests of learners with regard to their right to education, which must take place in an environment free of drugs and dangerous objects. Given that section 8A limits certain rights conferred in the Bill of Rights, it must be implemented with due regard to human dignity, privacy, and the right to property of the learners concerned.

Section 14[15] of the Constitution may be incorrectly interpreted, in the school situation, as meaning that educators are not permitted to search learners' possessions (eg for a dangerous weapon) and that possessions or people may not be searched (eg schoolbags for drugs). We do not support such an interpretation. Educators will, however, have to have a "reasonable suspicion" that an individual is in possession of a dangerous substance or weapon in order to carry out searches. The protection against searches and seizures is triggered only when the right to privacy is invaded. A two-step analysis must be done to draw a conclusion on the constitutionality of an invasion of privacy. Both the potential danger of the item being sought (dangerous weapons or drugs) and the validity of the information or the credibility of the informant that leads the searcher to believe a search is necessary, must be analysed.

In other words, the scope of the right to privacy must be assessed to determine whether law or conduct has infringed on the right. If there has been an infringement, the question remains as to whether it was justifiable under the limitation clause of the Constitution.

Section 36(1) of the Constitution imported a requirement of objective reasonableness into the limitation of learners' rights, such as would be the case with conducting searches and seizures at schools. This implies that, at school level, principals may seize an item only if, on reasonable grounds, they appear to have evidence of a contravention of any provision of the SASA.

A search will be permissible in scope when the measures adopted are reasonable in relation to the objectives of the search and not excessively intrusive in view of the age and sex of the learner and the nature of the infraction. Searches should be made in the privacy of an office by a person of the same sex in the presence of another person of the same sex.[16] The right to human dignity of the person being searched must always be protected. In all such cases the general rule should apply, namely that any limitation of the right to privacy should be justified by a rational educational purpose.

Parents may expect a school to take special care of their children, not only in terms of their education, but also in protecting them from harm during those hours when they are under the authority and care of the school. Therefore, educators have a duty to uphold, protect and promote

15 S 14 Constitution guarantees that everyone has the right to privacy.
16 S 8A(4) SASA.

the rights of learners to effective education, equal educational opportunities, human dignity, freedom of security of the person, a safe school environment, privacy and just administrative action to ensure a safe school environment.[17] Educators in a school furthermore have a legal duty in terms of the common law principle, *in loco parentis*, to ensure the safety of the learners in their care. There are two coextensive pillars to the *in loco parentis* role that educators play: the duty of care and the duty to maintain order at a school.

In the South African legal context, the terms search and seizure are not clearly defined.[18] The question of what constitutes a search is left to common sense and is determined on a case by case basis. It is maintained that an element of physical intrusion concerning a person or property is necessary to establish a search. "Search" where it relates to a person must be given its ordinary meaning in its context. "Search" may also be regarded as:

> [a]ny act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on or upon such person, container or premises.[19]

The latter approach to search is questionable. What is meant by "visually" is not defined. The meaning of search, when viewed from a constitutional perspective, should entail an element of physical intrusion, related to the level of privacy provided for in the Constitution.[20] If there is no reasonable expectation of privacy then no search has occurred.

Since a search may also infringe upon the rights to dignity[21] and to bodily security, including the right against cruel, inhuman or degrading treatment,[22] it must be conducted consonant with those rights.

In *Ntoyakhe v Minister of Safety and Security*[23] the court held that the word "seize" encompasses not only the act of taking possession of an article, but also the subsequent detention thereof. Otherwise the authority to seize would be rendered worthless. The power to seize is limited to articles which are either involved in, used during, or may provide proof of the commission of an offence in the Republic or

17 Ch 2 Constitution.
18 *Minister of Safety and Security v Xaba* 2003 1 All SA 596 (D). The second edition of the *Oxford English Dictionary* gives the following meaning to "search" where the verb relates to a person: "3(a) To examine (a person) by handling, removal of garments and the like, to ascertain whether any article (usually something stolen or contraband) is concealed in his clothing".
19 Basdeo "The Constitutional validity of search and seizure powers in South African criminal procedure" 2009 *Potchefstroom Electronic LJ* 4.
20 *Ibid*.
21 S 10 Constitution guarantees that everyone has inherent dignity and the right to have their dignity respected and protected.
22 S 12 Constitution guarantees the freedom and security of the person, including the right to be free from any forms of violence.
23 *Ntoyakhe v Minister of Safety and Security* 2000 1 SA 257 (ECD).

elsewhere, or provide proof of the fact that the commission of the offence was planned.

The safeguards against an unjustified interference in the right to privacy and other fundamental rights include an objective standard, which is whether there are "reasonable grounds" to believe that an offence has been or is likely to be committed and that the articles sought or seized may provide evidence of an offence. It is insufficient merely to ask if the articles are possibly connected with an offence. The question arising is what criteria should be employed to determine the basis of such grounds. One may infer that for seizure of property on reasonable grounds to be justifiable, there should exist an objective set of facts which causes the principal or his/her delegate to have the required belief. In the absence of such facts, the reliance on reasonable grounds will be vague.

Legislation, allowing for schools to search for drugs when there is "fair and reasonable suspicion" that illegal substances are being used on the school premises,[24] came into effect in 2007. As an extension of the National Drug Master Plan,[25] the Department of Education has developed a Policy Framework on the Management of Drug Abuse in all Public Schools and Further Education and Training Institutions.[26] The policy framework encapsulates recommendations made in the National Drug Master Plan and has been distributed to schools throughout South Africa. The policy framework focuses on prevention and early intervention based on a restorative justice approach.

2 4 Guidelines for Search and Seizure Practices in SA Schools

The Guidelines for the Management and Prevention of Drug Use/Abuse by Learners in all Public Schools and Further Education and Training Institutions[27] (hereafter Guidelines) provided by the Department of Education spells out that searches must be conducted in a manner that is reasonable and proportional to the suspected illegal activity. For example, where there is a suspicion that learners have illegal drugs in their school bags or lockers, the search may not be extended to their bodies. Where there is a suspicion that the learners are carrying illegal substances in their pockets or elsewhere in their clothing, only their clothing may be searched, and not their bags or lockers.

24 Education Laws Amendment Act 31 of 2007.

25 Department of Social Development *The National Drug Master Plan (NDMP)* (2006) was drafted in accordance with the stipulations of the Prevention and Treatment of Drug Dependency Act 20 of 1992. It reflects the country's responses to the substance abuse problem as set out by UN Conventions and other international bodies. The revised *National Drug Master Plan 2006-2011* is South Africa's answer to this challenge. It has been designed to serve as the basis for holistic and cost-effective strategies to reduce the supply and consumption of drugs and limit the harm they cause.

26 Department of Education 2002.

27 Department of Education 2008-09-19.

If a learner refuses to cooperate in a lawful search procedure, the parents must be informed that the learner is unwilling to cooperate and that the learner will be handed over to the police. If either the learner or the parent refuses to cooperate, the police may conduct a search in terms of the Criminal Procedure Act.[28] However, in terms of the Department of Education's drug policy, the focus is on identifying the drug abuse problem, and learners who are victims of a dependency must be assisted, as provided for in the system.

The Guidelines emphasise the sensitivity of drug testing and provides guidance on the practical approach to search and seizure. The general approach should be to search groups of learners only after a "fair and reasonable suspicion" has been established. All drug testing should be confidential, information must be clearly and correctly recorded, all objects and urine samples must be clearly labelled and all confiscated objects must be handed to the police.

It is important to note that, in accordance with SASA, random search and seizure procedures are only undertaken when a fair and reasonable suspicion has been established that substances are being used on the school premises. In this regard, searches are conducted after taking into account all relevant factors, including:

(a) the best interest of the learner in question or of any learner at the school;
(b) the safety and health of the learner/s in question or of any learner at the school;
(c) reasonable evidence of illegal activity; and all relevant evidence received.

The Guidelines[29] have been designed to balance the privacy and psychological integrity of the child against the need to respond both reasonably and proportionally to suspected illegal activity. If a drug test is considered necessary, it should form part of a structured intervention or relapse prevention programme, and be carried out according to school policy, the prescribed test procedures and ethical guidelines.

In terms of Section 8A(ii) of SASA, the Minister of Education must identify the device with which the drug test is to be done and the procedure to be followed and publish the name of this device, and any other relevant information about it, in the Government Gazette. The Minister has, accordingly, identified ten devices and a school may use any one of these.[30]

South Africa is in search of strategies, both educational and managerial, to confront the problem of substance abuse, whether it is real or perceived, in their schools. Educational strategies include health

28 *Idem* par 4.6.3.
29 Department of Education 2008 2.
30 Department of Education *Devices to be used for drug testing and the procedure to be followed*. Notice 1140 (2008-09-19).

education curricula that discuss the effects of various illicit drugs and alcohol on humans of all ages and that specify resources that are available to learners faced with drug use at home or in schools. Managerial tactics to thwart drug possession and drug use include various forms of search and seizure, such as random locker and school bag searches, canine searches, and even strip searches in rare instances.

Teachers and principals in South Africa are frequently finding it necessary to search learners and remove from their possession items which may be harmful to them or others. Search and seizure and drug testing in schools are relatively new procedures in South Africa and have not yet been tested in the courts. School principals and education officials are thus interpreting and implementing the legal provisions in SASA as they see fit.

3 Search and Seizure in United States' Schools

3 1 Introduction

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[31]

Based on experiences of British soldiers invading and seizing the homes and goods of colonists while searching for contraband, the Founders were adamant that citizens must be protected from such government action. The Fourth Amendment requires government (law enforcement officers and officials) to first establish probable cause and to obtain a warrant prior to searching or seizing a person, his papers, or his home. In other words, government has to respect the privacy of an individual, a right that protects an individual against "unreasonable searches and seizures."

3 2 Learners' Right to Privacy

While the right to privacy is extended to learners in public schools, the US Supreme Court, in *New Jersey v TLO*,[32] tempered it by balancing it against the government's interest in securing a safe learning environment. A lesser standard of "reasonable suspicion" was issued by the High Court for application by school officials who could not be expected to go to court to obtain a warrant in order to search for weapons, drugs, or other paraphernalia that might present a danger to the individual or to others.

31 US Const amend IV.
32 1985 469 US 325.

TLO was a 14-year-old student who was caught smoking in the bathroom with another student. The second girl admitted to smoking, but TLO denied it. She was escorted to the assistant principal who then searched her purse and found cigarettes and much more. There were rolling papers, a pipe, empty plastic bags, a small amount of marijuana, a substantial amount of money, index cards with names of learners who owed TLO money, and two letters implicating her in the selling of marijuana.

The assistant principal contacted the learner's parents and the police concerning her drug dealing. When they arrived at the police station, she confessed to dealing in marijuana at school. Based on her confession and the evidence found by the assistant principal, she was charged as a juvenile delinquent. However, once in the Juvenile and Domestic Relations Court, TLO moved to have her confession and the contents of her purse suppressed under the "exclusionary rule" arguing that the contraband and confession were illegally obtained. The trial court ruled that:

> A school official may properly conduct a search of a student's person if the official has 'reasonable suspicion' that a criminal act has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.[33]

TLO appealed this decision to the New Jersey Appellate Division, which affirmed the lower court's decision. She then appealed to the New Jersey Supreme Court, which overturned the previous rulings, declaring that the Fourth Amendment applies to school searches. It suppressed the evidence collected by the assistant principal, stating that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."[34]

The US Supreme Court accepted this case as an opportunity to evaluate whether the exclusionary rule should apply in Juvenile Delinquency proceedings that involved school searches. However, it had "doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities,"[35] so it ordered re-arguments on that question.

3 3 Searches in US Schools

In evaluating the context of school searches, the Supreme Court noted that some lower courts had held that school personnel were not subject to the restrictions placed on law enforcement by the Fourth Amendment because they acted *in loco parentis.* However, the Court disagreed with this reasoning:

33 *Idem* 736.
34 *Idem* 737.
35 *Idem* 739.

> Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.[36]

The Court followed this determination by weighing a learner's legitimate expectation of privacy against the State's interest in maintaining discipline in the school. On one hand, it disagreed with New Jersey's claim that students had no expectation of privacy at school:

> Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. Students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extra-curricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto the school grounds.[37]

On the other hand, it was cognisant of the difficulty faced by school personnel to maintain order:

> Against the child's interest in privacy, must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.[38]

The Court's answer to the dilemma of balancing these competing interests was to modify the requirement of probable cause for law enforcement to one of "reasonable suspicion" for school officials. It articulated a two-pronged test of reasonableness. It required that the school official must have reasonable individualised suspicion prior to initiating the search and that the search had to be reasonably related in nature and scope to the suspected school violation and in the light of the gender and age of the child:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception;' second, one

36 *Idem* 739-740.
37 *Idem* 741.
38 *Ibid*.

> must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in the light of the age and sex of the student and the nature of the infraction.[39]

In applying this "reasonableness" standard to the *TLO* case, the Court concluded that the assistant principal had "reasonable suspicion" prior to searching TLO's purse that she would find cigarettes. TLO was suspected of smoking and her friend confessed to it. The other contraband was in plain view once the cigarettes were taken out of the purse. The Court also determined that the nature and scope of the search was reasonable insomuch as a search of a purse was not intrusive given the circumstances of the suspected violation.

3 4 Guidelines for Search and Seizure Practices in US Schools

Beckham[40] suggested that a learner's demeanour and conduct may contribute to an individualised suspicion. However, the suspicion should be based on first hand observation or from a reliable source, such as a teacher. If a learner reports a concern about a school infraction that may require a search, the school official would be wise to investigate the matter further, particularly in the light of an intrusive search.

Courts do not look favourably upon generalised non-random searches. If a school violation is suspected, the teacher or administrator should first establish an "individualised" suspicion. School staff may not search a classroom of learners to find evidence of someone breaking a rule.

The courts have allowed school officials to search lockers and cars based on reasonable suspicion. Lockers are school property, so learners should be notified that random searches as well as those based on individualised reasonable suspicion are permitted. Driving to school and parking in a school lot is considered a privilege not a right, so learners' cars may be searched if reasonable suspicion is established. This may occur with canine searches in school parking lots.

Many schools have established the practice of searching all the luggage and hotel rooms of learners who are participating in school tours or outings. A Federal District Court in New York ruled that searching the hotel rooms of learners was justified and based the judgment on the

39 *Idem* 742-743.
40 Joseph Beckman *The Principal's Legal Handbook* (ed Lane, Gooden, Mead, Pauken, & Eckes) (2008) 32.

legitimate interest of the school to prevent learners from taking illegal substances on these trips.[41]

In this case, the learners were notified prior to the trip that their rooms would be checked on a daily basis. On one particular evening, a teacher passed a group of learners in the hallway and detected a strong smell of marijuana. A search of the learners' rooms thereafter uncovered marijuana and alcohol. The learners were immediately sent home and subsequently suspended from school. In its ruling, the court referred to the facts that the learners were aware of the school's code of conduct, they were given prior notice that there would be room checks, that the teachers acted *in loco parentis*, and that when the teacher smelled marijuana he had strong reason to believe that the learners were engaged in illegal activity. The court ruled that the search was constitutional.

Schools may utilise surveillance cameras in classrooms, hallways, and school grounds without encroaching on the right to privacy of learners. The US Court of Appeals, Sixth Circuit, has ruled that rooms where learners undress and shower are of "elevated personal privacy", and has clearly established that the personal privacy of learners may not be infringed when they are changing their clothes.[42]

If a search has the probability of being intrusive, the school official should assess whether it could be justified based on the danger presented by the suspected violation, as well as the age, gender, disciplinary history, and background of the learner. In other words, if a search of a learner's person is indicated, then the school official must have a strong safety concern, usually one that involves a weapon or drugs.

The most intrusive search is a strip search. Over the years, the courts have had difficulty in deciding if reasonable suspicion allowed students to be strip-searched. The Supreme Court took up the challenge two years ago in *Stafford United School District #1 v Redding*.[43] This case involved a 13-year-old girl, Savana, who was strip-searched because the assistant principal suspected she was hiding prescription strength ibuprofen as well as other pills that could be purchased over the counter. The administrator, Wilson, had been told by another girl, who was in possession of Savana's day planner and who was caught with the drugs, that Savana had given the drugs to her. Wilson interviewed Savana who denied the accusations, after which the administrator searched her backpack but found nothing. He then instructed the school nurse and a female administrative assistant to take Savana to another room and to search her clothing. They instructed her to undress to her underwear, at which point they asked her to hold out her bra and panties.

The Court ruled that the search of the backpack was reasonable, but that the strip search was not:

41 *Rhodes v Guarricino* 1999 54 FSupp 2d 186.
42 *Brannum v Overton County School Board* 2008 516 F3d 489.
43 2009 129 SCt 2633.

> We do mean … to make it clear that the T L O concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resorting to hiding evidence of wrongdoing in underwear before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.[44]

The Court recounted Savana's description of her ordeal as embarrassing, frightening, and humiliating and referred to professional mental health journals and *amicus* briefs as to the devastating effects of strip searches on adolescents. Nonetheless, the Court realised there may be situations in which strip searches may be required, but that a high level of justification was needed, something that was not present in this case:

> The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in TLO, that 'the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.' The scope will be permissible, that is, when it is 'not excessively intrusive in the light of the age and sex of the student and the nature of the infraction.' Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.[45]

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.[46]

Although searches of individual students must adhere to the standards of reasonableness described above, there is a category of searches that prevails under the "special needs" doctrine although they are not based on reasonable and individualised suspicion. The special needs doctrine recognises that there are general safety concerns that require more latitude in supervising learners. This is the justification that is given in support of random drug testing, or a search without specific suspicions that school officials may require of learners who participate in extra-

44 *Idem* 2643.
45 *Idem* 2642.
46 *Idem* 2643.

curricular activities.[47] However, the Court did caution that school districts should not assume that random drug testing would be constitutional in all contexts. Compulsory education laws require students to attend school and, therefore, they cannot be expected to give up their right to privacy and be subjected to suspicionless drug testing. Participating in extra-curricular activities is voluntary; a learner who objects to random drug testing has the choice to abstain from those activities in which testing would be a requirement. No such option would exist in the general population of learners who are required to attend school.

In summary, the protection against unreasonable searches and seizures implies that a search cannot be instituted without a school official having reasonable suspicion that a search is necessary. The search must be specific to an individual learner, and the nature and scope of the search must be reasonably related to the suspected infraction and take into consideration the age and gender of the learner.[48]

A learner's freedom from search and seizure must be balanced against the needs of the school to maintain order and discipline and to protect the health and safety of all learners. It is clear learners and teachers have constitutional rights, but those rights may be tempered by the unique circumstances that exist in public schools. The US Supreme Court resolved that learners have a lesser expectation of privacy when in school.[49]

The Court approved suspicionless drug testing of athletes in *Vernonia School District 47J v Acton*[50] and later for all participants in extra-curricular activities in *Board of Education of Independent School District No 92 of Pottawatomie v Earls*.[51] The Supreme Court held that special needs exist in schools that underpin the schools' obligation to deter drug use and, therefore, can require participants in extra-curricular activities to submit to drug testing. However, this kind of search has not been determined to be applicable in all contexts, such as where all learners are required to participate.

47 *Vernonia School District 47J v Acton* 515 US 646 (declaring that requiring student athletes to submit to random drug testing is not constitutionally infirm); *Board of Education of Indiana School District No 92 of Pottawatomie County v Earls* 536 US 822 (opining that requiring students in any competitive extra-curricular activity to participate in random drug tests is not a violation of the Fourth Amendment).

48 Alexander & Alexander *The Law of Schools, Students and Teachers* (2009) 271.

49 *New Jersey*.

50 *Vernonia School Dist 47J*.

51 *Board of Education of Indiana School District 92*.

4 Possible Inferences for South African School Principals

School principals should be primarily concerned with removing illegal substances from the school environment for the betterment of other learners and not for use in the criminal prosecution of learners. The question that arises is: can these illegal substances seized by teachers be used in criminal prosecutions or must they be excluded as evidence? The majority of the courts in the US have ruled that materials seized by school officials may be used as evidence in a criminal prosecution,[52] as long as the evidence was obtained by a legal search. With this lesson from the US courts in mind, inexperienced South African school principals and education officers need more clarification on the requirements for confiscating and safe-keeping of illegal substances until they can be handed over to the police.

School principals in South Africa often involve the police to assist them with search and seizure in their schools. Many US schools, particularly high schools, now employ law enforcement personnel to remain on school campuses to assist in school discipline and to combat criminal activity in schools. In the US a stronger "probable cause" standard applies when outside police search learners *unless* they are conducting the search at the request of a teacher or administrator. Law enforcement officers may need to meet only the reasonable suspicion standard if they are functioning in their capacity as a school official at the time.

School principals do not need the consent of the learner in order to conduct a search, although they often seek it. Consent, though, must be given freely and willingly without coercion. The learner's parents should be contacted and can be asked to explain to the learner the importance of cooperation with the school.

There is an important distinction between the freedom to search an individual in South Africa and the United States. The principal in the US does not have to first establish where the contraband is hidden. If a US school administrator has a reasonable suspicion that a learner is in possession of drugs or a weapon, the principal can search the learner, his belongings, or his locker. The test of a reasonable search is in the nature and scope of the search. The more intrusive the search, the more severe the suspected violation must be. In other words, it is reasonable to search a learner's locker for stolen property, but it is not reasonable to strip search a learner if the suspected violation does not involve dangerous drugs or weapons.

Likewise, a US principal may NOT search a group of students, even if reasonable suspicion has been established that perhaps one among them

52 Alexander & Alexander 206.

has committed a school violation. *Individualised* reasonable suspicion must be established before a search of a learner can proceed.

Random non-intrusive searches can be conducted in such instances as for example, when learners arrive at school and are required to pass through a metal detector or to be scanned by a wand. Schools can require all students to submit to such a search or they may institute a system in which learners are truly selected randomly for the screening.

A school may require a learner to be drug tested only upon establishing individualised reasonable suspicion and measures must be taken to ensure the privacy of the learner during the urine collection process. Random drug testing is only authorised for learners participating in extra-curricular activities. Schools may use positive results from random tests to deny learners the opportunity to participate in extra-curricular sports or clubs and to refer them to drug counselling, but they may neither share the results with law enforcement nor deny the students access to schooling.

The important lesson is that school officials have the responsibility to maintain a safe and secure learning environment for staff and learners. When they determine a search is necessary, they must conduct a search that is justified at the inception and the nature and scope of the search must be reasonably related to the nature of the suspected infraction and in the light of the age and gender of the student. The general rule of thumb is, the more intrusive the search, the stronger the justification must be to conduct it.

5 Conclusion

A substantial percentage of learners have access to and use illegal drugs and alcohol on school property.[53] It is imperative that schools be active to regain their role and function as institutions of learning and that a forceful drive to establish a culture of learning and appropriate discipline is instituted. Teachers and principals have frequently found it necessary to search learners and to remove from their possession, items which may be harmful to them or to others.

In each circumstance of a search, the court may determine whether the search was reasonable. The South African Schools Act makes it clear that the principal needs reasonable suspicion before conducting a search or drug test. In the case of drug testing, the learners' right to privacy is not violated if the testing procedures to collect samples do not intrude on the learners' privacy. Likewise, the test results must be kept confidential and must not be used to invoke school academic or disciplinary measures, or to provide evidence in a criminal procedure.

53 Medical Research Council of South Africa *The Second South African National Youth Risk Behaviour Survey* (2008) 14.

What guidance do the United States cases provide for South African school principals? Most obviously, if it is believed that there has been a breach of school rules, the suspected learner may be searched, and any contraband that is found, may be seized. However, it is important to remember the following caveats:

(1) Any detention, search, or seizure must be done with the intent of maintaining proper order and discipline in the school. Any such action cannot be done for the purpose of enforcing the criminal law.
(2) Any detention, search, and seizure must meet the 'reasonableness' test. That is, it must be based on credible information and carried out in a sensitive and reasonable manner. Strip searching an entire class of learners when money is missing from a locker or school bag, for example, would hardly meet this test.
(3) Whenever principals can, they should determine, in advance, whether a particular detention, search, or seizure is going to become a police matter and whether they want the learner to face criminal charges and potential conviction.
(4) Courts have noted that school principals can practice discretion. In the US, schools are required to report criminal activity, but they may not have the capacity to properly handle evidence. There is no general duty to report to police, for example, every time a learner commits assault in a fist fight. The seriousness of every situation must be weighed, and it is wise to be very familiar with Departmental policy on these matters.
(5) School lockers and desks are obviously the property of the school. Common sense would dictate that if teachers, under the authority of principals, may search learners in given circumstances, this would also extend to school property. In fact, schools may publish a policy advising learners that school lockers may be searched periodically, even in the absence of reasonable suspicion. The reason is to maintain control over school property at all times. Ideally, searches of learners and school lockers should be done with two or more persons present so that observations and the findings of evidence may be corroborated.

Educators must also be cautious of the following aspects. Interpretations of the law and what constitutes "reasonableness" can be subjective and might change over time. Furthermore, situations involving search and seizure are all different and might not conform exactly to precedent. New cases and new circumstances continually emerge. Drug use, for example, has been on the rise over the past few years, and decriminalisation of marijuana is a possibility. One example of a response by school principals to a perceived increase in drug use is the recent employment of dogs in several South African schools to assist in the search for drugs. Does this meet the test of reasonableness? Will this become necessary for the maintenance of proper order and discipline in school?

Students, websites, and freedom of expression in the United States and South Africa

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OPSOMMING

Leerders, Webblaaie en Vryheid van Uitdrukking in die VSA en Suid-Afrika

Leerders het geredelik toegang tot die internet en dit skep die geleentheid om deur e-pos en ander vorme van elektroniese kommunikasie met persone by die skool te kommunikeer sonder dat hulle fisies teenwoordig hoef te wees. Terwyl baie van hierdie kommunikasie steurend kan wees wanneer leerders gedurende die skooldag hulle daarmee besig hou, is die mees kommerwekkende aspek van elektroniese boodskappe dié wat kru, beledigend, neerhalend of selfs dreigend is. In die Verenigde State van Amerika (VSA) het skoolbeamptes gevind dat die beheer van sodanige kuberspraak wat hulle oorsprong buite die skool het, wemel van konstitusionele probleme.

Hierdie artikel het drie doelstellings. Die eerste is om die regspraak oor leerder kuberspaak in die VSA te ondersoek waar die volgende vyf feitelike variante die gesag van die skool om leerders te bestraf beïnvloed: die plek van oorsprong van die kuberspraak (binne of buite die skoolterrein), die plek van toegang tot die kuberspraak (binne of buite die skoolterrein), die persone wat die toegang tot die spraak bewerkstellig het (personeel of ander leerders), die inhoud van die elektroniese uitdrukking, en die impak van die uitdrukking op die skool. Die tweede doelstelling is om die gesag wat die skool het om leerders te bestraf vir buite-skoolse kuberkommunikasie te bespreek in verhouding tot die ouers se reg om die rigting en inhoud van hulle kinders se opvoeding te bepaal.

'n Bespreking van die regte van leerders tot uitdrukking in die kuberruimte vereis 'n veelsydige benadering wat oorweging skenk aan beide die regsbank se beoordeling van leerders se regte en die gesag wat skole het om leerders te dissiplineer. Hierdie artikel sal 'n ewewig bewerkstellig deur die hofuitsprake van Amerika sowel as Suid-Afrika te oorweeg. Die finale oogmerk is om beginsels vanuit die Amerikaanse regspraak, waar veelvuldige aspekte deurdink is, te ekstrapoleer tot riglyne vir Suid-Afrika.

1 Introduction

At least since the dawn of a new constitutional dispensation in 1994, discipline has been a problem in South African schools.[1] Research has found that teachers lack a repertoire of effective methods of maintaining discipline.[2] This state of affairs has a negative effect on the professional and personal lives of teachers. In an empirical study of the effect of student discipline problems on South African teachers Wolhuter and Van Staden[3] established that 85 percent of teachers are of the view that discipline problems sometimes or regularly make them unhappy in their work, 90 percent feel that discipline problems at school have sometimes or regularly caused tension in their family lives, and 79 percent have, because of discipline problems at school, at times considered quitting the teaching profession.

Student ready access to the internet affords opportunities through email and other forms of texting to communicate with persons from beyond the school without having to be physically present at school. While much of these communications can be distracting when accessed by students during the school day, the most worrisome electronic messages are those that are crude, insulting, disparaging, and, perhaps, even threatening. School officials in the United States of America (US) have found that controlling student cyber expression that originates off school premises is fraught with constitutional trip wires.

While in the US the problem of school discipline in the context of students' roaming on the electronic communication highway has been subjected to much jurisprudence, and a historical evolution is discernible, this is not the case in South Africa. This article has three purposes. The first is to examine how the following five factual variants in student cyber speech cases affect the authority of schools to punish students: the place or origin of the expression (on or off school premises), the place of access to the expression (on or off school premises), the person(s) who accesses the expression (staff or other students), the content of the electronic expression, and the impact of the expression on the school. The second purpose will be to discuss how the authority of schools to punish students for off-campus cyber interacts with the parents' right to direct the education of their children. The final purpose of the article is to extrapolate guidelines from jurisprudence in the US on the issue for South Africa, where this issue has not been as thoroughly thrashed out in jurisprudence as in the US. The Constitution of South Africa states that when interpreting the Bill of Rights contained in the Constitution, a court, tribunal or forum may consider foreign law.[4]

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1 Wolhuter, Oosthuizen & Van Staden "Skoolfase/Leerderouderdom as Faktor in Leerderdissipline in Suid-Afrikaanse Skole" 2010 *Tydskrif vir Christelike Wetenskap* 169-186.

2 Wolhuter & Van Staden "Bestaan daar 'n dissiplinekrisis binne Suid-Afrikaanse skole? Belewenis van opvoeders" 2008 *Tydskrif vir Geesteswetenskappe* 395-396.

3 *Ibid.*

4 S 39(1)(c) SA Constitution.

A discussion of student cyber expression rights requires a multi-faceted approach that explores both the judiciary's consideration of student expressive rights and the authority of schools to discipline students. This article will develop this balancing act by the courts by dividing the article into five sections that discuss: (1) The key US Supreme Court decisions affecting student expression; (2) the application of these US Supreme Court decisions to two selected cases (one state and the other federal); (3) the complications associated with analysing legal theories regarding cyber speech; (4) the implications of court decisions regarding student cyber speech, particularly as impacting the constitutional right of parents to direct the education of their children, and finally; (5) the South African jurisprudence on freedom of expression and its impact on student rights.

2 Tinker and its Progeny: Balancing Student Expression and the Authority of Schools to Discipline Students

The US Supreme Court's declaration in *Tinker v Des Moines Independent Community School District*[5] that "students … [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[6] has become the constitutional benchmark for determining the extent to which school officials can restrict student expression.[7] In upholding the right of students to wear black armbands to protest the war in Vietnam as a form of passive speech, the Court set a fairly high standard of limiting school restriction of student expression to that which would "materially and substantially disrupt the work and discipline of the school".[8] Despite the assertions of Justice Thomas that the Court's awarding of constitutional rights to students in *Tinker* "[was] without basis in the Constitution"[9] and that the Court should return to the

5 393 US 503 (1969).
6 *Idem* 506.
7 *Tinker* produced yet another standard, "intrudes upon … the rights of other students", (*Idem* 508) which was referenced by the Ninth Circuit in *Harper v Poway Unified School District* 445 F3d 1166 to prohibit a student from wearing a t-shirt with a religious message in opposition to sexual orientation; however, the *Harper* court of appeals also found the religious message inconsistent with the *Fraser* standard regarding "fundamental values of habits and manners of civility essential to a democratic society", (*Harper* 445 F3d 1185, citing *Fraser* 478 US 681) so the second *Tinker* standard does not have a clear record of standing on its own as does the *Tinker* disruption standard. For an article supporting the use of the second *Tinker* standard in assessing the constitutionality of student expression cases, see McCarthy "Student Expression That Collides with The Rights of Others: Should the Second Prong of Tinker Stand Alone?" 2009 *Ed Law Rep* 1 14 ("there may not be many other legal options beyond Tinker's second prong that allow school authorities to curtail non disruptive expression when it collides with others' rights to be secure and to be let alone").
8 *Idem* 513.
9 *Morse v Frederick* 551 US 393 (Thomas J concurring).

common-law doctrine of *in loco parentis* under which "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order", [10] the *Tinker* decision has demonstrated remarkable resilience.

In three post-*Tinker* decisions, *Bethel School District v Fraser*,[11] *Hazelwood School District v Kuhlmeier*[12] and *Morse v Frederick*,[13] the Supreme Court sought to broaden the control of school personnel over students. Thus, in *Fraser*, the Supreme Court, in refusing to grant free speech protection to a lewd and vulgar campaign speech delivered to students in an assembly, invoked a school's responsibility to instil "the habits and manners of civility".[14] In *Kuhlmeier*, the court, in refusing to award free speech protection to the school newspaper articles of a student editor, emphasised a reasonableness standard for school control over the school curriculum where the school's actions were "reasonably related to legitimate pedagogical concerns",[15] and where students, parents, and members of the public might reasonably perceive student expressive activities "to bear the imprimatur of the school".[16] Finally, in upholding the suspension of a student who had displayed a banner expressing support for marijuana, ("BONG HiTS 4 JESUS"),[17] the *Morse* court underscored the substantial interest that a school has in safeguarding "those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"[18] in violation of a "established school's policy"[19] against student use of illegal drugs.

The challenge for courts has been applying the student free expression case law from the *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* decisions to new sets of facts. In *Morse*, the Supreme Court's observations regarding *Tinker*, *Fraser*, and *Kuhlmeier* reflected some of the uncertainty as to how the legal principles of each case can be influenced by the facts of each case. The *Morse* court perceived *Tinker* as dealing with "political speech" where the school's only interests in that case had been the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint", or "an urgent wish to avoid the controversy which might result from the expression".[20] *Fraser*, according to the *Morse* court, would have been decided differently if the student had "delivered the same speech in a public forum outside the school context".[21] Finally, the court in *Morse* found *Kuhlmeier* inapplicable to its set of facts because

10 *Safford Unified School District No 1 v Redding* 129 SCt 2633, 2646 (Thomas J concurring in the judgment in part and dissenting in part).
11 478 US 675.
12 484 US 260.
13 551 US 393.
14 *Fraser* 478 US 681.
15 *Kuhlmeier* 484 US 273.
16 *Idem* 271.
17 *Morse* 551 US 397.
18 *Ibid.*
19 *Idem* 408.
20 *Idem* 403-04, citing *Virginia v Black* 538 US 343, *Tinker* 393 US 509 510.
21 *Morse* 551 US 405.

"no one would reasonably believe that Frederick's banner bore the school's imprimatur".[22]

In a pre-*Morse* Second Circuit decision involving a t-shirt, *Guiles v Marineau*,[23] the court of appeals suggested that *Tinker* was the default standard for student free expression cases in the absence of evidence that student t-shirt expression explicitly violated the *Fraser* or *Kuhlmeier* standards. *Morse*, with its new standard of refusing to protect student support of drugs in violation of established school policy, arguably has done nothing to challenge this default theory. In religious expression cases, the Establishment Clause has afforded considerably less protection for student expression. In the Supreme Court's decision, *Santa Fe Independent School District v Doe*,[24] the court invoked *Kuhlmeier* to reject a student religious speech claim and to strike down student prayer prior to football games. More recently, the Supreme Court, in *Christian Legal Society v Martinez*,[25] referenced both *Tinker*[26] and *Kuhlmeier*[27] in rejecting a law school student religious organisation's free speech claim that a law school non-discrimination policy prohibiting discrimination on the basis of sexual orientation violated the organisation's free speech right to determine the religious requirements for its members.[28]

22 *Idem*. Further complicating the picture of student expressive rights has been a wide range of cases concerning free speech protection for the messages on student t-shirts that has not yet reached the Supreme Court, as well as cases arguing protection for student religious expression which has. See Mawdsley "The Uncertain Currents of T Shirt Expression in the US" 2007 *ANZ J of Law and Ed* 69; Mawdsley "The Rise and Fall of Constitutionally Protected Religious Speech in the United States" 2009 *Int J of Law and Ed* 71.

23 461 F3d 320.

24 530 US 290.

25 130 SC. 2971. On remand to the Ninth Circuit regarding CLS's claim that the law school's failure to apply its "all comers" participation policy to other student group violated the First Amendment, the Ninth Circuit found that CLS's statement of the issue in its initial brief, "whether the Constitution permits a public law school to deny a religious student group numerous valuable benefits because the group requires its officers and voting members to agree with its religious viewpoint", lacked sufficient specificity to raise and, thus, save for review, the CLS organisation's pretext claim. See *CLS v Wu* 626 F3d 483 485. See also *CLS v Martinez*, *Appellate Brief to the Ninth Circuit* 2006 WL 3420535 2 for statement of the CLS organisation's claim.

26 *Idem* 2988. ("This Court has long recognised 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" *Tinker* 393 US 507).

27 *Idem* referencing the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges". *Kuhlmeier* 484 US 273.

28 For a pre-*CLS v Martinez* analysis of protected speech for religious organisations, see Mawdsley & Mawdsley "Balancing a University's Non-discrimination Policy Regarding Sexual Orientation With the Expressive Rights of Student Religious Organisations: A USA Perspective", 2007 *ANZ J of Law and Ed* 47.

In the past decade, a new genre of student cyber expression case law involving the use of web pages and the internet has captured the attention of school officials and the courts. This case law affords far more subtle expressive issues than the positions of student organisations on social issues[29] or student messages on t-shirts.[30] Courts are called to apply student expression standards designed in the context of physical symbols and signs (*Tinker*, *Morse*), direct face-to-face student expression (*Fraser*), and school-sponsored curriculum (*Kuhlmeier*) to student-generated electronic cyber expression accessed in schools where the person who originated the message may not be the person who accesses or distributes it within the school setting.

3 Punishing Student Cyber Expression: Comparing the Results from Two Similar Cases

Two court decisions, one a state supreme court decision and the other a federal circuit court decision, have been selected because of the similarity in facts to discuss in detail how courts have determined whether students could be punished for their cyber speech. Worth noting is how the two courts choose to emphasise different factors, either in supporting school discipline or protecting student expression.

In *JS v Bethlehem Area School District* (*Bethlehem*),[31] the Supreme Court of Pennsylvania upheld expulsion of an eighth grade student resulting from his home-generated website containing threatening and derogatory comments about a teacher. The student in this case, JS, apparently did not care for his algebra teacher and created at home a website entitled "Teacher Sux", which contained among other items, a picture of the teacher that morphed into a picture of Adolph Hitler and a hand-drawn picture of the teacher in a witch's costume. More serious, though, was a webpage regarding the teacher with the caption, "Why Should She Die?" with a request from the reader to give him "$20 to help pay the hitman".[32] Another page contained a small drawing of the teacher "with her head cut off and blood dripping from her neck".[33] The website was viewed by student members at the middle school, at least one of whom was directed to the site by JS. One of the school's instructors brought the webpage to the attention of the middle school principal who notified the local police and the Federal Bureau of Investigation (FBI), both of which declined to file charges against JS. The principal also informed the

29 See *Bannon v School District of Palm Beach County* 387 F3d 1208 (citing *Hazelwood* in permitting the school to delete religious murals that had been painted by the Fellowship of Christian Athletes on hallway panels where the murals were considered by the court of appeals to be school sponsored speech).

30 See *Guiles* 461 F3d 327-328 where a student t-shirt with martini and drugs, worn for two weeks to school, was considered to be acceptable political speech in opposition to the President of the United States.

31 807 A2d 847.

32 *Idem* 851.

33 *Ibid*.

algebra teacher about the webpage. After viewing the webpage the teacher testified she was frightened, fearing someone would try to kill her, [and] suffered stress, anxiety, loss of sleep, loss of weight, a general sense of well-being, short term memory loss, inability to go out of the house and mingle with crowds and headaches requir[ing] her to take anti-anxiety/anti-depressant medication.[34]

In addition, she was unable to finish the 1997-98 school year and "applied for and was granted a medical leave for the 1998-99 school year because of her inability to return to teaching".[35] As a result, the school was required to utilise three substitute teachers for the 1998-99 school year "which disrupted the educational process of the students".[36]

The parents of JS enrolled him in an out-of-state school which prevented his attending one of the two dates for the school board expulsion hearing.[37] In expelling JS, the board characterised JS's webpages as "a threat", "harassment", and "disrespect to the teacher … resulting in actual harm to the … school community [and] to the teacher".[38] JS's parents appealed the expulsion to a Pennsylvania state trial and appeals court, both of which upheld the expulsion. The state appeals court, in language reminiscent of *Tinker*, held that the school was justified in taking student threats seriously "where the conduct materially and substantially interferes with the educational process".[39]

On appeal to the Supreme Court of Pennsylvania, the court affirmed the expulsion, but only after carefully parsing the nature of the student's speech and the protection of the Free Speech Clause of the First Amendment. The Supreme Court determined that JS's speech did not fit within a category known as "true threats" which the US Supreme Court has ruled has no free speech protection.[40] In comparing JS's threats to other cases in which courts had found "a true threat",[41] the Supreme Court of Pennsylvania, in assessing the context in which JS's statements were made, the reaction of listeners, and the nature of the comments,

34 *Idem* 852.
35 *Ibid.*
36 *Ibid.*
37 *Idem* 853. JS was able to attend the hearing on Aug 19 but not on Aug 26.
38 *Ibid.*
39 *Ibid.*
40 See *Watts v US* 394 US 705 (holding that a Vietnam protestor stating that he would get LBJ in his sights was "political hyperbole", not a violation of a federal statute prohibiting threats against the President).
41 See *Lovell v Poway Unified School District* 90 F3d 367 (finding that, against a backdrop of violence in schools, a student's threat to kill her guidance counselor if she did not make changes in the student's schedule, a reasonable person in the student's position would interpret the statement as a serious expression of intent to harm or assault); *In the Interest of AS* 626 NW2d 712 (finding a true threat in a 13-year-old student's detailed descriptions of violence to a police officer, middle school principal, social studies teacher, and a fellow student where an objective, reasonable person would interpret the statement as a serious expression of a purpose to inflict harm).

determined that the statements did not constitute true threats.[42] Thus, the Pennsylvania supreme court had to weigh whether JS's constitutional free expression rights had been abridged by the school board's expulsion.

Citing *Tinker*, *Kuhlmeier*, and *Fraser,* the Supreme Court of Pennsylvania determined that the relevant criteria were the location of the speech (on or off-campus), the form of the speech (political, lewd, vulgar, offensive), the effect of the speech (level of disruption), the setting in which the speech is communicated (school assembly, classroom), and the speech as part of a school sponsored expressive activity (newspaper, play).[43] While finding that the website was created off-campus, the Supreme Court noted that JS had "facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site".[44] Although finding that JS's web site was not the "political message" of *Tinker*, nor was it the "lewd, vulgar and offensive speech" of *Fraser* or the school sponsored speech of *Kuhlmeier,*[45] the Pennsylvania Supreme Court, nonetheless, decided that either *Fraser* and *Tinker* might be able support the school board's expulsion of JS. However, while the court opined that "the 'Teacher Sux' web site [was] no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly"[46] it ruled that, ultimately, "it is the issue of disruption, potential or actual, that dissemination of 'Teacher Sux' caused to the work of the school"[47] that had to be considered. In rejecting the claims of JS's parents that the disruption was minimal, the Supreme Court found substantive disruption in "the direct and indirect impact of the emotional and physical injuries to [the teacher]", the anxiety of certain students "for their safety", and concerns voiced by parents "for school safety and the delivery of instruction by substitute teachers".[48]

The opposite result was reached in *Layshock v Heritage School District*[49] (*Layshock*) where the Third Circuit, in an *en banc* decision upholding a three judge court's decision on behalf of a school district, held that the school district had violated a 17-year-old student's free speech rights by punishing him for creating a parody web profile of his

42 See *JS* 807 A2d 858-859 (finding that the threatening statements were not made conditionally since no address was given to collect money for a hitman, that the threatening statements had not been made directly to the teacher, that JS had made no prior statements to the teacher, and that the teacher had no reason to believe JS had the propensity for violence).
43 *JS* 807 A2d 864.
44 *Idem* 865.
45 *Idem* 865-66.
46 *Idem* 868.
47 *Ibid.*
48 *Idem* 869.
49 F3d (3d Cir 2011) (*en banc*), *aff'ing* 593 F3d 249.

principal on *My Space*.[50] Using his grandmother's computer at her home, Layshock's profile of his high school principal was formed from bogus answers to phony questions that indicated in part the principal's use of drugs and steroids, as well as theft of items.[51] The word of the profile spread throughout the school and was accessed at school by Layshock and other students, in addition to spawning several other unflattering profiles prepared by other students. The principal, while not being concerned for his life, found the profiles to be "degrading", "demeaning", "demoralising" and "shocking".[52] Although the principal considered the profiles to constitute harassment, defamation or slander, no criminal charges were filed against Layshock or other creators of profiles. Approximately a week after creating the profile, Layshock apologised orally to the principal, followed by a written apology. Notwithstanding these apologies, Layshock was found by the school to have violated the school's discipline code[53] and, in addition to a ten-day suspension, was placed in the Alternative Education Program, was banned from extracurricular activities, and was not allowed to participate in graduation.[54] In upholding the Third Circuit three-judge panel's summary judgment for *Layshock*, the *en banc* Third Circuit, reviewed the limitation of student free expression in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*, concluding that none of the cases applied in *Layshock*. Noting that "Tinker's 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard", the Third Circuit cautioned that "the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits".[55] Observing that 'it would be unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities",[56] the Third Circuit found untenable the school district's claim that it could punish the student "because his speech has reached inside the school".[57] In substance, the *en banc* court of appeals found that the school district sought "to forge a nexus between the School and [the student's] profile by relying upon his

50 *MySpace* is a popular social-networking website that "allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and information about their lives and interests". *Doe v MySpace Inc* 474 FSupp 2d 843 845.

51 *Layshock* F3d 1, 2. (For example, some of the comments based on the three, "big", were: Are you a health freak: big steroid freak"; "In the past month have you smoked: big blunt"; In the past month have you been on pills: big pills".)

52 *Layshock* 593 F3d 253.

53 *Idem* 254. The language of the discipline code cited was: "Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehaviour; Obscene, vulgar and profane language; Computer Policy violations (use of school pictures without authorisation)".

54 *Ibid.*

55 *Layshock* F3d 9.

56 *Ibid.*

57 *Ibid.*

'entering' the [School] District's photo of [Principal] Trosch".[58] The Third circuit rejected the school district's claim that, although the student could not be punished under *Tinker* because no disruption had taken place, school officials could punish the student pursuant to the *JS*, *Wisniewski*, and *Doninger* decisions. However, the court of appeals observed that these three cases simply demonstrated that expressive conduct occurring outside of school can be treated as inside the "schoolhouse gate", but these limited circumstances did not apply in *Layshock*. The Third Circuit opined in its conclusion that:

> [w]e need not define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because … we hold that [the student's] use of the [School] District web site does not constitute entering the school and that the [School] District is not empowered to punish his out of school expressive conduct under the circumstances here.[59]

Worth noting is that, while the student in *Layshock* had a protected First Amendment right in his webpage created off-campus, the *en banc* Third Circuit let stand the three-judge panel's response to the parents' Fourteenth Amendment Liberty Clause claim regarding their upbringing of their son,[60] namely, that "they [had been] able to take the action they thought necessary to communicate their displeasure with their son's actions and the inappropriateness of his behaviour".[61]

4 Sorting out the Legal Theories: The Changing Interpretation of Student Expression

Both *Bethlehem* and *JS* reflect the difficulty in applying the Supreme Court's student discipline standards to student expression that originates off-campus. Although the Supreme Court of Pennsylvania in *Bethlehem* did not find the student's message to be a "true threat", the case does suggest a starting point for analysis in determining whether student expression is either a "true threat" for which no free speech protection exists, or is a threat that violates one or more of the student discipline standards. Thus, in *Wisniewski v Board of Education of the Weedsport Central School District*[62] (*Wisniewski*), the Second Circuit found that an *AOL Instant Messaging* icon, showing a pistol firing a bullet at a person's head with dots representing spattered blood and the words, "Kill Mr. Van der Molen" (the student's English teacher), below the icon, fell within

58 *Idem* *7.
59 *Idem* *12.
60 For a discussion of legal changes in the right of parents to direct the education of their children in the face of the development of students' constitutional rights, see Mawdsley "The Changing Face of Parents' Rights" 2003 *Brigham Young U Ed and Law J* 165.
61 *Layshock* 593 F3d 264. The case notes that the parents "were understandably upset over Justin's behaviour, discussed the matter with him, expressed their extreme disappointment, grounded him, and prohibited him from using their home computer". *Idem* 254.
62 494 F3d 34.

Tinker. The court of appeals refused to address whether the icon, which had been sent to other students but not to the teacher, was a "true threat", finding instead that under *Tinker* "school officials have significantly broader authority to sanction student speech".[63] In upholding the suspension of the student, the Second Circuit concluded that the student's icon:

> cross[ed] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school'.[64]

Thus, unlike *Bethlehem* where the student's message was read by the teacher, the message in *Wisniewski* sent to other students had not come to the attention of the teacher. Nonetheless, the Second Circuit found that because the "risk" that the icon distributed to students "would come to the attention of school authorities and the teacher whom the icon depicted being shot"[65] was "at least foreseeable to a reasonable person, if not inevitable", the icon represented "a risk of substantial disruption within the school environment".[66]

The notion that students can be disciplined for communications originating off-campus has been approved by two recent decisions in the Eighth and Fourth Circuit Courts of Appeal. In the Eighth Circuit decision, *DJM v Hannibal School District*[67] (*DJM*), DJM, a student in the Hannibal Public School District, sent instant messages from his home to a classmate (CM) in which he talked about getting a gun and shooting some other students at school. The alarmed recipient and a trusted adult she had consulted contacted the school principal about their concerns. School authorities decided they must notify the police, who took a statement from DJM that evening and then placed him in juvenile detention. DJM was subsequently suspended for ten days and later for the remainder of the school year. In upholding a federal district court's decision to deny DJM's free speech claim, the Eighth Circuit agreed that his communication was "a true threat" where DJM had communicated his statement to the object of the purported threat *or to a third party*[68] and where a reasonable recipient would have interpreted DJM's statements as a serious expression of an intent to harm or cause injury to another.[69] As the court of appeals noted, DJM's statements that "five specific named individuals 'would go' or 'would be the first to die' were real cause for alarm, especially since he talked about using a 357 magnum that could be borrowed from a friend", and were viewed as serious enough by CM and the trusted adult to report the content to the

63 *Idem* 38.
64 *Idem* 38-39, citing *Tinker* 393 US 513.
65 *Idem* 39.
66 *Idem* 40.
67 *DJM v Hannibal School District* F3d 2011 WL 3241876.
68 *Idem* (Headnote 1) (emphasis in original).
69 *Idem* (Headnote 4).

principal and district superintendent.[70] The Eighth Circuit also supported its result relying on *Tinker* for the proposition that "it was reasonably foreseeable that DJM's threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment".[71] However, as the Eighth Circuit noted in reflecting on the application of the US Supreme Court's *Tinker*, *Fraser* and *Morse* decisions to student off-campus electronic communications:

> [t]he [Supreme] Court has not yet had occasion to deal with a school case involving student threats or one requiring it to decide what degree of foreseeability or disruption to the school environment must be shown to limit speech by students.[72]

In the Fourth Circuit decision, *Kowalski v Berkeley County Schools*,[73] a school district with punishment for a student who used her home computer to create a My space page (SASH – Students Against Sluts Herpes) with about 100 individuals invited to participate. The web page contained false, derogatory, vulgar and offensive comments against a student, Shay N, which included pictures of Shay N and pictures alleging that she had herpes. Shay N's parents filed a harassment complaint against the students involved in the website and the school, after meeting with Kowalski who admitted to creating the website, "suspended her from school for 10 days [later reduced to 5] and issued her a 90–day [later reduced to 45-day] 'social suspension,' which prevented her from attending school events in which she was not a direct participant".[74] In addition she was not permitted to participate in crowning the new Queen of Charm or serve on the cheerleading squad. Unlike *DJM* though, the school dealt with the My Space website as a violation of the school's harassment policy.[75] The Eighth Circuit dispatched with the student's

70 Idem (Facts discussion, I) (the trusted friend Allen encouraged CM to continue e-mailing DJM with the following comments having been preserved and introduced into evidence:
the instant message conversation begins with DJM discussing his frustration having recently been spurned by "L", a romantic interest. CM asks DJM "what kinda gun did your friend have again?" DJM responds "357 magnum". CM then replies, "haha would you shoot L or let her live?" DJM answers, "I still like her so I would say let her live". CM follows up by asking, "well who would you shoot then lol", to which DJM responds "everyone else". DJM then named specific students who he would "have to get rid of", including a particular boy along with his older brother and some individual members of groups he did not like, namely "midgets", "fags", and "negro bitches". Some of them "would go" or "would be going". CM later forwarded most of these statements to Allen by email).

71 *Idem* (Headnote 6).

72 *Ibid.*

73 *Kowalski v Berkeley County Schools*, F3d (2011 WL 3132523) (4th Cir. 2011).

74 *Idem* (Fact discussion I).

75 *Idem* (Fact Discussion I). The *Harassment, Bullying, and Intimidation Policy* prohibited "any form of ... sexual ... harassment ... or any bullying or intimidation by any student ... during any school-related activity or during any education-sponsored event, whether in a building or other property owned, used or operated by the Berkeley Board of Education". The Policy

free speech claim and found support for the school's discipline under *Tinker* that "public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying";[76] under *Morse* where "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning";[77] and, under *Fraser* where abusive student speech:

> [I]s not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system'.[78]

However, the notion that off-campus speech that "causes or reasonably threatens to cause a substantial disruption of or material interference with a school" can be regulated was rejected by the Third Circuit, sitting *en banc*, in *JS v Blue Mountain School District* (*Blue Mountain*).[79] In *Blue Mountain*, two students created a fictitious profile on My Space of one of their middle school principal that included in the profile's URL the phrase, "kidsrockmybed", identified his interests as "hitting on students and their parents", and "mainly watching the playboy channel on directv", described himself in an "about me" section as a "sex addict", "I have come to my space so I can pervert the principal's [sic] to be just like

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defined "Bullying, Harassment and/or Intimidation" as "any intentional gesture, or any intentional written, verbal or physical act that"
(1)A reasonable person under the circumstances should know will have the effect of:
(a)Harming a student or staff member; …
(2)Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student. The policy also provided that violators would be suspended and that disciplinary actions could be appealed.
The *Student Code of Conduct* provided, "All students enrolled in Berkeley County public schools shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development". It also committed students to "help create an atmosphere free from bullying, intimidation and harassment" and to "treat others with respect" and "demonstrate compassion and caring". The *Code* classified "Bullying/Harassment/Intimidation" as a "Level III Violation" with possible consequences including an out-of-school suspension of up to 10 days; signing a behavioural contract; being denied participation in class and/or school activities; and a social suspension of up to one semester. Before punishing a student under the *Student Code of Conduct*, a principal was required to "immediately undertake or authorise an investigation" of the incident and complaint, including "personal interviews with the complainant, the individual(s) against whom the complaint is filed, who may have knowledge of the alleged incident(s) or circumstances giving rise to the complaint".

76 *Idem* (Headnote 6).
77 *Idem* (Headnote 6).
78 *Idem* citing *Fraser* 478 F3d 681.
79 593 F3d 286.

me", and declared that "I love children [and] sex of (any kind)".[80] JS and her colleague, KL, when confronted by the teacher, admitted to creating the webpage, apologised in his office, and later wrote letters of apology, but were still punished with a ten-day suspension. The principal considered criminal harassment charges but elected not to pursue them when informed by police that the charges would ultimately be dropped. The disruption to the school was limited: a teacher had to silence 7 or 8 students who wanted to talk about the profile in class, some 8th grade girls approached another teacher expressing concern about comments regarding the principal and his family, and several girls were reprimanded for decorating the lockers of JS and KL on the day they returned from their 10-day suspension.[81] In upholding the suspensions, a three judge panel of the Third Circuit applying *Tinker* to this set of facts, refused to limit off-campus speech to "any geographical technicality"[82] in terms of the authority of the school to control such expression and determined that "the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test".[83]

An *en banc* panel of the Third Circuit, finding that a student's free speech rights outside the school context were coextensive with the rights of adults, reversed the three judge panel and ruled that the school district could not have reasonably forecast substantial disruption and that the district could not punish student use of profane language outside the school and during non-school hours.[84]

Worth noting is that the *en banc* Third Circuit in *Blue Mountain*, unlike the *en banc* Third Circuit in *Layshock*, reached the merits of the parents' claim that the school district's action had deprived them of their liberty clause right to direct the education of their child. The *en banc* Third Circuit in *Blue Mountain* observed that a liberty clause violation would be implicated only if the state's action "deprived [the parents] of their right to make decisions concerning their child", and not when the action merely "complicated the making and implementation of these decisions".[85] In upholding the federal district court's summary judgment for the school district in *Blue Mountain* concerning the liberty clause claim, the *en banc* Third Circuit noted that "the school district's actions in no way forced or prevented JS's parents from reaching their own disciplinary decision, nor did its action force her parents to approve or disapprove of her conduct".[86]

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80 *Idem* 300.
81 See *Idem* 294 for a full description of disruption and school discipline.
82 *Idem* 301.
83 *Idem* 302.
84 *JS* F3d *11, citing *CN v Board of Education* 430 F3d 159.
85 *Idem* *13.
86 *Idem* *13. The three judge panel in *Blue Mountain* noted as a practical matter that the school's discipline had not pre-empted that of the parents since "they had also punished her 'for a very long time' for creating the profile". *Blue Mountain* 593 F3d 305.

The rejection of student free speech claims in the *Bethlehem* and *JS*, while upholding student free expression claims in *Layshock* and *Blue Mountain*, needs to be juxtaposed to other federal district court decisions finding on behalf of students. Worth noting is that these cases, similar to *Layshock* and *Blue Mountain*, tend to rely on a narrow interpretation of *Tinker*.

In the earliest of the cases, *Beussink v Woodland R-IV School District*[87] (*Beussink*), a Missouri federal district court granted a preliminary injunction against a ten-day suspension awarded to a student as a result of an off-campus created homepage that "was highly critical of the administration at Woodland High School [and] used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage".[88] Even though the principal and the computer teacher "were upset by the homepage",[89] the teacher had nonetheless permitted students to access the homepage in class. Citing *Tinker*, the district court found that "no significant disruption to school discipline [had] occurred"[90] and, indeed, in turning the case into one purely of free speech, the court pointedly declared that the student had not been disciplined "because he was disrespectful or disruptive in the classroom … [but] because he [had] expressed an opinion on the Internet which upset [the] Principal and [the computer teacher]".[91] In addition to enjoining the school district from using the ten day suspension served by plaintiff in any manner to adversely affect his grades, the district court also enjoined the school district "from restricting [the student's] use of his home computer to repost that homepage".[92]

Three years later, a Pennsylvania federal district court, in *Killion v Franklin Regional School District*[93] (*Killion*), granted injunctive relief to a student suspended for webpage content created at his home that contained a list of uncomplimentary comments about the athletic director.[94] In overturning the ten-day suspension awarded to the student because his list "contained offensive remarks about a school official",[95] the district court limited *Fraser* and *Hazelwood* to their narrow sets of facts[96] and applied *Tinker*. In addition to noting that the list was not "threatening", (even though it was "upsetting") to the athletic director,

87 30 FSupp 2d 1175.
88 *Idem* 1177.
89 *Idem* 1178.
90 *Idem* 1181.
91 *Ibid.*
92 *Idem* 1182.
93 136 FSupp 2d 446.
94 *Idem* 448. Among the comments about the athletic director were that: "He is constantly tripping over his chins"; "The girls the 900 #'s sic keep hanging up on him"; and, "He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key a time".
95 *Idem* 449.
96 See *Idem* 454. (The expression in *Killion* "was not in a school assembly" (*Fraser*) and "was not in a school sponsored newspaper" (*Hazelwood*)).

the school district adduced no evidence of "actual disruption;"[97] there was "no evidence that teachers were incapable of teaching or controlling their classes because of the list, [and] indeed, the list [had been] on school grounds for several days before the administration became aware of its existence, and at least one week passed before the defendants took any action".[98] A copy of the list had been downloaded and appeared at school although the school district was not able to produce any credible evidence that the student who created the webpage had been the one responsible;[99] in any case, even if the student had brought a hard copy of the list to school, the absence of disruption would most likely have produced the same result.

One year later, two federal district courts, one in Michigan, *Mahaffey v Aldrich*[100] (*Mahaffey*), and the other in Ohio, *Coy v Board of Education of the North Canton City Schools*[101] (*Coy*), relied on *Tinker* to address suspensions related to student-created websites. In *Mahaffey*, a high school suspended a student who had contributed the following content to a website he had created:

> SATAN'S MISSION FOR YOU THIS WEEK: stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. Unless [sic] Im [sic] there to watch. Or just go to Detroit. Hell is right in the middle. Drop by and say hi.
>
> PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?[102]

The *Mahaffey* district court found the comments to not constitute a threat because "there was no evidence that [the student] communicated the statements on the website to anyone".[103] More importantly, in granting summary judgment to the student, the court observed that the school district had produced "[no] proof of disruption to the school or on campus activity".[104]

Coy differed from *Mahaffey* in that the school district alleged that it had expelled a student, not for the content of his webpage, but for violating a school rule prohibiting use of school computers to visit unauthorised sites. The federal district court in *Coy* found sufficient evidence to warrant a middle school student going to trial following his suspension

97 *Idem* 455.
98 *Ibid.*
99 *Idem* 458 n 2.
100 236 FSupp 2d.
101 205 FSupp 2d 791.
102 *Mahaffey* 236 FSupp 2d 782. The federal district court inserted the "sic" references.
103 *Idem* 785. The court accepted the student's assertion on the website that it had been created "for laughs" and viewed the last sentence as a disclaimer that no reasonable person would interpret as "an intent to harm or kill anyone listed on the website". *Idem* 786.
104 *Idem* 786.

for four days after creating a webpage that contained: "a few insulting sentences written under each picture [of three other middle school students]", "two pictures of boys giving the 'finger'", "some profanity", "and a depressingly high number of spelling and grammatical errors".[105] Although the district court refused to grant summary judgment to the student (Coy), it did determine that the case should be resolved under a *Tinker* rather than a *Fraser* or *Kuhlmeier* standard. Even though the website was "crude", it did not contain the "elaborate, graphic, and explicit sexual metaphor" in *Fraser*[106] nor had Coy been "speaking or attempting to speak in front of a captive student audience".[107] Likewise, *Kuhlmeier* was not applicable because Coy's "activity was not sanctioned by the school nor did the school knowingly provide any materials to support the expression".[108] In sending the case back for trial, the district court established two key benchmarks: (1) "If the school disciplined Coy purely because they did not like what was contained in his personal website, the plaintiff will prevail;"[109] and, (2) even if the school established that it punished the student, not because of website content, but because he had violated a school policy prohibiting accessing non-approved websites using school computers, the school would still have to demonstrate under *Tinker* that accessing the website had an "effect upon the school district's ability to maintain discipline in the school".[110]

Most recently, an Indiana federal district court, in *TV v Smith-Green Community School Corporation*,[111] reversed a school district's removal of two female students (MK and TV) from the volleyball and show choir extracurricular teams (later reduced by the school to removal from 25% of the activities) after they had posted to one of the student's restricted access *MySpace* and *Facebook* accounts sexually provocative photos taken at an off-campus "sleepover". After two parents furnished the school principal with copies of the photos, the volleyball coach complained that the photos were causing divisiveness among team members who were taking sides supporting and opposing the photos. The school officials relied on their extracurricular activities policy which provided that "[i]f you act in a manner in school or out of school that brings discredit or dishonour upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year".[112] In finding that the student photos were protected free speech, the court concluded that:

> [a]s a matter of law that the conduct in which MK and TV engaged, and that they recorded in the images which led to their punishment by Smith-Green School Corporation, had a particularised message of crude humour likely to

105 *Coy* 205 FSupp 2d 795.
106 *Idem* 799 citing *Fraser* 478 US 678.
107 *Idem* 800.
108 *Ibid.*
109 *Idem* 801.
110 *Ibid.*
111 *TV v Smith-Green Community School Corporation* F Supp 2d.
112 *Idem* *2.

> be understood by those they expected to view the conduct, and so was sufficiently expressive as to be considered within the ambit of the First Amendment.[113]

The district court found *Fraser* inapplicable as the photos were taken off-campus and neither girl brought the photos onto the school campus.[114] In finding *Tinker* inapplicable because the photos had not caused disruption, the court declared that a student "cannot be punished with a ban from extracurricular activities for non-disruptive speech".[115] As to the school's claim that the photos had caused disruption, the court determined that:

> [p]etty disagreements among players on a team – or participants in clubs for that matter is utterly routine. This type of unremarkable dissension does not establish disruption with the work or discipline of the team or the school, much less disruption that is 'substantial' or 'material' … In sum, at most, this case involved two complaints from parents and some petty sniping among a group of 15 and 16 year olds. This can't be what the Supreme Court had in mind when it enunciated the 'substantial disruption" standard in *Tinker*'. [116]

The district court also found the school's policy unconstitutional for vagueness and overbreadth because "it is obvious that out-of-school conduct that brings discredit or dishonour upon the student or the school is a standard that reaches a whole host of acts for which no First Amendment protection could be claimed".[117]

5 Analysis and Implications: School Punishment of Students and the Rights of Parents

The dominating force of *Tinker* in addressing students' creation of and access to webpages created off-campus limits the disciplinary authority of school districts. *Coy* casts doubt as to whether school suspensions would be possible simply because a student has used a school computer to access a student-created website, although disciplinary sanctions restricting or prohibiting student access to school computers would seem to be plausible since students would not be excluded from the school setting. However, much seems to depend on the language of school disciplinary codes. The district court in *Coy* held that a school conduct provision prohibiting the use of "obscenity, profanity, any form of racial slur or ethnic slurs, or other patently offensive language or gesture",[118] was unconstitutionally overbroad,[119] since "it reached language,

113 *Idem* *6.
114 *Idem* *9.
115 *Idem* *10.
116 *Idem* *13.
117 *Idem* *18.
118 *Idem* 803.
119 A law or regulation is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep; *Coy* 205 F3d 801 citing *Déjà Vu of Nashville Inc v Metro*

distasteful as it might be, that is protected under the First Amendment".[120] Nonetheless, the court upheld the language as not being unconstitutionally vague, and thus could be enforced by the school, because it applied only to "school property, at school-sponsored events off school grounds, or during travel to and from school".[121] In effect, schools have discretion in formulating discipline policies defining inappropriate language as long as students are afforded sufficiently clear notice.

The second *Tinker* standard, "intrudes upon ... the rights of other students" or "collides with the rights of other students to be secure and to be let alone",[122] has supported school district discipline where students have worn t-shirts with messages expressing hostility or lack of tolerance for persons representing protected category viewpoints,[123] but one can question whether it applies with the same force to website messages created off-campus. In many of the cases discussed in this article, the students who created their webpages also accessed the website at school for their friends. Arguably, the student creator accessing his/her own webpage could be compared to a student choosing a t-shirt with a vulgar or offensive message to be worn at school, but the comparison breaks down when the person accessing the webpage at school is not the creator of the website. At some point, regardless how distasteful or vulgar, the school should not be able to reach into a student's home to punish him or her for the message created there. Indeed, at some point one returns to the facts of *Tinker* where the students who wore the black armbands were simply following the example of their parents,[124] although none of the webpage cases suggest that student vulgar comments on the internet merely reflected the parents' views of school personnel. Nonetheless, in the absence of the kind of disruption required under *Tinker*, one can argue that the function of education should not be to engage in a kind of mind control to eradicate the personally or politically unacceptable student views of the moment.[125] As the Second Circuit observed in the post-*Tinker*, but pre-*Fraser*, case, *Thomas v Board of Education*[126] (*Thomas*), student activity in

Government 274 F3d 377, or "imposes restrictions so broad that it chills speech outside its legitimate regulatory purpose" *Coy* 205 F3d 801 citing *Deja Yu* 274 F3d 377.

120 *Coy* 205 FSupp 2d 802.

121 *Idem* 803.

122 *Tinker* 393 US 508.

123 See *Harper* 445 F3d 1178 (finding that student handwritten message on a t-shirt, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" violated the second *Tinker* standard because "public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses").

124 See *Tinker* 393 US 504.

125 See eg *Beussink* 30 FSupp 2d 1177 where the student "did not intend his homepage to be accessed or viewed at his high school; he just wanted to voice his opinion".

126 *Thomas v Board of Education* 607 F2d 1043.

creating a satirical publication for distribution in school which "was deliberately designed to take place beyond the schoolhouse gate"[127] could not, in the absence of disruption, be the subject of school discipline. The Second Circuit opined in *Thomas* that "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate".[128]

Other than the Third Circuit *en banc* decision in *Blue Mountain*, none of the courts deciding cases discussed in this article addressed the substantive question whether the disciplinary reach of school officials into the home violates not only the free speech rights of the student, but the constitutional rights of the parents to direct the education of their children. Clearly, as the US Supreme Court noted in *Troxel v Granville*,[129] "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children".[130] Since the *en banc* Third circuit in *Layshock* did not address at all the parents' constitutional claim, the comments by the three judge panel, while not resolving the parents' claim on its merits, observed that it could envision situations "where a school's reaction to student's conduct could interfere with the parents' ability to exercise appropriate control and authority over their child and his/her upbringing and education".[131] However, the court of appeals provided no insights into what those situations might be. As far as the case before the Third Circuit was concerned, the court observed that the parents had communicated their displeasure with their son and "the school's inappropriate response to [their son's] actions in anyway interfered with [the parents'] liberty interest in raising their son".[132] At the very least, *Layshock* is indicative of current legal developments where "a child's constitutional rights will not always be coterminous with his/her parents' liberty interests",[133] and children are recognised as possessing constitutional rights even if parents have no constitutional claims.[134] The Third Circuit's *Blue Mountain en banc* decision remains the

127 *Idem* 1050. The articles in the publication included such topics as masturbation and prostitution, as well as more standard fare such as "school lunches, cheerleaders, classmates, and teachers". *Idem* 1045.

128 *Idem* 1045.

129 530 US 57 (invalidating state statute granting grandparents visitation rights where those rights would be contrary to the custodial parent's rights).

130 *Idem* 67 (relying for support on the seminal Supreme Court decisions recognising parent rights protected under the Liberty Clause, *Meyer v Nebraska* 262 US 390, *Pierce v Society of Sisters* 268 US 510).

131 *Layshock* 593 F3d 264.

132 *Ibid.*

133 *Ibid.*

134 See eg *The Circle Schools v Pappert* 381 F3d 172 (invalidating state statute requiring that parents be notified if their children failed to participate in the Pledge of Allegiance pursuant to student's right of privacy, but refusing to reach the merits of parents' Liberty Clause claim). *See generally*, Mawdsley "The Changing Face of Parents' Rights" 2003 *Brigham Young U Ed and Law J* 165 179-183.

only federal court of appeals decision that has addressed the merits of a parental liberty clause claim where they have sought to use that right to restrict the disciplinary authority of school officials. The reasoning of the *Blue Mountain* court of appeals does not bode well for parents who seek to use their liberty clause right to negate a school's discipline of their children. Whether a student can be punished by a school district is an issue between the school and the student and does not implicate the constitutional rights of parents. A parental liberty clause right to punish non-school conduct seems unaffected by the cases discussed in this article; what seems clear is that non-school conduct of students implicates the constitutional rights of students, but not the students' parents.

No one, certainly not the courts, is suggesting that students who create offensive websites should go unpunished, but, in the absence of *Tinker* disruption, school suspensions or expulsions should not be the appropriate means of punishment.[135] In several of the cases, school officials contemplated civil or criminal action, but then, whether dissuaded by the attendant publicity or the school board, decided not to proceed.[136] Should they decide to go forward with a judicial proceeding, school officials would probably have a difficult task in prevailing in civil damages or criminal claims,[137] but such difficulty should not become the determining factor as to whether school officials should bring to bear the full force of the school district against the student.

Unlike the *Harper* t-shirt message or the *Morse* sign that requires some advance planning and materials, the internet is instantaneous. What students could accomplish fifty years ago by writing and passing notes to only one or two students in class can now be readily accessible to a wide number students almost at the moment of creation by punching a few keys on a keyboard. Contrary to the notes passed in schools in the past, most of the objectionable Internet webpages have originated in the students' own homes. Perhaps, Justice Thomas was correct that in granting constitutional rights for students, we have opened the Pandora's Box of separating the role and responsibility of parents from the schools. Worth noting in the cases discussed in this article are the students who not only apologised for their webpages, but were also punished by their

135 For an example of a creative alternative, see *Doninger v Niehoff* 527 F3d 41 where the Second Circuit upheld denial of a preliminary injunction to a student disqualified by her high school from running for Senior Class Secretary after she posted a vulgar and misleading message, referring to school administrators as "douchebags", about the supposed cancellation of an upcoming school event; the court of appeals found that the language was not only "plainly offensive", but "foreseeably created a risk of substantial disruption within the school environment" by being "hardly conducive to cooperative conflict resolution". *Idem* 50-51.

136 See eg *Coy* 205 FSupp 2d 796.

137 See *Blue Mountain* 593 F3d 293 (state police officer after reviewing student's webpage told the principal he could press criminal charges "but they would likely be dropped").

parents.[138] By setting up school officials as the final arbiters of what is distasteful or inappropriate in student, home-generated webpages, we not only have made adversaries of parents but have made certain that the webpage content that was probably accessible to only a relatively few students will now be memorialised in West Publishing Company's Reporter series.

6 Summary: US Jurisprudence

The Eighth Circuit in *DJM* observed that "[o]ne of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment".[139] Despite over a decade of litigation, the courts are still no closer to articulating a clear free speech standard for student cyber speech. Other than the *Tinker* disruption standard, school officials are left with very little else to use as a standard for prohibiting offensive webpages and punishing students. What is becoming clear is that courts are loathe to permit schools to intrude into homes and monitor the parents' or students' personal computers. Courts seem willing to superimpose an objective test on student-generated webpages and give little, if any, attention to student intentions. If the effect of a webpage is school disruption, whether the student anticipated the result is apparently of no consequence. In walking through this free speech minefield, school officials would seem better served to avoid constitutional tripwires by focusing on the objective harm to the school setting and forego discussion about the subjective humiliation and embarrassment resulting from student cyber barbs.

7 Freedom of Expression in South Africa

Despite the fact that US law differs fundamentally from South African law, the wealth of US case law on freedom of expression in the education context is instructive. However, when comparing case law and legal theories the inherent differences of the two legal systems must always be kept in mind.[140] The Constitution of the Republic of South Africa, 1996 protects the broader concept "freedom of expression" and not only freedom of speech, which is the standard term used in the US. This implies that in addition to speech, any manner of human expression is protected as a fundamental right. Section 16(1) of the South African Constitution provides as follows:

> 16(1) Everyone has the right to freedom of expression, which includes
> (a) freedom of the press and other media;

138 See *eg Layshock* 593 F3d 254.
139 *DJM* F3d (Headnote 6 D).
140 For instance, the US Constitution does not have a limitation clause such as section 36 of the South African Bill of Rights which regulates the balancing of fundamental rights according to a set of criteria.

(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

Freedom of expression is one strand of a web of rights and is closely related freedom of religion, belief and opinion, the right to human dignity, as well as the right to freedom of association, the right to vote and to stand for public office and the right to assembly. These fundamental rights implicitly recognise the ability to form and express opinions, whether individually or collectively, even where those views are controversial.[141] The corollary of the freedom of expression and its related rights is tolerance by society of different views, opinions and ideas. Tolerance, of course, does not require approbation of a particular view. [142]

In *Le Roux v Dey* the Constitutional Court affirmed the importance of freedom of expression in South Africa by stating that "the free and open exchange of ideas is no less important than it is in the United States of America".[143] In the authoritarian political climate of Apartheid students were prevented from questioning educators, were not encouraged to think critically and were taught to accept authority without question. [144] As democracy is not yet firmly established in South Africa "the open market of ideas is all the more important"[145] in order to enable the "quest for truth"[146] by means of scientific, artistic or cultural expression of ideas and discoveries; to provide access to news, information and critical viewpoints inform the citizenry and electorate; to allow the free expression of the human personality as a natural part of being human; and to ensure accountability, responsiveness, and transparent decision-making.

However, section 16(2) of the SA Constitution contains internal limitations which demarcate the extent of constitutional free expression as follows:

(2) The right in subsection (1) does not extend to
(a) propaganda for war;
(b) enticement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

141 *South African National Defense Force Union v Minister of Defense* 1999 4 SA 469 (CC) par 8.
142 *Ibid.*
143 *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* JOL 27031 (CC) (2011) par 47.
144 Van Vollenhoven *Learners understanding of their right to freedom of expression in South Africa* (2006) 70.
145 *S v Mamabolo (eTV intervening)* 2001 3 SA 409 (CC) par 43.
146 Currie *et al* 310.

8 Freedom of Expression in the South African Education Context

South African courts have *inter alia* been called on to apply the constitutional standards to determine the limits of freedom of expression in the education or school context concerning physical symbols (Antonie,[147] Pillay[148]) personal expression (Williams[149]), publication of untrue statements in the media (Hamata[150]) student protests (Ngubo[151]) and student-generated electronic cyber expression created outside the school setting but having an effect on school discipline (Le Roux[152]).

Section 10 of the Constitution states that "Everyone has an inherent dignity and the right to have their dignity respected and protected".[153] At times the fundamental rights to dignity and freedom of expression come into conflict with one another. In the context of a school a further complicating factor is that the unlimited exercise of the right of freedom to expression can easily undermine student discipline, and thus also hamper the school in its function to educate children.

8 1 Substantive Disruption of Discipline – the *Tinker* Standard

In *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department*[154] the School Governing Body suspended a student from school for wearing dreadlocks in contravention of the school's uniform dress code. The student, *Antonie*, was a Rastafarian and wore dreadlocks as part of her religious practice. The student's parents supported her conduct. The matter was taken on review and the High Court held that the infringement of the school's uniform dress code was not a serious misconduct and did not warrant suspension. The court found that the suspension could not only have a negative effect on her normal development and her future career, but could also submerge her personality, dignity and self-esteem. On the facts the court found that the wearing of dreadlocks by the girl did not cause a substantial disruption of school discipline, to the extent that it impinged upon other students' right to basic education. The court ruled in favour of *Antonie* and the suspension was set aside.

147 *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2000 4 SA 738 (WC).
148 *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).
149 *Western Cape Residents' Association obo Williams v Parow High School* 2006 3 SA 542 (C).
150 *Hamata v Chairperson, Peninsula Technikon* 2000 4 SA 621 (C).
151 *Acting Superintendent-General of KwaZulu-Natal v Ngubo* 1996 3 BCLR 369 (N).
152 *Le Roux*.
153 S10 SA Constitution.
154 *Antonie*.

In *MEC for Education, KwaZulu-Natal v Pillay*, the Constitutional Court also upheld the right to freedom of expression of a student at Durban Girls High School, to wear a gold nose-stud to school, in keeping with her South Indian family traditions and culture.[155] Reading between the lines it is apparent the main driving force behind the insistence on wearing the nose-stud to school was the student's mother. The student's main argument was based on the right to equality and the constitutional prohibition against unfair discrimination based on culture and religion. The Constitutional Court found that the norm embodied by the school's code was not neutral, but that it enforced mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms.[156] The court reiterated that this case was not about the constitutionality of school uniforms. It was about granting religious and cultural exemptions to an existing uniform as symbolic expression. Langa CJ was of the opinion that school uniforms served admirable purposes but that these purposes would not be undermined by allowing for certain exemptions. The school did not present any evidence to show that a student who is granted an exemption from the provisions of the dress code will be any less disciplined or that it will negatively affect the discipline of others. The court thus held that the student's right to freedom of expression had been unjustifiably limited because her wearing of a nose-stud posed no risk of substantial disruption to school activities and would not impose an undue burden on the school. Langa CJ therefore confirmed that the refusal to allow Pillay to wear the nose-stud amounted to unfair discrimination which unconstitutionally limited the student's right to express her religion and culture which is central to the right to freedom of expression.

In both the aforementioned cases the courts applied the standard similar to that first articulated in *Tinker* that a student's right to free expression may only be limited if "substantial disruption of school discipline" could or would result from the student's conduct. Therefore, the authority of the educators and school governing bodies to set rules to establish an orderly and disciplined environment may be limited to allow free expression insofar as the school's discipline is not substantially disrupted. It is interesting to note that although in both *Antonie* and *Pillay* the rights of parents to direct the education and religious or cultural upbringing of their children played an important role in the perpetuating each student's adamant disregard for the school rules, the courts dealt with the merits of the issues by considering the constitutional rights of the students (ie the children) and not the rights of the parents.

155 *MEC for Education, KwaZulu-Natal*.
156 *MEC for Education, KwaZulu-Natal v Pillay* par 44.

8 2 Parents Attempt to Circumvent School Discipline and a School's Duty to Educate.

In *Western Cape Residents' Association obo Williams v Parow High School*[157] the parents (with the support of their friends in the Resident's Association) applied for an urgent interdict to compel the school to allow a grade 12 learner, *Williams,* to attend a matric farewell-function.[158] The school had refused permission because of her continued ill-discipline during the course of the year. The court considered arguments that the student's dignity, equality and freedom of expression had been infringed upon by the school's refusal, but found that the attendance of a matric farewell-function was an extra-curricular social activity and, as such, was a privilege and could not be claimed as and enforceable right. Also, the court considered the interests of the school, the other students and the applicant and determined on balance that:

> Two of the important lessons that a school must teach its learners are discipline and respect for authority. The granting of privilege as a reward for good behaviour is one tool that may be used to teach such lessons. The withholding of such privilege can therefore not be claimed as an infringement of a right to equality or to dignity. Indeed, the granting of the privilege in the absence of its having been earned may well constitute an infringement on the rights to equality and dignity of those who have merited the privilege. The right to freedom of expression, of course, does not equate to a right to be ill-disciplined or rude. The system of rewards for good behaviour permeates all walks of life and to learn the system at an early age can only benefit the learner later on in his or her life. I see nothing of constitutional concern in the use of such a system in schools.[159]

The court thus held that in view of the school's duty to teach children discipline and respect for authority, the withholding of privilege on the grounds of bad behaviour is not an infringement on the rights to dignity, equality or freedom of expression. By excluding the interests of the parents in the matters of *Antonie, Pillay* and *Williams*, the courts have implicitly affirmed the individual rights of the students by balancing it with the duty of the school authorities to maintain order and discipline. This sensible approach by the courts has undergirded the authority of the school authorities to maintain order and discipline in spite of attempts by the parents of the student to overlook ill-discipline or to attempt to circumvent the resultant punishment.

8.3 Untruthful Publication - Suspension of a Student Affirmed

In *Hamata v Chairperson, Peninsula Technikon*[160] a journalism student at the Peninsula Technikon was suspended after the publication of the

157 *Western Cape Residents' Association*.
158 Similar to a Prom-dance in the US context.
159 *Western Cape Residents' Association* 545B-C.
160 *Hamata v Chairperson, Peninsula Technikon* 2000 4 SA 621 (C).

article "Sex for Sale on Campus" in the *Mail and Guardian* newspaper during September 1998. The article refers to prostitution and conveyed the message in no uncertain terms, that not only the practice of prostitution on the Technikon's campus was prevalent and the existence thereof a well-known fact, but also that the authorities of the Technikon acquiesced in this practice. On review of the disciplinary proceedings the High Court held that although untrue information could at times be protected under the right to freedom of expression, this false dissemination could be limited when balanced against other constitutional rights. The court held that countervailing interests of the educational institution and of victims harmed by untrue statements would more easily override untrue than true expression. The court upheld the student's suspension and affirmed that the harmful exercise of the freedom of expression was justifiably limited in this instance.

8 4 Harmful Effects of Student Protests and Harassment

In *Acting Superintendent-General of KwaZulu-Natal v Ngubo*[161] police evicted college students who slept on the property and harassed college staff while protesting. The students contested the legality of this action and applied for a court review of the provincial Head of Education's decision to have protesting students forcibly evicted. The court held that the freedom of expression of the students had not been justifiably limited as "freedom of expression does not extend to justify harassment ...". This affirms that direct, face-to-face expression of protests may be duly limited if it infringes on the rights and safety of other persons or is unduly harmful to the educational institution.

8 5 Cyberbullying, Defamation and Schools

The case of *Le Roux v Dey*[162] is the only court ruling by South African courts involving students' use of cyberspace. In this case *Le Roux* (1st defendant) had created a computer image at his home in which the faces of the principals and deputy principal of his school were super-imposed on an image of two naked gay bodybuilders sitting in a sexually suggestive posture. The school crests were super-imposed over the genital areas of the two men in the image. Apparently satisfied and amused by his own handiwork, *Le Roux* shared his achievement with a close friend and sent it to his friend's cell phone via his computer. This friend (2nd defendant) then reproduced the image and circulated it to many other students at the high school. Eventually one of the students (3rd defendant) at the school made photocopies and affixed the image to the school's notice board. Understandably, the principal and deputy principal were embarrassed and felt particularly aggrieved by this. After an internal hearing by the School Governing Body the students were disciplined and their punishments *inter alia* included the performance of

161 *Acting Superintendent-General of KwaZulu-Natal v Ngubo* 1996 3 BCLR 369 (N).
162 Le Roux.

community service at the school and the Pretoria Zoo. However, despite the disciplinary steps against the students, the tag "Dey is gay" was heard in the corridors of the school which perpetuated untrue rumours and continued to infringe the deputy principal's dignity. The deputy principal instituted action and claimed damages for defamation. Defamation is per definition the wrongful infringement and harm of a person's good name and reputation. Its focus is the protection of the constitutional rights to dignity and privacy of any person. When a court assesses whether a publication is defamatory through the prism of the Constitution, it is concerned with the interpretation, protection and enforcement of the Constitution.[163] In this case the process involved the balancing of the rights to dignity and privacy on the one hand, with the rights freedom of expression and the rights of children, on the other.

The matter eventually reached the Constitutional Court where the schoolboys defended their conduct by contending that the picture was not defamatory as it was only a schoolboy prank. Also in defense of the actions of the students the Freedom of Expression Institute (1st *amicus curiae*) stressed the rights of children to freedom of satirical expression. The court did not accept the defendants' defense that they lack *animus iniurandi* or intent. Defamation does not require that the schoolboys were motivated by malice or ill-will. The court also accepted the evidence of the plaintiff and of another school principal that respect for teachers is an essential precondition for discipline, that discipline in turn is an essential requirement for the proper functioning of the school system, and that there is a growing tendency in South African schools to challenge the status and authority of teachers with a concomitant breakdown in discipline.

Brand J, on behalf of the majority of the Constitutional Court, considered whether the humour of the manipulated image was excusable, but held that a jest is not legitimate, if the joke would be insulting, offensive or degrading to another. The test is whether it is a joke in which the subject cannot share because it is hurtful and defamatory to the subject. A statement or idea which raises a laugh is defamatory when there is an element of *contumelia* in the joke, that is, when it is insulting or degrading to the butt of the joke. Brand J found that a schoolchild called as a witness for the schoolboys came to exactly the same conclusion; that even though it could be called a schoolboy prank, it humiliated and demeaned the victims of the prank. The court held that the question is not so much whether the attempt at a joke is objectively funny or not. Nor is it of any real consequence whether we regard the joke as unsavoury or whether we think that those who may laugh at it would be acting improperly. The real question is whether the reasonable observer – perhaps, while laughing – will understand the joke as belittling the victim; as making the victim look foolish and unworthy of respect; or as exposing the victim to ridicule and contempt. If the joke achieves that

163 *Idem* 31.

purpose, then it is defamatory, even when it is hilariously funny to everyone, apart from the victim.

The court thus confirmed that the manipulated computer image was defamatory and ordered that the students had to apologise and to pay compensation to the plaintiff. It follows therefore, that defamatory conduct that infringes the dignity of an educator, a student or anyone for that matter, whether it takes to form of direct face-tot-face insults or originates from a cyber source outside the school, is not only contrary to South African common law but also to the Constitution because it infringes a person's dignity.

The Constitutional Court thus set a subjective test as the high standard by which the defamatory consequences of insulting or degrading action or content should be measured. In *Le Roux* the court did not apply the objective standard of "substantive disruption of school discipline" (the *Tinker* standard) as the measuring yardstick to determine the constitutionality of the students' conduct. It matters not whether the injurious or harmful expression originated in the school or whether it had a deleterious effect on school discipline. Logically, therefore, the subjective *Le Roux* standard may be applied to any setting in society and simply inquires whether a reasonable observer would understand that the expression (in whatever format) infringes the dignity of the victim.

9 Summary: South African Jurisprudence

Broadly speaking, the South African courts have not applied the same reasoning as the US courts by considering the five factual variants of the place or origin of the expression (on or off school premises), the place of access to the expression (on or off school premises), the person(s) who accesses the expression (staff or other students), the content of the electronic expression, and the impact of the expression on the school in determining the constitutionality of the limitation of a student's right to freedom of expression.

However, the South African courts have adjudicated the right to freedom of expression in the school or education context by considering the nature of the idea or message (eg symbolic, cultural, religious, words, innuendo's, images etc), the manner of communication or expression (eg face-to-face or indirect) and the content of the expression. The cases that dealt with freedom of expression and student discipline in the school or educational context (*Antonie, Pillay, Hamata, Ngubo* and *Le Roux*) can be categorised into two factual variants namely, instances where the expressions have not been harmful, and instances where the expressions have been harmful to individuals, other persons or the educational institutions. In essence, therefore, the South African courts have firstly applied the *Tinker*-standard (albeit without naming it as such) that free expression is allowed in the absence of substantive disruption of student discipline or harm to others, and secondly, the *Le Roux* standard and

subjective test where the expression has subjectively infringed a person's dignity or has caused harm to others or the school.

10 Conclusion

In the US there has been, since *Tinker*, a movement in jurisprudence to confirm the right of schools to take decisions and to implement measures to exercise its duty to educate children and the right to have measures in place to maintain discipline. South African court rulings have likewise upheld this right of schools. When not threatening discipline, however, South African court rulings have come down in favour of upholding students' right to freedom of expression. When the exercise of free expression has been harmful to persons, educational institutions or individuals, the South African courts have upheld the limitation of the students' right to free expression in order to protect the safety of persons, and the dignity of individuals or educational institutions. However, the law is not settled with regard to a possible conflict between parents' rights to educate their children according to their own judgment, and a schools' right to lay down measures it deems proper. Whereas South African courts have yet to provide guidelines on this issue, the US jurisprudence has been in favour of a schools' right to maintain discipline.

A critical analysis of legislation on the financial management of public schools: A South African perspective

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OPSOMMING

'n Kritiese Ontleding van Wetgewing oor die Finansiële Bestuur van Openbare Skole: 'n Suid-Afrikaanse Perspektief

Die oogmerk van hierdie ondersoek is om die implementering van wetgewing wat handel oor openbare skole se finansiële bestuur te verstaan, verduidelik en te kritiseer. Die artikel fokus op die weersprekings en geskille wat ontstaan het rondom die bestuur van skool-finansies sedert 1994. Twee ooglopende finansiëlebestuursake word ondersoek: Wie is werklik aanspreeklik vir die skool se finansies: Die beheerliggaam of die skoolhoof? Wetgewing soos die Suid-Afrikaanse Skolewet 84 van 1996 en die Indiensnemingswet vir Opvoeders 76 van 1998 omskryf die regte en verantwoordelikhede van skoolhoofde en beheerliggame. Die tweede saak wat aangespreek word is: Spreek dit werklik sosiale regverdigheid en billikheid aan deur die implementering van die Nasionale Norme en Standaarde vir Skool-befondsing se Beleid op Openbare Skole? Dit is noodsaaklik dat skoolbeheerliggame wat daarna streef om skool-finansies behoorlik en doeltreffend te bestuur, 'n duidelike begrip van die wetgewing relevant tot skool finansiële bestuur te hê.

1 Introduction

The government's educational reforms, since 1994, have focused on redressing historical imbalances and achieving equity in attempts to restructure South African education. The aim of this article is to understand, explain and critique the design and implementation of policies relating to financial management in South African public schools. Investigating and understating this central problem required the researcher to understand its implementation from the perspectives of the Department of Education (DoE) officials, governing bodies, principals, parents and the communities at large.

This article makes the argument that, despite substantial government revisions of the education system, there is still widespread misconception as to who is accountable for public schools' finances, and whether social justice and equity have been adequately served by the implementation of the National Norms and Standards for School Funding (NNSSF). This article is for this reason divided into two sections. In the first section, the question raised is: Who is accountable for the schools' finances? To answer this question, The South African Schools

Act[1] (SASA), Public Finance Management Act[2] (PFMA), The Employment of Educators Act[3] (EEA) and the Education Laws Amendment Act[4] will be examined to resolve whether the principal and/or School Governing Body (SGB) is accountable for the management of school finances. In the second section of the paper, the implementation of the Amended NNSSF will be examined to establish whether the State has in fact addressed the issue of social justice and equity in ensuring that resources are equitably distributed to all public schools and learners in the provision of quality education.[5]

2 The Accountability of School Finances

SASA was the first attempt to involve communities in governance, and to set guidelines for self-managing and governing schools. Self-managing schools, a process that is also referred to as decentralisation, means that the State delegates authority to schools with a shared decision-making model engaging various stakeholders.[6] SASA gives unprecedented responsibilities to SGBs of public schools, placing them in a position of trust towards schools, and making them primarily responsible for the education of learners through democratically elected structures.[7] An SGB is a statutory body of parents, principals, teachers, non-teaching staff and learners of secondary schools only.[8] One of the primary functions of the SGB is to determine school policies, which must be implemented by principals and teachers.

Although decentralisation allows stakeholders to participate at a level in which they can have direct impact on matters that concern them, it allows different capacities and inequalities of power and influence, at governance level, to be expressed more strongly.[9] The role of principals and SGBs in managing a school's finances is complex: the functions of principals and SGBs appear to overlap, and this usually gives rise to conflicts among them. In order to lessen, or eliminate conflicts among various stakeholders of schools, provincial departments of education regularly send out circulars, or memoranda, to them explaining or clarifying the interpretation and implementation of legislation.[10] It is, therefore, imperative if SGBs are to be effective that they have knowledge of legislation.

The rights and responsibilities of SGBs are clearly defined in legislation. The Bill of Rights as enshrined in the Constitution protects the

1 Act 84 of 1996.
2 Act 1 of 1999.
3 Act 76 of 1998.
4 Act 31 of 2007.
5 *NNSSF* General Notice 29179; Notice 869.
6 Mestry & Bisschoff 11.
7 Mestry & Bisschoff 16.
8 S 16(1) SASA.
9 Chisholm, Motala & Vally 2003 246.
10 Gauteng Department of Education *Circular 13 of 2000*; *Circular 9 of 2003*.

principal and other school governors as persons having human rights, such as their right to freedom of speech, their right to privacy and human dignity, and their right to just administrative action.[11] SASA and the EEA define the rights and responsibilities of principals in their official capacity as employees of the provincial departments of education. SASA underpins school governance, while the EEA emphasises the professional duties of the principal in management. Although the PFMA has no direct bearing on schools *per se*, the Department of Education applies certain sections of the PFMA to prescribe how schools should manage the allocated funds from the National Treasury. This implies that principals are accountable to their respective Heads of Departments (HoDs) for subsidies received from the State.

The PFMA will be examined to determine how this Act applies to school finances.

2 1 Public Finance Management Act

As mentioned in the previous section, the PFMA has no direct bearing on schools *per se*. However, the HoDs, as accounting officers for the provincial departments of education, usually prescribe through circulars to principals and SGBs how the State's resource allocation for schools should be spent. The schools are obligated to spend State funds for resources, services and repairs and maintenance of schools. The spending of these funds is ring-fenced. For example, 50 % of the budget should be allocated to learning and teaching support materials, and 50 % for services rendered, repairs and maintenance of schools. Principals are advised not to deviate from this notice. Based on section 16A of SASA, the principal is placed in an enviable position to adhere to the Department's directives. In actual fact, the Department has no right to prescribe how State funding in respect of resource allocation should be expended. Once the Department determines the budget for schools, and accordingly releases the funds to these schools, the SGBs should take responsibility for the said funds. In the case of schools granted section 21 functions in terms of SASA, the funds will be deposited directly into the schools' banking accounts. Where schools have not applied for these additional functions, the Department will spend the money on behalf of these schools. It should be emphasised that in this instance the schools receive a paper budget from the provincial department of education and the funds essentially belong to the schools. The Department is merely the custodian of the funds but has no claim whatsoever over these funds.

2 2 The South African Schools Act and Employment of Educators Act

SASA states that the governance of the school vests in the SGB of the school and the professional management of a school must be undertaken

11 General Notice 17678.

by the principal.[12] The Act provides that the Department's management function is limited to the professional management of the school through the principal, as the employee of the Department.

Financial management, a crucial function of school governance, can be defined as the performance of financial management actions of schools with the main aim of achieving effective education. The preamble to SASA emphasises a partnership between the parents and the government, and aims ultimately to devolve maximum decision-making and power from education departments to SGBs. SASA gives meaningful functions to SGBs, and also underpins the management of public schools' finances.[13] In the discussion that follows, the roles and responsibilities of SGBs and principals in school financial management are examined.

SASA gives the responsibility of financial management to SGBs and not solely to principals. SGBs have mandatory financial functions in terms of section 20. They are responsible for establishing a school fund, preparing a budget annually, collecting and administering school fees, keeping financial records, appointing an auditor and supplementing the school's resources. Their responsibilities also include administering and controlling the school's property, buildings and grounds, adopting a constitution, permitting the reasonable use of the facilities of the school by the school community for social purposes, and fund raising. The Schools Act makes provision for SGBs to apply for additional functions in terms of section 21, namely, maintaining and improving school property, determining the extra-mural curriculum, the purchasing of textbooks, educational materials or equipment, and the payment for services to the school.[14] Hence, the full control of funds in schools has become the responsibility of the SGB, while provincial departments of education have very little influence on a school's finances.

The core duties and responsibilities as set out in the Personnel Administration Measures (PAM) determined in terms of the EEA require that, amongst others, principals should be held responsible for the professional management of the school: they should give proper instructions and guidelines for timetabling, admission and placement of learners, see to the day-to-day administration and learning at the school, perform departmental responsibilities prescribed by law, and organise all the activities that support teaching and learning.[15] The principal should have various kinds of school accounts and records kept properly to make the best use of funds for the benefit of learners in consultation with the appropriate structures. In the more recent Education Laws Amendment Act,[16] additional roles and responsibilities of the principal have been clearly defined. According to section 16A of SASA principals may not act

12 S 16(1), (3) SASA.
13 S 4 SASA contains the financial duties of the Governing Body such as maintaining a school fund, opening and maintaining a bank account.
14 Naidu *et al* 166; Davies 64.
15 Bisschoff & Mestry *Financial School Management explained* (2009) 59.
16 Act 31 of 2007.

in conflict with any instructions of legislation, policies or any provision of the EEA in their obligations towards the HoD or MEC. It can be argued that there are contradictions in determining the responsibilities of principals and SGBs in both SASA and the EEA.

The following discussion further defines the rights and responsibilities of the principal and the SGB.

2 2 1 Professional Management and Governance

As previously mentioned, SASA stipulates that the principal is responsible for the professional management of the school under the direction of the HoD whereas the overall governance of the school is vested in the SGB, whose role is described as fiduciary. The principal, on the other hand, has the role of supporting and providing assistance to the SGB. This mutual relationship is reinforced in the Education Laws Amendment Act.[17] Although the principal has no executive role in relation to the SGB with regards to financial and property matters, the amendments to the Act prescribe that the principal is responsible for the management of the use of learning support material, and other equipment, as well as the safekeeping of all school records. In no way can it be assumed that the principal is solely responsible for the school's financial management. According to the judge in *Schoonbee v MEC for Education Mpumalanga*,[18] the principal has the duty of facilitating and assisting the SGB in the execution of its statutory functions relating to the financial management of the school.[19] The SGB can delegate some of these functions to the principal and hold them accountable. It is also the SGB that could hold

17 Act 31 of 2007.

18 2009 3 SA 422 (SCA).

19 The MEC alleged that the principal of *Hoërskool* Ermelo had misappropriated and mismanaged the school funds. A forensic audit found that the principal (with the knowledge of the SGB) had in fact used school funds to pay for his domestic, entertainment expenses and overseas travel. The MEC based the argument that the principal was the accounting officer of the school and was therefore accountable to the Department of Education. The following were some deliberations in this case:
The employer is not entitled to hold the principal liable for the SGB's obligations. As mentioned previously, the principal is responsible for the professional management of the school, and governance is vested in the SGB. The judge indicated that the principal could not be accused of financial irregularities, because the responsibility for the school's financial management rests with the SGB: "The principal is an educator who manages the school professionally ... Managing the finances is something that you cannot expect from him (the principal). The contention that the principal should be held accountable for the finances is an absurd proposition".
(a)It was established that there are confusing roles played by the principal in his capacity as SGB member and as employee in terms of the Employment of Educators Act (Ch A s 4 PAM). The employer is entitled to hold the employee liable and accountable for the professional development of the school, but is not entitled to prescribe to employees, and hold them liable for statutory functions vested in the SGB relating to assets, liabilities, property and the financial management of the school.

the principal accountable for financial and property matters, which are not specifically entrusted to the principal by SASA.

2 3 The Education Laws Amendment Act

The Education Laws Amendment Act[20] amends section 16 of SASA to clearly define the additional functions and responsibilities of principals in public schools. These include, amongst others, that the principal represents the HoD in the SGB when acting in an official capacity.[21] The principal must assist the Governing Body in the performance of its functions and responsibilities, but such assistance, or participation, may not be in conflict with any instruction of the HoD, legislation or policy, obligation that he/she has towards the HoD, the Member of the Executive Council (MEC) or the Minister or provision of the EEM and the PAM.[22]

The Education Laws Amendment Act[23] stipulates further that the principal should:

> (a) Prepare and submit to the HoD an annual report in respect of:
> (i) the academic performance of that school in relation to minimum outcomes and standards and procedures for assessment determined by the Minister of Education; and
> (ii) the effective use of available resources.
> (b) undertake the professional management of a public school and carry out the following duties, which include the implementation of all educational programmes and curriculum activities, the management of the use of learning support material and other equipment, the safekeeping of all school records, the implementation of policy and legislation, and the performance of functions delegated to him/her by the HoD. In addition, the principal should attend and participate in all SGB meetings, inform the SGB about policy and legislation, and provide accurate information to the HoD when requested to do so.
> (c) assist the SGB in the performance of its functions and responsibilities, but that such assistance must not be in conflict with instructions of the HoD, legislation or policy, an obligation towards the HoD or the MEC, or a provision of the EEA, and the PAM.

These amendments essentially imply that the principal is accountable to the HoD for ensuring the effective use of available resources, managing the use of teaching and learning support materials, safekeeping of all school records, informing the SGB on policy and legislation and implementing it accordingly, providing accurate information when requested by the HoD and assisting the SGB in the performance of its functions and responsibilities.

To ensure that school finances are managed effectively and efficiently, the principal and SGB should ensure the existence, and the effective execution, of a sound, water tight financial policy and also management

20 Act 31 of 2007.
21 The Education Laws Amendment Act 31 of 2007 inserted s 16A (1)(a) SASA.
22 S 16(3) SASA.
23 Act 31 of 2007.

procedures.[24] Regular checks and counter-checks are necessary to avoid the mismanagement of funds by any person or groups of persons. In practice, most SGB parent members have had problems in fulfilling their obligations of governance, which include their personal interest, time devoted to their own work/business commitments, or they simply have very little expertise in fulfilling the financial functions of the school. In this instance, the principal performs a consultative role and will be called upon to advise the SGB on financial matters.

One can conclude that the SGB takes full responsibility for the management of school finances. The principal who plays a dual role, one as a member of the SGB and the other, as an employee of the provincial department of education, cannot be solely held accountable for the efficient and effective management of school funds. However, it should be noted that the department places the principal in a difficult position, because, in terms of new legislation, the principal is expected to obey two authorities: the department and the SGB.[25] The principal will either give effect to the department's wishes out of fear for a disciplinary hearing should he/she not obey the department, which goes against his/her obligation in terms of section 16(2), or the principal will choose to act in accordance with section 16(2) and place the interests of the school before the interests of the department, and disregard his/her duty as a departmental employee.[26] This is likely to impact on the relationship between the principal and the employer, and/or the principal and the SGB, causing an infringement of the principal's rights in terms of section 23(1) of the Constitution.

In the next section the implementation of the NNSSF will be examined to determine whether the State and schools have in fact achieved social justice and equity.

3 The National Norms and Standards for School Funding

Since 1996 the government's educational reforms have focused on access, equity, redress, quality, efficiency and democracy. The State has undoubtedly made great strides in addressing equity and past imbalances in education and this is demonstrated in many education policies, such as the post-provisioning norms, rationalisation and redeployment of teachers and non-teaching staff, management of school

24 Mestry "Financial accountability: the principal or the school governing body?" 2004 *SA J of Ed* 130.
25 S 16A SASA.
26 Van der Merwe "The Constitutionality of section 16A of the South African Schools Act" Paper delivered at the SAELA Conference in Durban Sept 2011.

fees, the functioning of SGBs and the NNSSF, as well as acceptable interventions.[27]

Sections 34 and 35 of SASA mandate the State to redress historical imbalances and achieve equity in attempts to restructure the South African education landscape. In fact, equity and redressing the past imbalances accelerates the realisation of social justice in education.[28] Section 34 of SASA prescribes that the State should fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision. Section 35 of SASA stipulates how the State should carry out the responsibility described in section 34.[29]

Two salient points with reference to sections 34 and 35 of SASA require further analysis:[30]

(1) Section 35(2)(b) provides for the creation of quintiles for individual learners. To date, this section has not been achieved. Instead the NNSSF provides that the national quintile for learners is always the same as the national quintile for the public school in which the learner is enrolled.

(2) The criteria used to allocate schools to a given quintile are filled with inconsistencies in a sense that income, wealth and level of education are privileged information. Also, in many schools learners do not live in the immediate vicinity of the school but commute daily to school from outside the feeder area. There are many cases where schools have been allocated to the wrong quintile and learners have consequently been disadvantaged because the incorrect funding formula was used to calculate their state subsidy.

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27 Mestry & Dzvimbo "Contestations of educational transformation: A critical analysis of how the norms and standards for funding are intended to achieve social justice and equity" 2011 *J of Ed Studies*.

28 Motala & Pampallis "Educational Law and Policy in Post apartheid South Africa" 78 in *The State, Education and Equity in Post-Apartheid South Africa: The Impact of state policies* (eds Motala & Pampallis).

29 S 35 SASA:

(1) Subject to the Constitution and this Act, the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance.

(2) The norms and standards for school funding contemplated in subsection (1) must –

(a) Set out criteria for the distribution of state funding to all public schools in a fair and equitable manner;

(b) Provide for a system in terms of which learners at all public schools can be placed in quintiles, referred to as national quintiles for learners according to financial means;

(c) Provide for a system in terms of which all public schools in the Republic can be placed into quintiles referred to as national quintiles for public schools, according to the distribution of learners in the national quintiles for learners; and

(d) Determine the procedure in terms of which the Member of the Executive Council can apply the criteria contemplated in paragraph (a).

30 Van Rooyen 36.

It can further be argued that inequalities in resource allocation from the State have been removed, but inequalities still persist for a number of reasons, including the inability of parents to pay school fees, poor learners' inaccessibility to schools in affluent areas, high dropout rates, the unavailability of qualified teachers in some schools, and the unfavourable learner-teacher ratios especially in Black schools and public schools, in general.[31] Curriculum changes such as the Outcome-based Education, Revised National Curriculum Statement and the National Curriculum Statement has also been a major stumbling block to educational reform in the system. Despite substantial government interventions to the education system, social justice and equity have not been served adequately by the implementation of the NNSSF, because inequalities based on race, class and gender persist not only in the education system, but in South African society as a whole.[32]

It is ironic, given the emphasis on addressing the past and equity by the government, that the funding provisions of SASA appeared to have worked thus far to the advantage of public schools, under the patronage of the middle-class and wealthy parents of all racial groups.[33] Vigorous fund-raising by parental bodies, including commercial sponsorship and fee income, have enabled many such schools to add to their facilities, equipment and learning resources, and expand their range of extra-mural activities. Poor parents, on the other hand, especially in the former homeland areas, have contributed a disproportionate share of their incomes over many decades to the building, upkeep and improvement of schools, through school fees and other contributions, including physical labour.[34] A number of schools in poor rural and urban working-class communities suffer the legacy of large classes, deplorable physical conditions and the absence of learning resources, despite a major Reconstruction and Development Programme (RDP), National School Building Programme, and many other projects paid directly from provincial budgets.[35]

To adequately address the problem under investigation, I will document key policy changes over the last five years, so as to provide a historical policy context for the problem under investigation. It is important to tender an explanation of how issues of social justice and equity are implicated in the contestations and reproductions of inequalities in South Africa, which are now based on class and race.

31 Motala "Education resourcing in post-apartheid South Africa: The impact of finance equity reforms in public schooling" 2006 *Perspectives in Ed* 80.
32 See note 24.
33 Chisholm 22.
34 Mestry 130.
35 Chisholm 22.

3 1 The Implementation of the NNSSF in Public Schools: Contestations and Contradictions

As discussed above, the pro-poor funding policy in provincial education is embedded in the NNSSF. These norms and standards provide a statutory basis for school funding in that schools are now classified into wealth quintiles and subsidised accordingly (that is, schools serving poorer communities must receive more funding than schools serving better-off communities). Current policy determines that a ratio of 7:1 must apply to resource allocation funds paid to schools in the two outer quintiles, where quintile 1 represents poor schools and quintile 5, affluent schools.

While both the NNSSF for non-personnel expenditure and the post-provisioning model contain aspects of socio-economic targeting, actual non-personnel expenditure constitutes only 8-10% of school budgets. This means that only a small portion of basic education of resource allocation by the State is allocated to addressing the past. Except for the 2% pro-poor weighting, the balance of State spending on schools directed towards the payment of personnel continues to favour historically-advantaged schools for two reasons: The application of the post-provisioning norm and restrictions placed on SGBs to spend State subsidies.[36] The teacher/learner ratio favours historically advantaged schools, where different technical subjects are taught and the weighting for these subjects are much higher than that of basic subjects taught in mainly historically disadvantaged schools. Secondly, the State's resource allocation can only be utilised for purchasing learning and teaching support materials, paying for services and school maintenance as prescribed by the Provincial Department of Education. Schools that have a dire need for additional resources (such as employing more teachers) are unable to access funds for such purposes. However, schools deriving additional income from school fees have the autonomy to spend additional funds solicited through fundraising projects and school fees on their needs and this includes hiring additional teachers to those allocated by the provincial department of education. Such a critique is essential to our understanding of the subjective and objective forces of social and cultural reproduction in our education system.

Up until 2006, the national school funding policy did not set out a minimum per learner funding levels. With varying provincial financial capacity, it was certain that the funding of poor learners across provinces would not be the same.[37] The contradiction became obvious when it was found that learners who were classified as non-poor in one province were receiving a per learner allocation greater than the poorest learners in another province.[38] This constraint restricted the ability of most provincial education departments to effect a meaningful distribution of

36 Porteus in (ed Veriava) 4.
37 Wildeman 4.
38 *Ibid*.

redress funds to the majority of poor learners. The average per learner expenditure distributed by the NNSSF mechanism was R184 in Gauteng and R275 in the Northern Cape, while in KwaZulu-Natal the amount was only R35.[39] Poverty targeting takes as its point of departure the assumption that certain groups of learners need more resources than others, as a result of economic advantage. Based on these statistics, poor schools and learners are persistently disadvantaged, and will take much longer to overcome the barriers of the past, thus prolonging the cycle of poor quality education.[40]

It has also been established that many poor and rural schools are still found at the lowest end of resource provisioning in spite of positive changes made in State funding. Although each provincial department of education was provided a monetary allocation from National Treasury, most of these departments had severely underspent the allocated funds, and this had serious implications for quality education provision as reflected in the poor Senior Certificate Examination results. One of the reasons cited for this phenomenon could be due to the complicated practice of the tender procedures set out by the State.[41]

In my view, funding policies that are intended to redress past inequalities actually end up being sources of a serious process of reproducing inequalities that is based on class, race and the physical location of learners. Because of the contestations in the process of developing these inequalities, the process of social reproduction engendered by funding policies becomes "a unity of social contradictions, unity of change and stability, unity of continuity and discontinuity".[42] As such, social justice and equity in education becomes a farce as inequalities engendered by funding policies continue.

It is one thing to rank schools according to quintiles and allocate funds equitably; it is another thing entirely to ensure that the money is spent on educational matters. Schools and SGBs have an unequal capacity to spend money, and, even where additional funds are allocated to poor schools, many SGBs and principals are unable to use them efficiently.[43] Moreover, a poverty ranking system might itself exacerbate inequality, as the government has clearly recognised that 60% of the population of a province is poor, which means that distinctions between levels of poverty in the bottom three quintiles are bound to be unjust.[44] It should

39 Schindler "Education in South Africa: A statistical overview" 1997 *Education Africa Forum*; Bot "A statistical overview of education in South Africa" 2000 *Education Africa Forum*; Maile "Equal access to education: Who can afford?" 2004 *Ed as Change* 57; Wildeman *Redistribution of school funding: Budget Brief no. 48* (2000) 3.

40 Wildeman *School funding norms 2001: Are more learners benefitting?* (2001) 10; Wildeman *Reviewing eight years of the implementation of the School Funding Norms, 2000-2008* (2008) 4.

41 Mestry & Bisschoff 49.

42 Morrow & Torres 8.

43 Department of Education 2003.

44 National Treasury 2003 in OECD 2008 103.

also be noted that there are schools that perform satisfactorily despite the fact that they suffer deplorable physical conditions, that learners come from poor households, and that teachers have average qualifications.[45]

The NNSSF added another dimension to the problem of addressing the past imbalances. By targeting only the poorest schools, those schools that are located in the middle of the resource targeting table, the so-called "middle schools", became neglected and impoverished. The implementation of the funding policy meant that, "these schools qualified for less State funding and in the absence of strong socio-economic parent communities, they faced the danger of real financial deterioration".[46] These "middle schools", as schools that do not exist in abject poverty, but which nevertheless lack stable income from school fees, became financially vulnerable because of insufficient funds, and were as a result unable to maintain themselves and provide adequate services to learners. In spite of the real increases in the NNSSF allocations, and the fact that more poor learners benefited from redistribution, the problem of middle schools persists.[47] Thus one can see the subtle process in which, as Bourdieu and Passeron[48] note, that an educational system has specific structures that correspond to both their "essential function" of inclusion, and their "external function" with respect to the reproduction of inequalities based on the socio-economic status of schools, districts and eventually learners.

3 2 School Fee Exemptions

In pursuit of equity and easy access to public schooling a system of exempting parents from paying school (user) fees has been instituted. In order to redress past imbalances in education, the Minister of Education amended school fee regulations.[49] The Education Laws Amendment Act,[50] the new NNSSF, and the new regulations relating to the Exemption of Parents from Payment of School Fees have been amended to give poor parents relief in the cost of their children's education.[51] However, many historically advantaged schools have not implemented these regulations and poor parents still bear the brunt of paying exorbitant school fees. Roithmayr[52] explains how the school exemption policy hinders access to education. Many families who are eligible to apply do not do so because the process is time-consuming, while it is also likely that the cost of dignity in terms of how parents and learners may be treated at school is regarded as too high. The policy fails to address other costs, such as

45 Department of Education 2003 64.
46 Wildeman 8.
47 See note 23.
48 Bourdieu & Passeron.
49 Reid "Critics say school fees in South Africa widen inequalities" *Education Week* 2002-11-06.
50 24 of 2005.
51 General Notice 28426.
52 Roithmayr "Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education" 2003 *SAJHR* 400.

transport, uniforms and textbooks, and this cost burden can force poor parents to keep their children at home. Proponents of a school fee policy, while agreeing that school fees act as a major barrier to education, do concede that fees coupled with other access costs can have serious implications for learners' access to education.

The in-built principle in the State's funding policy has been that the higher the fees set by a school, the greater the number of parents who will be exempted – thus deterring schools from increasing their fees.[53] Based on an investigation of school fee exemption patterns, only 2,5% of families with children in primary schools and 4,1% of families with children in former White schools receive fee exemptions. At secondary school level, only 3,7% of families and 5,7% at former White schools receive exemptions in all provinces.[54] The Plan of Action states that affluent public schools (quintile 5) will be compensated if they enrol, and grant exemptions to, poor learners.[55] The purpose of the school allocations flowing to quintile 5 (the wealthier public schools) is to make it possible and fair for these schools to enrol learners to a level where 25% of them would be granted full exemptions from school fees. This has not been followed through in any fundamental way in the Education Laws Amendment Bill and it appears to be the primary reason for the non-enforcement of the policy on the part of many schools. [56] Also, there are no formal requirements that schools determine their budgets for the year by taking into account the number of exemptions likely to be granted, consequently inequalities exist.

3 3 No Fee Schools

In 2006 a milestone was reached when the state exempted parents in many poor schools from paying school fees. Following the publication of the Plan of Action, an important immediate step was the promulgation of the Education Laws Amendment Act.[57] This legislation provided the legal mandate for the Minister of Education to determine quintile norms and minimum standards for the funding of public schools. Quintile 1 and 2 schools (representing 40% of schools in the country) will not be allowed to charge school fees. In almost all provinces, the no-fee school concept has been extended to quintile 3 schools. According to these regulations, the Department of Education is obliged to annually publish a target table, which reflects the target per learner allocation for each of the five quintiles. No-fee schools receive a per learner allocation that is greater than or equal to the no fee threshold for that year in question, and they also receive compensatory funding in areas such as school safety, nutrition, classroom construction and Grade R expansion.[58] The criterion

53 See note 36.
54 Fiske & Ladd in (2004) (ed Chisholm) 72-74.
55 See note 36.
56 Veriava 10.
57 See note 40.
58 Wildeman 6.

is aimed at ensuring that a critical level of public funding is reached before private funding in the form of school fees is removed.[59]

The introduction of no fee schools posed serious challenges for some of the poorer schools. It would appear that the criteria used by provincial departments of education to rank schools into quintiles are not fairly and consistently applied. For example, schools within a kilometre from each other and having similar physical resources are ranked differently. Furthermore, the provincial departments of education deposit the resource allocation and the day-to-day operating costs into the schools' banking accounts quite late in the year thus leaving the schools with serious liquidity problems. In terms of executing the budget, the schools are forced to fend for themselves during the first term.

Furthermore, public schools are scarce and face severe overcrowding in certain areas. Parents not residing in the feeder areas where no fee schools are located will conveniently send their children to no fee schools to avoid paying user fees. By declaring only certain schools free, many poor parents are placed in a situation where they cannot access these free schools and are forced to enrol their children at middle-of-the-range schools where they are required to pay user fees. The financial implication is that provinces in close proximity might have to deal with migration of poor learners from a poor province to a relatively rich province. The provincial departments may not necessarily have factored such movement into budgetary allocations, which are based on the number of learners in that province.[60]

On a more positive note, the no-fee school policy has improved drop-out rates of public schooling nationally.[61]

3 4 The Migration of Learners and School Choice

The migration of learners from schools in the townships and suburbs is complex. There is a tendency for learners to migrate from schools in the townships to schools situated in suburbs and inner city, which is motivated by the perceived poor quality education provided by township schools. The consequences of learners travelling daily from townships to attend schools in other areas have serious cost implications for parents. In addition to compensating for steep travelling costs, parents are subjected to paying exorbitant school fees. The same argument applies for learners migrating from suburbs to private schools where fees are sky high or moving to historically White schools that inhibit poorer children from gaining access to these schools based on the school's admission policy and/or language policy.[62] Many township schools have been

59 See note 40.
60 Wildeman 6.
61 Pandor "Significant school dropout rate after grade nine" 2008.
62 *Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province* [2011] ZAGPJHC 182 (2011-12-07); *Hoërskool Ermelo v The Head of Department of Education, Mpumalanga* [2009] ZASCA 22 (2009-03-27).

forced to shut down, or to combine with other schools, in order to deal with low learner enrolment and teacher redeployment. So it would appear that parents paying school fees is not the real problem for learner migration from public schools to private schools or from township schools to suburb or inner city schools.

The complexities of the freedom to exercise school choice, or the liberty principle in education finance, have serious implications for parents who are subjected to high school fee structures and are discouraged from applying for a fee exemption. Parents who want their children to receive "quality" education have no option but to abide by the school's fee payments, otherwise their children will not be allowed to continue with their schooling in the more affluent schools. To maintain a good educational standard, these schools have to raise their school fees because their State subsidies are minimal. However, parents have, in theory, the freedom of choice within the constraints of private resources and school-level policies; in fact, government policies create markets for education within which choice behaviour is exercised.[63] In the process, inequalities based on class are perpetuated as wealthier parents buy a better education for their children. Consequently, though remarkable positive changes have been made, many poor and rural schools still find themselves at the lowest end of infrastructure provisioning with a continuation of gross inequalities in educational outcomes.[64]

4 Conclusion

With reference to legislation such as SASA, the EEA, Education Laws Amendment Act[65] and the PFMA, and an important court case, *Schoonbee v MEC for Education* one can conclude that the principal has legal rights in managing school finances.[66] The new Education Laws Amendment Act[67] gives a new dimension to the principal's accountability in financial management.[68] The principal is required to submit an annual report to the HoD, which includes, amongst others, the efficient management of learning support materials and other resources. The principal is accountable to the HoD for the professional management of the school, and also to the SGB for specific delegated financial functions. The principal has rights accrued from the Bill of Rights, such as the right to dignity, privacy and just administrative action. However, in the final analysis, the SGB (including the principal) is accountable for the effective and efficient management of the school's finances.

63 Woolman & Fleisch "South Africa's education legislation, quasi markets and *de facto* school choice" (2006).
64 Mestry & Dzvimbo "Contestations of educational transformation: A critical analysis of how the norms and standards for funding are intended to achieve social justice and equity" *J of Ed Studies* 2011.
65 15 of 2011.
66 Unreported case No. 33750/01(T).
67 15 of 2011.
68 See note 4.

Although the South African government has taken significant strides in tackling equity, redress and social justice in education, challenges in the implementation of policies that have affected the process of bringing about fundamental changes and transformation in education still exist. It is evident that inequalities based on race, gender, class, and the socio-economic status of parents in particular, continues to be reproduced in a system that is only nominally egalitarian and democratic. Although progress has been made towards a fair distribution of public funds through the NNSSF significant disparities persist, which is attributed largely to the social legacy of apartheid, lack of SGBs' financial management knowledge and skills, and limited State funding.

Educational law in democracy - *Who guards the guardians? Freedom of expression and whistle-blowers - A personal narrative*

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OPSOMMING

Wie Bewaak die Bewaarders? Vryheid van Uitdrukking en Verklikkers – 'n Persoonlike Verhaal

Die bespreking van die opvoeder se reg op vryheid van uitdrukking in hierdie artikel spruit voort uit 'n departementele tugverhoor wat werklik plaasgevind het. Die opvoeder het, aldus die klagstaat, met die pers gepraat oor 'n voorval wat by die skool plaasgevind het. Die Departement beweer dat die opvoeder nie met die pers mag praat sonder die toestemming van die Departement nie. Hy sou dan ook nie sodanige toestemming gehad het nie. Tydens die verhoor het die skrywer as vakbondverteenwoordiger namens die opvoeder gepoog om die voorsittende beampte te oortuig dat die geldigheid van die klagtes oorweeg moet word in die lig van die opvoeder se reg op vryheid van spraak, welke reg nie willekeurig deur amptenare van die Departement beperk kan word nie. Dit sou beteken dat dit geldige aanklagtes moet wees. Hierdie verweer was nie suksesvol nie. Die aandag van die voorsittende beampte is ook gevestig op nuwe kinderwetgewing wat die beskerming van kinders vereis en die aanmelding van bepaalde oortredings verpligtend maak vir opvoeders. Die voorsittende beampte kon dit aanvaar, maar alleen aanmelding aan die polisie maar nie aan die pers nie. 'n Laaste poging is aangewend deur die voorsittende beampte se aandag te vestig op die voorskrifte van die Wet op Beskermde Bekendmakings 26 van 2000, wat die werkgewer gebied om, onder omstandighede waar aan die vereistes van die Wet voldoen is, 'n werknemer wat so 'n bekendmaking doen, te beskerm en verder die werkgewer verbied om die werknemer aan beroepsnadeel te onderwerp, wat in hierdie geval 'n skorsing en tugverhoor behels het. Ook hierdie poging was onsuksesvol. In die loop van die bespreking word ook melding gemaak van die basiese vereistes vir 'n billike verhoor wat verontagsaam is en wat buitendien daartoe behoort te lei dat die verrigtinge op appèl ter syde gestel behoort te word.

1 Introduction

In the following discussion, I deal with the powers and duties of employers of educators when dealing with misconduct and disciplining of educators. The discussion not only sets out to deal with the narrow technical parameters of the disciplinary process, but also seeks to show that departmental officials need to be aware of the broader set of Constitutional rights and duties of educators that also impacts on the conduct of both the employer and the employee. The narrative will deal

with the proceedings of an actual disciplinary hearing that took place. The article proposes to show what the legal requirements of a fair hearing are and to what extent these were not complied with during the hearing, resulting in a failure of justice. The narrative will follow and deal with the hearing and the procedural and legal issues, as well as many irregularities, as they unfold.

1 1 Charges of Misconduct Against an Educator Speaking to the Press

In the real life example that will be discussed below, the educator in question, a deputy principal of a public school (a public servant occupying a managerial position at the school), was charged with three counts of misconduct. It is alleged in the preamble to the charges that he is charged with misconduct for bringing the department into disrepute as set out in the three charges. Two of the charges allege that he contravened section 18(1)(f) of the Employment of Educators Act 76 of 1998, and the third charge alleges that he contravened section 18(1)(i) of the Employment of Educators Act[1] (the EEA).

Charges 1 and 2 allege that he unjustifiably prejudiced the administration, discipline or efficiency of the department of Education, an office of the state or a school, when he contacted the media and disclosed an incident involving a male learner at the School, which was published in two newspapers, without the consent or permission of the employer.

Charge 3 alleges that he failed to carry out a lawful order or routine instruction without just or reasonable cause when he contacted the local newspaper and disclosed an incident involving a male learner at the school without the consent or permission of the employer. The actual reason for using both terms "consent" and "permission" was never dealt with by the department during the hearing. This is the actual terminology used in the charge and appears to refer to some or other policy of the department which will be referred to and discussed in more detail later on.

When the educator received the charges, he requested his union to represent him at the hearing. This I undertook and that is how the particulars of the case came into my possession.

At the hearing, the educator testified that he had raised the issues that formed the basis of the charges against him at the school before, and that they were not dealt with. He testified that the principal was even present at the latest incident. He reported the incident to the Child Protection Unit (CPU) which referred him to the South African Police Service (SAPS). In view of his previous experiences of the lack of action, he went to the media. All of this was accepted by the departmental representative and

1 76 of 1998.

even by the presiding officer who, in his findings, ventured the opinion that the educator should have returned to the CPU to establish whether or not they were actually doing their work.

The evidence given by the educator on his own behalf, indicating why he acted in the manner he did, was not seriously challenged by the department, except for harping on the consent (or permission) issue end getting him to repeat that he knew about the policy. He was also once again admonished because he had spoken to the press and told that he should have heeded the warning given to him after the first incident not to do so again.

At the conclusion of the hearing, the educator was found guilty by the presiding officer on all three charges. The sanction that was imposed was that he be demoted from the rank of deputy principal to the rank of a post level 1 educator. He was also to be removed from the School Management Team (SMT) – a structure that normally comprises the senior staff of a school. The written notice containing the finding and the sanction informed him of his right to appeal against the finding and the sanction within five working days after receiving the notice. This was duly done within the stipulated time. The outcome of the appeal is still being awaited.

1 2 Misconduct

The EEA does not deal with the concept of misconduct under the definitions listed in section 1 of the Act. Sections 17 and 18 of the EEA, however, contain a list of acts and omissions which constitute "misconduct" for the purposes of the EEA. Also, section 18(1) refers to misconduct as "… a breakdown in the employment relationship and [that] an educator commits misconduct if he or she commits" any of a long list of possible acts of misconduct. It is interesting to note that section 17(1) which deals with *serious misconduct* leading to dismissal, does not contain the same wording as section 18(1) with regard to the breakdown of the employment relationship.

When an educator is charged with misconduct, the EEA requires the employer to give written notice of the proceedings and the notice must contain a description of the allegations of misconduct and the main evidence on which the employer will rely.[2] Item 3(1) of Schedule 2 to the EEA incorporates the Code of Good Practice of the Labour Relations Act[3] (the LRA) into the EEA as far as it relates to discipline and it constitutes part of the Disciplinary Code and Procedures contained in Schedule 2 to the EEA. The conduct of an educator which may warrant disciplinary action is listed in sections 17 and 18 of the EEA.

The incorporation of the Code of Good Practice of the LRA into the EEA as far as it relates to discipline, has, amongst other things, important

2 It 5(2) Sc 2 EEA.
3 66 of 1995.

implications with regard to the charges of misconduct as well as the nature of the disciplinary proceedings.

In the case of disciplinary proceedings, the civil onus for the discharging of the burden of proof applies, and that is proof on a balance of probabilities – that is to say that the educator has committed any of the acts of misconduct contained in the charge sheet. This is trite, as is the fact that the employer, in this case a provincial department of education, bears that onus. This is the conventional onus of proof. However, it also implies that whatever it is that the employer alleges the educator to have done, all the essentials of such charges should be set out in the charge and must then be proved on a balance of probabilities in the course of a proper and fair hearing. These essentials also lie at the heart of the right to fair labour practices which is a fundamental constitutional right.

1 3 The Bill of Rights: The Right to Fair Labour Practices

In terms of section 23(1) of the Constitution of the Republic of South Africa, 1996, everyone has the right to fair labour practices.

To give effect to these rights, the LRA was enacted, and one of the purposes of the LRA is to give effect to and to regulate the fundamental rights conferred by section 27 (the LRA still refers to section 27 as it was in the so-called interim Constitution of 1993) of the Constitution, and that is the right to fair labour practices.

When dealing with the concept of "fair labour practices", or rather with the concept of "unfair labour practices", we find this concept of "unfair labour practice" defined in section 186(2) of the LRA:

> ... meaning any unfair act or omission that arises between an employer and an employee involving –
> (a) …
> (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; ...

At the heart of a charge of misconduct lie the requirements set out in paragraph 7 of Schedule 8 to the LRA, the Code of Good Practice: Dismissal, referred to above, namely:

> Any person who is determining whether a *dismissal* for misconduct is unfair should consider:
> (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace
> (b) if a rule or standard was contravened, whether or not:
> (i) the rule was a valid or reasonable rule or standard;
> (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
> (iii) the rule or standard has been consistently applied by the employer;
> (iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard.

As set out above, The Code of Good Practice: Dismissal, constitutes part of the Disciplinary Code and Procedures for Educators in the Schedule to the EEA. This latter Code and Procedures require written notice to be given of the hearing, which includes a description of the allegations of misconduct and the main evidence on which the employer will rely. Most of these requirements were not complied with by the employer before the hearing.

1 4 A Valid or a Reasonable Rule or Standard

It is implicit in these instructions in the Code and Procedures laid down in the EEA, that the allegations of misconduct must be based on a valid or a reasonable rule or standard as set out in paragraph 7 of Schedule 8 to the LRA. It is also implicit in these instructions that the legal basis underlying the power of the employer to issue instructions requiring the consent or permission of the employer to speak to the press (in the case under discussion) should be set out in these charges. The charges referred to above, do not contain any such information. The documents containing these powers and instructions, were at no stage disclosed or provided at the hearing. These are issues that can be dealt with *in limine* at the start of the disciplinary proceedings and should be dealt with by the presiding officer before allowing the hearing to continue. These issues were raised by the union representative at the start of the proceedings.

It was argued by the union on behalf of the educator, that:

(a) the operative part of charges 1, 2 and 3, requiring the consent or permission of the employer to contact the media and to disclose an incident at the school, inasmuch (as far as it could be established at that time) as it is based on an alleged policy dealing with authority for officials to speak to the media, make comments or issue written statements, does not constitute a valid rule or standard which can form the basis of a charge of misconduct. In any event this document or policy was not produced and proven at the hearing.

(b) The principal of the school testified at the hearing and said that the staff was told at a meeting about such policy but that she had not even seen such a policy or could not produce such a document at the hearing. She told her staff about the prohibition and repeated it after the first report appeared in the newspaper. The department, however, did not produce any such document at the hearing either. In his judgement the presiding officer dealt with this Policy as if he could take judicial notice thereof – which he in fact seemed to do. The evidence given by the educator on his own behalf indicating why he acted in the manner he did, was not seriously challenged by the departmental representative, except for getting him to repeat that he knew about the policy and being once again admonished that he should not have spoken to the press and that he should have heeded the warning given to him not to do so again.

1 5 The Bill of Rights, Education, Democracy and Values

This special edition of *De Jure* deals with Education Law in a Democracy. It will, therefore, be necessary to examine how the introduction of a new and democratic Constitution has enabled important fundamental constitutional protections to become part of the country's legal fabric.

Section 1 of the Constitution proclaims the Republic of South Africa as one sovereign democratic state, founded on certain values. As far as the Bill of Rights is concerned, section 7 of the Constitution provides that:

> (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

In terms of section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Without any doubt, therefore, these provisions cover the department of Education, its officials and employees as well as the laws introduced above.

How then, should the State and its officials go about their business in this democratic constitutional context?

Albertyn and Davis[4] examine how the ascendancy of a liberal democratic constitution has enabled important democratic protections and transformative judgements. The authors point out that Dugard realised this in 1977 when he noted that a Bill of Rights would enable a post-apartheid government to restore respect for the law and legal institutions in circumstances where these had been used as instruments of oppression.[5] This, we would argue and add, applies in equal measure to employers and employees in education.

Albertyn and Davis emphasise[6] the central role of the Bill of Rights in a democracy and state that the establishment of a constitutional democracy placed the Bill of Rights at the centre of legal and political power in South Africa. According to s 7(1) of the Constitution, it is the "cornerstone of democracy" in South Africa, enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. Section 39(1)(a) requires a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights, and section 39(2) provides further that every court, tribunal or forum must

4 Albertyn & Davis "Legal realism, transformation and the legacy of Dugard" 2010 *SAJHR* 188.
5 2010 *SAJHR* 199.
6 2010 *SAJHR* 199, 200.

promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law.[7]

The law that we have in mind here for the purpose of this article, is labour and education legislation and the tribunal or forum that we would have in mind, would be the tribunal conducting the disciplinary hearing of an educator as an employee.

De Vos[8] uses the description of the Constitutional Court of South Africa's past to express the grand narrative of South Africa's history:

> As the struggle of almost all disenfranchised and disadvantaged South Africans against the apartheid system intensified, the minority government, backed by powerful security apparatus, became more repressive and authoritarian. In the process, 'the legitimacy of law itself was deeply wounded' as the conflict 'traumatised the entire nation'. Our history is therefore one of repression not freedom, oligarchy not democracy, apartheid and prejudice, not equality, clandestine not open government.[9]

Sadly, in the workplace this repression continues. However, when the court is required to rule on legally protected actions or even fundamental rights, it has, in view of the history of our country, first of all to set out clearly what the case is not about. For example, in *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa*[10] a case dealing with a "whistle-blower"[11] in the employ of the city council Wallis AJA explained that:

> [i]t is perhaps as well at the outset to make it clear what this case is not about. It is not about the disciplinary proceedings and whether the sending of the letters in fact constituted misconduct or whether Mr Weyers received a fair hearing. Nor is the case about the application of the Employment Equity Act in the Tshwane Metropolitan Municipality. Nor does it require any view to be expressed on the wisdom of the approach adopted by either of the main protagonists, Mr Weyers and Mr Mahlangu, to the appointment of system operators and other staff in the PSC centre. Quite plainly they approached that issue from different perspectives and senses of priority. Whilst one might hope that these difficult issues in our society would always be resolved by mature discussion and mutual understanding, that did not occur in this instance and it is not for this court to determine the rights and wrongs of the situation that arose. Our only task is to determine whether the sending of the letter to the Engineering Council and the department of Labour was protected by statute. It is to that question that I now turn.[12]

7 *Ibid.*
8 De Vos "A bridge too far? History as context in the interpretation of the South African Constitution" 2001 *SAJHR* 1.
9 2001 *SAJHR* 13.
10 2010 2 SA 333 (SCA) 347.
11 We will return to "whistle-blowers" again later and discuss the issue in the context of the accused educator talking to the press – conduct which formed the core of the charges against him at the disciplinary hearing.
12 *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* 2010 2 SA 333 (SCA) 347.

Along a different route, De Vos is also bearing down on this point:

> The Court has used this grand narrative in the interpretation of the nature and scope of many of the rights contained in the Bill of Rights, including the right to equality and non-discrimination, the right to dignity, the right to privacy, the right of access to information, the right to freedom of religion and conscience, the right of access to court, the right of access to health care, and the right of access to housing ... and of course the right to freedom of expression and also for example, the protection of 'whistle-blowers'.[13]

The protection of whistle-blowers is covered by the provisions of the Protected Disclosures Act[14] (the PDA).

2 Democracy and Freedom of Expression

Albertyn and Klaaren[15] make the point that the implications of yoking together rights and regulation are by no means confined to the more material realm of traditional political economy. According to Albertyn and Klaaren, struggles to secure the civil and political rights of individuals who contest emerging global regulatory regimes reshape those regimes and infuse the traditional regulatory questions of systemic efficiency and equity with new perspectives. From another direction, they argue, the technocratic minutiae that loom large when fleshing out the concrete dimensions of rights, destroy the very significance of some of the rights – cultural and spiritual in particular – they aim to protect.

Simply put, in relation to the position of the deputy principal in the case under discussion in this article, he fell foul of bureaucratic regulations (that is, the prohibition of speaking to the press – a fact that was not proved in evidence), that took no cognisance of his right to freedom of expression and his right and duty to make a protected disclosure in terms of current legislation, namely the PDA.

As Albertyn and Klaaren continue their discussion of rights and regulation, the discussion eventually reaches the issue of access to information and they make the point that, in this regard, the culture attached to a regulatory practice can more easily fit with shifting and reigning political agendas (such as have been evident in South Africa over the past ten years) than can the cultures attached to rights. The initial purchase of the rights aspect of access to information, they say, therefore appears likely to fall behind, in part because the rights aspect (at least for this civil/political right) seems dependent on the political climate. This, they say, shows in sharp relief the constructed character of this right of access to information, even if South Africa over the past ten years has

13 2001 *SAJHR* 13.
14 26 of 2000.
15 Albertyn & Klaaren "Introduction: Special Focus on 'Rights and Regulation'" 2008 *SAJHR* 530.

provided a conducive and facilitative environment for the construction of rights.[16]

Within the context of our discussion of rights and regulation of rights we can now turn our attention to the regulation of political activity in the public sector and even the exercise of fundamental rights, or stated differently, the prohibitions on political activity. Within the context of this article, the following point is important with regard to the rights of public sector employees.

In this regard, we can turn to the case of *Osborne v Canada Treasury Board*,[17] where the Canadian Supreme Court had to decide whether a statute prohibiting federal public servants from engaging in work for or against a candidate or political party infringed the guarantee of freedom of expression contained in section 2(b) of the Canadian Charter of Rights and Freedoms.

The respondents (on appeal) were public servants occupying a range of non-managerial positions.[18] They had been refused permission by their employer to engage in various political activities after hours, including electioneering work in a local constituency office and attendance at a political convention. In applying the limitations test, the court found that the government objective underlying the limitation in question, the preservation of the neutrality of the civil service, was one of sufficient importance to warrant overriding a constitutionally protected right or freedom. The court also found that the measures restricting partisan political activity were rationally connected to the objective of maintaining the neutrality of the civil service. However, applying the "minimum impairment" test, the court found the measures were "over-inclusive", both as to the range of activity prohibited and the level of public servant to whom the restrictions applied. The restrictions applied, the court said, to a great number of public servants who were employed in routine clerical, technical or industrial duties that were completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The restrictions also banned all partisan-related work by all public servants without distinction as to the type of work involved. Activities such as volunteer work in making telephone calls or stuffing envelopes for a candidate or partisan questioning of candidates at a political meeting were all included in the general language of the measure. Therefore the restrictions were over-inclusive and went beyond what was necessary to achieve the objective of an impartial and loyal civil service.[19]

The point to note at this stage is the approach of the Court, dealing with a protected right or freedom and how limitations thereof should be approached. We will return to the significance of this in the context of the

16 2008 *SAJHR* 534, 535.
17 1995 4 LCD 375 Can.
18 376.
19 1995 LCD 375 (CAN) 377-378.

article again below when we specifically deal with the educator's right to freedom of expression, the limitation of his rights and his duty to make certain disclosures and legislation dealing with protected disclosures. These are all defences against the charges. These issues are matters of law. The presiding officer at the departmental disciplinary hearing could not, however, be persuaded to take a better look at these defences that were raised before him.

3 The Bill of Rights: The Right to Freedom of Expression

Now to return to the hearing of the charges of misconduct against the educator. On behalf of the educator, the union representative presented an argument that was designed to show that the educator has a fundamental right to freedom of expression which could not be limited in an arbitrary manner by the department – most certainly not by any policy or instructions which were not even properly proved in evidence. The argument starts with the provisions of the Bill of Rights.

Section 16(1) of the Constitution provides that:

> (1) Everyone has the right to freedom of expression, which includes:
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity;
> (d) academic freedom and freedom of scientific research.

As far as possible limitations of the right to freedom of expression go, section 16(2) contains internal exclusions, namely:

> (2) The right in subsection (1) does not extend to:
> (a) propaganda for war;
> (b) incitement of imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The charges against the educator do not allege any of these actions, but appended various other attributes[20] to the alleged acts of misconduct, including:

> ... bringing the department into disrepute in the manner as set out in the three charges.
> ... unjustifiably prejudicing the administration, discipline or efficiency of the department of Education, an office of the state or a school.
> ... contacting the media during February 2011 and
> Worst of all, doing all of this without the consent or permission of the employer.

20 As set out in the charges against the educator.

Section 36(1) of the Constitution contains the following general 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 and purpose of the limitation;
> (b) the nature and extent of the limitation;
> (c) the relation between the limitation and its purpose;
> (d) less restrictive means to achieve the purpose.

In view of the charges against the educator, the department would be expected to make specific mention in the charges of misconduct of the source of the prohibition on contact with the media, disclose its legal foundation, and then to lead evidence to prove that it existed and was transgressed. Prior to the disciplinary hearing, a page from a document was made available to the union off the record by another departmental official who had no part in the disciplinary proceedings. Furthermore, neither this page nor the original document containing the alleged policy was ever introduced and proved during the hearing. The page in question is headed "Communication policy and services", and apparently purports to deal with the policy in question. This piece of paper, even if it had been properly introduced and proved in evidence, does not apply to the issues in question. It refers to the right of access to information held by the State or any other person and cannot have, and in fact does not have, any bearing on the charges in question. Nevertheless, it bears repeating that no such document, nor any other similar document, was in any event ever introduced in evidence.

It will be argued below that even if the department had provided this information and had properly proved this alleged policy during the hearing, it would still have been to no avail since, as we have indicated above, it does not apply to the facts of the case and, as will also be shown below, in law, policy cannot trump a constitutional right, such as a right to freedom of expression.

The alleged policy was not dealt with in evidence apart from the *viva voce* mention by the principal of having been told at a meeting at some or other time that they were not to speak to the press. Whether this constitutes the "policy" in question, was not clarified by any evidence during the hearing and cannot be relied on to make any finding regarding any of the transgressions with which the educator was charged – even if it were valid policy.

The proof of the policy would in any event have missed the point of the charges and the defence completely. The educator was not claiming any right of access to information in terms of this section. He is in possession of the information. He is claiming his right to freedom of expression, and as will be shown below, also his right (and to a certain

extent his duty) to have made a "protected disclosure" in terms of the PDA.

The information with which this case is concerned is in the possession of the educator, so that the alleged policy to which the page in question refers, relying on section 32 (dealing with the right of access to information – even had it been properly proved and introduced into evidence) cannot and in my view, does not apply to the case. Furthermore, section 32(2) of the Constitution requires legislation to be enacted to give effect to this right. No reference is made to any such legislation in the department's charges or in evidence during the hearing. Within very narrowly defined limits a statute can limit this right to freedom of expression. This was not argued by the department and neither was any statute disclosed as a basis for the prohibition on speaking to the press.

It should be abundantly clear by now, although it was not to the presiding officer at the hearing, and, therefore, it bears repeating, that even if all of this had been properly proved, which did not happen, "policy" is not law and certainly not law or a law of general application which can limit an entrenched fundamental right as required by section 36(1) of the Bill of Rights. It must be emphasised that the charges do not even refer the educator to any law or policy dealing with the dissemination of information. The charges merely refer to the "consent or permission" of the employer. The "policy" and the legal basis thereof was never referred to in the charges, nor disclosed at the hearing.

In addition to section 36(1) of the Constitution, dealing with the limitation of rights generally, section 36(2) continues and provides in particular as follows:

> (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.

There is no evidence of any such law on record. Neither does any of the charges refer to any such law or limitation. It bears repeating, that even if the so-called policy had been properly introduced and proved, "policy" is not covered by section 32(1) regarding the right of access to information and neither is such "policy", for the purposes of section 32(2), nor for the purposes of section 36(2), a law. As far as foreign law is concerned, it is useful to bear in mind the Canadian case of *Osborne v Canada Treasury Board*,[21] referred to above and, as far as the South African Constitution is concerned, we should bear in mind the provisions for the limitation of fundamental rights provided for in section 36, if it were appropriate and applicable.[22]

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21 [1991] 2 S.C.R. 69.

22 "The restrictions applied, the court said, to a great number of public servants who were employed in routine clerical, technical or industrial duties that were completely divorced from the exercise of any discretion that could be in any manner affected by political considerations." See above.

In the South African case of the *Islamic Unity Convention v Independent Broadcasting Authority*[23] the Constitutional Court, *inter alia*, considered the influence of a widely phrased limitation of the right to freedom of expression in the Code of Conduct for Broadcasting Services made pursuant to the empowering statute, being the Independent Broadcasting Authority Act[24] and which is contained in Schedule I to the Act.

In this case, the Code of Conduct for Broadcasting Services came under attack. It had been promulgated pursuant to legislation. The Court had to consider the right to freedom of expression in the light of the limitation contained in the Code of Conduct. Clause 2(a) of the Code of Conduct for Broadcasting Services prohibited, *inter alia*, the broadcasting of material likely to prejudice relations between sections of the population. The Court concluded that such a prohibition extended beyond constitutionally unprotected expression enumerated in section 16(2) of the Constitution. The prohibition was so widely phrased and so far-reaching as to deny broadcasters and audiences the right to hear, to form, to freely express and to disseminate their views and opinions on a wide range of subjects. Notwithstanding the fact that where appropriate, the regulation of broadcasting served an important and legitimate purpose, in this case the limitation on the right was not justifiable. The Court, accordingly, found the prohibition in clause 2(a) prohibiting broadcasting of material "likely to prejudice relations between sections of the population", unconstitutional.

In the misconduct case against the educator under discussion, we are not dealing with the limitation of an entrenched right contained in any law of general application or any other constitutionally empowered limitation. No such law came to light. From the point of view of the case for the department, we are dealing with so-called policy. Policy is not law. Even if it were law, there are powerful restrictions placed on a limitation of the right to freedom of expression as expressed in section 36(2) of the Constitution and the conduct set out in section 16(2) of the Constitution, and, as pointed out before, this aspect is not even mentioned in the charges. It is not applicable in this case and in any event it was not even dealt with in the evidence presented at the hearing. Although it would have been to no avail, it was nevertheless not even brought up in argument on behalf of the department.

In the *Islamic Unity* case the court held, *inter alia*, as follows:

> … where the scope of regulation extended beyond the categories of expression enumerated in s 16(2), such regulation would encroach upon the terrain of protected expression and would have to meet the justification criteria in s 36(1).[25]

23 2002 4 SA 294 (CC).
24 153 of 1993.
25 *Islamic Unity* case 309E par 34.

As to whether clause 2(a) was a constitutionally permissible limitation on expression not excluded from the protection of section 16(1), the Court held that it was in the public interest that people be free to speak their minds openly and robustly and that they be free, in turn, to receive information, views and ideas. It was also in the public interest that reasonable limitations be applied, provided that those limitations were consistent with the Constitution.[26]

The Court also that there was no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint had been based were far too extensive and outweighed the factors considered by the fourth respondent as ameliorating their impact. Although it was true that the appropriate regulation of broadcasting served an important and legitimate purpose because of the critical need in South Africa to protect and promote human dignity, equality, freedom, the healing of past divisions and the building of a united society, it had not been shown that that need could not adequately be met by the enactment of a provision which was appropriately tailored and more adequately focused. The relevant portion of clause 2(a) accordingly impermissibly limited the right to freedom of expression and was unconstitutional.[27]

These rulings in the *Islamic Unity* case will also apply in the present case against the educator except for the fact that the *Islamic Unity* judgment dealt with a statutory limitation – legislation which at least falls within the ambit of sections 32(2) and 36(2) of the Constitution. The limitation was, however, not upheld. In the case of the educator under discussion, the "consent or permission" requirement does not stem from any statutory empowerment. It apparently emanates from a departmental policy directive. This suggests that it was policy rather than law which required the educator to obtain the consent or permission of his employer to speak to the press. In other words it was policy rather than law which limited his right to freedom of expression. Had that policy been put before the hearing properly, the question could then arise: what would have been the legal effect of policy purporting to limit a fundamental right? This was never debated. As to the legal effect of policy, we need to examine the view of the Constitutional Court in the *Harris* case below.

The Constitutional Court dealt with this question in the case of *Minister of Education v Harris*.[28] In this case the issue was the effect of policy determined by the Minister of National Education pursuant to the National Education Policy Act[29] (NEPA).

On 18 February 2000 the Minister of Education published a notice under section 3(4) of NEPA stating that a learner may not be enrolled in

26 *Islamic Unity* case 310C-D par 37.
27 *Islamic Unity* case 314F-315B and 312F-313A par 51 read with par 45.
28 2001 4 1297 (CC).
29 27 of 1996.

grade one in an independent school if he or she does not reach the age of seven in the same calendar year. Talya Harris was part of a group of children who had enrolled at the age of three in the King David Pre-Primary School, and had spent three years being prepared for entry to the primary school in the year 2001. Her sixth birthday was due to fall on 11 January 2001, a short while before the school year was due to begin. Challenging the validity of the notice, her parents sought an order of Court permitting her to be enrolled in grade one in the year in which she turned six.

The Court held, *inter alia,* that in the light of the division of powers contemplated by the Constitution and the relationship between SASA and NEPA, the Minister's powers under s 3(4) of the latter Act were limited to making policy determinations. He had no power to issue an edict enforceable against schools and learners. Since the notice purported to impose legally binding obligations on independent schools and MECs it was *ultra vires* the Minister's powers under s 3 of the National Education Policy Act.[30]

In the present case of the disciplinary proceedings against the educator, although the question of the "policy" was contested from the outset and already *in limine*, the department never attempted to put evidence before the hearing pursuant to which powers the policy was formulated, especially since it purported to limit a fundamental right to express himself, which right was also asserted at the outset of the hearing. In the context of the submissions by the union on behalf of the educator in this regard, it is clear that the Minister does not have the power to make policy that has the force of law – and law at that which could limit a constitutional right to freedom of expression. In any event, no mention thereof is made in the charges and no argument supporting such position was presented by the department.

To the extent that the presiding officer found the educator guilty on all three charges, to that extent at least he must be presumed to find that the necessary legal power existed which required the consent or permission of the employer to speak to the press, and consequently he must be presumed to have found that such policy existed and furthermore, by parity of reasoning, that it could have the force of law which could limit a fundamental right. If this is so, the presiding officer has made a fatal error of law and accordingly his findings and the sanction imposed should not be allowed to stand and should be set aside on appeal. It must be abundantly clear at this stage of the argument, that:

(a) there was no law, no policy and no transgression of any valid rule or standard by the educator;
(b) the policy in question (apart from the other fatal defects already highlighted above regarding who speaks to the press, with or without the permission of the department) is not law and cannot limit the right to freedom of expression as asserted by the Constitution;

30 1305H-1306B, 1306E-G Par 11, 13.

(c) The educator's communication with the press, even if it had been properly proved (which is not the case), would fall within his right to freedom of expression and would be protected expression. Hence, once more no transgression of a valid rule or standard as required by the LRA is at stake.

Further provision for protected disclosures in terms of the Children's Act and the PDA, will be dealt with below.

4 School Safety, the Children's Act and the Protected Disclosures Act

During the course of the hearing of the disciplinary inquiry into the educator's alleged misconduct, the nature of the charges were such that the department as employer was also required to prove that there was a communication with the press, that it was the educator who had done so and also what had been communicated. Without calling any witnesses in this regard, the presiding officer, despite persistent objections from the union representative, allowed the departmental representative to "testify" from the "bar" regarding the official's communications with the press about the statements made by the educator, without complying with any of the proper requirements to present such evidence. The request by the union representative to be allowed to "cross-examine" the "witness" was met with vehement opposition from both departmental officials. This conduct of the presiding officer constituted a gross irregularity and on this basis alone, apart from all the other defects, constitutes sufficient reason to set aside the findings and the sanction. Clearly the educator's right to a fair hearing was severely compromised.

Although the newspapers and the reporters are local residents, and were available to testify, the departmental representative did not call any of them to testify. Neither did he hand in any affidavits with regard to the communications with the local media. Despite strenuous and continuous objections from the union, the presiding officer allowed the departmental representative, to "testify" from the "bar" to the effect that the educator had phoned the newspapers and that the official had obtained from the newspapers the information that the educator had communicated with both newspapers and the official also "testified" to what the information was that he had received over the telephone from the newspapers. No independent witness was called to testify. There was no opportunity to cross-examine any witness on this.

The conduct of the presiding officer in allowing this information to be put on record in this manner by the departmental prosecutor was totally irregular. The union nevertheless then requested an opportunity to cross-examine this "witness". The "witness" himself replied that this could not be done and that he could not be subjected to cross-examination. The presiding officer did not rule in favour of the union.

The departmental prosecutor then disingenuously, after further objections from the union, purported to withdraw his "evidence" and

proceeded to produce and to rely on statements received from the educator to prove what he (the official) had just "testified" to. Once again and continuing on the same path of irregular proceedings, he simply handed in those statements from the "bar" himself. No witness was called. No evidence of any witness was led to indicate how these statements were obtained, whether they had been made freely and voluntarily after the educator had been informed of his rights and properly warned about the import of the statements, should he make any. The defence was not provided with copies of these statements. The hearing simply continued.

The union could not put any of these questions to any witness, since no witness was called to identify and hand in these documents. The right to cross-examination is fundamental to these proceedings and as such is also re-stated in Schedule 2 to the EEA. This right was simply ignored. There was no witness to cross-examine.

The duty to prove documents and statements properly at a disciplinary hearing is equally important and the right to cross-examine those witnesses equally is expressly stated in Schedule 2 to the EEA. Nothing came of this. No fair hearing as required by the LRA and the EEA could come from such proceedings.

It must be said that the institutional bias of the presiding officer appears to have exceeded all rational limits and that the right of the educator to a fair hearing had been further compromised. The union and the educator had already sought a brief adjournment to consider withdrawing from the hearing proceedings in view of the irregularities and the bias of the presiding officer. This was, however, not done.

5 Protected Disclosures

The hearing proceeded and a further attempt was made by the union representative to convince the presiding officer that the proceedings against the educator could not be allowed to continue in that manner. The union tried to convince the presiding officer that in a case such as this, where the educator is charged with contravening subsections 18(1)(f) (charges 1 and 2) and 18(1)(i) (charge 3) of the EEA, contacting the media without the consent or the permission of the employer, the rule the department seeks to invoke amounts to an unconstitutional limitation of the educator's right of freedom of expression, and can therefore, not be a valid rule or standard as required by paragraph 7 of Schedule 8 to the LRA. No policy or any law limiting this right was proved by the department. Nor, as pointed out above, any power of the Minister to formulate such rule and consequently such limitation.

On this basis the educator should never have been suspended in the first place, nor should charges have been sustained after the start of the hearing.

Although these arguments were put before the presiding officer *in limine*, they were not dealt with apart from being "noted" and the hearing continued. These objections and arguments were repeated at the end of the case for the department when the union applied for the discharge of the educator, and also at the conclusion of the hearing.

All three charges should have been dismissed *in limine*. Once the hearing continued, there were serious lapses in the manner in which the evidence was presented as has been pointed out above. The case for the department in any event did not constitute a *prima facie* case. An application for the educator's discharge was made at the end of the case for the department. Apart from the irregular admission of evidence, most of the elements of the charges the department was required to prove to support the charges against the educator were not presented. The application for the educator's discharge at the end of the case for the department was nevertheless not sustained.

As already indicated above, the evidence given by the educator on his own behalf indicating why he acted in the manner he did, was not seriously challenged by the department. It was in the view of the department a simple matter, namely the existence of a policy, the fact that the educator knew about the policy and, therefore he was once again admonished that he should not have spoken to the press and that he should have heeded the warning given to him not to do so again.

The fact that the heart of his evidence still stands on record,[31] has a huge bearing on the matter that will be raised below, namely that of having made a protected disclosure to the press for the purposes of the PDA. On behalf of the educator it was also argued that the conduct of other educators at the school which the accused educator had brought to the attention of the press, could also fall under the provisions of SASA, relating to "initiation practices", or at least, under the heading of conduct which could endanger the health and safety of learners. Such conduct had to be dealt with officially.

SASA deals with many aspects of the health and safety of learners at schools. This includes safety measures and the prohibition of initiation practices at schools. Initiation practices are prohibited at public schools. For the purposes of section 10A of SASA, "initiation practices" are, *inter alia*, defined as:

> … any act which in the process of initiation, admission into, or affiliation with, or as condition for continued membership of a school, a group, intramural or extramural activities, inter-schools sports team, or organisation:
>
> (a) endangers the mental or physical health or safety of a person;
>
> …
>
> (4) In considering whether the conduct or participation of a person in any initiation practices falls within the definition of subsection (3), the relevant

31 It should be noted that a copy of the record of the proceedings has not been made available. It was also not available for the preparation of the appeal.

> disciplinary authority referred to in subsection (2)(a) must take into account the right of the learner not to be subjected to such practices.

The obligations and duties assumed by the educator and to which he testified at the hearing, and which was not rejected or attacked by the department, can be amplified by reference to the provisions of the Children's Act[32] (CA):

> The objects of the CA, which are relevant to this case, are, *inter alia*:
> (b) to give effect to the following constitutional rights of children, namely:
> …
> (iii) protection from maltreatment, neglect, abuse or degradation;
> (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
> …
> (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
> (g) to provide care and protection to children who are in need of care and protection;
> (h) to recognise the special needs that children with disabilities may have;
> …
> (i) generally, to promote the protection, development and well-being of children.

With regard to the reporting of abused or neglected children and children in need of care and protection, section 110(1) of the CA provides that:

> Any correctional official, dentist, homoeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

Bearing this in mind, the educator testified that he had raised these issues at the school before, and they were not dealt with. He testified that the principal was even present at the latest incident. He reported the incident to the Child Protection Unit which referred him to the SAPS. In view of previous experiences of the lack of action, he went to the media. All of this was accepted by the department and even by the presiding officer, who in his findings ventured the opinion that he should have returned to the CPU to establish whether they were actually doing their work and, also to repeat once more that the educator is not allowed to talk to the media – that's policy!

32 38 of 2005.

The attention of the presiding officer was drawn to the relevant legal provisions which justified the conduct of the educator. Apart from pointing out that this is a legal duty imposed on the persons listed in section 110(1) of the CA, it was also argued on behalf of the educator that his conduct could also be described as a protected disclosure, since section 110(3) clearly provides for the nature and the extent of the protection, namely:

> A person referred to in subsection (1) or (2) –
> (a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organisation or police official;
> (b) who makes a report in good faith is not liable to civil action on the basis of the report.

In contrast to the view of the presiding officer that the educator should have followed up his report to the CPU with a further visit to establish whether the matter had been dealt with, section 110 continues and describes the duties of the various officials, including a designated child protection organisation or police official, after such a report had been made. The presiding officer's take on this matter is completely erroneous. A simple reading of the legislation to which he was referred (and of which hard copies were handed to him by the union) would have cleared up this matter for him. He failed to do so. It is a serious error of law.

Finally, in argument it was brought to the attention of the presiding officer, taking the educator's undisputed testimony in that regard into account, that the educator's conduct falls squarely within the ambit of the provisions of the PDA.

What does this entail as far as the educator and this case is concerned?

The Preamble to the PDA indicates that Government recognised that:[33]

> (a) every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;
> (b) every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.

For the purposes of the PDA"

> 'disclosure' means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
> (a) that a criminal offence has been committed, is being committed or is likely to be committed;

33 See the Preamble Protected Disclosures Act 26 of 2000 (PDA).

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged;
(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

Such a disclosure amounts to a *protected disclosure* which is defined in the PDA as:

a *disclosure* made to –
(a) a *legal* adviser in accordance with section 5;
(b) an *employer* in accordance with section 6;
(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
(d) a person or body in accordance with section 8; or
(e) any other person or body in accordance with section 9,
but does not include a *disclosure* –
(i) in respect of which the *employee* concerned commits an offence by making that *disclosure*;
(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.

In terms of section 2(1) of the PDA the objects of the act are:

(a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
(b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
(c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

As the provisions of the PDA are perused further, section 3 provides that an employee making a protected disclosure should not be subjected to an occupational detriment:

No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

The occupational detriment which is prohibited by the PDA is defined as follows:

'occupational detriment', in relation to the working environment of an *employee*, means *inter alia*:
(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated.

The occupational detriment(s), in relation to the working environment of the accused educator to which he had already been subjected in this instance under discussion, is his suspension and being subjected to disciplinary action. Both are prohibited by the Act.

It is worth remembering that the educator's testimony in this regard was not attacked on the aspect of disclosure and the reasons therefor. The criticism by the departmental officials (and the basis for the charges against him) remained to the allegation that he required the consent or permission of the department to talk to the press. In other words, the policy prevents him from talking to the press. As indicated by the presiding officer in his finding, there are many persons or bodies to whom he could have spoken, but (according to the presiding officer and despite the provisions of the PDA) this does not extend to the press. This is of course, in view of the provisions of the PDA, patently wrong and a total misdirection as will be shown further below.

The question, therefore, arises, can the educator talk (disclose) to the press? The PDA provides for various routes of protected disclosures, inter alia, in section 9 for General Protected Disclosure.

The practical Guidelines for employees in terms of section 10(4)(a) of the PDA, were published on 31 August 2011.[34] A copy of this notice was handed to the presiding officer by the union at the hearing. The Guidelines emphasise that the PDA was implemented on 16 February 2001 and applies to disclosures made after 16 February 2001. The charges against the educator under discussion relate to events during February 2011.

The Guidelines refer to the various categories (or "routes") of disclosure listed in the PDA and under route 5 is listed:

> … any person, for example a member of the press (people working for radio and television stations or newspapers), a police official of the SAPS or a person working for an organisation which keeps watch over the public or private sector.

This is exactly what the educator under discussion had done and for which he should have been protected by his employer and not disciplined.

6 Whistle-blowers and Protected Disclosures

I have already referred to the provisions of section 186(2) of the LRA dealing with unfair labour practices. Section 186(2) (d) of the definition of "unfair labour practice" renders unfair any "occupational detriment" in contravention of the PDA, which is designed to protect "whistle-blowers". Grogan[35] sets out this protection and explains that the PDA

34 See the Preamble PDA.
35 Grogan *Workplace Law* (2009) 84-85.

and the LRA together protect employees against dismissal or any prejudice if they disclose information to specified persons concerning, among other things, the commission of criminal offences, "miscarriages of justice", unfair discrimination and conduct detrimental to health and safety or the environment. Section 186(2)(d) affords employees who suffer prejudicial treatment other than dismissal, relief in the Commission for Conciliation, Mediation and Arbitration, established in terms of section 112 of the LRA. In the case of educators employed by the State, the statutory bargaining council where this relief would be sought, would be the Educators Labour Relations Council (ELRC), also established in terms of the LRA.

To succeed in an unfair labour practice action under section 186(2)(d), Grogan[36] points out further that employees must prove, firstly, that the disclosure to which the employer took exception was protected and, secondly, that they were subjected to an occupational detriment. A protected disclosure, Grogan continues, is defined in terms of its content, the manner in which and the person to whom it is made, and the state of mind of the person making it. The disclosure must relate to the forms of wrongdoing mentioned in the PDA, and must constitute statements of fact, not unsubstantiated opinion. The disclosure is protected only if the employee had "reason to believe" that the information would disclose one of the specified wrongs, and if made to a legal advisor, an employer, a member of the Cabinet or the Executive Council of a province. Employees must also utilise the procedures provided by the employer when making such disclosures.

An "occupational detriment"[37] includes prejudice going beyond the forms of unfair labour practice identified in the LRA. Occupational detriments include, apart from being dismissed, being subjected to disciplinary action, harassed, intimidated, transferred or refused transfer, being subjected to adverse alteration of terms and conditions of employment, or being "otherwise adversely affected" in employment, profession or office, including employment opportunities or work security. In the case under discussion, the educator was suspended from work and then charged with misconduct for having spoken to the press – clearly conduct on the part of the employer which is prohibited by the PDA.

Inasmuch as this disclosure was made to the newspapers, it falls under the fifth category (route 5) and the educator should have been protected by his employer, not suspended and prosecuted.

A useful illustration of the application of this Act in the workplace is to be found in *City of Tshwane Metropolitan Municipality v Engineering Council of SA*.[38] In this case, Wallis AJA stated clearly that:

36 85.
37 85.
38 2010 31 ILJ 321 (SCA).

> … the Act, … seeks to encourage whistle-blowers in the interests of accountable and transparent governance in both the public and the private sector …
> … the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.

It is worth noting that the Guidelines and the Court refer to "whistle-blowing". This totally escaped the attention of the department and the presiding officer and, in retrospect, it appears to have been totally ignored.

In conclusion it must be said that even apart from all the failures in the case for the department, and the gross irregularities leading to a miscarriage of justice and an unfair hearing, the educator's conduct amounts to a protected disclosure and he should have been protected by his employer. The employer, especially, judged in retrospect on the basis of the bias against the educator (his suspension) before the hearing and during the hearing (disciplinary proceedings) and its basic ignorance of the provisions of the PDA, lead to the inevitable conclusion that the educator was not afforded a fair hearing. This despite the fact that his disclosures to various persons or bodies are all protected disclosures in the broadest sense of the word, namely:

> (1) his right to freedom of expression which cannot be curtailed by an unknown and unproven policy,
> (2) his duty to report the conduct of the staff in terms of the Children's Act; and last but not least
> (3) his protected disclosure in terms of the Protected Disclosures Act – an Act which:
> (i) obliges his employer to protect him;
> (ii) prohibits the employer from suspending him;
> (iii) prohibits the employer from subjecting him to a disciplinary hearing.

From these provisions of the PDA it must be clear that the educator should never have been suspended or charged with misconduct. However, having been charged, it became manifestly clear during the hearing that he had presented an absolute defence against the charges, that he was not proved to be guilty on a balance of probabilities and consequently that he should not have been found guilty.

7 The Possibility of Civil Claims Against the department and its Officials

In general it must also be said, all things considered, since the department in question had not acted upon previous reports, the officials appear to be blissfully unaware of the implications for them, the department and the school, of a failure to deal with this problem. The

extent of the implications appears from the judgement of Moosa J, in the case of *Jacobs v Chairman Governing Body Rhodes High School*.[39]

Moosa J, summed it up as follows:

> The incident which formed the basis of the cause of action in this matter had tragic, devastating and unfortunate consequences for the learner, the educator, the school principal and the school as a whole. On the fateful day of the incident, the learner bludgeoned the educator with a hammer in the class in the presence of other learners. Pandemonium and panic broke out amongst the shocked learners. Some of the learners rushed to the assistance of the educator and prevented the learner from attacking the educator further.

On the basis of the pleadings, the following issues had to be determined by the Court:

> (a) Whether there was a legal duty to take reasonable steps to ensure that Jacobs (the educator) was not harmed by the learner and if so, whether the Defendants and/or their servants breached that duty;
> (b) Whether the conduct of the Defendants or their servants was culpable, that is, whether they were negligent and whether there was a causal connection between such negligent breach of duty and the loss or damage suffered by the Plaintiff;
> (c) Whether the Plaintiff (Jacobs) suffered any loss or damage in consequence of any wrongful and negligent breach of duty and if so, what the quantum of such damages is.[40]

The Court found in favour of the plaintiff and awarded damages and costs against the principal and the department for having neglected their legal duties.

In the case under discussion in this article, it is highly likely that sooner or later something similar could happen at this school – whether it be injuries to learners or educators, or even damage to school property.

8 Conclusion

In terms of Item 7 of Schedule 8 to the LRA, fair disciplinary action requires a valid rule or standard. The PDA, in dealing with protected disclosures, specifically requires this kind of conduct to be reported and the Guidelines lay down the procedures – including the General section dealing with disclosure to the press. The PDA prohibits the employer from acting against the employee by way of suspension or disciplinary action and explicitly requires the employer to protect the employee from "occupational detriment".

The department argues that the employee knew about the communication policy and deliberately acted contrary to that. This

39 2011 1 SA 160 (WCC) 161, 162.
40 *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 1 SA 160 (WCC) 165.

argument ignores the provisions of the PDA and the Guidelines in terms of the PDA. The presiding officer in his findings appears to endorse the view of the officials of the department, and, in short, by parity of reasoning, finds that the "policy" trumps:

> (i) the right to freedom of expression in the Bill of Rights (which can actually only be limited by a law of general application);
> (ii) the provisions of the Childrens' Act which obliges certain groups of persons, such as teachers, to report certain conduct; and further by parity of reasoning,
> (iii) the provisions of the Protected Disclosures Act, despite the fact that this Act (like the Children's Act) obliges persons to report certain conduct, prohibits the employers from causing an employee occupational detriment (which includes suspension and disciplinary action) and compels the employer, under circumstances of protected disclosures, to protect the employee.

The Guidelines specifically authorise disclosure to the press.

The conclusion is inevitable that the rule or standard in the policy, sought to be enforced by the employer, is not a valid rule or standard which can form the basis of a valid charge of misconduct, and the educator can therefore not be found guilty on any of the three charges and he should accordingly have been found not guilty. The finding should be set aside on appeal.

Even if it is found to be a valid rule or standard, it must be emphasised that the proceedings were so grossly irregular and prejudicial that the educator was not afforded a fair hearing as guaranteed by the Constitution and the LRA and also the EEA. Most of these prescripts were violated.

There should be no doubt as to the implications for a school and the staff, the learners and their parents, the school governing body and the Department of Education, should the duty to watch over the safety of learners not be properly performed. In the *Rhodes* case, Moosa J made it quite clear that:

> [i]n terms of s 60(1) of the South African Schools Act, Act 76 of 1996 (SASA), the State is liable for any damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such school would otherwise have been liable. In terms of s 60(3), such a claim must be instituted against the third defendant (the MEC for Education, Western Cape). Similar provisions exist in WCPSEA (the Western Cape School Education Act), namely ss 19(1) and (2). There are a number of provisions in SASA and in the regulations promulgated in terms thereof which speak to the issue of safety and security at public schools. There are also a number of policy documents of the defendants that speak to the issue of safety and security at public schools, for example, the Procedural Manual for Managing Safety and Security within WCED (the Western Cape Education Department) Institutions. The Constitution and Code of Conduct of Rhodes High also provide for the safety and security of educators and learners alike. It must be noted that the principal is specifically given various

> powers of enforcement and various responsibilities by the Act and regulations, to ensure the safety of a school's teachers and students. It is therefore clear, given the range of powers and duties that fall into the hands of the principal, and the fact that management is vested in the principal, that it is he or she who carries the primary responsibility in ensuring the safety of the members of the school community.[41]

In the disciplinary hearing under discussion, the department of Education in question failed to perform some of its basic duties in terms of the statutory provisions referred to by Moosa J, above. Not only that, but when confronted with a situation at the school where the learners were improperly treated and the educator had repeatedly reported the conduct of his colleagues, when confronted by the newspaper reports, instead of recognising the situation for what it was and protecting the "whistle-blower", the employer did exactly what the PDA expressly prohibits the employer to do, and that is, to suspend the employee and to institute disciplinary proceedings. This Act requires exactly the opposite, and that is, to protect the employee. The employer failed to do that.

9 Who Guards the Guardians?

Going back in history, we find the Latin phrase *Quis custodiet ipsos custodes*? a phrase traditionally attributed to the Roman poet Juvenal from his Satires,[42] which is translated literally as "Who will guard the guards themselves?" It is sometimes rendered as "Who watches the watchmen?"[43]

If departments of State and their employees cannot be relied on to understand the fundamental rights of citizens and to be fully informed of all the ramifications of a true democracy, and to act within that framework, including the protection of "whistle-blowers", then the time has come to alert the other constitutional guardians of citizens, that is, the various State institutions supporting constitutional democracy as provided for in chapter 9 of the Constitution. The educator in question sought out the Fourth Estate – the press that likes to cast itself as society's guardian:

> The concept of the Fourth Estate (or fourth estate) is a societal or political force or institution whose influence is not consistently or officially recognised. The Fourth Estate now most commonly refers to the news media, especially print journalism …[44]

We have now come full circle. The educator disclosed the misconduct to the press. This is exactly what the PDA empowers the educator to do. The

41 *Idem* 168.
42 Satire VI, lines 347-348.
43 From *Wikipedia*.
44 From *Wikipedia*.

act prohibits the employer from suspending or disciplining the educator. However, this is exactly what the employer did and he was punished.

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 geregtigheids-benadering 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 Child[4] (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 Act[6] (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* parr 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.

Carrim[15] 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) parr 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 child[19] (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, Lundy[29] 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

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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 indispensible 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 3.
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.

Lundy[45] 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

Hart[54] 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 decoration[56], 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, participation[58] 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]

Shier[64] 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 Act[66] (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]

Shier[72] 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. Shier[73] 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's[74] 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.

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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.

Thornberg[75] 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. Thornberg[76] 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, Lundy[80] 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* parr 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. Cavanagh[92] 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. Cavanagh[93] 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 Mullet[100] 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, Carrim[110] 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 Act[120] 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 internal[121] 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] Mabovula[134] 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.

Alderson[135] 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 being 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* parr 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.

The constitutionality of section 16A of the South African Schools Act 84 of 1996

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OPSOMMING

Die Grondwetlikheid van Artikel 16A van die Suid-Afrikaanse Skolewet 84 van 1996

Die Wysigingswet op Onderwyswette 31 van 2007 het artikel 16A tot die Suid-Afrikaanse Skolewet 84 van 1996 toegevoeg. Hierdie artikel sal onder meer kyk na die implikasies van artikel 16A van die Skolewet op die rol van die skoolhoof as 'n lid van die beheerliggaam en as 'n werknemer van die Departement van Onderwys en die potensiële botsing van belange voortspruitend uit artikel 16A. Die grondwetlikheid van die betrokke artikel gaan deeglik ondersoek en bespreek word.

Artikel 16(2) van die Skolewet bepaal dat 'n beheerliggaam in 'n vertrouensposisie teenoor die skool staan. Hierdie bepaling geld ook vir die skoolhoof, as 'n lid van die beheerliggaam. Die gevolg van Artikel 16A is dat die skoolhoof 'n opdrag van die Departement kan ontvang om die Departement se belange in die beheerliggaam te verteenwoordig, maar dat hierdie belange dikwles in stryd is met die belange van beheerliggaam.

Artikel 23(1) van die Grondwet bepaal dat elkeen die reg tot billike arbeidspraktyke het. Billike arbeidspraktyke word nie in die Grondwet self omskryf nie.

Daar kan geargumenteer word dat die Departement die skoolhoof in 'n ongemaklike werksituasie plaas omdat daar ingevolge wetgewing, van die skoolhoof verwag word om twee teenstrydige opdragte uit te voer. Artikel 16A verwag van die skoolhoof om die Departement van Onderwys se belange eerste te stel terwyl artikel 16(2) die skoolhoof verplig om die skool se belange eerste te stel. Dit gee gevolg tot 'n onbillike arbeidspraktyk omdat die skoolhoof uit vrees vir 'n tugverhoor, sou hy nie sy opdrag van sy werkgewer navolg nie, 'n mandaat uitvoer wat strydig is met sy vertouensposisie teenoor die skool ingevolge artikel 16(2); of sou hy ingevolge artikel 16(2) optree en die belange van die skool bo die belange van die Departement kies en dan sy plig as werknemer teenoor die Departement ingevolge artikel 16A nie nakom nie. In beide hierdie situasies sal dit die verhouding tussen die skoolhoof en Departement nadelig bëinvloed en op 'n onbillike arbeidspraktyk neerkom wat teenstrydig is met artikel 23 van die Grondwet.

1 Introduction

The Education Laws Amendment Act[1] added section 16A to the South African Schools Act[2] (SASA). Section 16A(1) and (3) provide as follows:

> (1)(a) The principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 23(1)(b) and 24(1)(j).
> (2) …
> (3) The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with any:
> (a) instructions of the Head of Department;
> (b) legislation or policy;
> (c) obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or
> (d) provision of the Employment of Educators Act, 1998 (Act No. 76 of 1998), and the Personnel Administration Measures determined in terms thereof.

This article will look at the constitutionality of section 16A, its implications for the role of the principal as a member of the governing body as well as an employee of the Department of Education, and the potential conflict of interests arising from section 16A.

Firstly, I will discuss the different roles that the school governing body and the principal play, and point out the importance of a healthy relationship between the governing body and the principal. Secondly, I will explain how the state often unlawfully interferes in the business of the school, the governing body and the principal, and illustrate the detrimental effect of this interference. Lastly, I will give a thorough explanation of the unconstitutionality of section 16A, in that this section may enable the Department of Education, ie the employer, to act in a way that constitutes unfair labour practice. The concept "unfair labour practice" will also be defined and discussed.

2 The Role of the Governing Body and Principal

Good public school governance requires a flourishing partnership, based on mutual interest and mutual confidence, between the many constituencies that make up and support the school. The appropriate balance of different constituency rights and interests in the composition and operations of each school governing body is therefore vitally important.[3]

The different role players in education should respect each other and the roles they play. However, over the last few years, there seems to have

1 31 of 2007.
2 84 of 1996.
3 *Education White Paper 2*, General Notice 130 of 1996.

been confusion (especially on the part of the Department of Education) about who really has the final say over public school governance and management.

SASA clearly states that the governance of a public school vests in the governing body of the school,[4] while the professional management of a school must be undertaken by the school's principal.[5] The Act also clearly provides that the Department's management function is limited to the professional management of the school through the principal as the employee.

But what is the difference, then, between governance and professional management? SASA itself does not define these concepts, and one has to look beyond the Act for proper explanations.

In terms of the definition or meaning of "governance", I will refer to the *King II Report on Governance in South Africa*. This report was compiled by the King Committee, headed by the former High Court judge Mervyn King. Many may argue, erroneously I might add, that one cannot apply the principles of the *King II Report*, which was developed for corporate entities and businesses, to schools. However, on closer inspection of SASA and other relevant documentation,[6] it becomes apparent that a school's setup is similar to that of a business. The revised *King Code and Report on Governance for South Africa* (*King III*) was launched on 1 September 2009, and clearly states that it applies to all entities, regardless of the manner and form of incorporation or establishment, whether in the public, private or non-profit sector. The report was drafted so that every entity can apply it, and, in so doing, achieve good governance.[7]

In good governance practices, it is generally accepted that a governance structure would determine policies and strategies for an organisation or a corporate entity, whereas the implementation of these policies and strategies is the function of the executives of that organisation or entity. In the school setup, the governing body is responsible for determining policies, while the principal and other educators must implement them.[8] Concepts specific to the business sector, such as "company", "board of directors" or "directors", "manager" and "shareowners", can easily be replaced with school-related terms, such as "school", "governing bodies" or "governing body

4 S 16(1) SASA.
5 S 16 (3) SASA.
6 These include *Education White Paper 1* and *2*, various National Norms and Standards and Policies.
7 http://african.ipapercms.dk/IOD/KINGIII/kingiiireport/ (accessed 2011-07-12).
8 Policies prescribed in SASA include a language policy, an admission policy, a code of Conduct and a religion policy. Policies implied include but is not limited to a financial policy, a safety policy, a drug policy and a pregnancy policy.

members", "school principal", and "parents, learners, staff and state" respectively.[9]

The *King II Report* mentions the following seven characteristics of good corporate governance:

> (1) Discipline – a commitment to behaviour that is universally recognised and accepted as correct and proper.
> (2) Transparency – the ease with which an outsider is able to analyse the actions of a company/school.
> (3) Independence – the mechanisms to avoid or manage conflict.
> (4) Accountability – the existence of mechanisms to ensure accountability.
> (5) Responsibility – processes that allow for corrective action and responsible conduct towards all stakeholders.
> (6) Fairness – balancing competing interests.
> (7) Social responsibility – to be aware of, and respond to, social issues.[10]

Sir Adrian Cadbury, Chairman of Cadbury and Cadbury Schweppes for 24 years, once described corporate governance as follows:

> Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals … the aim is to align as nearly as possible the interests of individuals, corporations and society.

Precisely that is the function of a school governing body, as prescribed in the relevant sections of SASA.[11] It is the governing body's duty to strike a balance between the interests of the different parties involved in education; to ensure that the school provides quality education, while also running a financially stable school.

According to section 16(3) of SASA, the professional management of a public school must be undertaken by the principal, under the authority of the Head of Department. The professional management must furthermore be undertaken subject to SASA itself and any applicable provincial law.

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9 Colditz "The Duties of the School Governing Body – Basic Principles of Good Governance" 2007 www.fedsas.org.za (accessed 2011-07-12).

10 https://www.saica.co.za/TechnicalInformation/LegalandGovernance/King/tabid/626/language/en-A/Default.aspx#king2 (accessed 2011-07-12).

11 S16(2) SASA provides: "A governing body stands in a position of trust towards the school." According to s 20(1)(a) SASA "the governing body of a public school must promote the best interests of the school …". In terms of s 20(1)(e) SASA "the governing body of a public school must support the principal, educators and other staff of the school in the performance of their professional functions", and, according to ss 20(1)(eA), (g) SASA, the governing body of a public school must adhere to certain actions taken by the Head of the Department, or may not exercise certain powers in a manner that interferes with a decision made by the MEC or Head of Department, in terms of any law or policy. With reference to the financial management of a school, ch 4 SASA contains numerous provisions regarding the governing body's duties to establish and maintain a school fund, a school budget, etc.

It is particularly significant that the term "management" is not used in isolation, but that it is specifically called "professional management". A justifiable conclusion is that the concept "professional management" refers to just that – "management of the profession".[12]

When interpreted in this way, it means that the role of the principal, as representative of the education department, is limited to the management of that for which the professionals (educators) are responsible, which primarily entails curricular matters. An educator's task is mainly to take care of the process of learning and teaching at the school. Put quite simply: The task of educators (the professionals) in the school is to provide classroom instruction. That is what they were trained for. "Professional management", therefore, simply means "management of classroom instruction".[13]

Therefore, all other activities related to a public school resort under the authority of the governing body.[14]

The principal of the school, who is made an ex officio member of the school governing body, represents the State. However, the principal is but one of many governors on the school governing body. He/she has but one vote, which is not a casting vote or a more important vote than that of any other member of the school governing body. He/she is the representative of the Department as a professional manager, and not as a governor.

Thus, the principal functions in two capacities: on the one hand, as a governing body member; on the other, as the principal or departmental employee. In practice, this means that he/she should implement the policies of the provincial education department when operating as a departmental employee, and, when dealing with the department in his/

12 Colditz "The Role of the Principal in School Governance and Management" 2005 www.fedsas.org.za (accessed 2011-07-12).

13 The function performed will determine the capacity in which the principal is acting. Everything that has to do with the classroom and teaching (the profession), like the management of the educators at a school, is carried out by the principal in terms of s 16(3) SASA, every function related to the governance of a school, like administrative affairs and the discipline of learners, is performed by the principal in terms of s 16(1) SASA.

14 Colditz "The Role of the Principal in School Governance and Management" 2005 www.fedsas.org.za (accessed 2011-07-12). S 20 SASA lists the functions of all governing bodies. Some of these include: to promote the best interests of the school; adopt a mission statement; adopt a constitution; develop a mission statement of the school; adopt a code of conduct; support the principal and other staff; determine times of the school day; administer and control the school's property and recommend to the Head of Department the appointment of staff. S 21 SASA contains allocated functions of governing bodies and includes: to maintain and improve school property, determine extra-mural curriculum; to purchase textbooks and other material and to pay for services to the school.

her capacity as governing body member, watch over the interests of the governing body, the school and the parent community.[15]

However, the fulfilment of this dualistic role of the principal is much easier said than done.

3 State Interference

In any governance and management environment, the role players need to know what is expected of them and that each other's functions are respected. Any conduct contrary to this will eventually lead to conflict, which is something we are all too familiar with in the context of the relationship between governing bodies and the education department. Much of this conflict can be explained against the backdrop of the reform and transformation that have been taking place in education since 1994.[16] This places the supposed trust between these two partners in school education in a very bad light.

Proper governance, control and management of a school make the difference between a functional and a dysfunctional school. The importance of the relationship between a principal and the governing body for the proper functioning of a school cannot be overemphasised. This relationship can often be impaired by interference from an education department acting as the principal's employer.

From the explanation of the two concepts "governance" and "management", it is evident that the function of a public school principal is twofold: On the one hand, he/she is accountable to the Head of Department as his/her employer; on the other, he/she reports to the school governing body as a member of the governing body.

Therefore, it is possible for the principal to receive one assignment from the Department, and another, contradictory assignment from the governing body.

As Prinsloo stated rightfully, a disturbing trend has emerged of government officials abusing their powers, unlawfully interfering in the management and governance of schools, neglecting their duties, showing no respect for the rule of law, and even ignoring court orders against them. One only has to study a few court cases to confirm this disturbing phenomenon.[17]

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15 Beckmann "The legal position of the principal as school governing body member and employee of the Department of Education" Paper read at the Principal's Conference, Openheimer Theatre, Welkom, 2002-04-14.

16 Clase *et al* "Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof" 2002 *SA J of Ed* 243–263.

17 Prinsloo "State interference in the governance of public schools" *SA J of Ed* 2006 355–368.

In the matter *Welkom High School v The Head of the Department: Department of Education: Free State Province*,[18] Rampai J expressed himself as follows regarding unlawful actions or interference by the Department in the governing body's power to determine the school's pregnancy policy:

> Even if the learner pregnancy policies were substantively unfair, flawed and plagued by countless features of invalidity, the department had no administrative power to determine, amend, suspend or abolish (or to give instructions designed to attain any of these) the learner pregnancy policies for the schools. It follows from this reasoning that the directives issued by the first respondent late last year were unlawful. I am therefore inclined to declare them to be of no binding force and effect in law. To find otherwise would render the functioning of the school governing body ineffective and superfluous. The governance of the schools can fall into disarray.
>
> When the institutional autonomy of a school governing body is compromised by instructive official interventions, the elementary norm and standards of teaching and learning might be seriously eroded …

In the matter of *FEDSAS v MEC for Department of Basic Education Eastern Cape*,[19] Eksteen J made the very important statement that the structure of the system provided in SASA for the organisation, governance and funding of schools cannot be achieved unless the Head of Department complies with his obligations. If he fails to do so, the system breaks down.

Even though this matter was about the Department's failure to appoint temporary educators, the same principle applies to all of the Department's duties. Likewise, the Department must not overstep its boundaries in fulfilling its duties. If the Department fails to fulfil its duties or does so unlawfully, all the other stakeholders will be negatively affected, and, in the end, education as a whole will suffer.

Amendments to SASA are another means by which the state attempts to interfere in school governance. The state seeks to abuse the principal's position as a member of the governing body to gain some control over the governance of a school, by imposing certain duties on the principal as a departmental employee.

In reaction to the proposed amendments regarding the appointment of educators, Helen Zille, then DA spokesperson for education, commented that new legislation that limits governing bodies' powers proves once again that when the Department of Education is faced with a policy choice between ideology and quality, it will always choose ideology.[20] This also goes for the amendments to section 16 of SASA. The

18 Unreported Free State High Court Cases ZAFSHC 5714/2010, ZAFSHC 5714/2010.
19 Eastern Cape High Court 60/2011.
20 *Volksblad* (2005-05-18) 1.

Department merely contributes to the existing tension between the respective parties, and uses the school principal as its instrument.

4 Section 16A and its Implications

There can be no confusion about the relationship between a school principal and the education department. It is a clear-cut employer-employee relationship, regulated by SASA, the Employment of Educators Act; the Labour Relations Act[21] and, of course, the Constitution of the Republic of South Africa, 1996.

Section 16A(1) of SASA states that the principal represents the Head of Department on the governing body. In subsection 16(A)(3), SASA goes on to declare that the principal's assistance to, or participation in, the governing body may not be in conflict with instructions of the Head of Department; legislation or policy; an obligation towards the Head of Department, Member of the Executive Council (MEC) or the Minster, or a provision of the Employment of Educators Act.

Section 16(2) of SASA stipulates that a governing body stands in a position of trust towards the school. This provision applies equally to the principal, being a member of the governing body, as to the rest of the governing body members. The principal could thus receive conflicting assignments from the Department and the governing body because of their different goals and interests, which suddenly places the principal in a catch-22 situation.

In terms of section 20(1)(g) of SASA, the governing body of a school is responsible for the control and administration of the school's property, including hostels, and, according to chapter 4 of SASA, the governing body must, among other things, establish and administer the school fund,[22] and keep records of funds received and spent by the school.[23] In contrast, the Personnel Administration Measures (PAM)[24] determine that some of the core duties and responsibilities of the principal are to have various kinds of school accounts and records properly kept; to make the best use of funds for the benefit of the learners in consultation with the appropriate structures, and to be responsible for hostels, should they be attached to the school. These provisions create confusion, as, in terms of section 20(1)(g) and chapter 4 of SASA, the governing body has certain responsibilities, while PAM seems now to delegate these very same responsibilities to the principal. And remember, in terms of section 16A of SASA, the principal may not act in conflict with any instructions of the Head of Department; legislation or policies; obligations towards the Head

21 66 of 1995.
22 S 37 SASA.
23 S 42 SASA.
24 Personnel Administration Measures (PAM) determined by the Minister of Education in terms of the Employment of Educators Act 76 of 1998.

of Department or MEC, or a provision of the Employment of Educators Act.

The Department may order the principal to act according to the provisions of PAM, and, in terms of section 16A, the principal may not go against these instructions. However, in terms of the provisions as set out above, the governing body is responsible for certain school matters (such as school hostel administration), and may order the principal not to get involved in these. Is this a fair position for the principal to be placed in by his/her employer?

Let me illustrate the problem further. The governing body of a public school determines the language policy of the school (as authorised by section 6(2) of SASA). The governing body decides that the school is an Afrikaans-medium school, and instructs the principal to give preference to learners who choose to be instructed in Afrikaans. On the first school day at the beginning of the year, departmental officials, delegated by the Head of Department, arrive at the school, and instruct the principal to admit learners who want to receive education in English, and consequently change the school into a dual-medium institution. The officials also state that, should the principal choose not to give effect to the instruction, disciplinary action will follow.

In terms of section 16A(3)(a), the principal may now not go against the Head of Department's instruction. However, at the same time, the principal still is a member of the governing body to whom a specific part of the governing body's duties has been delegated.

In the matter *Governing Body of Mikro Primary School v Western Cape Minister of Education*,[25] this actually happened. The Education Department instructed the Afrikaans-medium school to admit and accommodate 40 English-speaking Grade 1 learners at the school, despite the existence of a parallel-medium school in the same area. The Department required the school to teach in English, and advised the principal that failure to implement this directive may constitute grounds for disciplinary action.[26]

On the morning of the opening of the school, departmental officials insisted that the children together with their parents attend assembly in the school hall, despite objections by the chairperson of Mikro's governing body. The principal of the school did not process the application forms that had been completed by the parents under the supervision of the officials.[27]

In his judgment, Thring J found that the insistence by the departmental officials that the children and their parents attend school assembly

25 *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 JOL 13716 (C).
26 Prinsloo 2006 *SA J of Ed* 355–368.
27 *Idem*.

against the wishes of the principal and the chairperson of the governing body constituted interference in the governance and professional management of the school.

With reference to section 16(3), the judge made the following remarks: The fact that a school principal, in terms of section 16(3) of the Schools Act, must undertake the professional management of his school 'under the authority of the Head of Department' does not, to my mind, render him subservient to the department in everything he does. He does not, thereby, become the second respondent's lackey.

The judge was also concerned about the legality of the officials' actions:

> The principle of legality simply means that the state must obey the law. That is such a fundamental principle, and so important in any civilised country, that only in extremely rare cases, if ever, the rule of law may be "held hostage" if it proves to be in the children's best interests. Indeed, it is difficult to imagine how, in the long term, it could ever be in the best interests of children to grow up in a country where the state and its organs and functionaries have been elevated to a position where they regard themselves as being above the law, as, as far as they are concerned, the rule of law has been abrogated.[28]

In the matter *Schoonbee v MEC for Education, Mpumalanga*,[29] the Department assumed that the principal of the school is also the accounting officer of school funds, and suspended him for alleged misuse of school funds. In his judgment, Moseneke J gave certain guidelines on how the relationship between the school governing body and the principal should be dealt with. The judge found that the principal has a duty to facilitate, support and assist the governing body in the execution of its statutory functions relating to assets, liabilities, property and financial management of the public school; that the principal is accountable to the governing body, and that it is the governing body, and not the Department, that should hold the principal accountable for financial and property matters that are not specifically entrusted to the principal by the statute.[30]

The judge also stated that the Department (the employer) is not entitled to impute to employees, and hold them liable for, statutory functions vested in governing bodies with regard to assets, liabilities, property and the financial management of the school.[31]

I see no reason why this judgment cannot be applied equally to the other statutory functions of a governing body. If it is the function of a governing body to determine the school's language of instruction or

28 *The Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 JOL 13716 (C).
29 *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T).
30 Prinsloo 2006 *SA J of Ed* 355–368.
31 *Ibid*.

admission policy, the Department has no business instructing the principal to act in contradiction to the governing body's policies, as section 16A(3)(1) ostensibly determines.

5 The Effect of the Department's Interference

In a circular of the Gauteng Department of Education dated 2010 regarding the role and responsibilities of the principal relating to the admission of learners, the Department reminded principals of their duties in terms of section 16A. The issue with this circular, to name but one, is the way in which it is phrased – as if the Department is threatening principals should they not act accordingly. The Department uses bold font and capital letters to remind principals of their duties. Yes, they must assist the governing body in the performance of its functions, but beware ... Threats like these, disguised in departmental circulars, show how section 16A may lead to unfair labour practice. The principal is placed in a situation where he/she will have to act either according to the governing body's policies and face disciplinary action, or the circulars and commands of the Department and contravene section 16(2) of SASA. It is unfair to expect the principal to fulfil both roles at the same time, without prejudicing one of the parties involved.

Section 23(1) of the Constitution provides that "everyone has the right to fair labour practice", but fails to define "fair labour practice". In the matter *NEHAWU v University of Cape Town*, Ngcobo J examined section 23(1) of the Constitution, and came to the following conclusion:

> The concept of fair labour practice is incapable of precise definition. This problem is confounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations.[32]

The definition of "unfair labour practise" that was in force when the Constitution was written, was incorporated into the Labour Relations Act in 1991 and provides as follows:

> An unfair labour practice is defined as any act or omission, other than a strike or a lock-out, which has or may have the effect that:
> (a) an employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
> (b) the business of an employer or class of employers is or may be unfairly affected or disrupted thereby;
> (c) labour unrest is or may be created or promoted thereby; or
> (d) *the labour relationship between employer and employee is or may be detrimentally affected thereby* (own emphasis).

It may be argued that the legislature had this definition in mind when section 23(1) of the Constitution was drafted.

32 *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC).

Currently, section 186(2) of the amended Labour Relations Act contains a definition of the concept "unfair labour practise", but in the matter *Ntlabezo v MEC of Education, Eastern Cape*,[33] the High Court concluded that the unfair labour practice from which employees are protected in terms of the Labour Relations Act, differs from the unfair labour practice as contemplated in the Constitution. The definition contained in the Labour Relations Act does not cover all instances of unfair labour practice, and, therefore, individuals cannot be denied the right to turn to the Constitution for protection.

Should the definition, as set out above, be accepted, one may argue that the Department is placing the principal in an impossible work situation, because, in terms of legislation, the principal is expected to obey two conflicting authorities' conflicting commands. The principal will either give effect to the Department's wishes out of fear for a disciplinary hearing should he/she not obey his/her employer, which goes against his/her obligation in terms of section 16(2), or the principal will choose to act in accordance with section 16(2) and place the interests of the school before the interests of the Department, and disregard his/her duty as a departmental employee. No matter the situation, either the relationship between the principal and Department or between the principal and the governing body will be adversely affected. If the principal goes against the wishes of the governing body, the governing body will be unhappy. If he/she disregards the Department's instructions, "the labour relationship between employer and employee … may be detrimentally affected", causing an infringement of the principal's right in terms of section 23(1) of the Constitution.

It is important to note that the Department cannot take disciplinary action against the principal of a public school for the way in which the governing body executes any of its statutory functions.[34] Any threat of this nature by an employer/the Department will be unfair. Fairness means more than lawfulness. Lawful conduct is not necessarily fair. In delivering the majority judgment in the matter *National Union of Metalworkers of SA v Vetsak Co-operative*, Nienaber J noted the following, the underlying principle of which I believe may be applied to the conduct of the Department of Education as well. He stated:

> [T]here is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair, a lawful dismissal will not for that reason alone be fair.[35]

Such conduct would constitute unfair labour practice in breach of section 23(1) of the Constitution. Even though an employer has the right to take

33 *Ntlabezo v MEC of Education, Eastern Cape* 2002 3 BLLR 274 (Tk).
34 Prinsloo 2006 *SA J of Ed* 355–368.
35 *National Union of Metalworkers of SA v Vetsak Co-operative* 1996 17 ILJ 455 (A) 459H.

disciplinary action against his/her employee, it does not necessarily constitute fair labour practice.[36]

6 Conclusion

With regard to the Education Department, school principals and the demands of section 16A of SASA, one may argue that, if the Department mandates the principal to act in a certain way, and rely on section 16A as its empowering provision, the conduct of the Department constitutes unfair labour practice.

As mentioned earlier, "the concept of fair labour practice is incapable of precise definition",[37] and the price for this flexibility is uncertainty. In this regard, Landman J stated: "The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms."[38] This indeed holds true when it comes to the conduct of a school principal, and the attempt by section 16A to legislate the conduct of a school principal may very well constitute unfair labour practice.

The harm caused by the violation of constitutional rights is not merely harm to an individual applicant, but harm to society as a whole: The violation impedes the realisation of the constitutional project of creating a just and democratic society.[39] The harm caused by section 16A does not only affect a particular school principal in a particular circumstance, but all of the 24 451 principals of public schools in South Africa.

As expressed by Judge Kriegler in *Fose v Minister of Safety and Security*:[40]

> The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise. Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to 'defend against encroachment or interference'. It suggests that certain harms, if not addressed, diminish our faith in the Constitution.

When courts award a remedy (a declaration of invalidity of unconstitutional law) in constitutional cases, they "attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of the supremacy of the Constitution".[41]

The real world is the one in which the principal is placed in an unfair labour environment, and virtually impossible expectations are imposed

36 *Council of Mining Unions v Chamber of Mines of SA* 1985 6 ILJ 293 (IC) 295C.
37 *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC).
38 *NEWU V CCMA* 2003 24 ILJ 2335 (LC).
39 Curie & De Waal *The Bill of Rights Handbook* (2005) 196.
40 *Fose v Minister of Safety and Security* 1997 3 SA 789 (CC) parr 95–96.
41 Curie & De Waal 194.

upon him by section 16A; the ideal constitutional world is the one in which the principal functions in a fair labour environment. As Curie and De Waal[42] put it, the object is to make the real world more consistent with the Bill of Rights.

Section 172(1)(a) of the Constitution provides that a law must be declared invalid in as far as it is inconsistent with the Constitution. This requires a court to declare invalid only those parts of the law that are unconstitutional.[43] This will entail striking out section 16A(3) of SASA, and leaving the rest of the section intact. Severance (separation) aims to cure legislation of any constitutional defects, and, in the matter *Coetzee v Government of the Republic of South Africa*,[44] it was determined that "if the good is not dependent on the bad, and can be separated from it, one gives effect to the good that remains after the separation, if it still gives effect to the main objective of the statute". The rest of section 16A deals with the professional management functions of the principal and his duties towards the Head of Department, and elaborates on the provisions contained in section 16(3)[45] of SASA. However, section 16(A)(3) oversteps certain boundaries set by other sections of SASA that were promulgated prior to the commencement of the Amendment Act, and eventually interferes in school governance. As mentioned earlier, the underlying objective of section 16A(3) is to hold the principal responsible for the governing body's actions.

Public school governance is part of the country's new dispensation of democratic governance. It must be a genuine partnership between a local community and the provincial education department, with the latter's role being restricted to the minimum required for legal accountability.

If the state has any real concerns regarding the way in which certain governing bodies govern schools, SASA provides multiple remedies to deal with these concerns. However, to promulgate legislation that will limit all governing bodies, even those functioning properly, and to place the principal in an unfair labour environment, will not solve the real problem. The dysfunctional governing bodies will continue to govern poorly; the functional governing bodies will continue to be frustrated by the state's power struggle, and the principal will be caught in the middle, having to keep wicket on both sides.

42 *Idem* 196.
43 *Idem* 200.
44 *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) par 16.
45 S16(3) SASA provides: "Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department".

Statistical adjustment of matric marks: The right of access to information

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OPSOMMING

Statistiese Aanpassing van Matriekpunte: Die Reg op Toegang tot Inligting

Hierdie artikel neem die historiese rol van Umalusi, 'n liggaam wat wetlik daargestel is om as kwaliteitversekeraar en kurator van die Nasionale Senior-Sertifikaat (Graad 12) te funksioneer, onder die loep. Die doel is om vas te stel in welke mate die Bevordering van Toegang tot Inligting Wet 2 van 2000 gebruik kan word om toegang tot sensitiewe inligting aangaande die statistiese verstelling of "standaardisering" van matriekpunte te verkry.

Die artikel verskaf in-diepte agtergrond aangaande twee aspekte, naamlik: die legitieme mandaat van Umalusi om punteverstellings te mag doen en hulle aanvanklike weiering in 2011 om die uitkomste van sulke verstellings aan die media en breë publiek bekend te stel, gegewe die historiese konteks; tweedens ontleed die artikel die doel en bepalings van die Wet ten einde uitvoering te gee aan artikel 32(2) van die Grondwet van die Republiek van Suid-Afrika, 1996.

Die uitgang van hierdie studie is die betoog van die media en publiek in 2011 dat hulle die grondwetlike reg het om ingelig te word aangaande die proses en uitkoms van die statistiese verstelling van matriekpunte (Graad 12). Volgens regsvertolking is Umalusi deur parlementêre wetgewing daargestel as 'n staatsliggaam wat in die openbare belang binne 'n bepaalde politieke en juridiese raamwerk funksioneer en sy aksies moet as sodanig gemoniteer kan word.

1 Introduction

Learner assessment and standard setting have always been an issue of discussion, not only among professionals, but also in public. Broadfoot[1] indicates that the search for an unambiguous and dependable way of measuring "ability" is indeed one of the enduring themes of assessment research in the 20th century. In addition, the tension between the scientific aspirations of assessment technologies to represent an objective reality, and the unavoidable subjectivities contaminated by the

1 Broadfoot "Dynamic Versus Arbitrary Standards: recognising the human factor in assessment" 2003 *Assessment in Education: Principle, Policy and Practice* 12.

human focus of these technologies is very much in evidence in most countries.[2]

The production and setting of standards becomes even more of an issue in countries where exit level examinations and assessments mediate university entrance. Access to institutions that cater to a mass market, entry to which is very important to people's development in life, is bound to be a vexed, and political, issue.[3]

Umalusi[4] is required to approve the release of results, once it is satisfied that the examinations have been conducted in a credible manner.[5] The final step in determining the validity and credibility of the examination, before Umalusi releases the results, is called "standardisation" or "normalisation" of marks.[6] Until February 2011, the standardisation process and outcomes were treated as confidential. On the advice of the Umalusi Council and its Assessment Standards Committee, Umalusi does not, as a matter of principle and practice, disclose the individual subject standardisation decisions.[7]

2 The Historical Context and Current Contextual Factors.

Assessment in South Africa has been dominated by the Senior Certificate (Matric) examination, which doubles as a school exit certificate and a university entrance qualification.[8] From 1921 up to 1953, the Joint Matriculation Board (JMB) granted permission to various provincial departments of education to run school leaving examinations, and, thus, to become examination bodies. The JMB's reason for being was to ensure that these exams were of a comparable standard to that set by the board itself. As far back as 1933, a standing committee of the JMB supervised examination statistics, because of the considerable variation in the failure rate of various examinations in the course of time, "… the only conclusion one can come to is that the variation must be in the standard

2 Davies "Levels of Attainment in Geography" 2001 *Assessment in Education: Principle, Policy and Practice* 8.

3 Bakker & Wolf "Upper-Secondary Examinations and Entry to University: The School University transition in an age of mass higher Education" 2001 *Assessment in Education: Principles, Policy and Practice* 26.

4 "Umalusi" is the Council for Quality Assurance in General and Further Education and Training, established by an Act of Parliament, the General and Further Education and Training Quality Assurance Act 58 of 2001 (GENFETQA).

5 The Act also stipulates that Umalusi is permitted to adjust the raw marks when necessary.

6 Loock *The dilemma of equating examinations and assessment standards for the National Senior Certificate in South Africa* 2003.

7 See Umalusi press release (2011-01-08).

8 Lubisi & Murphy "Assessment in South African Schools" 2001 *Assessment in Education: Principle, Policy and Practice* 34-46.

of the examination."[9] The argument was that an obligatory standard distribution curve ought to be applied per subject in order to adjust the marks to a standard score before the comparative process could be applied.

In order to improve the application of the standard distribution curve, a further sub-committee for standard distribution was appointed in 1975. They immediately attempted to structure the issue concerning standard distributions and formulate an equation and demanded rectifications from time to time. Concern was voiced about the propriety of the adjustment of examination marks on the basis of standards and norms.[10] The year 1992 was marked by the demise of the JMB. Matriculation was to be controlled by the Matriculation Board, which was to be a sub-committee of the Committee for University Principals (CUP). A new statutory body, the South African Certification Council (SAFCERT), was established in 1986.[11] Until 2002, SAFCERT would be responsible for the moderation and quality control of all school leaving examinations. SAFCERT was transformed by the end of 2002, to cater for a new education and training system, currently known as the General and Further Education and Training Quality Assurance Council (Umalusi).[12] Umalusi continued to build on both SAFCERT and the JMB's approaches to controlling the standard of the Senior Certificate Examination. However, it was becoming increasingly evident that the context in which the examination was being written was continuously changing.[13]

While most of the examination bodies in countries, other than South Africa, utilise statistical data to standardise results, few of them apply pre-determined statistical norms or desired distributions. Not only is the standardisation of raw examination records recognised as an educationally sound practice, it proved to be a cost effective, reliable and appropriate process for the South African scenario.[14] The National Senior

9 Trümpelmann *The Joint Matriculation Board. Seventy Five Years: Achievement in Perspective* (1991).

10 Trümpelmann (1991). Such views were based on the feeling that examinations itself should be the measure of success – the examination paper, set by competent examiners and moderated by experienced moderators should be the final criterion. The fact is that practice proved different, as it has been repeatedly demonstrated, by having several examiners mark the same script independently, that the marks given by different examiners to the same answer to the same question may differ widely and a variation of 10% is common, even in the so-called objective subjects. It was true then and it is still true today.

11 Under the South African Certification Council Act 85 of 1986 with school leaving certification as its primary objective.

12 In accordance with the General and Further Education and Training Act 58 of 2001.

13 Lolwana *Umalusi: a historical perspective* (2006).

14 See SAFCERT (2002) 18. It is clear that the concept of high stakes standardised testing and the issue of equating examinations and scores, using one common scale is not a simplistic one and needs retrospective research. Equated exams enable us to compare the performance of learners over a number of years. The equivalence of marks obtained in the

Certificate (NSC) requires candidates to pass minimum levels of a prescribed combination of subjects. These subject packages not only differ in terms of the subject content, they also differ in the level of difficulty. For the purposes of Grade 12, prior to 2008, candidates could offer subjects at Lower, Standard and Higher Grades.[15] The problem that faced SAFCERT at the time, and currently faces Umalusi, is to ensure that candidates with equal ability, who write different examination question papers, under different circumstances and marked at different marking venues, will obtain equivalent results, in order to comply with the requirements for the issuing of a single certificate, as indicated above. SAFCERT concluded that: "Statistical moderation is necessary to take care of the variation in the standards of marking that may occur from year to year, from one subject to another, or from one examining body to another".[16] The conclusion since 1933 was, that statistical data could be utilised much more effectively to bring greater reliability to the Senior Certificate Examinations, an approach that is still adopted today.

2 1 Statistical Adjustment of External Examination and Assessment results

In its report to the Minister of Education SAFCERT reiterated that there is an abundance of evidence, both in South Africa and elsewhere in the world, that despite the careful attention, and diligence, of competent and experienced examiners, moderators and markers, it is impossible to determine whether a question paper is actually of the required standard until it has been written and marked. It is essential, for this reason, to review the raw examination marks. These raw results should be adjusted, or "standardised", if evidence indicates that the question paper did not produce a fair result.[17] If the examination papers of the examinations in one year are the same standard as those of the previous year, the results should theoretically compare closely with the norms, as calculated by the quality assurance body (Umalusi). If this is not the case, adjustments will be applied. The suggested adjustments are analysed and

matriculation examinations in South Africa prior to the 2008 changes in the curriculum always required careful consideration, however, one cannot simply assume that the traditional reference norm or reference instrument can still be applied, or that established equating procedures, such as those currently adopted in South Africa, will still provide meaningful information used to control the performance level of certified learners and their consequent progression.

15 *National Education Policy Initiative* (1992) 16. All these subjects were (and still are) internally assessed through school-based, continuous assessment procedures, and externally benchmarked by an exit level external written examination.

16 See SAFCERT (2000/2001) 10.

17 Standardisation, of examination results is the process whereby the results of the examination in a particular year is compared with established or calculated norms and adjusted if necessary. The standardisation process consists of a set of computer programs by way of which examination raw marks are compared with the norms as calculated and provided by Umalusi.

evaluated by the National and Inter-provincial Standardisation Committees.[18]

2 2 Statistical Adjustment of School-based Continuous Assessment Results.

While moderation is a process of ensuring that the same assessment standards are applied to learners from every school, statistical moderation is a process of adjusting a particular school's continuous assessment marks to a set standard, while maintaining the rank order of learners as reflected by the standardised external examination marks.[19] School-based assessment is an important component for the calculation of a learner's promotion mark.[20] It is important to ensure that the continuous school-based assessment results of all schools throughout the country are comparable. Statistical moderation is a process of adjusting the level, and spread, of each school's assessment results for a specific subject, to match the level and spread of the same learners' scores on a common external examination.[21] Following these processes of standardisation, and the statistical moderation of the 2010 Grade 12 results, Umalusi declared the results valid, by indicating that as a matter of principle and historical practice, it cannot disclose the individual subject adjustment decisions. The media statement released by Umalusi on the occasion of the release of the 2010 NSC examination results,[22] sparked a public and media outcry on the legitimacy of the 2010 NSC examination results, due to the lack of transparency, and Umalusi's seemingly non-compliance with the *Bill of Rights*, and access to information that is deemed to be in the public interest.

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18 During the standardisation process a graph and statistical data are produced separately for each subject – the graph and statistical data reflect the outcome of the examination accurately in comparison to the norm.

19 At present we assume that the only common measure of standard in the grade 12 schooling system is the examination even though the external written examination may assess different skills and competencies from school-based assessment, the assumption is that a group of learners that does well in the examination should also do well in the school-based assessment. Since school-based assessment provides more opportunities and also a less stressful environment, the assumption is that school-based marks of a group should in general be better than the external common examination.

20 The unadjusted continuous assessment mark (CASS mark) of a learner for a specific subject, at a specific school, is the cumulative result of the educator/learner's efforts during the year.

21 This is done after the achieved results of the common external examination have been standardised against the expected national norm, as previously discussed. Because the common examination is written by all learners in the country, it is regarded as the common standard against which schools' results can be compared. As the standardised examination mark is used as the norm, the CASS mark moderation can only be executed once that process is completed. The statistical moderation is done according to the formulae and procedures as determined by a statistics committee of the General and Further Education and Training Quality Assurance Body, Umalusi.

22 See Umalusi press release (2011-01-06).

2 3 The Issue of Non-disclosure of Information

Umalusi believes that disclosing standardisation decisions in respect of particular subjects will be prejudicial to the learners, as Umalusi and the assessment bodies are "… dealing with the entire system in the standardisation processes and not with individual learners".[23]

The media and general public did not accept this announcement on face-value:

> The message is clear: Umalusi was the authority, bursting at the seams with experts and why should they explain themselves to anyone – let alone us poor mushrooms whose children are subjected to the state education system?[24]

The media continued to voice the public frustration against Umalusi's position, stating:

> Umalusi admits that there were statistical moderations to the outcome of the exams and that such moderations are normal. But what they refuse to answer are questions relating to how these adjustments were made and what the 2010 matric pass rate would have been without the adjustments.[25]

Readers also expressed their opinions, calling on the constitutional right to information in the public interest: "the Constitution guarantees every citizen the right to know what is going on in the country. Any violation of this hallowed tenet in our *Bill of Rights* must be challenged in the highest courts".[26]

In an effort to defend its position not to disclose the details of the adjustments applied to the 2010 NSC-results, Umalusi indicated that the non-disclosure of raw mark adjustments is a universal practice, because examinations cannot be field tested despite being moderated by Umalusi, before they were written: "Standardisation of marks involves a

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23 See Umalusi press release (2011-01-06): "… standardisation decisions are made behind closed doors because the work is highly complex, technical and qualitative, and because the welfare of many hundreds of thousands of candidates depends on that work. Disclosing the outcome of this rich discussion to the general public without the benefit of the plentiful debate that informed a particular outcome in respect of a particular subject is simply inappropriate."

24 Trench http:www.trench.com.2011-03-23/bust-open-secrets-southafricas-wonderful-access-to-information-laws.htm (accessed 2011-08-05).

25 *The Sowetan* (2011-01-18) 3.

26 *Business Day* (2011-02-01) 5 lead with the mainline: Questions remain over Umalusi data and further stated that, "Umalusi, the body responsible for certifying SA's matric results are up to standard, has done itself no favours in the manner in which it has handled widespread scepticism over the credibility of the 2010 pass rate". Similar reports appeared in most of the newspapers in the Media24-stable, including *City Press*, *Rapport* and *Beeld* (2011-01-05); *The Sowetan* (2011-01-25) even went as far as to declare: "Public trust in Umalusi wiped out: Body should not take citizens on a guilt trip over the right to ask questions".

sophisticated statistical model, which increases or decreases candidates marks by a proportion of their total".[27]

In this context the question can be asked, whether the initial argument posed by Umalusi with regard to understanding the complexity of the process is valid and not in the public interest?

Is this an issue that Umalusi is in the position to resolved unilaterally? Section 32 of the Constitution of the Republic of South Africa, 1996 (the Constitution), clearly states that everyone has the right of access to information held by either the state, or another person that is required for the exercise of protection of any rights.[28] The Promotion of Access to Information Act[29] (PAIA) gives effect to the right. The South African Human Rights Commission (SAHRC) indicates that the PAIA represents a landmark in South African history, by addressing, for the first time, the pre-1994 culture of secrecy in state and private institutions, seeking instead to foster a culture of transparency and accountability in South Africa.

Although access to information regimes are fast gaining momentum around the world, South Africa's freedom of information legislation remains unique, since it is the only such law that permits access to records held by private, as well as public bodies.[30] It is within this broader context that one needs to consider the initial position adopted by Umalusi, in light of the provisions of PAIA.

3 The Promotion of Access to Information[31]

The Constitution provides that every person has the right of access to information. Legislation, in the form of the PAIA, was promulgated with the aim to foster a culture of transparency and accountability in public and private bodies, by giving effect to the right of access to information, and, possibly more importantly, to promote a society in which South African citizens have access to information to enable them to exercise and protect all of their rights more fully,[32] as well as give effect to the constitutional right of access to any information held by the State, and any information that is held by another person, which is required for the

27 Umalusi press release (2011-02-23).
28 S 31(1)(a) Constitution entrenches the right that everyone has access to any information held by the state.
29 2 of 2000.
30 See http://www.acts.co.za/promotion_of_access_to_information_act_2000.htm (accessed 2011-08-05) on-laws.htm.emaintext.efootnotes. (accessed 2011-08-05).
31 The Act has been amended several times since 2000, the last of which was the amendment by the Judicial Matters Amendment Act 66 of 2008. See also Notice R 1185 *GG* 23806 (2009-12-18), as well as Notice R 1094 dealing with the Form D.
32 When interpreting the provisions of PAIA, a court must prefer any reasonable interpretation of the provision that is consistent with the objectives of PAIA as articulated above.

exercise of the protection of any rights, and to provide for matters connected therewith.[33]

In the preamble to PAIA, one is reminded of the fact that the:

> system of government in South Africa, before 27 April 1994, amongst others resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations.

This seems to be core of the media and public demand for transparency and openness during the release of the standardised "matric" results, and actually challenges Umalusi's claim that the detail of subject adjustments was never revealed, since 1918. According to Roberts, the mere existence of a legislative framework regulating aspects, such as the nature of the right of access to information, administrative matters, legitimate limitations and enforcement mechanisms, does not mean that the right of access to information will automatically be fulfilled in the way that the drafters of PAIA envisaged.[34]

The general provisions of PAIA stipulate that it applies to a record of a public body, to the exclusion of other legislation that:

> (a) Prohibits or restricts the disclosure of a record of a public body or private body; and
> (b) Is materially inconsistent with an object, or a specific provision of PAIA.

The right of access to any information held by a public, or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.[35] The Umalusi Council decided not to disclose the full record on the marks adjustments applied to particular subjects during the standardisation process, because they believed that learners could be prejudiced as the general public might not understand the sophistication and complexity of the process. They also argued that in terms of the General and Further Education and Training Quality Assurance Act,[36] Umalusi is permitted to adjust the raw marks when necessary.[37]

Considering the media and public reaction discussed in the introduction to this article, it would be prudent to establish what recourse was available to the general public, and media, in terms of the right of

33 See http://www.acts.co.za/promotion_of_access_to_information_act_2000.htm (accessed 2011-02-20).
34 Roberts "Prerequisites for the successful implementation of the access to Information Act 2 of 2000" 2006 *JPA* 1.
35 Consider Umalusi' s decision to withhold information in terms of the justifiable limitations articulated in s9(b)(i) PAIA.
36 58 of 2001.
37 S 9(b) PAIA states that the objectives of PAIA is subject to justifiable limitations, including but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and in a manner which balances that right with any other rights, including the rights in the Bill of Rights, Ch 2 Constitution.

access to information.[38] PAIA states that a "requester" must be given access to a record of a public body if the requester complies with all the procedural requirements in PAIA relating to a request for access to that record in accordance with section 18(1) of PAIA.[39] The decision on a request, and notice thereof, must be taken and the "requester" notified, as soon as is reasonably possible, but in any event within 30 days after the request has been received.[40] The information officer may extend the period of 30 days (the "original period") once, for a further period of not more than 30 days, if the request is for a large number of records and compliance with the original period would unreasonably interfere with the activities of the public body concerned. The "requester" must be notified accordingly. In the case of Umalusi, public access to, and/or the publication of, the large scale NSC examination and standardisation records within a short period of time might be problematic, even challenging, as it needs to be presented in a different format than the computerised data, which are used by the Umalusi Technical (standardisation) Committee for the purposes of adjustment and resulting.[41] An interesting dimension to the Umalusi debacle was that initially no person, organisation or individual formally submitted an official application to Umalusi in terms of section 18(1) of PAIA. Calls and demands for more information on the standardisation of the NSC results have been mostly verbal, while public interest was initially mostly articulated by the media. Only after Umalusi's continued persistence not to disclose the details of the marks adjustments did Media24 file a formal application.[42] Other media from the Avusa-stable (*City Press* and *Rapport*) opted to threaten with litigation. On the 23 February 2011, Umalusi called a press conference and summarily disclosed the extent of the individual subject adjustments applied during the resulting process stating that Umalusi is taking this, "unprecedented step because of the intense interest in the standardisation process and after intensive

38 See part 2 PAIA.

39 A request for access must be made in the prescribed form to the information officer of a body and the requester must provide sufficient particulars to enable the official of the public body to adhere to the request.

40 s 24(1)(a) PAIA stipulates: "If the information officer of a public body decides to grant a request for access to a record, but that record- is to be published within 90 days after the receipt or transfer of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it; ... the information officer may defer giving access to the record for a reasonable period".

41 The standardisation records, per subject, per province and, in the extreme cases, per learner are very comprehensive. Such records will typically include norm calculation tables, marks-distribution tables, marks-adjustment tables and school based assessment (SBA) moderation records.

42 See http://andrewtrench.com/2011/02/23/bust-open-secrets-south-africas-wonderful-access-to-information (accessed 2011-02-20): "… we demanded copies of every record relating to the decision and which would show how the mark adjustment decisions were made, which subjects were changed and how much".

consultation with stakeholders and other interested parties".[43] The media had a field day and the news was carried in the tabloids the following day.[44] As far as Media24's application was concerned, full records were released to them by Umalusi on the 30 day deadline.[45]

The fact that Umalusi disclosed the sum total of the individual subject adjustments under public and media pressure, will not make the issue disappear and it will be prudent for the Umalusi Council to consider its position in view of the provisions, and prerequisites, of the PAIA, as well as, lessons to be learned from emerging case law.

In *Nextcom (Pty) Ltd v Funde*[46] the court held that the respondent is an organ of State, conceived and born in Parliament. It is also financed by the State and its activities prescribed or determined by statute.[47] This is equally valid for and applicable to Umalusi. The Court further held that the justification of administrative and executive decisions is only truly possible if there is transparency. A free flow of information is the very essence of justification. It was held that the applicant had a right open to protection by section 32 of the Constitution. The respondent was in possession of all the information, which would enable the applicant to establish whether its rights had been compromised.[48]

In *CCII Systems (Pty) Ltd v Fakie*[49] the court held the number of documents requested by the applicant was too vast, and the work involved in processing the request would substantially and unreasonably have diverted the respondent's resources from its core business. The court held that the respondents approach made it impossible to evaluate its entitlement to privilege in respect of the records was justified.[50]

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43 Umalusi (2011-02-23). Press statement by Umalusi Council chairmen, Prof Sizwe Mabizela: "We realised that non-disclosure is more damaging to the regulator … we have nothing to hide. The process of standardisation s very rigorous and we have a great team of statisticians and academics. If the public wants to disclose every year, we are ready".

44 *The Times* (2011-02-24) 3 "Umalusi denies cooking the books"; *Sowetan* (25-02-2011) 5 "Public trust in Umalusi wiped Out"*; Pretoria News* (2011-02-24) 3 "How matric marks were adjusted".

45 The information officer has a legal duty to consider, provide and assist the requester with the application as determined by s 19(20) PAIA.

46 *Nextcom (Pty) Ltd v Funde* 2000 4 SA 491 (T).

47 Umalusi was established by GENFETQA as an organ of state, responsible for moderation, monitoring, standardisation and certification of exit level exams.

48 See Umalusi' s response to the media, that "… standardisation decisions are made behind closed doors because the work is highly complex, technical and qualitative, and because the welfare of many hundreds of thousands of candidates depends on that work. Disclosing the outcome of this rich discussion to the general public without the benefit of the plentiful debate that informed a particular outcome in respect of a particular subject is simply inappropriate."

49 *CCII systems (Pty) Ltd v Fakie* 2000 4 SA 491 (T).

50 In the case of Umalusi this is equally appropriate: "At the press conference the grandiloquent prof Mabizela spent hours lecturing my colleagues on the finer points of statistics and ogive curves and the like, berating the press and

Considering the media coverage the matter had enjoyed and the prominence of the members, the court held that maximum access was necessary to dispel any suspicion of a cover-up.[51] In addition, the applicant had alluded to conflicts of interest and political pressure. The court held that if at all feasible such suspicions had to be put to rest.[52] The court held further that section 44 did not deal with historical situations.[53]

4 Conclusion

The Constitution stipulates that every person has the right of access to information held by the government. To give effect to this right, legislation in the form of the PAIA was promulgated. Up to 2011, the non-disclosure of individual subject mark adjustments relating to the Grade 12 exit level examinations has never been challenged. The Umalusi Council for Quality Assurance in General and Further Education and Training, was established by an Act of Parliament in 2001, to moderate, standardise and certify exit level exams in the country, with a mandate to adjust raw marks if necessary. Umalusi maintained the historical position of the previous quality assuring bodies on the non-disclosure of information pertaining to individual subject raw mark adjustments prior to resulting, and informed the media of its intended persistence in this approach during a press release in January 2011. Over and above media and public outrage, Umalusi was threatened with litigation. In terms of the Act, Media24 subsequently applied, formally, to the Umalusi Council to release all relevant records to enable them to determine whether, and to what extent, public and individual rights have been compromised by the non-disclosure of the standardisation and mark adjustment records of the Grade 12 examinations.

This article explored the historical context and role of Umalusi, as an organ of state established by an Act of Parliament with the view to being the custodian and quality assurer of all exit level examinations and assessment in South Africa, within the relatively new access to information regime. The article explored the scope of the Promotion of Access to Information Act with reference to the nature of information that may be requested, the public institutions to which the Act applies and who is allowed to request information in terms of this legislation. These

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experts who dared to question the judgement of the esteemed experts of Umalusi." Trench (http://www.trench.com.2011/03/23/bust-open-secrets-southafricas-wonderful-access-to-information-laws.htm (accessed 2011-08-05)).

51 See the suspicion voiced by the media about Umalusi's approach: "The organisation was initially highly defensive over the fact that the pass rate was almost 12% higher than the previous year, but it felt no need to explain why this is the case" *Business Day* (2011-01-18) 3.

52 See par 17.

53 Umalusi also defended its initial position on the non-disclosure of information on the principal that standardisation records have never been made public, since 1918 and need to take cognisance of this ruling.

aspects are analysed by drawing on some case law and the corresponding provisions of the Act, as it relates to the challenge to access the Umalusi-records on subject marks adjustments for the first time since 1918.

The human rights paradox of lesbian, gay, bisexual and transgender students in South African education

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OPSOMMING

Die Menseregte-paradoks van Lesbiese, Gay, Biseksuele en Transgeslagtelike Studente in die Suid-Afrikaanse Onderwys

Onlangse navorsing toon duidelik aan dat benewens geslag, seksuele oriëntasie waarskynlik die volgende sleuteleienskap is wat bepaal wie ons as mense is. Seksuele oriëntasie is een van die belangrike aspekte wat 'n persoon se identiteit, *persona,* selfbeeld, samehorigheid, gelykheid en waardigheid bepaal. Wanopvattings en vooroordele lei dikwels tot emosionele, sielkundige en woordelikse diskriminasie of viktimisasie, en kan selfs tot fisiese geweld teen lesbiese, gay, biseksuele en transgeslagtelike (LGBT) student lei. Hierdie artikel ondersoek eerstens historiese voorbeelde van menseregteskendings teen LGBT-mense in Suid-Afrika, sowel as voorbeelde van teenswoordige menseregteskendings teen LGBT-mense, ten spyte van duidelike rondwetlike bepalings in hierdie verband. Ten einde die onderliggende faktore wat sulke skendings meebring te verstaan, word sosiale wanopvattings aangaande LGBT-mense ondersoek, gevolg deur 'n bespreking van wat biologiese navorsing aangaande LGBT-oriëntasie aan die lig gebring het. Die Menseregtekommissie berig dat fisiese en sielkundige misbruik van LGBT-studente is menseregteskendings wat dikwels in die Suid-Afrikaanse onderwysstelsel voorkom. Die artikel voer aan dat stilswye, wanopvattings, miskenning sosiale vooroordele aangaande seksuele oriëntasie 'n "verskuilde kurrikulum" skep wat LGBT-studente se reg op waardigheid en gelykheid skend, en 'n paradoks meebring met die grondwetlike waardes wat Suid-Afrika se demokratiese bestel onderlê.

1 Historical Examples of Human Rights Violations Against LGBT People in South Africa

South Africa, as other countries, has a dark history of discrimination and prosecution against gay people. Since 1872, sodomy was a common law crime in South Africa, defined as anal or oral sex amongst men. This is in line with Texas legislation in the United States of America (USA), where the court upheld the law in 2003 that an act of sodomy between two adults of the same sex in their private homes would be illegal.[1] The

1 *John Geddes Lawrence and Tyron Garner Petitioners v Texas* 123 S Ct 2472.

Sexual Offences Act[2] prohibited men from engaging in erotic conduct when there were more than two people present. section 20A of the Sexual Offences Act made the "unnatural sexual offence" of sodomy punishable with a penalty of up to two years of imprisonment or a fine of up to R400, or both. The fine was increased to R4000 in 1988. General Viljoen, Head of the South African National Defence Force, ordered in 1982 that all possible steps had to be taken to combat the phenomenon of homosexuality or lesbianism in the army.[3] During the Apartheid years approximately 900 young Lesbian, Gay, Bisexual and Transgender (LGBT) men and women were strained by the Defence Force to undergo aversion therapy, including shock therapy, behavioural therapy, narcoanalysis, chemical castrations with massive doses of hormones, medical torture and gender reassignment surgery in Ward 22 at 1 Military Hospital, Voortrekkerhoogte, Pretoria.[4] However, the grass was not greener for LGBT people on the other side of the fence either.

Stompie Seipei, a child activist and member of the Mandela Football Club, a front for the political mobilisation of township youths to stand against apartheid, was abducted near the Methodist Church (Manse) in Soweto on December 29, 1988, and took to Winnie Mandela's (wife of the former President of South Africa, Nelson Mandela) home. One of the convicted, Jerry Richardson, testified that Winnie Mandela initiated the torture of Seipei, who was sjamboked, bounced on the floor and killed for sexual misconduct with a Methodist reverend Paul Verryn who was accused by some of the boys of performing homosexual acts with young boys. Mandela also accused Seipei of being a police informer, a charge that carried a death penalty in terms of township mob justice. While she denied any involvement in the death of Seipei, the judge implicated Winnie Mandela in the murder by ruling that she was present when Seipei was tortured. Later Mandela accepted before the Truth and Reconciliation Commission some responsibility for the death of Seipei.[5] Today, Winnie Mandela's formal house where the murder took place, is one of the conceited attractions shown to international tourists on historical Apartheid tours through Soweto. The article will now focus on provisions regarding LGTB people in Post Apartheid era.

2 24 of 1957.

3 Lewin "Personal interview" 2001 quoted from Belkin & Canaday "Assessing the integration of gays and lesbians into the South African National Defence Force" 2010 *Scientia Militaria: SA J of Military Studies* 1-20.

4 Van Zyl, de Gruchy, Lapinsky, Lewin & Reid *Human rights abuses of gays and lesbians in the South African Defence Force by health workers during the apartheid era* 1999; Van der Linde "Sometimes having to say you're sorry" 1995 *SA Med J* 715-716.

5 *The Daily Mail* (1990-08-08) 2.

2 Constitutional Provisions Regarding LGTB People in Post-Apartheid

> We (gay people) are here in Africa. We live in the mainstream, we pay taxes like everybody else in the mainstream, we relate with people in the mainstream. We are a naturally occurring phenomenon in the universe.[6]

On 9 October 1993, the South African High Court held that all convictions of consensual sodomy, dating back to the adoption of the interim Constitution in 1993, were subject to invalidation.[7] In 1996 South Africa was the first country to adopt a Constitution[8] that protects people from discrimination on grounds of sexual orientation. The Republic of South Africa is one, sovereign, democratic State, founded on a set of values which includes, amongst others values, human dignity, non- racialism and non-sexism.[9] As the Supreme Constitution is underpinned by these values, no legislation or decision in South Africa should contradict these underpinned values. In terms of section 7 of the Constitution, the Bill of Rights is for all people in our country, irrelevant of their sexual orientation, and it enshrines the democratic values of human dignity, equality and freedom.

The Constitution defines the unalienable rights of all people in South Africa to be exercised in democratically responsive institutions. It guarantees tolerance towards diversity in its widest sphere, free of any coercion. Policies, like school policies, should guide people who implement human rights, to apply these rights according to these underpinning values. If values don't underpin a legal system, the law remains unenforceable and people's rights will remain violated. In terms of section 9(1) of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law. It continues to guarantee in section 9(3) that the State may not unfairly discriminate against anyone on grounds of, amongst other things, sexual orientation; section 10 guarantees everyone the right to human dignity; section 12 states that everyone has the right to security of the person, while section 14 holds that everyone has the right to privacy. This includes, amongst other things, that the private life and sexual activities of all people should be respected. The latter, however, excludes public indecency, illegal activities like loitering, and sexual behaviour that could offend minors or other citizens. It is necessary to indicate, however, that an action that offends someone is not necessarily illegal as certain actions involuntary will offend other persons. Furthermore, in terms of section 16 of the

6 Donna Smith, representative of the Forum for the Empowerment of Women – an African lesbian organisation based in Johannesburg; *Mail & Guardian* (2006-06-24) online archive: http://www.mg.co.za/article/2006-06-24-gay-and-lesbian-people-are-here-in-africa (accessed 2013-29-03).

7 Leonard "South Africa's Highest Court strikes down sodomy law" 2004 Online Available: http://www.sodomylaws.org/world/south_africa/sanews006.htm (accessed 2013-29-03).

8 Constitution of the Republic of South Africa 1996.

9 S 1 Constitution.

Constitution, everyone has the right to freedom of expression, which in terms of section 16(1)(b), includes the freedom to receive information. LGBT learners' right to freedom of expression are therefore violated if school curricula deny addressing their existence and refusing to deal with supportive life orientation content. It continues in section 16(2)(c) that no one can legally express advocacy of hatred that constitutes incitement or harm. In terms of section 18 everyone has the right to freedom of association. This includes the freedom of choice to make friends, and spend time with people of the same gender and sexual orientation without being threatened, physically or emotionally.

Despite these post-Apartheid constitutional provisions, human rights violations against LGBT people recurrently surface in the South African media. Continual social intolerance against LGBT people hints towards a gap in the South African education system to educate ill-informed members of society against homophobia and unfair prejudice against sexual orientation.[10] The article will therefore now turn to touch on contemporary human rights violations.

3 Examples of Contemporary Human Rights Violations Against LGBT People

Only a few examples of different human rights violations will be dealt with as example of the *status quo* in society.

3 1 Equality

While Judge Edwin Cameron, a self-recognised homosexual, was appointed as a judge in the Constitutional Court, during August 2009 in Gauteng judge Omar requested the *Legal Services Commission* to not appoint Judge Kathy Satchwell as a judge in the Constitutional Court because of her sexual orientation.[11] This leads as example of a systemic problem where even the adjudicators of our legal system seem to misplace the niche of the underpinning values of the application of human rights.

3 2 Freedom of Expression

On May 27, 2010, as part of the Harold Wolpe lecture presented by the Eastern Cape Socio-Economic Advisory Committee in collaboration with the Fort Hare and Rhodes Universities, Pastor Sipho Mengezeleli of the Godly Governance Network, during the audience discussion of his conference paper entitled "Is Social Conservatism on the Rise in South Africa?", stated that to be gay (the modern word for homosexual –

10 Francis & Msibi "Teaching about Heterosexism: Challenging Homophobia in South Africa" 2011 *Journal of LGBT Youth* 157-173.

11 *Beeld* (2009-08-29) online archive http://www.beeld.com/Suid-Afrika/Nuus/Lesbier-is-nie-geskik-20090829 (accessed 2013-29-03).

ironically homosexuals often have a happy image, but inside they are scared, humiliated and discriminated against within society) is inhumane and unnatural … those who live so make themselves non-human. Not even dogs and cats do this.[12] He further argued that homosexuality should not be enforced arrogantly on nations and that South Africa, with its 85% African people, cannot be forced to accept what the rest of the world accepts. He called for a National referendum, and if the majority of South Africans would not agree with homosexuality, it should be handled accordingly.

This statement cannot be viewed as the pastor's right to freedom of expression as this right is inherently limited in terms of section 16(2)(c) which states that the right to freedom of expression does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. The fact that religious leaders, the value- and pastoral carers of society, seem not to implement the values of society, is a further outcry to the systemic problem that does not enforce legislation according to the underpinning values.

3 3 Human Dignity and Life

In 1999, a gay bar in Cape Town was targeted with a bomb during which six people were injured. In a television interview, former Safety and Security Minister Steve Tshwete claimed that the vigilante group *People Against Gangsterism and Drugs (PAGAD)* was behind this act of terrorism because the post-apartheid State supports abortion and gay rights.[13]

In February 2006, 19-year-old lesbian Zoliswa Nkonyana died in a township outside Cape Town after she was chased by a mob, beaten with golf clubs and bricks, and stabbed because of her sexual orientation. No one was arrested.[14]

In April 2008, 31-year-old Eudy Simelane, one of the first women to live openly as a lesbian in KwaThema township playing for the South African women's soccer team, was accosted while leaving a pub and robbed of her cell phone, trainers and cash. She died from wounds to the abdomen after being gang-raped and stabbed 12 times. Her naked body was dragged towards a stream and dumped. During the sentence trail of one of her murderers, Judge Ratha Mokgoathleng stated:

> Eudy Simelane suffered a brutal, undignified death … She was stripped naked, stabbed, assaulted, raped. What more indignity can a person endure

12 *Rapport* (2010-05-29) online archive http://www.rapport.co.za/Suid-Afrika/Nuus/Gays-is-slegter-as-honde-gn-beledigend-se-pastoor-20100529-2 (accessed 2013-29-03).

13 Cock "Engendering gay and lesbian rights: the equality clause in the South African Constitution" 2003 *Women's Studies Int Forum* 35-45.

14 *Mail & Guardian* (2006-11-06) online archive http://www.mg.co.za/article/2006-11-06-fear-and-violence-still-rule-gay-township-life (accessed 2013-29-03).

> … The accused has shown no remorse whatsoever. He steadfastly maintains … that is his right.[15]

If the South African School system instils the values that underpin our Constitution and society, there should be a tolerance amongst citizens to not abuse other's human rights because they may think or act differently. In line with this Reyneke[16] refers to a value crisis in the South African society and concludes that the systemic problems in the education sector, amongst others can be the result of a failure of respect for values and more specifically to the right to human dignity.[17]

These incidents are but a drop in the ocean and serve as examples of people in society not living according to the values that underpin their constitution and which are still on a daily basis violating the rights of LGBT people. This phenomenon indicates an educational dysfunction as to the development of skills and attitudes in our school system where the implementation of values should be internalised. As social systems inform the law, these systems develop statutes and policies to apply or enforce the law in practice. The fact that LGBT students experience violations of their human rights at school could be laid at the feet of various social misconceptions.

4 Socially Held Misconceptions about LGBT

In order to better understand the underlying factors causing human rights violations against LGBT people, it is necessary to explore and challenge socially held misconceptions about LGBT people.

4 1 Misconception 1: Homosexuality is a Product of Western Culture or Post-modernism

> Culture is a wonderful thing that is there to nurture and protect people, not abuse and humiliate – Nthombikayise Mthiya

Homosexuality has been around since prehistoric times.[18] Historically, the most cited example of widespread homosexuality was among the Greeks of around 2,500 years ago (who were in fact comprised of diverse

15 Mail & Guardian (2009-09-29) online archivehttp://www.mg.co.za/article/2009-09-23-gangrape-killer-of-lesbian-footballer-gets-life (accessed 2013-29-03).

16 73.

17 Reyneke "Dignity: The missing building block in South African schools?" 2010 *J for Juridical Science Special Issue* 71-100.

18 Jefferson "Gay caveman grave proves caveman smarter than many Americans" 2011 online archive http://www.good.is/post/gay-caveman-grave-proves-cavemen-smarter-than-many-americans (accessed 2013-29-03).

cultural groups).[19] Social anthropologists[20] found proof that homosexuality existed throughout history to much the same degree as it does today. It shows to be constant in frequency within different cultural groups around the World. Discrimination against homosexuals in South Africa is partly a result of a misconception that homosexuality is an unwanted legacy of colonialism, white culture and post-modernism.[21]

Various African leaders, including the presidents of Namibia, Uganda, Zambia, Zimbabwe and Kenya openly condemned homosexuality around the notion that homosexuality is "unafrican". In 1995 President Robert Mugabe of Zimbabwe stated:

> Gays are perverts and their behaviour is worse than that of pigs ... They are lower than dogs and pigs, for these animals don't know homosexual behaviour.[22] He then encouraged the population to take the law into its own hands, to arrest homosexuals, to report, and deport them ... Homosexuality is unafrican and in conflict with culture.[23] [24]

On another occasion he stated that "[l]esbianism is not part of Zimbabwean culture".[25] In *The Star* of August 21, 1995, a South African reader praised Mugabe in a letter because:

> [h]e espouses and cherishes our traditions and customs. Homosexuality is an aberration to all thinking Africans and indeed to most of civilised mankind. Homosexuals are regarded as an abdominal species, which must be punished and locked up ... Viva Robert Mugabe ... who defends our continent from Satanists, sodomists and faggots.[26]

With the same negative attitude, the then Deputy President Jacob Zuma said in a September 2006 speech: "same-sex marriages are a disgrace to the nation and to God. When I was growing up a gay would not have stood in front of me. I would knock him out".[27] Despite these claims that homosexuality is "unafrican", anthropologists found clear evidence that homosexuality was widely tolerated in many parts of pre-colonial Africa amongst various African cultures.[28] Also, various African LGBT organisations exist,[29] and in 2006 activists from six African countries, South Africa, Swaziland, Kenya, Namibia, Uganda and Tanzania, co-

19 Wilson & Rahman *Born gay: the psychology of sex orientation* (2005).
20 Whitam & Zent "A cross-cultural assessment of early cross-gender behaviour and familial factors in male homosexuality" 1984 *Archives of sexual behaviour* 427-439; Whitam, Daskalos, Sobolewski & Padilla "The emergence of lesbian sexuality and identity cross-culturally: Brazil, Peru, Philippines, and the USA" 1998 *Archives of Sexual Behaviour* 187-206.
21 *Mail & Guardian* (2006-11-06).
22 Luirink *Moffies: gay life in Southern Africa* 1998 51.
23 Luirink 51.
24 Cock 2003 *Women's Studies Int Forum* 26 1 41.
25 *The Star* (1998-04-24).
26 *The Star* (1995-08-21).
27 *Ibid*.
28 Murray *Homosexuality in "Traditional" Sub-Saharan Africa and Contemporary South Africa* 1998.
29 *Ibid*.

authored a publication on how African lesbians find ways to express their sexuality, despite opposition from their communities.[30]

4 2 Misconception 2: Homosexuality is an Emotional or Mental Disorder/disease, or Caused by the Depravity of Moral Values

Since 1973, psychology, psychiatry, and medical associations around the world (including post-Apartheid South Africa), do not consider homosexuality to be an emotional or mental disorder. To quote from the American Psychological Association's Statement on Homosexuality, which was released in July 1994:

> The research on homosexuality is very clear. Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents the mental health of gay men and lesbians. Studies of judgment, stability, reliability, and social and vocational adaptiveness all show that gay men and lesbians function every bit as well as heterosexuals, nor is homosexuality a matter of individual choice. Research suggests that LGBT orientation is in place very early in the life cycle of an individual, possibly even before birth. It is found in about ten percent of the population, a figure, which is surprisingly constant across cultures, irrespective of the different moral values and standards of a particular culture. Contrary to what some imply, the incidence of homosexuality in a population does not appear to change with new moral codes or social mores. Research findings suggest that efforts to 'repair' LGBTs are nothing more than social prejudice garbed in psychological accoutrements.

Research shows that in general there is no significant difference between the mental health of heterosexual people and the mental health of LGBT people. Since homosexuality is not a disease or a disorder, there is nothing to be cured. It is rather misconceptions, social stigma, and prejudice that are dangerous to the psychological well-being of young and scared LGBT people, who often turn to depression, anxiety and destructive behaviour, in fear of, or in reaction to, social exclusion and rejection.[31] Family rejection has been found as a predictor of negative health outcomes amongst young LGBT adults.[32]

Social, religious and cultural prejudice and discrimination often force LGBT people to fake heterosexual behaviour and lifestyles. Research comparing the psychological well-being of a multicultural group of homosexual men, with that of a group of heterosexual men (including members of the South African Police Service) found that 6 out of 80 heterosexual men indicated anonymous that they are not open about

30 Morgan & Wieringa *Tommy Boys, Lesbian Men and Ancestral Wives: Female Same-Sex Practices in Africa* 2006.
31 Wilson & Rahman (2005).
32 Ryan, Huebner, Diaz & Sanchez "Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults" 2009 *Pediatrics* 346-352.

their sexual orientation.[33] Homosexuals living homosexual lifestyles are experiencing higher levels of emotional and psychological well-being than those forced to live fake heterosexual lifestyles in fear of social and religious prejudice, exclusion, and discrimination. [34]

LGBT people are often unconstitutionally forced to confront discrimination and victimisation, opening themselves up to further public discrimination and prejudice.[35] Furthermore, LGBT people are still been discriminated against in work areas, regardless of the fact that the human rights of LGBT people are clearly protected by the Constitution of South Africa.[36]

4 3 Misconception 3: Homosexuals 'Seduce' Heterosexuals into Becoming Gay

According to researchers at the Institute of Psychiatry in London:

> [h]omosexual fantasies are quite common in heterosexual men and women as a form of 'mental exploration', and unless they predominate within mental life they do not usually imply repressed homosexuality… many people who are basically straight might consider an occasional homosexual adventure simply to broaden their horizons.[37]

Some people also appear to "protest too much" against homosexuality. In a famous experiment at the University of Georgia, it was found that men who expressed hostile feelings towards homosexuals (referred to as homophobes), showed greater signs of erectile response (measured by a *penile plethysmograph*) when viewing film clips depicting homosexual activity, than heterosexual men who were more accepting towards homosexuals.[38] This finding suggests that homophobia might be masking homosexual urges that are unacceptable to the self via the Freudian defence mechanism called reaction formation.

There is no scientific evidence for the notion that homosexuals "seduce" others into becoming gay, or that gay parents influence the sexual orientation of their biological or adopted children.[39] Research into homosexual identities and personality development[40] clearly indicates

33 Dreyer "Die psigologiese- en sosiale welsyn van 'n groep homoseksuele mans" 2003. (Masters Dissertation PU for CHE Potchefstroom) 91.
34 Bozett & Sussman *Homosexuality and family relations* 1990; Dreyer 2003; Neubeck & Neubeck *Social problems – a critical approach* 1997.
35 Nel & Joubert "Coming out of the closet: A gay experience" 1997 *Psychologia* 17-31.
36 Breytenbach "Optimale belewenisse in die werkplek van homoseksuele mans teenoor die van heteroseksuele mans" 2000 (Masters Dissertation PU for CHE Potchefstroom).
37 Wilson & Rahman (2005) 5.
38 Adams, Wright & Lohr "Is homophobia associated with homosexual arousal?" 1996 *J of Abnormal Psychology* 440-445.
39 Wilson & Rahman (2005).
40 Bell & Weinberg *Homosexuality: A study of human diversity* 1978; Troiden "The formation of homosexual identities" 1989 *J of Homosexuality* 43-73.

that – like heterosexual people – LGBT people discover their sexuality as a process of maturing – they are not recruited, seduced, or taught to be homosexual. Sexual activities with minors are an offence whether committed by heterosexual or LGBT people and punishable by law. Paedophilia is generally associated with immoral values and/or mental disorder, and not with sexual orientation.

4 4 Misconception 4: All Denominations of Religion Condemn Homosexuality

Religion is interpreted in many different ways. Some Christian scholars believe the Bible condemns homosexuality, while others do not. Different Christian denominations use the Bible as a basis for their faith, yet beliefs between these religious groups can be quite diverse.[41] The ordination of gay bishops in the Anglican Church is a good example of the considerable ambivalence within Christianity concerning homosexuality.[42] Africa's leading Anglican churchman, Nigeria's Archbishop Peter Akinola, condemned the worldwide church's response to the controversy over the ordination of an openly homosexual bishop as wholly inadequate and insulting.[43]

Throughout history, some mainstream Christian groups have used the Bible to justify slavery, racism, child abuse, domestic violence, and sexism. Martin Luther King Jr used the Scriptures to inspire those struggling to overcome racism. At the same time others used the Bible to promote racial segregation and violence. While Islam is widely considered one of the religions that condemns homosexuality most, various online social groups exist on the Internet in which LGBT people from African and Middle Eastern countries come out online, regardless of the fact that homosexual acts are illegal in most of these countries, with penalties ranging from long-term imprisonment to execution[44]. For example, recently a Malaysian Muslim man confessed on Youtube, a video-sharing website, to being gay, and questions the validity of Islam's views on homosexuality.[45] While the majority of the Islamic world may view his statements as profane, nevertheless, it shows that even in Islam ambivalence exists concerning LGBT.

In terms of section 15 of the Constitution everyone has the right to freedom of religion. However, no denomination is superior to another. As all religious denominations are minority groups in the South African society, they cannot claim their dogmatic rules superior to the

41 Blumenfield & Raymond *Looking at Gay and Lesbian Life* 1988.
42 Wilson & Rahman (2005) 14.
43 *Mail & Guardian* (2004-10-21) online archive http://www.mg.co.za/article/2004-10-21-africas-top-anglican-slams-gay-report (accessed 2013-29-03).
44 *Mail & Guardian* (2008-02-18) online archive http://www.mg.co.za/article/2008-02-18-gay-africans-and-arabs-come-out-online (accessed 2013-29-03).
45 Youtube (2011-04-11) http://www.youtube.com/watch?v = wMkGQmpNzmY (accessed 2013-29-03).

Constitution. In many South African schools, religious traditions and sentiments undermine the human rights of LGBT students.[46]

5 What does Biological Research say about LGBT Orientation?

Research on psycho-social factors in the development of sexual orientation has turned up virtually nothing.[47] Social and religious theories tend to make loose predictions and explanations about LGBT development without any scientific proof. Even most psychological theories, for example Freud's sexual development theory, is so theoretical and vague that there is no way they can be tested scientifically. Biological sciences, on the other hand, increasingly provide scientific explanations for LGBT orientation. For example, gay men shared a region of the X chromosome called Xq28,[48] but a lack of consistent material-line-effect suggests that other patterns of genetic transmission apart from Xq28 should also be considered.[49] Prenatal sex hormonal molecules in the womb (especially androgens, such as testosterone in males and estrogens in females) influence the development of certain parts of the brain responsible for the gender and the sexual orientation of the unborn foetus.[50] Clear evidence was found that prenatal sex hormones are involved in human sexual orientation: finger-length ratios (the second to fourth finger-length ratio is connected to androgen receptor genes) – indicate prenatal sex hormone levels.[51] These finger-length ratios are of special interest because there is no way they could be affected by learning, social or psychological factors. Further evidence for the role of prenatal sex hormones in sexual orientation is provided by an auditory phenomenon called Oto-Acoustic Emissions (OAEs). Research shows that the cochleae of lesbian woman are masculinised. However, for gay men the picture is different – the OAEs of gay men are sex-typical, just like those of straight men, but the part of the brain that regulates auditory processing seems to be more masculinised.[52] Also, feminisation of sexual preferences in gay men is associated with too much, not too little, androgen in some areas of the

46 Avert (2011).
47 Wilson & Rahman (2005) 30-33.
48 Hamer, Hu, Magnuson, Hu & Pattatucci "A linkage between DNA markers on the X Chromosome and male sexual orientation" 1993 *Science* 261 321.
49 Wilson & Rahman (2005) 53.
50 Ellis & Ames "Neurohormonal functioning and sexual orientation: a theory of homosexuality-heterosexuality" 1987 *Psychological Bulletin* 233-258; Wilson & Rahman (2005) 54.
51 Manning, Bundred, Newton & Flanagan "The second to fourth finger-length ratio and variation in the androgen receptor gene" 2003 *Evolution and Human Behaviour* 399-405; Manning & Robinson "2nd to 4th digit ratio and a universal mean for prenatal testosterone in homosexual men" 2003 *Medical Hypothesis* 303-306.
52 Wilson & Rahman (2005) 84.

brain.[53] This means that gay men might show a number of differences in various markers that are in female-typical directions, eg certain measures of growth, but others that are in the hyper-male direction. Other research studies found that homosexual men have significantly larger penises than heterosexual men.[54] Earlier pubertal onset was found within homosexual boys than heterosexual ones, indicating a hyper-male trait within homosexual men caused by high prenatal testosterone levels during development.[55]

Inquiries into whether one's birth order could affect sexual orientation began as early as the 1930s. Contemporary research[56] confirms that the birth order effect in human sexual orientation is real, ie the odds of being gay increase by around 33% with each older brother. Thus, the more sons a woman has borne, the greater the likelihood that her subsequent sons will be gay. A good explanation for this could be that male foetuses trigger a reaction in their mother's immune system because they produce hormones or proteins that threaten the mother's balance of sex hormones via placental blood connections – increasing certain hormonal reaction and thus forming a homosexual foetus.

A male-specified substance that might trigger such a maternal immune attack is the minor histocompatibility antigen known as H-Y, which is produced by genes on the Y chromosome.[57] The Paternal/ Fraternal Birth Order Effect is one of the most reliable correlates of male sexual orientation. Research[58] shows that one in seven gay men owe their sexual orientation to the Fraternal Birth Order Effect. Generic and prenatal determinants of sexual orientation influence how the nerve cells grow and connect with each other in specific parts of the brain that control direction of sexual preference to make one person attracted to the opposite sex and another person attracted to the same sex. Prenatal hormones or maternal antibodies could do this through interacting with sex hormone receptors. One brain area involved with prenatal sex hormones and maternal antibodies is the hypothalamus, which appears to be a key sexual centre in mammals, influencing sexual behaviour and orientation.[59] Researchers[60] examined the interstitial nuclei of the

53 McFadden "Masculinisation effects in the auditory systems" 2002 *Archives of Sexual Behaviour* 99-111.
54 Bogaert & Herschberger "The relation between sexual orientation and penile size" 1999 *Archives of Sexual Behaviour* 28 213-221; Nedoma & Freund "Somatosexulni nalezy u homosexualnich muzu" 1961 *Ceskoslovenskia Psychiatre* 57 100-103.
55 Bogaert & Herschberger 1999.
56 Blanchard & Bogaert "Homosexuality in men and number of older brothers" 1996 *Am J of Psychiatry* 27-31.
57 Wilson & Rahman (2005) 103.
58 Cantor, Blanchard, Paterson & Bogaert "How many gay men owe their sexual orientation to fraternal birth order" 2002 *Archives of Sexual Behaviour* 63-71.
59 Wilson & Rahman (2005) 108.
60 LeVay "A difference in hypothalamic structure between heterosexual and homosexual men" 1991 *Science* 1034-1037.

anterior hypothalamus [INAH] of gay men, straight men and straight women in autopsy brain tissue; and first confirmed the sex difference in INAH-3 between men and woman, and then found that gay men had a smaller INAH-3 than straight men. In fact it was comparable in size, to that of straight women. A study using a brain scanning technique called Positron Emission Tomography, also suggests a hypothalamic difference between heterosexual- and homosexual people.

International research on homosexuality[61] indicates that one out of thirty men, and one out of seventy women of the world's population is completely homosexual in orientation. Meta-analyses indicate that regardless of culture, gay men constitute up to 5%, and lesbians 1% of the world's population.[62] These percentages remain stable over time and social values have minimal impact on the emergence of homosexuality, either to impede or encourage it. According to an estimate by the United Nations, the World population already exceeded 7 billion by the beginning of November 2011.[63] This means that there are currently approximately 50 Million gay men and 10 Million lesbians worldwide. While these figures may seem low to some, however, gay men and lesbian women constitute a substantial minority group who is still been ignored and not fully recognised by many countries, mainly because of religious dogma filtering through political power.

In terms of section 7 of the Constitution, human rights are guaranteed to all people in South-Africa, whether you are forming part of a minority group or not. This is confirmed in the USA court case where it is determined that the courts do not count heads before enforcing the First Amendment.[64]

From the above exposition, it becomes clear that research from various fields of study substantiates the fact that sexual orientation is not a matter of choice but largely determined by biological factors.

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61 Bailey, Dunne & Martin "Genetic and environmental influences on sexual orientation and its correlates in an Australian twin sample" 2000 *J of Personality and Social Psychology* 524-536; Erens, Mcmanus, Prescott, Field, Johnson, Wellings, Fenton, Mercer, Macdowel, Copas & Nanchahal *National survey of sexual attitudes and lifestyles II: references table and summary reports* (2003); Dickson, Paul & Herbison "Same-sex attraction in a birth cohort: prevalence and persistence in early adulthood" 2003 *Social Science and Medicine* 298-304; Laumann, Michael, Gagnon & Michaels *The social organization of sexuality: sexuality practices in the United States* (1994); Johnson, Mercer, Erens, Copas, Mcmanus, Wellings, Fenton, Korovessis, Macdowall, Nanchahal, Purdon & Fields "Sexual behaviour in Britain: partnership, practice and HIV risk behaviours" 2001 *The Lancet* 1835-1842; Traeen, Stigum & Sorensen "Sexual diversity among urban Norwegians" 2002 *J of Sex Research* 249-258; Wilson & Rahman (2005).

62 Wilson & Rahman (2005) 23.

63 BBC (2011-10-26) online archive http://www.bbc.co.uk/news/world-15459643 (accessed 2013-29-03).

64 *West Virginia Board of Education v Barnette* 319 US 624 638.

If one chooses to ignore this evidence, nevertheless, everyone has the fundamental human right not to be discriminated against due to their sexual orientation, irrelevant whether one believes the orientation is by nature or choice.

The article will now turn to focus on how these misconceptions influence behaviour to LGBT students within our school system.

6 The Human Rights Paradox of LGBT Students in South African Education: The "Hidden Curriculum"

Besides the other Constitutional rights mentioned above, children, as minors, have additional rights in terms of section 28 of the Constitution.[65] Physical and psychological abuse against LGBT students in schools would violate their right to be protected from maltreatment, neglect, abuse or degradation.

Furthermore, it is stated in section 28(2) that a child's best interests are of paramount importance, which includes the right not to be discriminated against due to sexual orientation. The National Education Policy Act[66] aims towards the facilitation of democratic transformation of the national education system that serves the fundamental rights of all people in South Africa. It enhances in section 4(a)(i) the constitutional guarantee that every person will be protected against unfair discrimination in education institutions, including discrimination against sexual orientation. In terms of the preamble of the South African Schools Act[67] the school system needs to redress past injustices in educational provision and need to combat racism, and sexism and all other forms of unfair discrimination and intolerance, … and uphold the rights of all learners … Furthermore, the Promotion of Equality and Prevention of Unfair Discrimination Act[68] provides a legal mechanism to confront, address and remedy past and present forms of incidental, institutionalised or structured unfair discrimination and inequality in the South African Education System.

In terms of section 9(3) of the Constitution, LGBT students might not be found guilty on any charge merely because of their sexual orientation and if any decision regarding them is made due to their sexual orientation, it boils down to discrimination.

LGBT students are often harassed and assaulted by peers and educators at school.[69] More than a fifth of sexual assaults on young

65 Constitution of the Republic of South Africa, 1996.
66 27 of 1996.
67 84 of 1996.
68 4 of 2000.
69 Espelage, Aragon & Birkett "Homophobic teasing, psychological outcomes,

people occur while they are at school. This is expanded by Prinsloo who states that more than 30 % of girls are raped at schools.[70] Similarly all the participants in a study indicated that they had all experienced discrimination, isolation, and non tolerance within their high school contexts.[71] Furthermore, a longitudinal research study[72] found that LGBT, particularly non-heterosexual girls, have a higher risk for sanctions in schools and have greater odds of being confronted by police and expulsion from school, than heterosexual girls. Consequently, LGBT youth suffer from disproportionate educational and criminal-justice punishments that are not explained by greater engagement in illegal or transgressive behaviour. The South African Human Rights Commission's *Report on School-Based Violence*[73] found that "corrective rape", where a male student or students sexually harass and rape a female lesbian student "to make her heterosexual", is a growing phenomenon in South African schools, as a young lesbian from Soweto explains:

> I've been raped six times, five times just because I am gay. I was raped by men I know, who wanted to show me what it means to be a woman. They thought it would change me, that it would keep me from being gay... I'm HIV-positive because of one of the rapes. I'm just angry. I'm angry all the time. And it is lonely. You are so lonely when you are gay and afraid in the townships. The smell of hate never goes away. The thought of betrayal stays and remains within my thoughts, sight, senses, and deep within my soul and spirit. It has created continuous and uncontrollable anger. It has filled me with hate. It has made me think and feel I am mad and sometimes it hits me like I am worth nothing.[74]

These "corrective rapes" are not only an inhuman violation of the rights to be safe and to be treated with dignity, but it also violates their right not to be discriminated against on the basis of sexual orientation.

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and sexual orientation among high school students: what influence do parents and schools have?" 2008 *School Psychological Review* 202-216; Schaffner *Girls in trouble with the law* 2006; Human Rights Watch *Hatred in the hallways: violence and discrimination against lesbian, gay, bisexual and trans-gender students in US schools* 2009; Goodenow, Szalacha & Westheimer "Schools support groups, other schools facilitators, and the safety of sexual minority adolescents" 2006 *Psychology in the Schools* 573-589; Savin-Williams "Verbal and physical abuse as stressors in the lives of lesbians, gay male, and bisexual youth: associations with school problems, running away, substance abuse, prostitution, and suicide" 1994 *J of Consulting Clinical Psychology* 261-269.

70 Prinsloo "Sexual harassment and violence in South African schools" 2006 *SA J of Ed* 305–318; *Mail & Guardian* (2008-05-12).

71 Butler, Alphasla, Strümpfer & Astbury "Gay and Lesbian Youth Experiences of Homophobia in South African Secondary Education" 2003 *LGBT Youth* 3-28.

72 Himmelstein & Brückner "Criminal-justice and school sanctions against nonheterosexual youth: a National longitudinal study" 2011 *Pediatrics* 49-57.

73 South African Human Rights Commission *Report of the Public Hearing on School-based Violence* (2008) 9.

74 *Mail & Guardian* (2006-11-06).

Furthermore, while every person has a right to a safe environment,[75] there is a legal duty on teachers to ensure that students will not be harmed physically and psychologically. The report furthermore found that homosexual pupils experience high levels of prejudice in schools, resulting in exclusion, marginalisation and victimisation, and that heterosexuality and homophobia fuel discrimination against LGBT students.[76] The report also found evidence of psychological violence (bullying, harassment, victimisation, abusive treats and intimidation) in schools. Most LGBT people experienced bullying the one way or the other during their school career.[77] The human dignity of minors is violated, which in many cases lead to permanent psychological damage and/or suicide. Bullying on grounds of sexual orientation boils down not only to an infringement of the right to dignity[78] but also of the right to equality.[79] It also includes the right to be protected from maltreatment, neglect, abuse or degradation.[80] Psychological violence can have a discriminatory basis, and can occur in a number of educational settings, both between educators and learners and between learners and fellow learners. Although a single incident can suffice, psychological violence often consists of repeated, unwelcome, unreciprocated and imposed action that may have a devastating effect on the victim.[81] The report further states that discrimination against LGBT students results in high drop-out rates which violates the right to education;[82] suicide, which violates the right to life[83] and might lead to substance abuse. This is in line with research[84] that found that LGBT students often experience verbal and physical abuse and receive more harsh punishments than their heterosexual peers. And even if LGBT students engaged in wrongdoings, they would rather receive punishment instead of support, therapy or services.[85] Furthermore, in some cases LGBT students are forced to go to psychologists or theologists in an attempt to "heal" or change their sexual orientation. This act by itself is in contrast with scientific evidence which suggests that reparative therapy would not be effective.[86]

Physical as well as psychological abuse, such as name-calling and bullying, is a violation of the right to freedom and security of the person,

75 S 24 Constitution.
76 South African Human Rights Commission (2008) 9; Avert "Homophobia, Prejudice & Attitudes to Gay Men and Lesbians" (2011) online at http://www.avert.org/homophobia.htm (accessed 2013-29-03).
77 Avert (2011).
78 S 10 Constitution.
79 S 9 Constitution.
80 S 28(1)(d) Constitution.
81 South African Human Rights Commission (2008) 9.
82 S 29 Constitution.
83 S 11 Constitution.
84 Himmelstein & Brückner (2011) 49-57.
85 Bloomberg *Businessweek* (2010-12-06) online archive http://www.businessweek.com/ lifestyle/content/healthday/646958.html (accessed 2013-29-03).
86 Erica Elle *5FM* (2008-05-22) "The ex-gay movement fraud".

which includes that people should be free from all forms of violence[87] and will not be tortured in any way.[88] Further, belittling of LGBT people is also a violation of section 10 of the Constitution which provides everyone inherent dignity and respect. Clearly if any of the above mentioned rights of LGBT students have been violated, it could be argued that it was not in the best interest of the child.[89]

Although it becomes clear that LGBT students have the same rights as other students at school, and there should be no discrimination against them, the topic of homosexuality has always been ignored in educational curricula. Allport[90] posits that greater exposure to LGBT people and their issues can decrease homo-pejorative attitudes and beliefs. This is echoed by Zozky[91] who states that Greater exposure to issues important to LGBT people can have a positive impact on heterosexual students by decreasing their ignorance, stereotypes, and prejudices by providing positive educational exposure to a group who is different from them. Inclusion of LGBT content into the curriculum can benefit LGBT students by sending the message that as a minority, their existence and identity does not have to be invisible, marginalised, or subjugated. The absence of the phenomenon of sexual orientation in schools' Life Orientation curricula denies students the right to be informed and taught on this topic and therefore violates LGBT students' rights to freedom of expression in terms of section 16(1)(b) which states that everyone has the right to freedom of expression which includes freedom to receive or impart information or ideas. This also violates the right to freedom of expression of heterosexual students as they are deprived of the right to be informed and to instil an attitudinal change.

Even in sex education, the topic of homosexuality is totally ignored as something that deserves to be stigmatised. In a study by Harber and Serf[92] it was determined that none of the teacher students in England and South Africa said they had discussed homosexuality and homophobia as part of democracy education. Young LGBT students have been denied their right to receive information[93] to deal with aspects like safe homosexual sex, and experience an absence of support.[94] Nelson and Krieger exposed 190 psychology students to a 50-minute panel presentation by two gay male students and two lesbian students and found a significant increase in gay acceptance at post-test as compared to pre-test as measured by the Attitude Towards Homosexuality Scale.[95]

87 S 12(1)(c) Constitution.
88 S 12(1)(d) Constitution.
89 S 28(2) Constitution.
90 Allport *The Nature of Prejudice* (1954) reading MA Addison-Wesley.
91 Zosky *Education's Missed Opportunity to Influence Tolerance: The Absence of LGBT Content in Curriculum* (2006).
92 Harber & Serf "Teacher education for a democratic society in England and South Africa" 2008 *Teacher and Teacher Education* 22 8 966-997.
93 S 16(1)(c) Constitution.
94 Avert (2011).
95 Nelson & Krieger "Changes in attitude towards homosexuality in college

Hood, Muller, and Seitz[96] and Probst[97] found that didactic learning content promoting diversity competency had a significant effect on more positive attitudes toward LGBT people. Zosky confirms that heterosexual students who would not initiate opportunities to learn about the LGBT minority population could experience exposure when the experience is brought to them through the curriculum. Schools should therefore not overlook the opportunity to impact on students' tolerance and acceptance to sexual orientation and gender identity diversity.

In line with this is the use of code words such as "people with a certain life style" when referring to LGBT students. This code language masks discomfort when referring to sexual orientation and also enhances the undemocratic stigma that is still rife in our society. Silence, misconceptions, disregard and social prejudice upholds a "hidden curriculum" that violates LGBT students' rights to dignity and equality, and enhances the homophobic stigma that still exists in the minds of many people.

The manner in which schools refuse to acknowledge LGBT students their right not to be discriminated against, enhances the "hidden curriculum" with a message that it is wrong to have a different sexual orientation than the "privileged" gender stereotypes. Inclusion of LGBT content into the curriculum could also be an opportunity to influence the collegiate environment for LGBT students. Inclusive content sends a clear message to LGBT students that their existence, experience, and presence are valued. Inclusion in the pedagogy makes a statement to all students, gay and straight, that the learning environment considers LGBT issues as legitimate and valid. Content on the contributions made to society by LGBT people can shed a positive light on a minority group that still experiences discrimination, oppression, and marginalisation.

This turning of a "blind eye" on LGBT students' rights and existence, installs the skewed value application in this regard. The fact that people like Zoliswa Ngonyana was killed for no other reason than her sexual orientation, is a disgrace to a country claiming to uphold human rights. The fact that her murderers have still not been arrested bears witness of an incidence of misplaced human rights culture in dire need of educational value-driven transformation.[98]

students: Implementation of a gay men and lesbian peer panel" 1997 *J of Homosexuality* 63-81.

96 Hood, Miller & Seitz "Attitudes of Hispanics and Anglos surrounding a workforce diversity intervention" 2001 *Hisp J of Behavioral Sciences* 444-458.

97 Probst "Changing attitudes over time: Assessing the effectiveness of a workplace diversity course" 2003 *Teaching of Psychology* 236-239.

98 *Mail & Guardian* (2006-11-06).

7 Recommendations

South Africa has the most advanced Constitution in Africa that protects human rights[99] based, amongst others, on sexual orientation.[100] In addition it was the first country in Africa to legalise same-sex marriages. It is then a pity that comments from South African politicians instil discrimination against LGBT people, which is in direct contrast with the values that underpin the Constitution.[101] It seems that South Africa, with a democratic westernised constitution, struggles to practice these entrenched human rights. Although South African schools are steered by legislation such as the Constitution which entrenched all people's rights, attitudes of people in the school and social systems are yet to be improved towards LGBT people.

The education system, whose main function is to educate young people to fulfil their place in a democratic society according to Constitutional values, fails and sends out a skewed valued system not in harmony with a human rights culture. The education system still reproduces social unjust and inequality in which heterosexual students are privileged.[102]

Silence, misconceptions, disregard and social prejudice produce a "hidden curriculum" in the education system that violates LGBT students' rights to dignity and equality, and forms a paradox against the Constitutional value system that underpins our country and its democracy. External factors, such as the community and religious sentiment regularly infiltrate the education system on all levels and send out the message that it is fine to be homophobic and it is wrong to be different than the majority. This indicates that although all students have the same human rights, the way society and schools implement these rights, is a violation of the right not to be discriminated against on the basis of sexual orientation. It sends out a wrong message with a skewed value system and is destroying attempts to install a human rights culture in schools and wider society.[103]

To overcome this paradox, there should be a radical change within and from society. This change needs to be initiated in our school system, which should be accounted for because schools are not isolated, but reflect and represent society.

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99 *Idem*.

100 S 9(3) Constitution.

101 *Mail & Guardian* (2006-11-06); *Beeld* (2011-05-31) online archive http://www.beeld.com/Suid-Afrika/Nuus/Gays-Qwelane-moet-skuus-se-20110531 (accessed 2013-29-03).

102 Francis & Msibi (2011) 157-173; Richardson "Researching LGB youth in post apartheid South Africa" 2006 *J of Gay and Lesbian Issues in Ed* 135-140; Wells & Polders "Anti-gay crimes in South Africa: Prevalence, reporting practices and experiences of the police" 2006 *Agenda* 12-19.

103 Harber & Serf 2008 *Teacher and Teacher Education* 966-997.

Homophobia should be tackled in the school system in order to address prejudicial attitudes and discrimination. The implementation of a management strategy to include diversity over its complete spectrum implies support from the principal as well as advocacy by the school management team and department of education. Educators should be educated and trained to implement and promote basic human rights amongst students, and should show a conscience acknowledgement of the challenges non-heterosexual youth face in schools and wider society.

Institutions of higher education can do a great deal to influence the learning environment to be more tolerant and accepting of GLBT students. This can be instrumental in preparing all students for a role in society that is diverse in many ways, including sexual orientation and gender identity. As educational leader and manager the educator should furthermore establish a classroom climate, sensitive to, amongst other diversity issues, sexual orientation. Hereby a supportive environment for GLBT students should be established.

A remedy for this systemic problem would be reinstituting the place of values in the Constitution. A new focus on this controversial issue, imbedded by the underpinning value system within a human rights culture, should be included in the school curriculum to enhance a non-discriminatory democratic South Africa. Sexual orientation should be included in the school curriculum, and therefore should also be addressed during teacher training. As learning mediators educators should be trained to create a learning environment where stereotypes are challenged. The British organisation EachAction[104] advocates ten strategies to challenge homophobia in education systems, adapted as:

(1) Avoid marginalising LGBT students by using inclusive language in general discussions eg "we need to discuss sexual behaviour today", rather than "we need to discuss how those people have sex".
(2) Include positive statements about sexuality in all equality policies, therefore refer specifically to sec 9(3) of the Constitution.
(3) Create a safe environment by supplying help-line numbers and approachable staff members to which students may turn. It is advisable to rather have more than one teacher as all students might not always relate to all teachers.
(4) Ensure appropriate literature on LGBT issues in the library and remove offensive literature.
(5) Ensure each student's right to equal sexual health education. In sexual health education, both heterosexual and homosexual issues should be addressed in the curriculum.
(6) Staff should adopt consistent respectful behaviour against LGBT students, and be role models in instilling the values underpinning the Constitution.
(7) Staff should be supportive and should not automatically refer LGBT students to someone else. A mere referral of LGBT students to another

104 EachAction "Ten things you can do to challenge homophobia" (2008) online at http://user33763.vs.easily.co.uk/wp-content/uploads/2011/04/EACH_10_Things.pdf (accessed 2013-29-03).

member of staff or person to assist would instil the stigma that I cant/won't deal with "these" people or that I will deal differently with them (the outcasts) as with others (the normal or privileged).

(8) Use the curriculum to incorporate LGBT education.

(9) Invite outside speakers to talk about difference, respect, understanding, prejudice, stereotypes and discrimination.

(10) Educators should be sufficiently trained regarding LGBT and homophobia. Initial teacher training curriculum should include LGBT people in order to inform teachers about the misconceptions as well as the balancing of human rights and its application according to the underpinning values of the Constitution.

8 Conclusion

South African schools have an important part to play in challenging diversity issues such as homophobia, as homophobia is fuelled by both a lack of awareness and a lack of the promotion of Constitutional values and rights. LGBT education is fundamental to overcome widely accepted prejudice, as well as the "hidden curriculum" in the South African Education System and broader society. To deny LGBT students their human rights due to their sexual orientation would be the same as to deny any other minority group the same basic rights.

Unfortunately, sexuality within society and schools is still drifting in the quicksand of religious dogma, prejudice, and political power, and is not in line with the cornerstones of our Constitution – promoting reconciliation, mutual tolerance and respect for all. Individuals should rather be seen as sexual beings that have the freedom to be with any person (regardless of the sex), he/she connects with, and feels attracted to. Social classification inherently produces social differentiation and conflict, which is the breeding ground for most human rights violations. Hopefully, this kind of sexual liberation, supported by enlightened education system, embedded in a culture of human rights, will someday reconstruct homosexuality into dignity, equality, and self-worth for all; and consequently society will reach the true *spiritus rector* of all biological and psychological events, signified by the attainment of total consciousness, ie a non-discriminating culture in the broadest sense, with self-knowledge at the heart and essence of this process.[105]

Although South Africa has one of the most advanced constitutions that entrenches human rights, the remedy of living up to these rights lies within the implementation of applying the underpinning values.

Two gay Englishmen once came to Gandhi – this was in the 1930s – and asked him what he thought about their relationship. After questioning them a bit, Gandhi fell silent for a short time, and then said, "The greatest gift that God gives us is another person to love." Placing the

105 Jung *Memories, dreams, reflections* (1963) 357.

two men's hands in each other's, he then quietly asked, "Who are we to question God's choices?"

The potential remedial function of the law in the deteriorating public education system of South Africa

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OPSOMMING

Die Potensiële Remediërende Funksie van die Reg in die Verswakkende Openbare Skoolsisteem van Suid-Afrika

Hierdie artikel maak daarop aanspraak dat die Suid-Afrikaanse regstelsel sowel die vermoë as die verpligting het om die nodige remediërende funksie te vervul, sodat verdere agteruitgang van die openbare onderwysstelsel gestuit word. Daadwerklike optrede vanuit die regstelsel word in die vooruitsig gestel om openbare amptenare, onderwysvakbondlede en politici wat die reg verontagsaam, te dwing om die heerskappy van die reg en oppergesag van die Grondwet te erken en te respekteer.

Die artikel wys daarop dat daar dringende optrede nodig is teen vakbonde soos SADOU, wat volgens alle getuienis die reeds kwesbare onderwysstelsel verder ondermyn. Sowel die aanstigting van gewelddadige optrede tydens langdurige stakingsaksies as die beskerming van lede wat hulle deurlopend skuldig maak aan substandaard-onderrig, moet teengewerk word. Sodanige onprofessionele, onetiese optrede tas die reg van leerders op onderwys ernstig aan. Die Staat se aandeel aan mislukte onderhandelinge en die gevolglike nywerheidsaksies in die openbare sektor, insluitend die onderwys, moet egter nie misgekyk word nie.

Die eerste aanbeveling is dat belanghebbendes by die onderwys moet saamwerk om die nodige respek vir die heerskappy van die reg te vestig en af te dwing. In gevalle waar versuim onder amptenare, vakbondlede of politici om die reg te respekteer opgemerk word, moet die belanghebbendes nie skroom om hofsake teen die oortreders aanhangig te maak nie.

Die tweede aanbeveling hou verband met die potensieel kragdadige optrede van die howe, soos in *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP) gedemonstreer is. Daar word aanbeveel dat, waar openbare amptenare hulle aan *mala fide*-optrede skuldig maak, hulle in hul persoonlike hoedanigheid aanspreeklik gehou sal word vir die volle regskoste, eerder as om dit vanuit Staatsfondse te laat vereffen. Dit sal as 'n gepaste straf dien, en ook as 'n afskrikmiddel om ander amptenare te keer om hulle aan soortgelyke wangedrag skuldig te maak.

1 Problem Statement

It is trite to state that education in South Africa is in dire straits. A plethora of serious risks regarding the provision of quality education is simultaneously encountered and created by the South African school system, which currently compares unfavourably against some other

African countries with a considerably smaller education budget. Motala and Dieltiens[1] point out that "despite substantial improvements in both policy and practice, education in SA remains poor in terms of learning outcomes".

One of the reasons for this state of disarray in the system is the lack of effective and ethical leadership by politicians and governmental structures such as the departments of education on national and provincial level. Landman[2] states that a lack of ethical leadership has become common practice in the public life in SA. He points out that some top leaders are establishing a culture that puts ethical and democratic values second to their own political agendas. In comparison, Landman draws attention to the fact that former president Nelson Mandela during his term of office honestly and frequently admitted his mistakes, but nowadays some leaders refuse to do so.

This deficiency regarding ethical leadership can be distinguished from one other prominent problem, that of teacher unionism, but can also be seen as one of the contributory factors towards the problems associated with some unions.

Unionism, and specifically the actions of some teacher unions, is a cause of grave concern. During the public workers' strikes of 2010, which included large numbers of educators, intimidation, violent behaviour and vandalism prevailed. This is an example of unethical conduct at lower levels of society, as compared to the leadership that was mentioned. Part of this approach is to intimidate and even assault non-striking colleagues, but "union and political leaders refuse to take a principled stand against this".[3] Landman adds that "too many top leaders are light weights in heavy-weight positions who do not understand or do not take seriously enough the attendant responsibilities."[4]

In the light of above-mentioned risks, deficiencies and the resulting general decline in the quality of education provision, solutions and remedies have to be identified to counter this tendency. The properly developed legal framework, including the Constitution of the Republic of South Africa, 1996 (the Constitution), in principle does provide the necessary support for the system, but the improper way in which these legal principles are put into operation currently leads to further deterioration. Approached from a legal perspective, the provision regarding the rule of law as entrenched in section 1(c) of the Constitution as part of its founding provisions, should be recognised as one of the cornerstones of this democracy, and should without doubt be considered

1 Motala & Dieltiens "Educational Access in South Africa Country Research Summary" (2010) http://www.create-rpc.org/pdf_documents/South_Africa_Country_Research_Summary.pdf (accessed 2011-03-02).
2 Landman "Ethical, responsible leadership is far too rare" *Beeld Sake24* (2011-02-04) 2.
3 *Ibid.*
4 *Ibid.*

as part of the solution and remedial function of the law. The rule of law is directly linked with the supremacy of the Constitution, and both these notions may be harnessed to respond to the deterioration of the system.

In the argumentation that follows, the focus will be on selected prominent causes and the potential of legal remedies for the prevailing situation. The claim of this article, that will be substantiated in the discussions that follow, is that the legal system can provide, given certain limitations and conditions, the necessary remedy and thus mend this deterioration of the system. In this context the legal system would include the legislator, judiciary and executive.

2 Conceptual Framework

2 1 The Law, and the Functions of Law

The legal systems in most democracies adhere to the principle of separation of powers, according to which the legislative, judiciary and executive powers of the State function as separate entities. The direct influence of the one on the other is normally not tolerated. Although not written expressly into the Constitution, the South African legal system also subscribes to this principle. References in this article to the law or legal system includes all three spheres of the state's power: all three can and should contribute towards remedying the deficiencies of the education system.

One crucial question that should be answered from the outset is what the actual function of a legal system is. Can the judicial structures and the laws of a country be seen as entities that can or should remedy any deteriorating system? Further, can it be expected from a legal system to function proactively and protect a system from deviations, or should the function be merely *post hoc*, that is, in reaction to problems, challenges and violations of the law?

The answer to these questions can be sought in the roots of South African law. The South African legal system is firmly rooted in the Roman-Dutch system, which originates from the Kings era dated 753 to 509 BC.[5] For the purpose of this discussion, the focus is on the period when the office of the Praetor was established in 367 BC, which fell in the important period before the rule of Caesar Justinian. Several sources of the law were established in this period, all pointing at the one central function of the law – the regulation of civil life.[6] The customary law of the time contained a number of rules that regulated public relations in Rome. In 451 BC the *Twelve Tables* were developed as a result of the public demand to, for the first time, codify legal rules and regulations. These

5 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1983) 15.
6 *Ibid.*

systematic and clear tables, engraved in bronze, were short sayings written in an authoritative idiom.[7]

Ever since then, as the Roman-Dutch law developed through the centuries, the law had one central function: that of regulating the relationships between people, on horizontal level, and the vertical relationship between the State and its citizens and other inhabitants. The South African common law, as it developed from the Roman-Dutch law since the establishment of the Cape Colony in 1652, still had this one primary function.

It can thus be stated that the one most prominent function of a legal system is to provide in a regulatory way the necessary structure within which both interpersonal relations and large, complex structures such as the government and its subdivisions can function effectively. In so doing, it can provide security to the citizens of the country, and also ensure that the government fulfils its obligations.

Focusing on the problems encountered in the South African public school system, as pointed out, the legal system can and should be seen as a remedy, both proactively and reactively.

2 2 The Remedial Effect of the Law

The term "legal remedy" can be defined as "[t]he manner in which a right is enforced or satisfied by a court when some harm or injury, recognised by society as a wrongful act, is inflicted upon an individual".[8] The four basic types of judicial remedies are damages, restitution, coercive remedies and declaratory remedies.[9] According to the same dictionary the "law of remedies" refers to the relief to which a plaintiff is entitled after successfully establishing in a court that a substantive right has been infringed by the defendant.

For the purpose of this article the general meaning of the word "remedy" will rather be used, synonymous with terms such as "cure" or "therapy". In terms of the central claim of the article, the legal system of the country is deemed to be capable of supplying answers to the deterioration in the education system, to a greater or lesser extent curing or remedying the weaknesses and flaws. The claim is not only that the system is capable of achieving this, but also that it is expected of the legal system to provide the answers. In the final discussion of the article a number of recommendations will be offered as to how the legal system can and should be utilised to combat the main deficiencies in the education system.

7 *Ibid.*
8 According to *The Free Dictionary* (http://www.legal-dictionary.thefree dictionary.com (accessed 2011-10-10).
9 *Ibid.*

The first element of the legal system that holds part of the answer is the rule of law and the associated principle of legality, which will be discussed next.

2 3 The Rule of Law and the Principle of Legality

The rule of law was first described in the early 20th century in England, when it was stated that the purpose of the rule of law was

> [t]o protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.[10]

Hoffmann[11] refers to the World Justice Project which aims at a worldwide promotion of the rule of law.[12] Through partnerships and legal research the Rule of Law Index was compiled, and four universal principles that lie at the heart of the rule of law were formulated.[13] These principles have direct bearing upon the current South African education situation:

> (a) The government and its officials are accountable under the law.
> (b) The laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property.
> (c) The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
> (d) Access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The principle of legality is currently often seen as the essence of the rule of law, and implies that decisions can only be made "by the application of known and general principles of law".[14] It has also developed into a general requirement that all law and state conduct must be rationally related to a legitimate government purpose, as confirmed in *President of the Republic of South Africa v South African Rugby Football Union.*[15] Jowell[16] refers to this case, remarking that the Constitutional Court struck down an action of the then newly elected President, Nelson Mandela. Instead of launching the now familiar counter-attack on "unelected judges", as certain politicians currently tend to do, President Mandela graciously welcomed that no person is above the law.[17]

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10 Currie & De Waal *The Bill of Rights Handbook* (2005) 10.
11 Hoffman "Accountability and the Rule of Law" (2009) http://www.ifaisa.org/Accountability_and_the_rule_of_law.html (accessed 2011-05-05).
12 *Ibid.*
13 *Ibid.*
14 Currie & De Waal 11.
15 2000 1 SA 1 (CC).
16 Jowell "How secure is the rule of law in South Africa?" (2009) www.thetimes.co.uk/tto/law/article2213352.ece (accessed 2011-05-20).
17 *Ibid.*

Du Plessis AJ in the judgment *Coetzee v National Commissioner of Police*[18] sums up the disarray of the South African society in the following words:

> South Africa is facing a tsunami of corruption, bribery, state intervention in all spheres of the economy, unlawful, incompetent and malicious execution by public officials of the exercise of their duties, in breach of the Constitution, and in breach of virtually every other obligation that exists. The only bulwark against this threat to the public, innocent citizens, and the poor, the frail and the needy, are the courts and the rule of law. The courts and the independence of the courts, and the willingness of the judiciary to stand up against intimidation and *mala fide* actions of state officials must be utilised in its full force.

This alarming decline in the country in general, and more specifically the education system, can be partially ascribed to the non-adherence of both public officials and politicians to the constitutionally entrenched concept of the rule of law.[19] This will be discussed later in more detail.

3 The Need for Remedial Action against Teacher Unionism

The World Innovation Summit for Education (WISE) is an annual international seminar, initiated by a number of international organisations under the leadership of the Qatar Foundation. The focus of the 2011 conference was on innovation in education.[20] The respective roles of the parents, learners, school leaders and educators in this process of innovation was discussed in depth, but it was significant that amongst the 126 countries no reference was made in any debate to the role of teacher unions.[21] This points at the fact that unionism does not necessarily form an essential part of any education system, and that the focus in educational debates can readily be on other structures that make the system function effectively.

In South Africa teacher unions have a very prominent impact on education, unfortunately predominantly to the detriment of the already crippled school system. The most visible influence of unions is the conduct of certain unions' members during strike actions, when intimidation and harassment of fellow educators and learners are regularly alternated with violence and vandalism – unlawful conduct that tarnishes the image of the profession.

In the keynote address at the Fifth Commonwealth Teachers' Research Symposium in 2010, with the focus on teacher

18 2011 2 SA 227 (GNP) 91.
19 *Maritzburg College v Dlamini* [2005] JOL 15075 (N).
20 Colditz *Report of CEO to FEDSAS* 2011.
21 *Ibid*.

professionalism, Jansen[22] commented that South Africa is probably one of few countries in the world "where the unions rather than government run the schools". In 2011 Jansen repeated his concern about the adverse influence of unionism, and added that it is currently a fact that president Zuma would not attempt to control South African Democratic Teachers' Union (SADTU), due to its alliance with the ruling African National Congress through the Congress of South African Trade Unions (Cosatu).[23] He explained that the "balance of powers" in the politics prevents any attempt of the state to improve education.[24]

3 1 The SAOU's Approach to Education

While all teacher unions take part in strike actions, not all unions contribute to the threatening demise of quality education. Unions such as the *Suid-Afrikaanse Onderwysersunie* (South African Teachers' Union – SAOU) and others in the Combined Trade Union-Autonomous Teachers' Unions promote professional conduct and high quality teaching by its members.[25] In-service training to specific groups of educators and principals are regularly offered by the SAOU, raising their levels of expertise and ensuring professional management and teaching in the schools where these educators are based. Zille[26] expressed her appreciation and respect for the SAOU, and added: "This is one of few teacher unions that tries to find a balance between educators' rights and the rights of learners."

3 2 SADTU's Approach to Education

There is a growing sentiment against the approach of the SADTU, which is ironically regarded as the single most prominent hindrance to quality education in South Africa. SADTU was established about 20 years ago and currently has 245,000 members. Buhlungu[27] is quoted as follows:

22 Ochs "Enhancing Teacher Professionalism and Status" (2010) http://www.thecommonwealth.org/files/234058/FileName/Enhancing_Teacher_Professionalism_and_Status.pdf (accessed 2011-09-20) 15.

23 Steyn "Beset Staat se Geboue" (2011) http://www.volksblad.com (accessed 2011-11-23).

24 *Ibid*.

25 On 2011-08-31, the Combined Trade Unions - Autonomous Teacher Unions (CTU-ATU) was admitted into the Education Labour Relations Council (ELRC) in the place of the Combined Trade Unions - Independent Teacher Unions (CTU-ITU). This CTU represents 123,500 teachers. NAPTOSA has the largest membership of the parties within this CTU while the other parties are SAOU, NATU, PEU, HOSPERSA and PSA (Rossouw *Labour Relations in Education - A South African Perspective* (2010) 105).

26 *Ibid;* Zille "Die SA Onderwysstelsel: voldoen dit aan die behoeftes van die internasionale arbeidsmark?" (Speech delivered by DA Leader Helen Zille at the *Suid-Afrikaanse Onderwysersunie* Principals' Symposium in Port Elizabeth, 2010-08-31 available at http://da.org.za/docs/10348/SAOUToespraakfinaal.doc.pdf (accessed 2011-11-25) 2.

27 Seekoei "'Union lords', not idealists, running show at SADTU" *Mail & Guardian* (2010-09-03).

> 'Little union lords' are running the South African Democratic Teachers Union (SADTU), having long ago defeated the education idealists who were central to the union's formation 20 years ago. The intimidation and vandalism marking the 2010 strikes would have been foreign to 1989 education idealists. Twenty years ago teachers were rather conservative professionals, regarded as elites in their communities.

Also commenting on the effect of the 2010 public workers' strikes on quality education, James[28] stated: "The teachers' union SADTU has forgotten about the learners' right to education. Through their ill-disciplined and sometimes violent conduct they have forsaken their biggest responsibility: excellent teaching". He added that SADTU is an "anti-education organisation, which is hostile to the interests of learners."[29]

SADTU president Thobile Ntola refers to the earlier days of the union by stating that teachers initially did not want to affiliate to the trade union federation Cosatu because they considered themselves professionals.[30] Also noting the changed approach of SADTU, Zille reports about the exodus of SADTU's members, "who are increasingly disillusioned with the tone, style and management of their organisation."[31] This union nevertheless remains the single largest South African trade union, with about two thirds of the 390 000 South African educators as its members.[32]

3 3 Strikes and Picketing

In spite of the fact that some teacher unions aim at advancing the professionalism of their members, unionism is closely associated with aggressive industrial action. Looking back over the first decade of the 21st century, headlines such as the following point to looming or on-going educator strikes, and caught the attention of the public and the media: "2 000 teachers to strike today", "Teachers' strike suspended after legal threat" and "No pay cut for Cape's non-striking teachers".[33] In the report

28 Peyper "Peiling wys SA skolestelsel is vierde swakste ter wêreld" *Beeld* (2010-25-09) ("Poll shows that SA school system is worst in the world, bar three") (own translation)).

29 SAPA "Teaching an essential service - DA" (2010) http://www.news24.com/SouthAfrica/News/Teaching-an-essential-service-DA-20101011 (accessed 2011-11-15).

30 Seekoei *Mail & Guardian* (2010-09-03).

31 Zille (2010-08-31).

32 Van Onselen "How Sadtu and SACE have damaged accountability in SA Education" (2012) http://inside-politics.org/2012/06/25/how-sadtu-and-the-sace-have-damaged-accountability-in-sa-education/ (accessed 2011-11-15).

33 Mkokeli "2000 teachers to strike today" *Eastern Cape Herald* 2003-04-11 1; Masondo 2005 "Teachers' strike suspended after legal threat" *The Herald* (available at http://www.theherald.co.za/herald/2005/02/23/news/n13_23022005.htm) (accessed 2005-03-30); Peters "No pay cut for Cape's non-striking teachers" *Cape Argus* 2005-03-07 (available at http://www.iol.co.za/index.php?set_id=1&click_id=105&art_id=vn20050307102032456C353645) (accessed 2005-03-07).

"NAHT plans first strike in 114 year history" the possible strike of school principals was highlighted.[34]

A strike is defined as follows:[35]

> 'strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

While the right to strike is entrenched in the Constitution, the Labour Relations Act[36] (LRA) includes certain limitations that render strikes unprotected where the prescriptions of legislation or collective agreements were not followed.[37] In order to act lawfully, a number of requirements in this Act must be met and certain procedures have to be followed by those planning to take industrial action.[38]

3 3 1 Strike Action of 2007

After a relatively peaceful period of about two years, June 2007 saw the most extensive teacher strike activities, which ranged from a one day action to a prolonged nationwide strike of three weeks that severely damaged the educational prospects of thousands of learners. This strike action took place after months of unsuccessful negotiations, and was

34 Bamber "NAHT plans first strike in 114 year history" (2011) http://teachersupport.info/news/in-the-press/NAHT-plans-first-strike-in-114-year-history.php (accessed 2011-11-20).

35 S 213 Labour Relations Act 66 of 1995 (LRA).

36 66 of 1995.

37 S 23 Constitution; s 68 LRA.

38 S 64 LRA contains the right to strike and recourse to lock-out: "(1) Every employee has the right to strike and every employer has recourse to lock-out if– (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and– (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that– (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless– (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (d) the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)."

supported by all teacher unions, including unions such as the SAOU that previously abstained from this type of industrial action. Thousands of teachers went on strike for the first time in their careers, a strike that lasted for the members of the SAOU for one day only: 1 June 2007.

It should be noted that, in contrast to public perception, the reason for this strike was not the salary dispute only. A variety of grounds for the strikes was published by the unions, of which the salary increase was most prominent, but concerns regarding educator security were also raised by the SAOU. Educators are seriously concerned about the lack of action from the State to curb those elements that regularly impact on their security, as stipulated. This is an infringement of their basic right to an environment that is harmful to their health or well-being.[39] Security is also properly entrenched in the Constitution, according to which all citizens' security, including that of educators, is provided for.[40]

The extended strike of three weeks by SADTU members ended at the beginning of the winter holidays of 2007. The salary dispute ended when the unions accepted the 7,5% increase the government finally offered.

The severely negative effect of this type of prolonged industrial action was clear in the grade 12 results at the end of 2007 – a decline in the pass rate at numerous schools that previously made good progress. The educators' constitutional right to strike had to be weighed against the learners' entrenched right to education. The educators eventually managed to raise the increase by 1,5% from the initial 6% that was offered, but the cost for the education system was high. At many schools the culture of teaching and learning was damaged, while the status of educators declined in the eyes of their learners and the public.

In an attempt to mitigate the damage, provincial education departments initiated an expensive catch-up program, which was only partly successful.[41] Despite good intentions, numerous learners and educators did not attend the scheduled teaching sessions on Saturdays and during the September holidays.

3 3 2 Strike Action of 2010

In July and August 2010 a more severe strike than the one in 2007 by various groups of public workers followed directly after the football World Cup final. For several weeks teachers affiliated to some of the unions went on strike in a period of time when the final year students were to write their penultimate examinations. Some examinations were

39 S 24(a) Constitution.

40 S 12 Constitution contains the right to freedom and security of the person, which reads in relevant part: "Everyone has the right to freedom and security of the person, which includes the right – (c) to be free from all forms of violence from either public or private sources."

41 Prinsloo & Beckmann "(Un)lawful union activity: the risk of liability" 2012 (paper presented at the SAELA International Conference 2012-09-10–12) Somerset West, South Africa.

postponed, and in some cases even cancelled, with teacher unions demonstrating indifference regarding the importance of these examinations for the future of the students.

Referring to the intimidation, violence and vandalism as well as other forms of unlawful conduct that was part of this strike action, the editor of one prominent newspaper commented as follows, reflecting the sentiment of a certain portion of the South-African society:

> There are thousands of educators who see their work as a calling and who deserve better salaries. The members of SADTU who are lazy and who act in a criminal way during the strike, do not count as part of this group. They are supposed to help children to establish a foundation of good education before entering adult life. Instead, SADTU starts an indefinite strike weeks before the final examinations. These educators can destroy the future of the poorest students, those who deserve it the least, through their strike action.[42]

The timing of the strike was as dreadful as the type of unlawful activities resorted to. A parent summed it up as follows:

> The angry and chanting mob forced our children out of their classes when some educators were busy teaching. If it were not for the presence of the police, we don't know what they would have done as they were angered by the unrelenting attitude of the principal, the staff and the resistance of the learners to leave school premises.[43]

In this case the staff members demonstrated the basic attitude of the SAOU and other members of the CTU. They all demonstrated their disappointment with the unacceptable low offer from the government, but did their best to mitigate the adverse effect on the children's education and academic progress.

The *Code of Professional Ethics* of the SA Council for Educators (SACE) specifies that all educators registered at the SACE have to:[44]

> (a) acknowledge the noble calling of their profession to educate and train the learners of our country;
> (b) acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa;
> (c) commit themselves to do all within their power, in the exercising of their professional duties, to act in accordance with the ideals of their profession.

These guidelines are intended to be the professional norm for educators and their unions, and should be read with the entrenched Constitutional notion of the best interests of the child.[45]

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42 Du Plessis "Zuma moet self dié stakers vasvat" *Beeld* (2010-08-17) (available at http://www.beeld.com/Opinie/HoofArtikels/Zuma-moet-die-stakers-self-vasvat- (accessed 2011-08-18).

43 Vaal Reefs Technical High School SGB "2010 Report to FEDSAS NW Province" 2010.

44 S 2(1) South African Council for Educators Act 31 of 2000.

45 S 28(2) Constitution.

Specific provisions in the LRA exist that, if implemented in education, would serve the best interests of the child in the context of education. The following limitations are specified in section 65:

> (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if –
> (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
> (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
> (d) that person is engaged in –
> (i) an essential service; or
> (ii) a maintenance service.
> (2)(a) Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.

Referring to strike actions in general, Oosthuizen states that "... while the educators exercised their constitutional right to express their dissatisfaction through strike action, thousands of learners were deprived of teaching". [46] Du Plessis sees these striking teachers as "... thugs who should have appeared today in the criminal court on charges of intimidation, assault and vandalism.[47] Teaching is the last place for them to be."

Mills comments in "Why Africa is poor" that the youth of Africa, which could be regarded as an immense potential source of talent and energy, is currently seen as a threat to safety in their countries.[48] The reason is that the majority are untrained and jobless, and it is obvious that every strike action in South Africa will increase this problem.

A further element that has a severe influence on the problems created by strike actions, is that quality education is not demonstrated nor experienced. Motala and Tikly state that "parents and children have no proper benchmark of what good basic education might entail, and thus they are more accepting of mediocre school and teacher performances and consequently are not fully aware of their predicament".[49]

3 3 3 Looming Strike Action of 2011

In the second term of 2011 it was jointly announced by the Independent Labour Caucus (ILC) and Cosatu Unions that they have formally rejected

46 Oosthuizen *et al Aspects of Education Law* (2009) 275.
47 Du Plessis *Beeld* (2010-08-17).
48 Du Plessis "Staking word 'n monster wat SA kan verteer" *Beeld* (2010-08-25).
49 Motala & Dieltiens "Educational Access in South Africa Country Research Summary" (2010) http://www.create-rpc.org/pdf_documents/South_Africa_Country_Research_Summary.pdf (accessed 2011-03-02) 10.

the government's offer for a salary increase.[50] The following reasons for rejecting the offer have *inter alia* been put forward:

> (a) The projected CPI for 2011 is 4.7% and therefore the offer of 4.8% is in effect an offer of CPI + 0.1%. Therefore, totally unacceptable.
> (b) The postponement of long outstanding matters, such as the improvement of housing benefits and medical benefits is unacceptable.

The ILC and Cosatu Unions were of the opinion that these offers imply that the state as employer prefers to ignore past crises in the hope that they will disappear, the government "demonstrates their unwillingness to conclude these negotiations amicably".[51] Considering the arguments of the unions, a despondency has developed on the unions' side regarding the inability of the State to look after the interests of its employees. It was also mentioned that about 40% of the educators are financially blacklisted in South Africa in terms of the National Credit Act,[52] which is some kind of indication of the amount of the average teacher's salary.

The state might argue that it does not have the financial means to meet the demands regarding salary increases. This argument, which was obviously also followed in the 2010 salary bargaining, is diminished by the way in which a high percentage of politicians has spent state funding in recent years, including extraordinary amounts paid immediately after their elections towards super luxury vehicles and the renovation of their personal housing facilities. In addition, the general mismanagement by a number of state departments – either through corruption, overspending or underspending of the allocated funds – contributes to the relentless, ever demanding approach of unions. The auditor-general, Mr Terence Nombembe, pointed out that R4 billion was wasted irregularly and fruitlessly by government departments in the 2009-2010 tax year.[53]

In the light of the effect of successful or unsuccessful collective bargaining, one legal structure that should be recognised as a potential source of remediation is the Education Labour Relations Council (ELRC). This bargaining council has been established in terms of section 37(3)(b) of the LRA. Section 28 of the LRA provides for the powers and functions of bargaining councils, most notably the conclusion and enforcement of collective agreements, the prevention or solving of labour disputes and the development of proposals for submission to the National Economic Development and Labour Council NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area.[54]

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50 Press release by SAOU (2011) available at http://www.saou.co.za/images/stories/libraryNuusflits/Press_statement-public_service_wage_negotiations-_May_0620.pdf (accessed 2011-03-02).
51 *Ibid*.
52 34 of 2005.
53 Landman *Beeld* (2011-02-04) 2.
54 S 28(1)(a), (b), (c), (h) Constitution.

Although educators normally approach the ELRC for education-specific matters, educators also fall within the Public Service Coordinating Bargaining Council (PSCBC) when matters that concern two or more public sectors are negotiated.[55]

One ELRC function that has the potential to remedy the adverse effects of strikes is "to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lockout at the workplace".[56] If this function is effectively performed, some incidences of industrial action in education may be prevented by ruling out those matters that should rather be resolved through mechanisms that do not directly affect the teaching and learning process.

3 3 4 Risks for Unions During Violent Industrial Action

Referring to the risks encountered by teacher unions, Prinsloo and Beckmann[57] argue as follows:

> Like a reasonable person a reasonable union ought to be able to foresee the damage or harm happening to a school, a learner, a parent, the education system and the country as a whole as a result of strike action and should take all reasonable steps to avoid such action.

Since the judgment in *SATAWU v Garvas*[58] violent conduct of members during industrial action holds real financial risks for unions. In *SATAWU* the Constitutional Court held that a law is consistent with constitutional principles if it holds organisers of gatherings, normally union leaders, liable for riot damage caused during such industrial action, "unless they took all reasonable steps to avoid the damage and they did not reasonably foresee that damage." In September 2012 Joubert reports that this far-reaching measure might eventually be included in law amendments currently being debated.[59] Cosatu is aggressively opposed to such amendment, which was first proposed by the Democratic Alliance in 2010, which might render those unions without proper control over their members bankrupt.

3 4 Remedial Action through Law Amendments

Statutory provision is made to regulate industrial action, and to limit it where necessary. In section 65 of the LRA the normal right to strike is limited when essential services have to be rendered. According to section 213 of the LRA "essential service" means "a service, the interruption of which endangers the life, personal safety or health of the whole or any

55 Rossouw *Labour Relations in Education - A South African Perspective* (2010) 107.
56 S 28(1)(i) Constitution
57 Prinsloo & Beckmann "(Un)lawful union activity: the risk of liability" 2012 (paper presented at the SAELA International Conference 2012-09-10–12) Somerset West, South Africa.
58 CCT 112/11 [2012] ZACC 13.
59 Joubert "Unies boet dalk as lede aanjaag" *Beeld* (2012-09-28) 13.

part of the population." An essential services committee, established by the Minister of Labour in consultation with the Minister for the Public Service and Administration, has as one of its functions in terms of section 70 of the LRA "to conduct investigations as to whether or not the whole or a part of any service is an essential service, and then to decide whether or not to designate the whole or a part of that service as an essential service".

The prohibition of essential services to strike in terms of section 65 can be seen as a powerful mechanism to maintain a certain level of functionality in public services. The LRA regulates the relationships between all employers and employees in both public and private employ, including educators at public schools. If education is classified by the essential services committee as an essential service, similar to the defence force, police service, and nursing, such a step has the potential to drastically reduce the disruptive effect of teachers' industrial action. Deacon reasons that South Africa has "sufficient laws regulating strikes and, particularly, protest action or picketing" and is not in favour of further law amendments but this suggested amendment to labour law is supported by Reynecke, the Democratic Alliance as well as Beckmann and Prinsloo.[60] Such an amendment implies that the existing definition of essential services might need to be expanded to also include possible damage to the psychological and academic well-being of learners, over and above threats to their physical safety and health. In so doing, the devastating influence of some teachers' unions could be curbed. In turn, this might be the start of building (or bringing back to where it once existed) a culture of teaching and learning conducive to quality education.

4 The Need for Remedial Action Against Departmental Incompetence

Jansen is of the opinion that three quarters of public schools in South Africa can be classified as being weak.[61] He blames this on the government's appalling attitude towards service provision, which is also visible in other state departments.

One legal instrument that regulates competence in service provision, especially related to decisions by public officials that adversely affect the

60 Deacon "The implications and risks of the teacher's right to strike" (paper presented at the SAELA International Conference 2012-09-10–12) South Africa; Reynecke "The Right to Dignity in Education" (paper presented at the SAELA International Conference 2007-00-26–28) South Africa; SAPA "Teaching an essential service" (2010) http://www.news24.com/SouthAfrica/News/ Teaching-an-essential-service-DA-20101011 (accessed 2011-03-02); Prinsloo & Beckmann "(Un)lawful union activity: the risk of liability" (paper presented at the SAELA International Conference 2012-09-10–12) South Africa.

61 Steyn (2011) *http://www.volksblad.com* (accessed 2011-11-23).

rights of citizens, is the application of the Promotion of Administrative Justice Act.[62] It is expected from the State to ensure fairness in the treatment of both employees of the state, such as educators in public schools, and ordinary citizens of the country. Referring to the Constitutional right to just administrative action, Currie and De Waal state that the "... entrenchment of fundamental principles of administrative law in the Constitution and Bill of Rights should be seen against the background of a long history of abuse of governmental power in South Africa".[63]

Another legal instrument that may have a remedial effect upon the quality of service provision by public officials, is the *Code of Conduct for the Public Service*, which forms Chapter 2 of the Public Service Regulations. This *Code* sets as its purpose to:

> … act as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct and in their relationship with others. Compliance with the Code can be expected to enhance professionalism and help to ensure confidence in the Public Service.

To give effect to this general statement, this code sets a number of ideals for public servants' approach to their duties, amongst others that such an employee:

> (a) puts the public interest first in the execution of his or her duties;[64]
> (b) loyally executes the policies of the Government of the day in the performance of his or her official duties as contained in all statutory and other prescripts;[65]
> (c) is committed through timely service to the development and upliftment of all South Africans;[66]
> (d) is committed to the optimal development, motivation and utilisation of his or her staff and the promotion of sound labour and interpersonal relations;[67]
> (e) refrains from party political activities in the workplace;[68]
> (f) is punctual in the execution of his or her duties;[69]
> (g) executes his or her duties in a professional and competent manner.[70]

These ideals for the conduct and attitude of public officials, such as departmental officials in the department of education, serve as basic guidelines for the discussion that follows. While some reasons for the decline in the quality of education are also to be found within underperforming schools, such as lacking principal leadership or

62 3 of 2000.
63 S 33 Constitution; Currie & De Waal 642.
64 S 3.1 *Code of Conduct for the Public Service* (*CCPS*).
65 *Ibid*.
66 S 3.2 *CCPS*.
67 S 3.3 *CCPS*.
68 *Ibid*.
69 S 3.4 *CCPS*.
70 *Ibid*.

educator diligence, the discussion will focus on the role and efficiency of the various departments of education.

4 1 Substandard Education

An international assessment of the whole education system of 100 countries was done in 2010 by the magazine *Newsweek*.[71] The report pointed out that South African education came 96th as compared to 100 other countries. In comparison, Mozambique ended up in the 95th place, Tanzania (94th) and Ghana (92nd), all having a much smaller education budget. The reasons for such a poor performance should be identified, and remedies should be urgently implemented. There are numerous schools where the matric pass rate is less that 20%, and in some cases 0%. The national pass rate in 2010 was 61%, but in the province of Mpumalanga only 48% and in Limpopo 49%.

This is to a certain extent due to ineffective provincial education departments and district offices, which is in contrast to the ideals set in the code of conduct for public servants, as discussed. They regularly lack both the ability and willingness to provide professional and academic guidance, and also lack control over schools and indolent educators, adding to this unsatisfactory situation. Jansen refers to the inability or unwillingness of the education department to control quality service delivery: "*... no one has the balls to fire a pathetic principal. Mediocrity is a big problem in South Africa*".[72]

In one case where the provincial education department did act against educator misconduct – allegedly organising illegal meetings – it was reported that SADTU planned a strike and was also demanding "the removal of Modidima Mannya, the head of the Eastern Cape's crisis-ridden education department".[73]

4 2 Transformation

It seems as if the political ideology of transformation has become more important than the interests of learners, an approach to appointments of educators and officials that prevails in both the teacher unions and the various departments of education. There are also irregularities during teacher appointments.[74] The appointment process is often strongly influenced by the dominating teachers' union, SADTU. As a result, individuals without the necessary experience, skills or an inclination towards working hard are appointed in positions beyond their

71 Peyper *Beeld* (2010-25-09).
72 Steyn (2011) *http://www.volksblad.com* (accessed 2011-11-23).
73 John "SADTU backs down from strike but goes to court" *Mail & Guardian* 2011-11-22 (available at http://mg.co.za/article/2011-11-22-sadtu-backs-down-from-strike-but-goes-to-court) (accessed 2011-11-23).
74 *The Governing Body of the Point High School v The Head of the Western Cape Education Department Case* 14188/2006 (C).

capability.[75] In effect the district offices have become notorious for not demonstrating the capacity or willingness to improve the quality of education. Towards the end of 2011 the situation has deteriorated to such an extent that Jansen urged parents and other stakeholders to "occupy the offices of the education department in every province".[76] Du Plessis does not agree with such a *modus operandi*, but strongly agrees with Jansen on the urgency of protest action.[77]

Though by far in the minority, well-functioning schools, in contrast, achieve high pass rates every year. On average and on a non-provincial basis, the grouping that can be called ex-Model C schools achieve a pass rate of 96.14%. Colditz explains this as follows:[78] "The role-players in the school communities make the difference: leadership by principals and governing bodies, diligent and hardworking teachers, disciplined teachers and students, as well as loyal support by parents." Somewhat ironically he adds: "This success is achieved not because of, but despite the involvement of the respective education departments."

To further substantiate the references to the lack of competence or diligence of some education departments, two recent court cases will be analysed.

4 2 1 Maritzburg College v Dlamini 2005

One prominent problem encountered by schools in disciplinary matters that involve suspension and expulsion, is the unreasonable delay by Heads of Education Departments (HoDs), which has led to considerable prolonged uncertainty amongst educators, principals, parents and the learners involved. In *Maritzburg College v Dlamini*[79] the school waited on three different occasions for between a year and 21 months for the HoD of the Natal Education Department, (first respondent) to respond to their correspondence.[80] In this case the reaction only came after he was summoned to a High Court hearing. The judge commented as follows on the tardiness of the official: "I find it disturbing (to put it mildly) that a public official had to be galvanised into action to do his duty only when served with a court application."[81]

Following *Maritzburg*, the legislator amended section 9 of the South African Schools Act[82] in 2006. This section on suspensions and expulsions now includes specific time frames, formulated as follows:

75 Du Plessis "Rektor som ANC reg op met dié woord" *Beeld* (2011-11-21) (available at http://www.beeld.com/Opinie/HoofArtikels/Rektor-som-ANC-reg-op-met-die-woord-20111121) (accessed 2011-11-22).
76 Steyn (2011) *http://www.volksblad.com* (accessed 2011-11-23).
77 Du Plessis *Beeld* (2011-11-21).
78 Personal communication with Colditz in Jan 2011.
79 [2005] JOL 15075 (N).
80 *Maritzburg College v Dlamini* [2005] JOL 15075 (N).
81 *Ibid.*
82 84 of 1996.

> (1C) A governing body may, if a learner is found guilty of serious misconduct during the disciplinary proceedings contemplated in section 8 –
> (a) impose the suspension of such learner for a period not longer than seven school days or any other sanction contemplated in the code of conduct of the public school; or
> (b) make a recommendation to the Head of Department to expel such learner from the public school.
> (1D) A Head of Department must consider the recommendation by the governing body referred to in subsection (1C)(b) and must decide whether or not to expel a learner within 14 days of receiving such recommendation.
> (1E) A governing body may suspend or extend the suspension of a learner for a period not longer than 14 days pending the decision by the Head of Department whether or not to expel such learner from the public school.

If these provisions are followed properly, an unruly learner that has been found guilty by a school governing body of serious transgressions will be suspended for a maximum of 21 days after the transgression – an initial seven days, plus a maximum of 14 days, pending the decision by the HoD whether or not to expel such learner from the public school. Within that period, the HoD has 14 days to finalise his or her decision.

4 2 2 FEDSAS v The MEC, Eastern Cape Education Department

In January 2011 the Pan Africanist Movement reacted to the "continuous decline and stagnation in matric results and general decline in the management of education" in the Eastern Cape Province.[83] They suggested that the education department of that province should be put under administration by the national government. This happened shortly afterwards when Minister of Basic Education, Ms Angie Motshekga, announced in March that the Eastern Cape Department of Education was put under administration in terms of section 100 of the Constitution.[84] All functions of that department were taken over by the National Department, a situation that prevailed for the rest of 2011. By August 2011 the National Basic Education Department has encountered, according to minister Motshekga, much resistance and a lack of cooperation regarding its intervention plans to get the Eastern Cape Department of Education back on track. [85]

Section 100 of the Constitution provides for national intervention in provincial administration:

> 100 National intervention in provincial administration
> (1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene

83 Mayekiso "Education system is dysfunctional – PAM" 2010-01-07 *City Press* (available at http://www.citypress.co.za/SouthAfrica/News/Education-system-is-dysfunctional-PAM-20100107) (accessed 2010-04-27).

84 *Ibid.*

85 SAPA "Eastern Cape education rot goes deep" (2011) http://www.news24.com/SouthAfrica/News/Eastern-Cape-education-rot-goes-deep-20110823 (accessed 2011-08-27).

> by taking any appropriate steps to ensure fulfilment of that obligation, including -
> (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
> (b) assuming responsibility for the relevant obligation in that province to the extent necessary to –
> (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
> (ii) maintain economic unity;
> (iii) maintain national security; or
> (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

It is not difficult to find a variety of reasons for the poor performance in the Eastern Cape, one being financial mismanagement due to both incapacity of officials and undue union involvement.[86] Another reason is the lack of proper administration regarding teacher provision. The deadline for post provision scales to be published by all provincial departments of education for the appointment of teachers was 30 September 2010 to enable schools to start the new school year with an approved duty sheet. This department failed to do that, and early in 2011 started – in the absence of such scales – to remove temporary teachers from their positions, severely disrupting education in many schools. The Federation of Governing Bodies of South African Schools (FEDSAS), a voluntary association of school governing bodies of public schools that supports quality education in schools, intervened on behalf of its member schools in that province. An interim court order was issued on 22 February in the Eastern Cape High Court, that compelled the Eastern Cape Department to appoint teachers in some 6000 vacant posts in schools in this province to prevent further disruption of schools, a decision that the Department unsuccessfully appealed against, with costs.[87] In the interim decision the court ordered the department to fill posts within five days of the order being served. In some schools there are up to twelve vacant posts, obviously disrupting all attempts towards quality education.

In a joint media release by Paul Colditz, the chief executive officer of FEDSAS, and Chris Klopper, the chief executive officer of SAOU, said: [88]

> We are grateful that the court acted in the best interests of the learners, because it is clearly not a priority for the provincial education department. FEDSAS and the SAOU are prepared to work with the minister to ensure that the situation returns to normality. However, then the focus should be on solving problems; not simply treating symptoms.[89]

86 John *Mail & Guardian* (2011-11-22).
87 *FEDSAS v MEC for the Department of Basic Education* case no 60/2011 (EC High Court).
88 FEDSAS & SAOU "Eastern Cape Education Department reigned in" Joint media release on 2011-03-04.
89 *Ibid.*

Financial problems such as these in the Eastern Cape should be addressed, because it deprives children of their right to quality education.

The Department of Basic Education has a history of being accused of contempt of court orders, which might be ascribed to both incompetence to carry out the orders, and an attitude of not taking the judiciary seriously.[90] This resistance to the rule of law was also visible on this matter regarding post provisioning, resulting in the case of PJ Olivier High School later in that year, after failure by the Department to abide by the initial court order.[91] The Democratic Alliance spokesperson Van Vuuren reports in January 2012 that "[t]he process of post provisioning has been completed, but sadly 8 000 vacancies have as yet not been filled".[92] Van Vuuren added:

> It is incumbent upon this Department of Education to exercise its responsibilities towards the core function of education which is teaching and learning, by providing a teacher for every available subject and classroom. Although there are challenges in the implementation of the post provisioning, this Department has once more horribly failed our learners.

To above-mentioned court cases a list of other cases in most provinces in South Africa can be added, where the respective departments of education lost cases on a variety of issues, such as irregularities during teacher appointments, admission of students and the language policy of the school.[93]

The tolerance of the National Department of Basic Education regarding the lack of competence demonstrated by officials in provincial departments, leading to expensive court cases, is tested regularly. Most of these court cases point out that basic legal principles have not been respected, irregularities in procedures prevail, undue influence has been applied, and an obsession with transformation has obscured reason.

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90 Carlisle "Education officials could face jail time" *Daily Dispatch* (2011-10-21) (available at http://www.lrc.org.za/lrc-in-the-news/1634-2011-10-21-education-officials-could-face-jail-time (accessed 2012-03-15)); Mabuza "School says minister, MEC in contempt of court order" *Business Day* (2011-08-19) (available at http://www.businessday.co.za/articles/Content.aspx?id = 156364 (accessed 2012-03-15)); PSA "Eastern Cape Department of Education in contempt of court" 2011 (available at http://www.google.co.za/url?sa = t&rct = j&q = &esrc = s&source = web&cd = 3&ved = 0CFUQFjAC&url = http % 3 % 2F % 2Fwww.psa.co.za % 2Fforce-download % 3Ffile % 3Dsites % 2F default % 2Fpsa % 2Ffiles % 2Fmedia_statements % 2FPSA2411 2011 % 2520ECEduc.pdf&ei = GQHCT8XbNYPIhAfX3YGSCg&usg = AFQjCNF7QiwQ6K8n0oTSAPA-yXjPvWMMAA) (accessed 2012-03-15).

91 *PJ Olivier High School v MEC for Education, Eastern Cape* (2011-07-14) case 214/11 (EC).

92 Van Vuuren "8 000 Teacher Vacancies in EC Not Filled" (2012) http://www.dabhisho.org.za/2012/01/16 (accessed 2012-03-15).

93 *The Governing Body of the Point High School v the Head of the Western Cape Education Department* case 14188/2006 (C); *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 3 SA 504 (C); *High School Ermelo v Head of Department, Mpumalanga Department of Education* case 30627/07 (TPD).

4 3 Remedies through Policy Development

In the light of such a strong set of factors negatively impacting upon the quality of public education provision in the country, it should be obvious that any attempt to turn the tide will have to be performed with great efficiency and determination. Isolated, uncoordinated attempts would not be sufficient, and a political will and strong leadership is a prerequisite, both on political level and in schools and education departments. A fine blend between tolerance and impatience with the progress (or lack of progress) will have to be found.

Current policy developments may serve as remedies to the prevailing unsatisfactory state of affairs. Under the topic "A delivery-driven basic education system" in the budget speech by the Minister of Basic Education, she made a number of statements that can be seen as positive trends and, if properly implemented, can start turning the tide:[94]

> (a) She referred to the initiative that was developed in 2010: Action Plan to 2014: Towards the Realisation of Schooling 2025. This Action Plan is the "heading arrow for improving learning outcomes."
> (b) She referred to 2010 as the year when education came face to face with a brooding teachers' strike, but still achieved an impressive 67.8 percent pass-rate, showing that the system is improving. This was an increase of 7.2 percent on the 2009 pass-rate of 60.6. "Most importantly, we turned the tide and rolled back the downward spiral of the past years. The challenge is to maintain or improve results. 70 percent is within reach."

Unlike some of her predecessors, she admitted boldly that education does have a number of weaknesses. Using the favourite term of "challenges", she referred to:[95]

> (a) Inefficiencies resulting in poor management and weak financial controls – this we see in some provinces continuing to receive qualified reports.
> (b) Poor accountability in different parts of the system; poor planning, monitoring and evaluation; poorly designed institutional structures that are not aligned to the key role of the department because of poor focus on the key role of instructional responsibilities for an education department, especially at district level, thus making it difficult to deliver on the key mandate of the department; and unsettling safety levels in schools.
> (c) Educator well-being, which is aggravated by the nation's burden of disease, such as the impact of HIV and AIDS; low levels of skills, commitment and discipline, and inappropriate working conditions.

What lacked here, unfortunately, was a direct reference to the undesirable influence of SADTU and its affiliates, currently one of the major weaknesses in the education system and a prominent threat against the delivery of quality education.

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94 Department of Basic Education Budget Vote speech by Minister Angie Motshekga at the National Council of Provinces.
95 *Ibid.*

A further positive element was the direct reference to some provincial departments' under-performance:

> The planning and delivery oversight unit's initial task will be to focus on improving the performance of 18 poorly performing districts in the Eastern Cape, Limpopo and Mpumalanga. These are the districts which over a period of 3 years have consistently underperformed in the National Senior Certificate exams.

In the debate that followed the budget speech, comments and criticism from the opposition regarding further deficiencies in the system was not (as often previously) summarily turned down, and the Minister indicated that she took note of such problems and will seriously look into those.

5 Recommendations

The most prominent reason why the legal system should remedy education in South Africa is found in the constitutional provision of the best interests of the child, which is of paramount importance in every matter concerning such a child.[96] In addition, the Constitution provides for the right of everyone in South Africa to a basic education.[97]

The claim of this article, as formulated at the outset, is that the South African legal system has the ability to provide a remedial function. To further substantiate this claim, two specific recommendations related to the most prominent problems, as identified, will now be offered.

The first recommendation relates to the principle of legality and rule of law. Consistent adherence to the rule of law by public officials and politicians can remedy certain ills of the education system. As pointed out, some provincial departments of basic education have made themselves guilty of contempt of court orders and a general disrespect of the legal system. This attitude of not taking the judiciary seriously can be effectively countered if the verdict in *Maritzburg* is consistently applied.

The judge referred to the unwillingness of the HoD to expeditiously make a decision on the expulsion. The HoD regarded it "utterly unreasonable" to expect him to make a decision within two months. The judge finally contended that:

> … consideration must be given in future, in my view, where litigants are forced to come to court to compel public servants to carry out their duties where they have failed to do so, that such officials be ordered to pay the costs incurred, personally.[98]

It is therefore recommended that stakeholders should work together towards respect for the rule of law, and if non-adherence is observed,

96 S 28(2) Constitution.
97 S 29(1) Constitution.
98 *Maritzburg College v Dlamini* [2005] JOL 15075 (N).

these stakeholders should consider bringing lawsuits against transgressors in their personal capacity.

The second recommendation concerns departmental incompetence, which can often be traced back to inappropriate appointment processes, as influenced by the obsession with transformation.

Following the *Maritzburg* case, the case of *Coetzee* can serve as a landmark case in curbing both incompetence and *mala fide* conduct of state officials.[99]

Arguing the appropriateness of *de bonis propriis* cost orders against government officials, Du Plessis AJ specify actions by such officials "that cause unnecessary litigation and costs, that are unreasonable, reckless and dishonest". He also quotes Plasket J in *Venbor (Pty) Ltd v Vendaland Development Company (Pty) Ltd t/a Campstore*[100] who indicated that officials acting in bad faith should be ordered to pay the legal costs in their personal capacity. Internationally, the Canadian appeal case *Re West Nissouri Continuation Board*[101] judgment is of importance. Riddel J, referred to officials found guilty of misconduct and said: " ... nor can they be allowed to use public money to pay for the results of their own misconduct".

Du Plessis AJ, in *Coetzee*, said that in his view:

> [t]he time has come for courts to impose the full extent of the law upon government officials who arrogantly act in breach of the constitutional imperatives referred to above, who act with impunity, and who are not taken to task by government, mostly because of inability, unwillingness or political reasons.
>
> The time has come to order such public officials, not only to right the wrong that has been caused, and not only to avoid the taxpayer to fund their unlawful frolics of their own, but also to act as a deterrent to public officials in future, to grant an order in terms of which all the costs of the litigation caused should be carried by those responsible.

This decision, while referring to incompetent police officials, highlights two elements that are also applicable to the education scenario: the current unwillingness by certain sections of government to discipline employees in breach of their public duties, and the necessity to ensure that officials in future do not dare to repeat these type of mistakes.

Many of the problems causing the threatening demise of the public education system, such as unethical leadership, strike actions and departmental incompetence, are clearly working against these fundamental rights of the child's best interests, the right to education and the right to freedom and security. Stakeholders that have the vision of quality education for all South African children should take a unanimous

99 *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP).
100 1989 2 SA 619 (V).
101 (1970) 38 Ontario Law Reports 207.

stand against these negative influences. Educator security should be enhanced in the quest for quality education. The stranglehold should be broken through a final change in the political will to improve the system, linked with diligence on the part of school principals, teachers and hardworking school governing bodies.

The South African legal system, including the legislative, the judiciary and the executive, does (albeit in principle) provide the remedies needed to rectify the deficiencies in the education system. The prerequisites for this process to succeed, is respect for the rule of law, adherence to the principle of legality, and proper functioning of the whole legal system. The ideals for education can be reached if the adverse effects of teacher unionism as well as the incompetence of provincial departments of education are effectively and decisively dealt with.

Language and culture restrictions in K-12 non-public schools in the United States: Exploring the reach of federal non-discrimination law and implications for South Africa

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OPSOMMING

Taal- en Kultuurbeperkings in K-12 Nie-openbare Skole in die Verenigde State: 'n Verkenning van die Reikwydte van Federale Nie-diskriminasie Wetgewing en Implikasies vir Suid-Afrika

In hierdie artikel ondersoek en vergelyk ons aspekte van die beperking sowel as die beskerming van taal- en kultuurregte in skoolverband (onafhanklike skole in die Verenigde State en openbare skole in Suid-Afrika). Ons doen dit deur grondwetlike en ander bepalings te bespreek en geselekteerde regspraak in die twee lande onder die vergrootglas te plaas. Ons ondersoek ook die samehang of gebrek aan samehang tussen die konsepte taal en kultuur in wetgewing en in regspraak. Ten slotte dui ons enkele besluitnemings- en bestuursimplikasies vir rolspelers in die onderwys aan en oorweeg ons ook die rol wat wetgewing en regspraak sou kon speel in die voortbestaan of ondergang van minderheidstale en -kulture.

1 Introduction

The purpose of this article is to examine two recent private school cases in the United States (US) addressing language and culture issues in schools and reflect on their application to similar issues in South African public and independent (private) schools. In the two US cases, *Silva v St Anne Catholic School*[1] (*Silva*) involving a private school's creation of an English-only policy and *Doe v Kamehameha Schools*[2] (*Kamehameha*) involving a private school's admission policy limiting admission only to those students who are related by blood as Native Hawaiians, two federal courts examined the legality of the policies in light of federal statutory and constitutional law. In South Africa, the Constitutional Court, in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*[3] (*Ermelo*), addressed the extent to which, under the Constitution of the Republic of South Africa, 1996 (the SA Constitution), a public school was

1 *Silva v St Anne Catholic School* 595 F Supp 2d 1171.
2 *Doe v Kamehameha Schools* 596 F3d 1036.

entitled to continue operating as a single medium Afrikaans school where its space was underutilised and nearby English speaking students were attending severely overcrowded schools. The common factor in *Silva*, *Kamehameha*, and *Ermelo* is the extent to which school governing bodies (South Africa) or school boards (US) should be able to select and promote a particular language and/or culture.

This article is divided into five parts: (1) presenting brief discussions of selected South African cases; (2) presenting the facts and court opinion for *Silva*; (2) presenting the facts and court opinions for *Kamehameha*; (3) analysing the US cases and their implications for schools under the following headings: culture and school policies in *Silva* and *Doe*; *Runyon v McCrary* and § 1981; the reception of federal aid and Title VI; equal protection and burden shifting standards; free expression issues and culture, and, judicial deference to school decisions; and (4) discussing what implications the US cases might have for *Ermelo*-type decisions in South Africa.

2 South African Cases

The cases of *Matukane*,[4] *Gauteng School Education Bill*,[5] *Laerskool Middelburg*,[6] *Mikro*,[7] *Seodin*[8] and *Ermelo*[9] can all be said to deal strictly with legal issues regarding language in schools, such as who may make the language policy of a public school, what are the powers of school governing bodies (SGBs) in this regard and what are the powers of a provincial education department *vis-à-vis* those of an SGB.[10] On the other hand they also deal implicitly and sometimes explicitly with matters of a socio-economic nature namely what does a child's right to a basic education as captured in section 29 of the SA Constitution entail and what are the responsibilities and powers of the state to ensure access

3 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC). It is the most recent in a sextet of cases dealing with the issue of language in schools.

4 *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T)

5 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of* 1995 1996 3 SA 165 (CC)

6 *Die Laerskool Middelburg v Die Departementshoof: Mpumalanga se Departement van Onderwys* 2002 JOL 10351 (T).

7 *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 3 SA 504 (C).

8 *Seodin Primary School v MEC of Education Northern Cape* (2) 2006 4 BCLR 542 (NC).

9 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).

10 All of these cases should be read in light of two provisions of the Constitution of the Republic of South Africa, 1996 (SA Constitution) namely s 29(2) in terms of which 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 and s 30 in terms of which everyone has the right to use the language and to participate in the cultural life of their choice.

to this right while complying with all other relevant provisions of the SA Constitution. In a sense the *Ermelo* case takes the issues to a logical and inevitable conclusion enjoining the Department of Education of Mpumalanga (representing the state) and the SGB of *Hoërskool* Ermelo to reconsider the language policy of the school in light of the issues of socio-economic justice which co-influenced the court's decision.

2 1 *Matukane*

Matukane was the first education case which captured national and international attention after the changeover to democracy in 1994. At the beginning of 1996 three black parents charged a dual medium primary school (with largely Afrikaans-speaking students but with some English-speaking ones), Potgietersrus *Laerskool*, with discrimination on the basis of race, ethnic or social origin, culture or language. The school argued that the school had an exclusively Christian Afrikaans culture and ethos which the school was entitled to protect "by refusing to admit pupils from a different or foreign language".[11] In granting the parents an order for admission to the school, Justice Spoelstra rejected the school's claim that a culture should be allowed to have its own schools where children can be educated in the mother-tongue according to their own religion and culture.

2 2 *Gauteng School Education Bill*

This case was heard under the interim Constitution of the Republic of South Africa, 1993.[12] In this judgment in the Constitutional Court Mahomed DP pointed out that the Speaker of the Gauteng Provincial Legislature had been petitioned by members of the Legislature to request the Constitutional Court to settle a dispute that had arisen regarding the constitutionality of certain provisions of the Gauteng School Education Bill (the Bill).

Among the disputed provisions was section 19(1) of the Bill which provided that language competence testing shall not be used as an admission requirement to a public school. The petitioners as well as the South African Foundation for Education and Training (SAFET) (which had been admitted to the proceedings as an *amicus curiae*) disputed section 19(1) arguing that it invaded the right of persons to attend schools where language competence testing is permitted as an admission requirement. They further argued that in terms of section 32(c) of the interim Constitution every person could demand from the state the right to have established [public][13] schools based on a common culture, language or religion provided that there shall be no discrimination on the ground of race. Mahomed DP found that Section 32(c) of the interim Constitution did not confer on the state an obligation to establish such [public]

11 *Matukane* 231.
12 We believe that, if the case were heard under the 1996 Constitution, the outcome would probably have been the same.
13 Our insertion.

educational institutions. The Section merely created a defensive right to a person who sought to establish such [independent or private] educational institutions and it protected that right from invasion by the state.[14]

Mahomed DP therefore declared that section 19(1) of the Gauteng School Education Bill of 1995 was not inconsistent with the Constitution on any of the grounds advanced by the petitioners and SAFET.[15]

2 3 *Laerskool Middelburg*

Justice Bertelsmann heard this case in which the *Laerskool* (Primary School) Middelburg approached the court to set aside a decision by the Head of Department of the Mpumalanga Department of Education and his officials to change the school from a single medium Afrikaans school to a parallel medium school.

Justice Bertelsmann noted with concern that the school had to join two classes for learners with special educational needs to make provision for an English stream. Because it had become clear (commonplace) that the Department's aim was to transform the school and to do away with Afrikaans medium schools in Mpumalanga despite the provisions of Section 29(2) of the SA Constitution and because the documentation before the court hardly seemed to give consideration to the interests of the learners to be enrolled at the school, the Justice Bertelsmann appointed a *curatrix ad litem* for all the children involved.[16]

From the report of the *curatrix* it was clear that the Department could have placed the children at other schools. It also became clear that the children had adapted well to the school but formed a somewhat isolated group. The children received good education and their parents wanted to keep them at the school. It would not be in the interests of the children to transfer them to other schools.[17]

Because of the best interests of the children and because the school had let a considerable time elapse before it approached the court, the court did not set aside the decisions by the authorities and *de facto* created a parallel medium school as the children would continue to other grades. If the school had litigated earlier the judgment might well have been different.

14 Our insertions.
15 S 29(3) SA Constitution puts the intention of the Constitution beyond doubt: "Everyone has the right to establish and maintain, their own expense, independent educational institutions …". Such independent schools may be based on a common language or religion and the state may subsidise such schools.
16 8, 9.
17 9.

2 4 *Mikro*

The case was heard by Justice Thring and he had to judge an application brought by Mikro Primary School (a single medium Afrikaans school since 1993) and its SGB against the Western Cape Member of the Executive Council for Education (MEC) and the Head of the Department of Education (HoD).[18] The school is just one kilometre from a parallel medium primary school.[19] In November 2004 the HoD had instructed the principal under threat of disciplinary action of the school to admit 40 learners who wanted to be taught through the medium of English to the school's grade 1 class in 2005.[20] The school refused and appealed to the MEC who dismissed their appeal on 19 January 2005 and on the same day "... two senior departmental officers came to the school and participated in the process by which 21 … children ... came ... to attend the school".[21]

On 20 January 2005 the school and its SGB applied to the court among others to set aside the decisions and actions by the MEC and the HoD and the officials of the Education Department.[22] Justice Thring found that the SGB was not an organ of state obliged to carry out the instructions of the HoD.[23] He also found that "a future repetition of similar conduct on the part of the first and second respondents is not unlikely" and also considered the best interests of the children who had been "enrolled".[24] Justice Thring ordered that the decisions of the MEC and the actions of the HOD and his officials be set aside and the children be relocated to another school as soon as practical but that they should be relocated before the beginning of the 2006 school year.[25]

2 5 *Seodin*

On 31 August 2004 the MEC for Education of the Northern Cape decided all single-medium Afrikaans schools in the Kuruman District, as well as Northern Cape Agricultural High School should from January 2005 convert to and function as double-medium Afrikaans-and-English schools. On 1 September the HoD in question decided to implement the MEC's decision.[26] Four Afrikaans medium schools affected by the decision of the MEC approached a full bench of the Northern Cape Division of the High Court for leave to appeal against the judgment in an interlocutory application reported *sub nom* as *Seodin Primary School v*

18 2.
19 38-39.
20 3.
21 4.
22 5-7.
23 16 *et seq*.
24 47.
25 59-61.
26 3-4.

MEC of Education, Northern Cape.[27] The application was dismissed.[28] Leave to appeal was not granted.

2 6 *Ermelo*

Ermelo tested section 29(2) of the SA Constitution providing that "[e]veryone 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".[29] Unlike *Matukane* that involved a school that was largely Afrikaans-speaking (with an English minority), *Ermelo* addressed the authority of a school governing body (SGB) to create an Afrikaans-only school, and then, to deny admission to English-speaking students who did not speak Afrikaans and were not willing to learn and be taught in Afrikaans. *Matukane* presented vexing questions, such as whether there is a right to mother tongue medium instruction, what the state's responsibility, if any, is to effect protection of that right, and whether an SGB has a right to create a single medium school. The Head of Department of Education of Mpumalanga had taken the extraordinary action of revoking the SGB's authority to determine the language policy at Ermelo and had ordered the school to admit English-speaking students from a nearby school. The Constitutional Court determined that the HoD had no authority to replace the SGB, but in so doing, the Court took note of the unused space at Ermelo and the crowded conditions at neighbouring township schools and directed the SGB to revisit its language policy in light of the needs of the community.

Whether *Ermelo* represents the eventual end of Afrikaans speaking single medium schools is open to debate.[30] *Ermelo* addressed the limitation on SGBs in requiring a single medium for instruction but did not address the larger question whether language would be a more defensible issue if considered in the broader context of culture. Post-World War II comments referring to Afrikaans in South Africa "as an effective instrument for social engineering" leave unclear whether Afrikaans was one aspect (albeit an important one) of a larger Afrikaans culture or whether language stood by itself as a way of assuring that the Afrikaans speaking population not be swamped by the English speaking one.[31]

In an unusual order the court instructed the SGB of *Hoërskool* Ermelo to:

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27 [2006] 1 All SA 54 (NC).
28 10.
29 S 29(2) SA Constitution.
30 More than 50% of the schools that used Afrikaans as the medium of instruction have been dismantled since 1994; http://www.unpo.org/images/member-_profile/afrikaneroct2009.pdf (accessed 2011-11-16).
31 See generally, Mawdsley & De Waal "Symbolism in Education: Its Role, Importance and Unique Application in US and South African Schools" 2007 *Ed Law Rep* 587 (arguing that the Afrikaans language is a valid and viable symbolism of a culture, without, however, being able to identify any other aspects besides language as the distinctive aspect of an Afrikaans culture).

(a) review and determine a language policy in terms of section 6(2) of the Schools Act and the Constitution;
(b) by not later than Monday 16 November 2009 lodge with this Court an affidavit setting out the process that was followed to review its language policy and a copy of the language policy.

This order can be seen as a creative attempt to reconcile the "legal and lawfulness" issues and the deeper socio-economic issues of access to education.[32]

3 Schools and Culture in the US: Statutory, Constitutional and Case Law

3 1 Statutory and Constitutional Law

Of the approximately 5,000,000 students in the US attending non-public schools, 80 percent of these students attend sectarian schools.[33] Because of the manner in which federal non-discrimination statutes are written or are interpreted, students or employees in some of these schools may find themselves excluded from protection under certain federal non-discrimination statutes. For example, some statutes expressly provide specific exemptions for religious institutions.[34] In other cases, the application of certain federal non-discrimination statutes will depend on whether a private school receives federal financial assistance. Thus, a private school's acceptance of such assistance will make the school subject to the Rehabilitation Act of 1973 (section 504)[35] which prohibits discrimination on the basis of disabilities, Title IX of the Educational Amendments of 1972[36] which prohibits gender discrimination, the Equal Pay Act of 1963 which prohibits gender-based wage discrimination,[37] and Title VI of the Civil Rights Act of 1964[38] which

32 It appears that the SGB has complied with this order and that a new language policy has been developed that addresses both legal (power) issues and social issues and the need for more school places.
33 See US Department of Education, National Center for Education Statistics *Characteristics of Private Schools in the United States: Results From the 2007-08 Private School University Survey* (2009) 6 Tab 1.
34 See eg 28 C FR § 36.102(e) (under Title III of the Americans with Disability Act, a public accommodation is prohibited from discriminating on the basis of disability; however, a "religious entity", defined as "a religious organisation, including a place of worship", is exempted from this definition). See also Title VII 42 USC § 2000e-2 *et seq* that contains three exemptions for religious organisations: where religion is a "*bona fide* occupational qualification"; 42 USC § 2000e-2(e)(1), where an employee is part of an educational institution "directed towards the propagation of a particular religion"; 42 USC 2000-§ 3(e)(2), and where individuals of a particular religion "perform work connected with carrying on the activities of such … educational institution"; 42 USC §2000e-1 (a).
35 29 USC § 794.
36 20 USC § 1681 *et seq*.
37 29 USC § 206(d)(1).
38 42 USC § 2000d.

prohibits discrimination on the basis of race, colour or national origin. Even if private schools do not receive federal assistance they are still subject to § 1981 of the Civil Rights Act of 1866 that accords all persons the same rights to make contracts, sue, and present evidence as "are enjoyed by white citizens".[39]

In certain exceptional situations, the Free Exercise Clause of the First Amendment permits a complete ministerial exemption from school liability for alleged liability under federal non-discrimination statutes.[40] However, such exclusion is very limited.[41] This portion of the paper addresses the liability of private K-12 educational institutions where their language or cultural admissions restrictions are alleged to constitute discrimination. In particular, this paper considers the extent to which a private school's enforcing its English-only policy against students during the school day and a private school's limiting student admission only to those students with a particular cultural background violates Title VI and § 1981. The challenge, in part, is that neither language restrictions nor cultural requirements are expressly addressed in Title VI or § 1981.

3 2 *Silva:* Facts and Court Decision

In *Silva*, near the beginning of the 2007-2008 school year, a private Catholic diocesan elementary and middle school (St Anne) in Wichita, Kansas adopted an English-only rule requiring that English be the only language spoken at school. The rule had been adopted in response to alleged offensive comments by Spanish-speaking students in their native language towards non-Spanish speaking students. The comments were considered by school officials, none of whom seemed to speak Spanish,[42] to constitute bullying. To explain the new English-only policy, the school principal sent home to all parents the following letter:

> We are experiencing some challenges in behaviour that are inappropriate for St. Anne School. Some of these include: name calling, not including others, put-downs, and in general-Bullying! Sometimes it appears to me that some

39 *Idem* § 1981(a).

40 Courts have created a ministerial exemption under the Free Exercise Clause that exempts religious employers from discriminatory claims. See eg *EEOC v Catholic University of America* 83 F3d 455 (dismissing a nun's Title VII gender discrimination claim after she was denied tenure in the Canon Law Department, the court of appeals finding that, because the department played a significant role in training priests and, thus, was important to the spiritual mission of the Catholic Church, teaching in the department qualified for a ministerial exemption).

41 See eg *Welter v Seton Hall Univ*ersity 608 A2d 206 (upholding damages awarded for breach of contract to two nuns and refusing to apply the ministerial exemption where the nuns played no role in performing ministerial functions for the university).

42 The facts in *Silva* are not clear as to who alerted non-Spanish-speaking school personnel to the content of the Hispanic students' comments in the lunchroom and on the playground, but a reasonable inference from the facts of the case seems to suggest that the source may have been bilingual students in the school. See *Silva* 595 F Supp 2d 1175.

> students feel that they don't have to abide by our policies. This will not be tolerated. This causes disruption in teaching and learning. If this continues, individual parents/students will be obliged to attend a conference!
>
> …
>
> We require English be spoken during school at all times! We are requesting that no native language other than English be spoken. Since all subjects are taught in English then they need strengthening in that area. The more students are immersed in English language the better the chance for improvement/success.[43]

Three days after this letter was sent, the school's principal met with three families of Spanish-speaking parents, including the Silvas,[44] to discuss the language rule, explaining that the English-only rule was enacted "to combat bullying, name-calling, and putdowns".[45] Although three Spanish-speaking parents were plaintiffs in *Silva*, the discriminatory claims discussed in the cases focused on the Silvas's son, Adam and, for purposes of the discussion of the facts, the Silvas' claims will be considered representative of all plaintiffs. The Silvas were strongly opposed to the new rule and in a subsequent meeting with the principal told the principal not to embarrass their son (Adam) in front of his classmates. Two weeks later, the Silva's sixth-grade son was transferred to another diocesan school for refusing to sign in his class an acknowledgement of school rules, including adherence to the English-only rule. While school officials treated this transfer to another diocesan as a disciplinary measure in response to Adam's refusal to sign the acknowledgement, the Silva parents treated it as punishment for Adam's and the parents' exercise of their expressive rights in objecting to the school's authority to ban their native language (Spanish) from the school. An additional parent claim centred on a school seating arrangement whereby Spanish-speaking students were prohibited from sitting together. Even though the school abolished the seating arrangement, the plaintiff parents claimed that their children continued to be targeted and were watched more closely than other children. In addition to the school's allegation that some Spanish-speaking students had bullied other students with derogatory and uncomplimentary comments, two other incidents of non-Spanish speaking students taunting the minor plaintiffs with ethnic comments allegedly had occurred, thus further complicating the legal issues.[46]

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43 *Ibid*.

44 *Idem* 1179. The three student plaintiffs in this case represented three families.

45 *Ibid*.

46 *Idem* 1179 (in one incident, a student sent an email referencing the United States as "our country, not yours", and in the second incident, a non-Spanish speaking student criticised a Spanish-speaking student's incorrect folding of the US flag with the comment, "we aren't in Mexico").

The *Silva* plaintiffs[47] presented three legal claims: (1) intentional discrimination under § 1981 and Title VI; (2) hostile environment under § 1981 and Title VI; and, (3) retaliation under § 1981 and Title VI. Essentially the plaintiffs' primary claim was that the blanket English-only policy constituted a *prima facie* case of discrimination. The school, in defence, denied the plaintiffs' claims, alleging that the English-only rule neither was discriminatory nor the cause of the alleged hostile educational environment.

The threshold question for the federal district court in *Silva* was whether § 1981 and Title VI applied to the private, religious school in this case. While the US Supreme Court in an earlier decision, *Runyon v McCrary,*[48] had determined that § 1981 applied to private schools whose written policies denied admission based on race, the defendants in *Silva* argued that the plaintiffs had failed to demonstrate race discrimination by the school in the making and enforcement of any contract. However, in denying the school's motion for summary judgment, the district court noted that statements in the school's handbook regarding race and diversity were sufficient to "give rise to enough of a contractual relationship to allow the case to proceed under § 1981".[49]

Federal court jurisdiction under Title VI requires that a school receive federal funds, a jurisdictional issue that was not a problem in *Silva* since St Ann received National School Lunch Program (NSLP)[50] federal funds administered by the United States Department of Agriculture.[51] In response to the defendants' claim that Title VI is program specific and, thus, applies only to discrimination in the program through which the school receives federal funds, the district court held that the interpretation of Title VI follows that of Title IX. The *Silva* court noted that Congress had acted to amend Title IX following the US Supreme Court's decision in *Grove City College v Bell*[52] where the court had held the prohibition of gender discrimination was program-specific. Subsequent to the Court's *Grove City* decision, Congress enacted the Civil Rights Restoration Act of 1987[53] that expressly applied Title IX institution-wide to any educational institution receiving federal funds. As a result, the

47 The three student plaintiffs represented three families of Spanish-speaking parents. *Idem* 1179.
48 427 US 160.
49 *Idem* 1180.
50 42 USC § 1756 (The NSLP provides that, where private schools have families that satisfy the family income eligibility requirements of the statute, "The State revenues provided by any State to meet the requirement of subsection (a) of this section shall, to the extent the State deems practicable, be disbursed to schools participating in the school lunch program under this chapter".). *Idem* § 1756 (a), (b).
51 *Silva* 595 F Supp2d 1174 ("Under the program, the government gave St Anne's $2.47 in cash for every free lunch, $2.07 for every reduced price lunch, and $0.23 for every paid lunch the school served during the 2007-2008 school year".).
52 465 US 555.
53 42 USC § 2000d-4a(3)(A)(i).

federal district court in *Silva* held that Title VI applied as well on an institution-wide basis to St Anne, observing that it is well established that Title VI is interpreted as "parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs". [54]

However, even though Title VI applied institution-wide in *Silva*, the district court found that the plaintiffs had failed to produce evidence that the English-only policy was discriminatory under either Title VI, or § 1981, because they had experienced no adverse action. The court likened the defendant's English-only policy as "akin to the almost universal decision by private schools to mandate the use of uniforms",[55] reasoning that just as parents "do not have a fundamental right to control the clothing their children wear to school", so also parents have "[no] right to control the language their children can or cannot speak at school".[56]

While the English-only policy, on its face, did not constitute discrimination under Title VI or § 1981, the plaintiffs in *Silva* alleged that interpretation of the policy should be subject to the burden shifting test in Title VII where the Equal Employment Opportunity Commission (EEOC) in its regulations has indicated that an English-only policy applicable at all times to all employees regardless of occupation or activity can be evidence of a hostile work environment.[57] However, the *Silva* federal district court found that the school's policy, even though it required the speaking of English during the entire school day, did not invoke discrimination comparable to that for employment settings under the EEOC Title VII regulation. Nonetheless, even though the English-only policy was not discriminatory, the *Silva* district court agreed that a school-wide policy did, under the facts of this case, present a genuine issue of material fact as to whether the plaintiffs had implemented the policy in such a way as to create a hostile environment. To support its conclusion, the *Silva* court identified four allegations in the plaintiffs' complaint, in terms of the school's enforcement of its English-only policy, that one could argue pointed to a hostile environment: the Hispanic students were watched more closely than other students; the Hispanic students were worried about being expelled if they spoke Spanish; the Hispanic students were worried that other students would report them for speaking Spanish; and the Spanish-speaking students were unable to concentrate on their academics.[58]

54 *Silva* 595 F Supp2d 1181, citing *Gebser v Lago Vista Independent School District* 524 US 274.
55 *Silva* 595 F Supp 2d 1184.
56 *Idem* 1184-1185.
57 42 USC § 2000e-2(a) (prohibiting employment discrimination on the basis of race, colour, religion, sex, or national origin). See 29 C FR §1601.7 ("A rule requiring employees to speak only English all times in the workplace is a burdensome term and condition of employment".).
58 *Silva* 595 F Supp 2d 1186.

The court observed, though, that, while these factors did not establish that a hostile environment existed at the school, the plaintiffs were entitled to an evidentiary trial to determine if such an environment had, in fact, existed at the time the lawsuit was filed. Under the *McDonnell Douglas Corporation v Green*[59] burden shifting test, the plaintiffs in *Silva* would have the initial burden of establishing a *prima facie* case that the policy created a hostile environment, after which the burden will shift to the defendant school to demonstrate a legitimate non-discriminatory reason for creation of the policy. If the school meets that burden, the plaintiffs must demonstrate that the proffered reason is pretextual.[60]

3 3 *Doe v Kamehameha Schools:* Facts and Court Decisions

In *Kamehameha*, the Ninth Circuit addressed the admissions policy of the Kamehameha Schools in Hawaii that limits enrolment in the schools only to native Hawaiians. The Kamehameha Schools were first established in 1884 by the last descendant of the Hawaiian monarchy, Princess Bernice Pauahi Bishop, who was a member of the Hawaiian royal family and at the time of her death in 1884 the largest landowner in Hawaii, owning approximately one tenth of the land.[61] Kamehameha Schools have expanded over the years to three K-12 schools and now have an endowment of $9.1 billion.[62]

The Bishop Estate trust agreement provided that trustees were "to expend the annual income in the maintenance of said schools – and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood before admitting other

59 *McDonnell Douglas Corporation v Green* 411 US 792.

60 See *Silva* 595 F Supp 2d 1182.

61 *Doe v Kamehameha Schools* 416 F3d 1025.

62 This significant endowment resulted from the Supreme Court's upholding an Hawaiian 1967 state statute allowing eminent domain to force the sale of privately held land, including land owned by the Bishop estate, the money from this sale was paid into the Bishop Trust and was the funding source of the Kamehameha Schools. At the time of the statute, the Hawaii Legislature discovered that significant amounts of real property were in the hands of only a few landowners, resulting in an inflated price for non-privately held land. The legislature found that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners, including the Bishop Estate. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanised of the islands, 22 landowners owned 72.5% of the fee simple titles. As a result of the eminent domain sale of Bishop Estate property, the endowment ballooned to $6 billion, a sum that has since increased to $9.1 billion at the time of the current lawsuit. *See Hawaii Housing Authority v Midkiff* 467 US 229 232; Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as *amici curiae* 32. For a discussion of the Hawaiian statute and the eminent domain challenge, see Mawdsley "Section 1981 and Private Schools: The Ninth Circuit Revisits Race-Conscious Admissions Policies" 2006 *Ed Law Rep* 23.

applicants".[63] Organised to preserve Hawaiian culture and identity by providing classes on Hawaiian culture and the Hawaiian language, the schools currently enrol approximately 5,000 students[64] and have, with very few exceptions, admitted only students "with any amount of Native Hawaiian blood". [65]

Native Hawaiians have received special attention from Congress, in some cases being included with legislation protecting Native Americans, such as the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act.[66] However, in the absence of language connecting Native Americans and Native Hawaiians, statutes protecting Native Americans do not always apply to Native Hawaiians. In its 2005 *Kamehameha* decision, the Ninth Circuit (in interpreting *Morton v Mancari*[67] where the Supreme Court had found Native American hiring preferences not to constitute a Title VII violation) had refused to accord Native Hawaiians the same unique trust relationship that existed between the US government and Native American tribes. The special status granted Native Americans under the Bureau of Indian Affairs (BIA) in a hiring preference for Native Americans did not apply to Native Hawaiians because the preference applied not "towards a 'racial' group consisting of 'Indians'" but instead "to members of 'federally recognised tribes'".[68] In essence "the [BIA] preference [was] political rather than racial in nature"[69] and, thus, without a Native Hawaiian political entity corresponding to an Indian tribe, the Kamehameha Schools' admission policy could be considered to be a violation of § 1981. However, under the No Child Left Behind (NCLB), a Native American school for purposes of compliance with the statute extends to:

> Native American (including Alaska Native) children and youth, an Indian tribe, a tribally sanctioned educational authority, a Native Hawaiian or Native American Pacific Islander native language education organisation, or an elementary school or secondary school that is operated or funded by the Bureau of Indian Affairs. [70]

Nonetheless, the NCLB distinguishes between Native American and Native Hawaiian in terms of the amount of funding[71] and the NCLB

63 *Doe v Kamehameha Schools* 990 F2d 458.
64 *Doe v Kamehameha Schools* 295 FSupp 2d 1141.
65 *Kamehameha* 596 F3d 1039.
66 See 20 USC § 4401 *et seq*. (Congress observed in the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act that "it is appropriate and necessary for the Federal Government to support research and scholarship in Indian art and culture and Native Hawaiian art and culture and to complement programs for the advancement of such art and culture by tribal, private, and public agencies and organisations".).
67 417 US 535 (upholding hiring preferences by the BIA under the Indian Reorganization Act of 1934 for Native Americans as not being discriminatory under Title VII).
68 *Idem* 553.
69 *Kamehameha* 596 F3d 1044.
70 20 USC § 3203.
71 *CF* 20 USC § 4111(a)(1) with § 4117.

distinguishes between Native American and Native Hawaiian schools in terms of designing, implementing and enforcing programs funded under the statute.[72] The effect of the federal legislation appears to be that, while Native Hawaiians enjoy inclusion in funding under the NCLB, they do not do appear to do so at the same degree as Native Americans.

Since 1966, the Kamehameha Schools have admitted only two non-Hawaiian students, (one student in 2002 and the second in 2003), under its admissions policy that allows for such admissions if no qualified Native Hawaiian candidates are available. However, the Bishop Estate Board of Trustees has since amended the admission policy by waiving the application fee and minimum test score requirements so as to "effectively ensure that there would never again be an insufficient number of qualified Native-Hawaiian applicants". [73] In the 1960s, the Kamehameha Schools' trustees also closed another admissions loophole by reversing an earlier policy allowing children of faculty to attend the schools.[74]

The *Kamehameha* lawsuit has had a complex legal history. The student referenced in the preceding paragraph (hereafter referred to as Doe I) was admitted in 2003 pursuant to a temporary injunction ordering the schools to readmit him after the trustees had rescinded his admission on the grounds that the student's mother, who had been adopted by a Native Hawaiian, did not qualify the student as a Native Hawaiian for purposes of admission. This injunction led eventually to a settlement agreement permitting the student to continue enrolment at the Kamehameha Schools.[75] The most recent lawsuit involved a different student (hereafter referred to as Doe II) who, however, was unsuccessful in his § 1981 claim to gain admission, also in 2003. Doe II, rather than negotiate a settlement agreement as had Doe I, chose instead to challenge the admissions policy as discriminatory on its face under § 1981.

A federal district court found, regarding Doe II's claim, that the schools' admissions policy granting preference to children of Native Hawaiian ancestry constituted a valid race-conscious remedial affirmative action program and, thus, did not violate § 1981.[76] On appeal to the Ninth Circuit, a three-judge panel held that the schools' race-based admissions policy did not constitute a valid affirmative action plan, and, thus, because the schools had failed to supply a legitimate non-discriminatory reason for its admission policy, the policy was in violation of § 1981.[77] However, the Ninth Circuit Court of Appeals, sitting *en banc*, reversed the three-judge panel. The *en banc* Court of Appeals found that the Kamehameha School's policy of giving preference in admission to

72 *CF* 20 USC §§ 7101-7152 (Native Americans) with §§ 7201-7207 (Native Hawaiians).
73 *Kamehameha* 596 US 1039.
74 *Idem* n 1.
75 *Ibid*.
76 *Kamehameha* 295 F Supp 2d 1166-67.
77 *Kamehameha* 416 F3d 1042.

students of Native Hawaiian ancestry did not violate § 1981 inasmuch as a manifest imbalance in educational achievement existed between Native Hawaiians and other ethnic groups in the State of Hawaii and the schools' purpose was to remedy such imbalance.[78] The *en banc* Ninth Circuit also found that educational opportunities were not deficient for non-Native Hawaiians. In addition, the policy which had been constant for 118 years (the number of years at the time of the *en banc* decision) allowed for admission to non-Hawaiians if Native Hawaiians did not apply in sufficient numbers and would be in place only so long as necessary to remedy past discrimination.[79]

The US Supreme Court denied certiorari[80] but that has not stopped the procedural litigation. While the admissions policy was still waiting for a Supreme Court decision on the writ of certiorari, the Doe II plaintiff filed a motion to proceed anonymously because of his fear of physical injury if his identity were revealed. The plaintiff and his parents referenced three incidents that caused them fear: (1) a general sense of anger and rage over the federal district court settlement agreement permitting the plaintiff in 2003 to attend the school; (2) an affidavit from plaintiff's mother where unnamed persons demanded that the plaintiff's name be revealed, threatening physical violence; and, (3) a series of anonymous emails calling the student and parent plaintiffs derogatory names relating to their skin colour, especially the use of the term "haoles".[81] The Ninth Circuit upheld the federal district court's denial of plaintiffs' motion to proceed anonymously, agreeing that the plaintiffs had failed to prove that they "reasonably feared such harm".[82] Balancing the "common law rights of access to the courts and judicial records"[83] with the plaintiffs' "claims of widespread discrimination",[84] the Ninth Circuit supported "the default presumption that the plaintiffs will use their true names" [85] because most of the negative comments contained statements supporting non-violence[86] and because "the US attorney had issued a strongly worded warning, reminding the public that threats based on race are a federal felony".[87]

This procedural venture by the plaintiff Doe II was only a sideshow distraction for the substantive question as to whether the Kamehameha Schools' admission policy is discriminatory under § 1981. Assuming that

78 *Doe v Kamehameha* 470 F3d 827.
79 *Ibid.*
80 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 550 US 931.
81 *Kamehameha* 596 F3d 1040 n 3. "Haole" is a term in the Native Hawaiian language denoting a foreigner, especially a White or Caucasian person". "Kill haole day" is an unofficial tradition in Hawaiian public schools when some Native Hawaiian children "beatup Caucasian students on the last day of school" (citations omitted).
82 *Idem* 1044.
83 *Idem* 1042.
84 *Idem* 1043.
85 *Idem* 1046.
86 *Idem* 1045.
87 *Ibid.*

the plaintiffs will proceed now under their true names in a federal district court to challenge the admissions policy, both the district court and the Ninth Circuit will have another opportunity to consider the discriminatory nature of a school policy that furthers a particular culture by excluding all persons not of that culture.

3 4 Analysis and Implications

As between language and culture, culture is clearly the more expansive term. While language is generally part of one's culture, culture can include a wide range of other defining concepts such as religion, important historical events and activities. Unfortunately in the US, case law has not provided direction as to whether culture is a protected area under federal law, nor, if culture is protected, have the courts furnished clear guidelines as whether a private school's limitation of language will be permissible as long as it does not restrict all aspects of culture.

3 4 1 Culture and School Policies in Silva *and* Doe

The two US cases selected for discussion, *Silva* and *Kamehameha*, present important differences concerning language and culture policies in schools. While both cases addressed factors important to an understanding of culture, they accomplish their purposes in quite different ways. Contrary to *Kamehameha* which represents a coordinated and comprehensive effort to preserve the Hawaiian culture by excluding non-Native Hawaiians, the English-only policy in *Silva*, one can argue, was initiated by the private religious school not to further a culture, but simply to address alleged bullying by Spanish-speaking students. In effect, the exclusion of a language from school could be viewed as excluding, at best, only one part of Hispanic culture (language) from a school.

The problem, of course, is determining the definition of culture and its impact on students. In *Abbott v Abbott*,[88] the US Supreme Court held, following a divorced, custodial mother's taking her son from his birth country (Chile) to the US without the father's consent, that the Chilean father's *ne exeat*[89] right granted by a Chilean family court constituted a "right of custody" under the Hague Convention.[90] In upholding the veto rights of the Chilean father concerning the mother's removing the child from Chile, the Court observed that "[f]ew decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb".[91] However, worth noting is the

88 130 S Ct 1983 (2010).

89 *Ne exeat* is a writ to restrain a person from leaving the country, or the jurisdiction of the court. *Black's Law Dictionary* (1951) 1180.

90 The Hague Convention on the Civil Aspects of International Child Abduction (Convention) 1980-10-24, TIAS No 11670 S Treaty Doc No 99-11, implemented in the US as the International Child Abduction Remedies Act 42 USC § 11601 *et seq*.

91 *Abbott* 130 S Ct 1991.

three-justice dissent in *Abbott* which was critical of the majority and noted that even returning the child to Chile would not permit the father's veto to determine "any number of decisions that are vital to AJA's physical, psychological, and cultural development",[92] such as the kind of school he attends, the religion he chooses to follow, the foods he chooses to eat, the sports he chooses to participate in, or the language he chooses to speak.[93] Although arising out of a child custody setting, *Abbott*, nonetheless, recognises that culture is a multi-faceted concept that includes, but is not necessarily limited to, language. *Abbott* suggests that, in addressing the issue of culture, much depends on the perspective. From the perspective of the child in *Abbott*, the language and culture in Chile that the child had experienced from birth will probably undergo a substantial reorientation when the child is placed in a US school. If the mother prevails, the child's immersion in US education will require the acquisition and use of the English language as well as knowledge of and participation in new historical, social, and educational events, activities, and experiences that represent culture in US schools. At the same time, though, such a transition from Chile to the US will likely result in the diminution (or disappearance) of the Chilean culture through lack of the child's opportunity to participate in Chilean activities and events that would have been part of the Chilean educational experience. This conflict is mirrored in the positions of the Chilean father and the US mother who have used the authority of Chilean, US, and international law regarding custody to determine what the post-divorce culture of their child should be.

In *Silva* the contest is not between parents, but rather between parents and their child's school. While the English-only policy was limited only to the language spoken at school, the court's decision is silent as to how the school might be expected to address parent-requested celebrations at school of Hispanic activities or events that may require the use of costumes, music, and non-English languages. The religious private school in *Silva* was able to avoid a Title VI discrimination claim because its English-only policy was limited only to a fairly narrow disciplinary issue involving inappropriate student comments in a language understood by some students but not by any of the school teachers.[94] However, the fact that the federal district court in *Silva* refused to grant the school summary judgment on plaintiffs' hostile environment claim reflects how fragile may be the school's Title VI and § 1981 defence.[95] The district court found nothing discriminatory in the school's transferring Adam Silva to another school after he had refused to sign St Anne's English-only policy in class.

92 *Idem* 2000. (Stephens J, Thomas J, and Breyer J dissenting).
93 *Ibid*.
94 *Silva* 595 F Supp 2d 1185; (The federal district court found non-pretextual St Anne's claim that it required "that English be spoken so that students and teachers can understand what is being said, and so that a foreign language could not be used to make fun of or exclude others".).
95 *Idem* 1188-1189.

However, *Silva* presents more challenging issues that were not before the district court but may become issues in future litigation. The court did not have to determine how Title VI and § 1981 might be applied were St Anne to expand its English-only policy to prohibit other aspects of culture, such as wearing foreign country-specific symbols, displaying a non-US flag on clothes or school bags, singing songs at school in Spanish (or another language) rather than English, honouring non-US historical personages, or celebrating another country's important historical or social events.[96]

On its face, *Silva* clearly does not involve exclusion from school of a student because he speaks Spanish, nor had the school indicated any intention to expand its English-only policy to other areas. Worth noting is that the religious school in *Silva* did not advance its English-only policy as a means of advancing an "English-only" or "American" culture, but rather as a means of curbing alleged verbal bullying by students who spoke a language understood by none of the school teachers.

Such is not the case, though, in *Kamehameha* where the Kamehameha Schools exist not only to protect a single culture, but to prohibit the enrolment of any students not part of that culture. The Ninth Circuit in a prior *Kamehameha* decision upholding the restrictive enrolment policy observed that:

> Native Hawaiians are over-represented in negative socioeconomic statistics such as poverty, homelessness, child abuse and neglect, and criminal activity; they are more likely to live in economically disadvantaged neighbourhoods and attend low-quality schools; and, because of low levels of educational attainment, they are severely under-represented in professional and managerial positions, and over-represented in low-paying service and labour occupations.[97]

To address "the imbalances, disadvantages and marginalisation facing Native Hawaiians",[98] the Ninth Circuit observed that the Kamehameha Schools had created a learning community that "embrace[d] Native Hawaiian culture, reconnect[ed] the children with the values or respect and sharing that guided their ancestors and builds their pride and senses of dignity",[99] claims not dissimilar to those that have been made on behalf of historically black colleges and universities and single-sex

96 See *Idem* 1188. The district court suggests two different discrimination interpretations of the student plaintiff's (Adam's) refusal to sign the English-only letter. The first, and one adopted by the court, was that speaking a foreign language is not a protected activity. The second, and one not adopted by the court, is that the student's refusal to sign the policy constituted activity protected under Title VI or § 1981 as opposing discrimination.

97 *Kamehameha* 416 F3d 1041.

98 *Kamehameha* 295 F Supp 2d 1168.

99 *Idem* 1169.

schools.[100] In addition, the mission of Kamehameha Schools included a comprehensive remedial plan to increase both "the achievement scores of Native Hawaiian students" and "the number of Native Hawaiian students receiving college and advanced degrees,"[101] a plan that appeared to be working with seniors outperforming both national and state norms on the SAT I verbal and math tests and with virtually the entire graduating class of 2002 planning to enrol in some form of post-secondary education.[102]

However, even though the educational achievement of native Hawaiians at the Kamehameha Schools was improving, the general condition of Native Hawaiian students was not. Congress in 2002 had extended the Native Hawaiians Education Act (NHEA),[103] first enacted in 1994,[104] authorising a variety of preferential educational programs for Native Hawaiians. The NHEA, reauthorised again in 2010,[105] recognised that "Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores",[106] "continue to score below national norms on standardised education achievement tests at all grade levels",[107] "continue [in both public and private schools] to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs",[108] "continue to be over-represented among students qualifying for special education programs provided to students with learning disabilities, mild intellectual disabilities, emotional impairment, and other such disabilities",[109] "continue to be under-represented in institutions of higher education and among adults who have completed four or more years of college",[110] and "are more likely to be retained in grade level and to be excessively absent in secondary school".[111] In other words, although graduates from the Kamehameha Schools were achieving success in education, the overall picture for Native Hawaiians continued to be bleak compared to non-Native Hawaiians.[112] Worth noting is that the deficiencies referenced

100 See generally Flowers & Pascarella "Cognitive Effects of College Racial Composition After 3 Years of College" 1999 *J of College Student Dev* 669; Allen "The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities" 1992 *Harv Ed Rev* 26.

101 *Kamehameha* 295 F Supp 2d 1169.

102 *Idem* 1170.

103 20 USC § 7511 *et seq*.

104 The NHEA was first codified 20 USC § 7901 *et seq*.

105 20 USC § 7511 *et seq*.

106 *Idem* § 7511(16) (B).

107 *Idem* § 7511(16) (C).

108 *Idem* § 7511(16) (D).

109 *Idem* § 7511(16) (E).

110 *Idem* § 7511(16) (F).

111 20 USC § 7512 (16)(G)(i).

112 Native Hawaiian students score the lowest among major ethnic groups on state-wide standardised tests, approximately 11% below the State Department of Education ("DOE") average on reading and roughly 14% below the DOE average in math. Native Hawaiian children are also less

above from the 2010 reauthorisation of the NHEA are exactly the same as those from the 2002 reauthorisation. Ironically, despite the deplorable condition of Native Hawaiian achievement in education in general that has prompted federal government assistance, the Kamehameha Schools have not taken advantage of the aid provided under the NHEA and have remained separate from the government, a fact perhaps reflecting its huge endowment.

In its appellee's brief to the Ninth Circuit, Kamehameha Schools had argued that reversing the district court decision and upholding plaintiff's claim "would effectively nullify the mission of a universally applauded educational institution that has helped to reverse the near-destruction of a dispossessed indigenous people".[113] If the schools could no longer provide preferential enrolment to Native Hawaiians, their numbers could very well decline and, as the schools argued in its brief:

> [i]f Kamehameha's population [were to become] only 25% Native Hawaiian, ... mirroring the general population in Hawai'i, its mission of improving the capability of Native Hawaiians and helping to preserve Native Hawaiians as an indigenous people would be greatly impaired.[114]

If one follows the reasoning of the Ninth Circuit that the schools had failed to state a compelling reason to justify its discriminatory admissions policy, the Ninth Circuit's decision could very well have the effect of diminishing (or terminating) the schools' purpose of assisting the Native Hawaiian population they had been created to help.[115] Much will depend, of course, on how many non-Native Hawaiians, should admission be opened to all applicants, would seek and secure admission to the Kamehameha Schools.

No statistics are available as to how many non-Native Hawaiians might want to attend Kamehameha Schools, in large part, presumably, because the preference for Native Hawaiians is sufficiently well-known to

112 likely to graduate from high school on time and are more likely to drop out of school than their non-Native Hawaiian counterparts; only 68.4% of Native Hawaiians in the public school system satisfy graduation requirements compared with 76.6% system-wide. Native Hawaiians are less likely to go on to higher education and well-paying jobs. In 1990, only 9.1% of Native Hawaiians 25 or older in Hawaii had obtained a bachelor's degree, in contrast with 30.3% of persons of Chinese descent, 25.2% of persons of Japanese descent, and 30.2% of Caucasians. Only 22.8% of Native Hawaiians are professionals or managers, compared with 34.2% of non-Native Hawaiians, while 12.1% of Native Hawaiians are low-paid labourers, compared with 8.2% of non-Native Hawaiians. *Appellee's Answering Brief* 11, 12 (No 03- 00316-ack). *Kamehameha* 416 F3d 1046-1047.

113 *Appellee's Answering Brief* 1.

114 *Idem* 37.

115 From the 70,000 school-aged Native Hawaiians state-wide, Kamehameha Schools currently are able to admit only about 738 students annually. *Kamehameha* 295 F Supp 2d 1157.

discourage admission applications.[116] The extent then to which non-Native Hawaiians would seek admission remains to be seen, but if the schools are as effective in preparing students for post-secondary institutions as their current success record appears to suggest, one can reasonably expect that many students currently denied access to the schools may want to seek admission and, thus, the plaintiff in this case will be the first of many non-Native Hawaiian applicants.

3 4 2 Runyon v McCrary and § 1981

The limitation placed on private school discrimination under § 1981 was addressed in 1976 by the US Supreme Court in *Runyon v McCrary*.[117] The *Runyon* court held that the right of contract accorded to "all persons" under § 1981 had been enacted by Congress pursuant to the Thirteenth Amendment's prohibition of slavery and involuntary servitude which, as applied to schools, prohibited them from refusing to admit black students on the basis of their race.[118] The Supreme Court in *Runyon* put to rest lingering uncertainty as to whether Congress' authority to prohibit discrimination in private schools pursuant to the Thirteenth Amendment required a finding of state action by a school, as expressly mandated in the Fourteenth Amendment.[119]

The *Runyon* Court effectively brought private schools within § 1981 despite the absence of state action required under the Fourteenth Amendment.[120] The Supreme Court, in upholding Congress' prohibition under § 1981 of "racial discrimination that interferes with the making

116 One non-Native Hawaiian student was admitted for the 2002-2003 academic year because space remained after all qualified native Hawaiians were admitted, but this admission apparently prompted an investigation that resulted in a promise by school administrators to ensure that admission remained only for native Hawaiians. See *Kamehameha* 416 F3d 1039 n 8.

117 427 US 160.

118 US ConSt Amend XIII. The Thirteenth Amendment prohibits slavery and involuntary servitude and has been interpreted as not requiring state action like the Fourteenth Amendment. See *Runyon* 427 US 189 (Powell J concurring) ("§ 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are 'private' in the sense that they involve no *state* action".). Contrast the view of two dissenting justices in *Runyon*, Justice White, joined by (then) Justice Rehnquist, who would have restricted application of § 1981, in essence prohibiting its application to the private schools in *Runyon*, because it was like the "Fourteenth Amendment statute under which the Congress may and did reach only state action". *Runyon* 427 US 213 (White J joined by Rehnquist J dissenting). For a discussion of private schools and state action under the Fourteenth Amendment, see *Rendell-Baker v Kohn*, 457 US 830.

119 *Runyon* had been preceded eight years earlier by a non-education case, *Jones v Alfred H Mayer* 392 US 409, upholding 42 USC § 1982 that had been enacted pursuant to the Thirteenth Amendment and that prohibited race discrimination in the rental and sale of property. Worth noting is Justice Stevens' concurring opinion in *Runyon* stating that *Jones* had been wrongly decided but refusing to disturb the decision once it had been made. *Runyon* 427 US 189-190 (Stevens J concurring).

120 A finding of state action requires that least one of the tests in *Blum v Yaretsky* 457 US 991 1004, must be met: (1) the extent to which the private

and enforcement of contracts for private educational services",[121] found the private schools' and parental liberty clause arguments not applicable. In essence, the court found that Congress, in prohibiting discrimination in making contracts, had not interfered with parental rights under the liberty clause to make educational choices and child-rearing decisions for their children,[122] and § 1981 as a "reasonable government regulation"[123] did not interfere with any decisions the schools may make to "inculcate whatever values and standards they deem desirable".[124]

In *Silva*, the federal district court applied *Runyon*'s § 1981 prohibition of discriminatory policies in the creation of contracts to "racial discrimination that impairs an existing contractual relationship".[125] The district court in Silva determined that "the school handbook's statements regarding race and diversity gave rise to enough of a contractual relationship to allow the case to proceed under § 1981".[126]

3 4 3 Title VI and the Reception of Federal Aid

The *Silva* and *Doe* cases are exemplars for understanding the jurisdictional requirement of federal aid for purposes of applying Title VI to private schools. Because the Kamehameha Schools do not accept federal aid, they are not subject to Title VI. However, St Anne in *Silva* participates in the federally funded lunch program and, for that reason, is scrutinised regarding the race discrimination and retaliation remedies under Title VI.

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entity is subject to state or federal regulations; (2) sufficiency of close nexus between the state and private entity so that action of the latter is treated as action of the former; and, (3) presence of such coercive power or significant encouragement of the state that private decisions are essentially those of the state.

121 *Runyon* 427 US 179.

122 See *Meyer v Nebraska* 262 US 390 (reversing criminal conviction of teacher for teaching course content in German in violation of state law, finding that the state prohibition on instruction except in English violated parents' liberty clause right to make education choices for their children); *Pierce v Society of Sisters* 268 US 510 (invalidating state statute requiring attendance at public Schools finding the statute a violation of parents' liberty clause right to make educational choices for their children); *Wisconsin v Yoder* 406 US 205 (invalidating state compulsory statute as applied to Amish children where requiring students to attend public high school would interfere with parents' liberty clause right to make educational choices for their children and their free exercise of religion).

123 See *Pierce* 268 US 534. The partial quote is from a larger statement by the Court:

No question is raised concerning the power of the state reasonably to regulate all Schools to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some School that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

124 *Runyon* 427 US 177.

125 *Silva* 595 F Supp 2d 1180, citing *Domino's Pizza v McDonald* 546 US 470 476.

126 *Silva* 595 F Supp 2d 1180.

Before a court can consider an alleged discriminatory policy under Title VI, a plaintiff must satisfy a three-part *prima facie* test: (1) the plaintiffs are a member of a protected class; (2) the plaintiffs suffered an adverse action; and (3) the plaintiffs were treated less favourably than similarly situated students.[127] In *Silva*, the plaintiffs' identification as Hispanic met the first requirement.[128] However, the plaintiffs failed to establish that the school's creation of an English-only policy and its application to Hispanic-speaking represented an adverse action, the federal district court observing that a language policy is no different than a school's dress code which private schools are free to dictate to students and their parents.[129] Because the plaintiffs could not satisfy the second *prima facie* requirement, their Title VI discrimination claim failed.

However, the defendant school in *Silva* was not successful in opposing the plaintiffs' Title VI hostile environment claim. In examining the Hispanic plaintiffs' claims of racially insensitive statements by non-Hispanic students and the school's English-only policy, the district court found sufficient evidence of deliberately indifferent response by school personnel to the statements, as well as the severe, pervasive, and objectionably offensive nature of the statements, so as to state a Title VI claim.[130] While the district court notes that the plaintiffs have only stated sufficient facts to go to trial "to determine if [a hostile] environment exists",[131] St. Anne will still have to expend funds to defend against the Title VI claim at trial.

One wonders though, when this lawsuit is resolved, whether officials at St Anne will examine how the cost of defending the lawsuit compares to the financial benefits it received from the federal school lunch program.[132] For many private schools that choose to participate in federal funded programs, such data would be useful in comparing the value of federal aid received with the cost of defending a discrimination lawsuit where jurisdiction depends on the reception of federal funds.

3 4 4 Equal Protection and Burden Shifting Standards

Unlike *Silva* where the religious school faces both Title VI and § 1981 claims, only a § 1981 discrimination claim can be advanced against the Kamehameha Schools. The Ninth Circuit's three-justice panel, in a decision subsequently reversed by a Ninth Circuit *en banc* decision, found the admissions policy discriminatory, but struggled to find a legal

127 *Idem* 1182.
128 *Ibid*.
129 *Idem* 1184-1185.
130 *Idem* 1186-1187.
131 *Idem* 1187.
132 While the facts in *Silva* are silent as to the number of students who participated in the National School Lunch Program, the facts do reveal that "the government gave St Anne's $2.47 in cash for every free lunch, $2.07 for every reduced price lunch, and $0.23 for every paid lunch the school served during the 2007-2008 school year". *Idem* 1184.

standard to use in analysing the legality of a race-conscious admissions policy.

The three-justice panel rejected the strict scrutiny standard under the Equal Protection Clause of the Fourteenth Amendment that had been applied in *Gratz v Bollinger*[133] and *Grutter v Bollinger*,[134] finding the standard inappropriate. Since liability under the Fourteenth Amendment requires state action and, since the Kamehameha Schools did not receive federal funds, the schools had no government connections to make them subject to the Equal Protection Clause.[135]

However, the panel found more fruitful ground in its effort to apply the *McDonnell Douglas Corporation v Green*[136] Title VII burden shifting test.[137] In so doing, the panel found that "Kamehameha's unconditional refusal to admit non-Hawaiian applicants so long as there are native Hawaiian applicants categorically trammelled the rights of non-Hawaiians".[138] The Ninth Circuit, in its *en banc* decision, rejected this conclusion, finding that Kamehameha Schools' Native Hawaiians-only policy, even though it operated as a complete bar to non-Hawaiians, had legitimate purposes.[139] Thus, even under the three-justice panel's use of the *McDonnell* Title VII burden shifting test, the policy:

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133 *Gratz v Bollinger* 539 US 244 (invalidating undergraduate admissions policy distributing 20 points or one-fifth of the total to all under-represented minorities as not being a race-conscious policy narrowly tailored to achieve diversity).

134 *Grutter v Bollinger* 539 US 306 (upholding law school's use of race as a factor in admission because law school had a compelling interest in a narrowly tailored admission policy to assure that the law school had a diverse student body).

135 US ConSt Amend XIV § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

136 411 US 792 (court remanding for trial so that the plaintiff black employee who had been discharged by McDonnell and had engaged in unlawful conduct in response toward the corporation would have an opportunity to produce evidence that corporation's legitimate non-discriminatory reason for refusing to hire him for a different position was pretextual).

137 *Idem* 802. Under this test, complainants are required as part of a *prima facie* case to produce evidence that an employer's adverse employment action was intentionally discriminatory, after which the employer can rebut the complainant's presumption of racial discriminatory treatment by introducing evidence of a legitimate, non-discriminatory reason for its action. Once the employer had produced such evidence, the burden shifts to the complainant to produce evidence of pretext.

138 See *Kamehameha* 416 F3d 1041.

139 See *United Steelworkers of America v Weber* 443 US 193 208 (upholding collective bargaining agreement reserving fifty per cent of new openings in an in-plant craft training program to black applicants, finding that the agreement had not "unnecessarily trammelled the interests of the white employees" where the agreement did not require discharge of white employees and did not act as "an absolute bar to the advancement of white employees").

> [had] a legitimate justification and serve[d] a legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalising Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilisation.[140]

On remand, the plaintiff in *Kamehameha* will have the burden under *McDonnell* of producing evidence that these reasons are pretextual.

A similar *McDonnell* burden shifting analysis was applied to both Title VI and § 1981 claims in *Silva*. However, the court in *Silva* refused to apply the EEOC Title VII employment guidelines concerning "tailored English-only policies in the workplace"[141] to the school context, recognising that "courts have long held that school officials must be able to prescribe and control conduct in the schools, so long as it is consistent with fundamental constitutional safeguards".[142]

3 4 5 Free Expression Issues and Culture

Somewhat worrisome is the *Silva* federal district court's discussion of student public school free speech rights under *Tinker v Des Moines Independent School District*,[143] and *Bethel School District v Fraser*,[144] in the context of a private school. Private school students have virtually no constitutional rights with regard to their activities at school to the extent that private schools lack sufficient government contacts to invoke state action under the Fourteenth Amendment.[145] To discuss the *McDonnell* burden shifting under Title VI and § 1981 in the context of student constitutional rights is to mix apples and oranges. Whether a private school's English-only or exclusionary admission policies violate Title VI and § 1981is a matter of adverse discriminatory action, but such a determination cannot involve the denial of constitutional rights. Students in private schools cannot experience adverse action as to rights that they do not have. To state, as the court in *Silva* does, that "private schools have even broader power [than public schools] to regulate free speech",[146] suggests, incorrectly, that a First Amendment limitation may exist at some point for private schools, albeit a less restrictive limitation than for public schools.

In the public educational sector, claims touching on student culture frequently are enveloped in constitutional free speech analysis. The

140 See *Kamehameha* 295 FSupp 2d 1166.
141 *Idem* 1184. See 29 C FR § 1606.7.
142 *Kamehameha* 295 F Supp 2d 1184.
143 393 US 503 (reversing suspension of students for passive speech in wearing black armbands where the school provided no evidence of disruption).
144 478 US 675 (upholding suspension of student who delivered lewd and vulgar speech at school assembly).
145 For a comprehensive discussion of state action and private schools see Mawdsley *Legal Problems of Religious and Private Schools* (2005) 8-15.
146 *Silva* 595 F Supp 2d 1185.

advantage of constitutional analysis is that a First Amendment free speech approach furnishes a method for addressing controversial cultural claims without, necessarily, having to refer directly to culture. Thus, in cases involving controversial symbols, such as student displays of the Confederate flag, the *Tinker* disruption or *Fraser* lewd and vulgar tests furnish readily convenient mechanisms for prohibiting, as disruptive or potentially disruptive, expression without having to weigh the merits of cultural issues.[147] The difficulty of such a judicial weighing process is suggested in *Scott v School Board of Alachua County*.[148] In *Scott*, the Eleventh Circuit upheld a school district ban on Confederate symbols on *Tinker* disruption grounds without directly having to address the cultural arguments of the plaintiffs challenging the district policy. In upholding a federal district court summary judgment for the school district, the Eleventh Circuit noted that, had the case gone to trial, the plaintiffs' experts planned to testify that:

> [t]he Confederate battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical and political principles of a decentralised form of government in which states and local government retain all powers not expressly ceded to the centralised federal government under the constitution

and that thus the flag is merely "a symbol of southern heritage".[149] Noting that the school district was prepared to produce evidence that the Confederate symbol had come to represent "slavery" and "white supremacy",[150] the Eleventh Circuit declared that "[t]he problem, of course, is that both [plaintiff and defendant] are correct".[151] Rather than try to weigh the merits of the competing cultural viewpoints, the court of appeals bowed out of making a judicial interpretation of a preferred cultural position, asserting instead that, where evidence existed of racial tensions at the high school, the court should defer to the "public school's essential mission to teach students of differing races, creeds and colours to engage each other in civil terms rather than in terms of debate highly offensive or highly threatening to others".[152] In effect, the plaintiffs' culture arguments, framed as free speech viewpoint discrimination, were trumped by the defendant school's legitimate interest in prohibiting student expression that could be disruptive.

3 4 6 Judicial Deference to School Decisions

Without the constitutional overlay, *Scott* is similar to *Silva* in that both courts resolved the cases on school authority and discipline grounds rather than weigh the impact that the denial of a cultural symbol may

147 See *Defoe v Spiva* 625 F3d 324 (upholding suspension of student for wearing the Confederate flag on clothing that violated a school dress code and upholding the constitutionality of the school code).
148 *Scott v School Board of Alachua County* 324 F3d 1246.
149 *Idem* 1248-1249.
150 *Idem* 1249.
151 *Ibid*.
152 *Ibid*.

have on those students for whom the symbol is important. The evidence necessary to prevail in a Title VI or § 1981 claim in *Silva* was similar to the plaintiff's free speech challenge in *Scott*, with testimony in both cases finding support that the school's disciplinary action was necessary to prevent a disruptive impact on the schools.

However, the total ban on non-Native Hawaiians in *Kamehameha* is, arguably, more difficult to rationalise. When one considers that the Kamehameha Schools have been in existence for well over a century, one wonders when, if ever, the depressed condition of Native Hawaiians will be transformed to the point where non-Native Hawaiians can enrol and participate in the Kamehameha Schools. One can argue that permitting continued discrimination in admissions at the schools runs contrary to the notions of diversity and inclusion so prevalent in the rest of US education. Kamehameha Schools' huge endowment virtually assures that, in the absence of legal pressure, the schools have little if any incentive to change their admissions policy. Certainly, one can suggest that permitting the Kamehameha Schools' admission policy to continue for an indefinite period of time into the future runs counter to Supreme Court precedents in *Runyon* and *Bob Jones University v US*[153] that have used federal law to reject discrimination by private educational institutions. Even in *Grutter* where the Supreme Court upheld a public law school's consideration of race and ethnicity in its admissions decisions, the court observed that, in light of the twenty-five years that had intervened since the court addressed racial diversity in university admissions in *Regents of University of California v Bakke*,[154] "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today".[155] No such specific forecast appears to have been made for the Kamehameha Schools. The best that the federal courts could do is reflected in the Ninth Circuit's *en banc* decision where it asserted quite broadly that:

> [p]reference will be given to students with Native Hawaiian ancestry only for so long as is necessary to remedy the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation.[156]

3 4 7 Application of Silva *and* Kamehameha *to South African cases*

All rights in the SA Constitution are prefaced with three core values of

153 *Bob Jones University v US* 461 US 574 (upholding denial of tax exempt status for a religious university that had policies forbidding inter-racial marriage and dating).

154 438 US 265 (finding a violation of the Equal Protection Clause as to a special admissions program under which 16 of 100 new admitted students were required to be disadvantaged minority students, but also noting that race could be a factor in determining students admitted).

155 *Grutter* 539 US 343.

156 *Kamehameha* 470 F3d 846.

"human dignity, equality and freedom".[157] Of these three, human dignity, codified as recognition of everyone's "inherent dignity and the right to have their dignity respected and protected",[158] appears to be pivotal[159] and is the only one of the three core values that has no counterpart at all in the US Constitution. The right to equality under the SA Constitution, providing that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law",[160] is reminiscent of the US Constitution's Fourteenth Amendment guarantee of "equal protection". The South African constitutional guarantee of equality though is much broader, prohibiting unfair discrimination:

> [o]n one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,[161]

areas addressed to a more limited extent in the US under a variety of federal and state laws.[162] The constitutional right to freedom protects

157 S 7(1) SA Constitution.

158 S 10 SA Constitution.

159 See *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 144. (In a case challenging the administration of capital punishment, the Court observed that "[t]he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3 of the Constitution. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others".)

160 S 9(1) SA Constitution.

161 S 9(3) SA Constitution.

162 See eg US Constitution: *Brown v Board of Education* 347 US 483 (prohibiting race discrimination in education under Equal Protection Clause, using a strict scrutiny test); *US v Virginia* 516 US 910 (finding refusal to admit women to state supported military academy a violation of Equal Protection Clause under a heightened scrutiny test); *Plyler v Doe* 457 US 202 (invalidating, under Equal Protection Clause, Texas statute withholding funds from school districts providing education to undocumented children, using a rational purpose test); Federal Statutes: 42 USC §§ 2000 *et seq* (prohibiting employment discrimination on the bases of race, colour, religion, sex, and national origin); 29 USC §§ 621 *et seq* (prohibiting employment discrimination on the basis of age); 42 USC §§ 12101 *et seq* (prohibiting discrimination on basis of disability in employment Title I, in state and local agencies Title II, and in public accommodations Title III); 42 USC § 2000e(k) (prohibiting employment discrimination on the basis of pregnancy); State Statutes/Constitutions: Ohio Rev Code § 4112.02 (prohibiting employment discrimination on the grounds of race, colour, religion, sex, national origin, disability, age, or ancestry); Ohio Rev Code § 4112.021 (prohibiting discrimination in credit applications on the bases of race, colour, religion, age, sex, marital status, national origin, disability, or ancestry); NJ Stat Ann § 10:5-4 (prohibiting employment discrimination on the bases of "race, creed, colour, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex or source of lawful income".) See also, Colo ConSt Art 2 § 30b (constitutional provision enacted by popular initiative to prohibit protected status on the basis of "homosexual, lesbian or bisexual orientation" invalidated in *Romer v Evans* 517 US 620 109, on grounds that the state constitutional amendment lacked a rational relationship to legitimate state interests under the Equal Protection Clause).

"the right to freedom and security of the person"[163] and "the right to bodily and psychological integrity"[164] (including everyone's right "to make decisions concerning reproduction" and to exercise "control over their bodies"),[165] areas protected as derivative rights in the US Constitution under the liberty clause of the Fourteenth Amendment.[166] "Human dignity" has no specific counterpart in the US Constitution and the Supreme Court has incorporated this concept only in a very limited way into decisions concerning capital punishment.[167] In addition to the three core rights of human dignity, freedom and equality, the SA Constitution protects a broad range of rights that, while they have similarities to the US Bill of Rights, are far more explicit and expansive. Thus, while the SA Constitution protects rights of expression,[168]

163 S 12(1) SA Constitution.

164 S 12(2) SA Constitution.

165 S 12(2)(a), (b) SA Constitution.

166 See *Roe v Wade* 410 US 113 (state statute criminalising performance of an abortion any time during pregnancy except for health of woman violated right of privacy under the Fourteenth Amendment; "the right of personal privacy includes the abortion decision").

167 See eg *Chavez v Martinez* 538 US 760 (in remanding for trial plaintiff's substantive due process claim concerning his detention and questioning, Justice Souter writing for a divided Court noted that "convictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shock the conscience' violate the Due Process Clause of the Fourteenth Amendment"); *Hope v Pelzer* 536 US 730 (upholding prisoner's Eighth Amendment claim for "cruel and unusual punishment" where handcuffing plaintiff to a fixed object in the prison after he had been subdued "treated him in a way antithetical to human dignity"); *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 916 (in upholding the legitimacy of Roe v Wade, Justice Stevens, concurring in part and dissenting in part, observed that "the woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature ... The authority to make such traumatic and yet empowering decisions is an element of basic human dignity"); *Cruzan v Director Missouri Department of Health* 497 US 261 (in upholding Missouri Supreme Court's clear and convincing evidence standard as to whether a vegetative patient's artificial hydration and nutrition could be terminated, the Supreme Court recognised that states could set high standards in protecting the interests of incompetent persons without necessarily endorsing the "reasoning that an incompetent person retains the same rights as a competent individual 'because the value of human dignity extends to both ...'") See also *Roper v Simmons* 543 US 551 (in invalidating execution of juveniles as a violation of the Eighth Amendment of the US Constitution, Justice Kennedy writing for a 5-4 Court, relied on "our society's evolving standards of decency", as reflected in his observations that most states no longer executed juveniles, the nations that share our Anglo-American judicial have abolished capital punishment for juveniles, and the United States is the last country in the world still executing juveniles).

168 S 16 SA Constitution. However, the South African constitutional approach to expression contains much detail that has developed by interpretation in the United States. For example, South Africa includes as expression "freedom of the press and other media" and "freedom to receive or impart information or ideas" while excluding "propaganda for war", "incitement of imminent violence", or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". S 16(1)(a), (b), (2) SA Constitution. See eg *Board of Education Island Trees Union Free School*

religion,[169] property,[170] assembly and presenting petitions[171] that have their far less broadly stated counterparts in the US Constitution, the SA Constitution also enumerates rights, such as association[172] and privacy,[173] that are protected only, at best, as derivative rights under the US Constitution.[174] Of singular moment for purposes of this article is the SA Constitution's protection of persons' rights "to enjoy their culture, practice their religion and use their language", a right not found at all in the US Constitution.[175]

The SA Constitution provides that, in interpreting its Bill of Rights, courts "may consider foreign law".[176] One can query what legal principles in *Silva* or *Kamehameha* might have useful application to South Africa.

Both *Silva* and *Kamehameha* recognise that, while language is part of culture, language can be addressed separate from culture when a rational basis exists for doing so (*Silva*) and culture can be the basis for preserving language where the two concepts cannot be readily separated (*Kamehameha*). Since the SA Constitution protects both "language" and

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District v Pico 457 US 853 (invalidating school board removal of books from library based on political or personal views of board members where such removal deprived students of free speech right of access to ideas).

169 S 15 SA Constitution. While the Constitution protects "the right to freedom of conscience, religion, thought, belief and opinion", it also permits "religious observances" at state or state-aided institutions provided that "those observances follow rules made by the appropriate public authorities; they are conducted on an equitable basis; and attendance them is free and voluntary". S 15(1), (2) SA Constitution. In effect, South Africa's Constitution does not contain an Establishment Clause that has generated considerable litigation in the United States. See generally Mawdsley "Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause" 2004 *BYU Ed and Law J* 269).

170 S 25 SA Constitution. Of the 39 provisions in the Bill of Rights, this provision regarding property rights other than s 35 addressing the rights of those accused, detained or imprisoned is the longest. While the section protects both private right to property and government's right of eminent domain, it also addresses the equitable process for determining the value of property and the role of government in correcting past discriminatory actions through land reform.

171 S 17 SA Constitution. This section also includes the rights "to demonstrate and to picket".

172 S 18 SA Constitution.

173 S 14 SA Constitution. Specifically enumerated are the rights of persons not to have "their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed".

174 See *Boy Scouts of America v Dale* 530 US 640 (Boy Scouts' dismissal of homosexual scout leader not in violation of state non-discrimination statute prohibiting employment discrimination on basis of sexual orientation because organisation had First Amendment association expressive rights to shared values). See generally Mawdsley & Russo "Student Privacy and Classroom Pedagogies: An American Perspective" 2002 *ANZ J of Law and Ed* 65.

175 S 31(1) SA Constitution.

176 S 39(1)(c) SA Constitution.

"culture", one can ask whether the Constitutional Court in *Ermelo* fully considered the interplay between language and culture in its decision. Unlike the Chilean student in *Abbott* for whom the loss of language would not decimate his culture that also included music, costumes, events, and activities, one might argue that language is the last identifiable aspect of Afrikaans culture. The Constitutional Court's rational basis argument in *Ermelo* that the need for available classroom space in an Afrikaans-medium school can trump the preservation of the Afrikaans language as the medium of instruction suggests, as would occur in interpreting the US Constitution, that the amount of protection under constitutional rights depends on the right being asserted.[177]

The Constitutional Court in *Ermelo* did not assert that the admission of English-speaking students to an Afrikaans medium school would, in itself, eliminate the authority of SGBs to choose the medium of instruction nor eliminate the prominence of the Afrikaans language in the schools. However, one could argue that, should the number of Afrikaans-speaking students decrease over time, the influence of the language as a means of instruction would also diminish. Such diminution would seem to parallel the policy argument of the Hawaiian students in *Kamehameha* that the percentage of students falling below 25% in their schools would effectively eliminate the distinctiveness of the Hawaiian culture in the Kamehameha Schools.[178]

One can only wonder if an Afrikaans medium school would be permitted to address a bullying problem in the same manner as *Silva*. In *Silva*, the school's prohibition against students speaking Spanish applied to all school activities during the school day; however, nothing in the SA Constitution suggests that an SGB's authority to select the medium of instruction also extends to the prohibition of students using languages other than those language(s) chosen as the medium for instruction. Would the same constitutional interpretation of language and culture in *Ermelo* that permits modification of an SGB's choice of medium of instruction be invoked in a *Silva*-type set of facts so as to prohibit a school from enforcing a ban on speaking a language that has been used in an inappropriate manner? One might argue that the outcome of interpreting

177 In the interpretation of the US Constitution's Equal Protection Clause, the Supreme Court has created three standards of protection each with its own burden of proof: "strict scrutiny" and "compelling interest"; "heightened scrutiny" and "exceeding persuasive justification;" and, "not suspect" and "rational basis". For an example of "strict scrutiny", *see Board of Education v Brown* 347 US 483 (race); for an example of "heightened scrutiny", see *Virginia Military Institute v US* 508 US 946 (gender); for an example of no suspect class, see *City of Cleburne v Cleburne Living Center* 473 US 432 (disability).

178 *Kamehameha Appellee's Answering Brief* 1.

constitutional rights should not have to depend on "whose ox is being gored".[179]

4 Conclusion

Both *Silva* and *Kamehameha* involve issues relating to students and culture although the culture issues are far more pronounced in *Kamehameha*. Without the allegations of bullying and inappropriate comments in *Silva*, the English-only policy, one can speculate, would probably not have come into existence. Certainly, nothing suggests, in addition to language, that other aspects of Hispanic culture, such as historical or social events or celebrations, would be excluded from the school. In short, the religious school in *Silva* appeared to have no intention of creating either, from one perspective, a broad based English-only or American culture in the school, or from a different perspective, a non-Hispanic culture.

The Kamehameha Schools, however, function quite differently. The Bishop Estate trustee policies serve quite clearly to further only one culture, featuring the language, activities and events relevant to Native Hawaiians. However, in the process, they totally exclude non-Native Hawaiians from being part of that cultural environment. Presumably, the plaintiffs in *Kamehameha* will choose to proceed against the schools under their own names to challenge the schools' exclusionary policy on the merits, with the eventual possibility that the case may yet reach the Supreme Court.

The public policy arguments in *Kamehameha* are not easy ones to resolve, mainly because, while federal non-discrimination statutes and the US Constitution protect the right of religious schools to preserve their religious integrity by limiting admission only to students of a particular faith, no such express protection exists for culture. The difference can be critical. If the issue in *Silva*, rather than the relationship to language, had involved refusal to admit students who were not Roman Catholic, the resolution would have been much simpler. A religious school, like St Anne in *Silva* that is controlled by a religious entity (in this case, a diocesan church), is not required to demonstrate why admitting only students of a particular religious faith is important for the preservation of the school's religious system because, as a matter of constitutional law, protection of the integrity of a religious school based on its religious beliefs is considered to be a valued public policy in itself.[180] No such blanket exemption seems to exist for culture, which explains why the

179 *Regents of Univ of California v Bakke* 438 US 265 295 n 35 (the Supreme Court noted that "it is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others").

180 See generally *Mawdsley* 15-35 for a discussion of broad judicial protection of constitutional and contractual authority to set religious requirements for sectarian schools.

Kamehameha Schools can prevail only if they can present persuasive evidence that the Native Hawaiian culture is so threatened that, were the schools not entitled to maintain their exclusionary admissions policy, the very preservation of that culture would be at risk. This difference exposes the fragility of the Kamehameha Schools' admission policy where the schools will be subject to an ongoing burden of proof concerning admissions that a religious school, such as the one in *Silva*, would never confront.[181]

Silva does not indicate how widespread English-only school policies are in terms both of the number of religious schools and the variety of languages. *Silva* suggests that such policies present a stronger non-discrimination case where, in the absence of school awareness of bullying words in a language other than English, only those students speaking English would most likely be the ones punished. Whether, in the absence of bullying language, private schools could dismiss students merely because they persist in speaking a language other than English is an open question after *Silva*. If Title VI and § 1981 apply to culture, private schools with an English-only policy might be encouraged to incorporate one or more international days into the school curriculum to permit student emphasis of language, events, and activities important to their culture and, thus, to diminish a claim of cultural discrimination. In addition, private schools receiving federal financial assistance may want to reconsider whether the costs associated with defending a Title VI claim are greater than the amount of financial aid received.

The South African experience in *Matukane*, *Gauteng School Education Bill*, *Laerskool Middelburg*, *Mikro*, *Seodin* and *Ermelo* suggests that the *Kamehameha* approach to language and culture will not prevail in South Africa. The future for South African education in the wake of these cases is difficult to assess because any language or culture policy is certain to involve the constitutional core values of "freedom", "equality", and "human dignity". What seems to be missing in South Africa is the assertion by different indigenous cultures for recognition of their languages as a medium of instruction. Perhaps, even if other cultures were to advocate for their language as a means of instruction, the Constitutional Court would still reach the same conclusion as in *Ermelo* and the cases that preceded it to restrict single medium schools using a rational basis test. The absence of other language claims, however, should not in itself throttle the effort of the Afrikaans-speaking population to have single medium schools. What one could argue is tragic about the impending end of single-medium Afrikaans school is that the loss of

181 Worth noting is that the Kamehameha Schools trust agreement provides "that the teachers of said schools shall forever be persons of the Protestant religion". *Kamehameha* 990 F2d 459 n 1. However, the Ninth Circuit rejected the schools' claim to a Title VII religious exemption when the schools refused to hire a non-Protestant, the court of appeals reasoning that the schools were not affiliated with any denomination of Protestants, and, in any case, the schools (unlike St Anne in *Silva* that is controlled by the Catholic Diocese) were not controlled by a religious entity. *Idem* 461.

language may be viewed as the last remaining distinctive of the Afrikaans culture that, at one time, may have included gatherings, activities, religious services, and special events that celebrated or honoured the history of the Afrikaners, but which today have been altered or eliminated. Unfortunately, the conscientious effort in the US to preserve, by the majority, the rights of the Hawaiian minority in the Kamehameha Schools does not seem to have its counterpart in South African schools.

It is noteworthy that the most of the South African cases emerged from events that took place towards the end of the school year or at the beginning of a new school year. There are opinions that this phenomenon suggests a lack of planning on the parts of the authorities and that they start making crisis decisions and resorting to unlawful practices to save themselves from embarrassment and to cover their lack of planning to provide enough school places for all the learners in the various provinces.

In the *Middelburg* case the court referred to efforts to do away with Afrikaans single language medium schools. Two articles by Malherbe[182] that discussed this issue were quoted in *Mikro* and *Middelburg*. In one of the articles Malherbe refers to the "indiscriminate targeting of Afrikaans-medium schools" to become parallel or dual medium schools and maintains that this denies the multilingual reality of South Africa.[183] He states very clearly that section 29(2) of the SA Constitution requires the option of single medium schools to be considered.[184] He does not see a guarantee to single medium mother tongue schools in section 29(2). In 2001, according to Woolman and Fleisch, he apparently held a different view that linguistic communities "can create and maintain publicly funded single-medium institutions".[185] They come to the conclusion that the Constitution neither guarantees a right to single medium public schools nor does it prohibit the existence of such institutions.[186] We fully agree with their conclusion but the possibility of further litigation in this regard after *Ermelo* is not excluded.[187]

The courts have been engaged in both the issues of legal powers of various role players and deeper-lying issues like the best interests of children. It would be pure speculation whether or not there will be more cases but it seems that single medium schools that are not "full" will be hard pressed to retain such status and the right to education in the

182 Malherbe "Reflections on the Background and Context of the Education Clause in the South African Bill of Rights" 1997 *TSAR* 85. Malherbe "The constitutional framework for pursuing equal opportunities in education" *Perspectives in Ed* 9.
183 *Perspectives in Ed* 22.
184 Ibid.
185 Woolman & Fleisch *The Constitution in the classroom: law and education in South Africa 1994 – 2008* (2009) 63. His article in *Perspectives in Ed supra* does not support Woolman & Fleish's comment. Also see Currie & De Waal *The Bill of Rights Handbook* (2010) 621-640.
186 80.
187 See the discussion of *Mikro* and *Middelburg supra*.

language of one's choice will increasingly be exercised in dual or parallel medium public schools. The courts have also laid down the rule that legal issues alone will not determine future decisions but that issues of (social) justice and fairness will also be considered.

There is a real danger that the approach outlined in the previous paragraph may lead to the total demise of Afrikaans single medium schools or even to the demise of Afrikaans as a language of education.[188] Perhaps, the future will bear out that public policy has been better served by the *Ermelo* decision, but one must at least acknowledge that a culture and a language, once gone, are not likely to reassert themselves.

188 The number of Afrikaans medium single medium schools has indeed dwindled significantly since 1994 and some parallel medium schools have since discontinued the use of Afrikaans as medium of instruction. See *supra*.

Compatibility of democracy and learner discipline in South African schools

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OPSOMMING

Versoenbaarheid van Demokrasie en Leerderdissipline in Suid-Afrikaanse Skole

As gevolg van die afskaffing van lyfstraf voel baie onderwysers magteloos om ernstige leerder wangedrag by skole effektiewelik te hanteer. Nogtans bevat die Skolewet kenmerke van verteenwoordigende- en deelnemende demokrasie en is gegrond op die beginsels van aanspreeklikheid, deursigtigheid en billikheid. Demokrasie beteken nie anargie of wetteloosheid nie, maar impliseer die behoud van 'n ordelike en gedissiplineerde skoolomgewing op grond van die oppergesag van die reg. Uit die regspraak is dit duidelik dat die howe deurgaans die behoud van dissipline en respek vir gesag handhaaf, veral in gevalle van kwetsende vrye uitdrukkings en ernstige leerder-wangedrag. Fundamentele regte is 'n voorvereiste en grondwetlike element van demokrasie. Elke skool is 'n mikrokosmos van die samelewing en demokratiese praktyke, soos die handhawing van dissipline en die skepping van 'n menseregtekultuur, is in ooreenstemming met die daarstelling van substantiewe demokrasie.

1 Introduction

Since 1994, post-Apartheid South Africa has ventured on the exciting but challenging road of transforming this society to a fully fledged democracy. Section 7(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that the "Bill of Rights is a cornerstone of democracy in South Africa". In other words, the most important building block for establishing democracy in South Africa is the advancement and protection of the fundamental rights as enshrined in the Bill of Rights. Woolman and Fleisch[1] assert that the values of human dignity, equality and freedom enumerated in section 7(1) of the Constitution are species of a generic value: democracy. This important insight underscores the fact that the condition of democracy, and not the value of human dignity, is foundational to the establishment of a mature constitutional democracy in South Africa. Fundamental rights do not stand in opposition to democracy, but are constitutive elements of democracy. In other words, without the rights to equality, dignity, life, personal safety, belief, privacy, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts, language and culture, safe environment, children's rights, education, and just administrative action, there will be no

1 Woolman & Fleisch *The Constitution in the classroom – Law and Education in South Africa 1994-2008* (2009) 174.

meaningful democracy in South Africa. These rights are themselves the preconditions for an open and democratic society.[2]

In present-day South Africa it is not uncommon for educators at schools to be confronted by learners that assertively stand up for their human rights. Such conviction and confidence in the importance and usefulness of human rights in schools and daily life should be welcomed because it points to the establishment and growth of a democratic culture based on respect for human rights. On the other hand, it often occurs that human rights are exaggerated or misconstrued to serve an inappropriate purpose or to obtain a questionable entitlement. Perhaps this is understandable, though not excusable, in view of the fact that South Africa is a fledgling democracy where the content knowledge, fundamental understanding and experience of human rights are still developing. Rossouw and De Waal[3] found, in an empirical study, that many students exaggerate their rights, yet they neglect their concomitant obligations, which causes conflict and discipline problems in schools.

Educators feel disempowered in the human rights environment because one of the traditional measures to maintain order and discipline, corporal punishment, has been abolished.[4] The Constitutional Court held in the matter of *Christian Education* that corporal punishment is a form of cruel and degrading punishment that violates a person's human dignity and thus infringes section 12(1)(e) of the Constitution.[5] Sachs J explained the reason for the prohibition of corporal punishment at schools as follows: "It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children".

Over the past fifteen years some of the effects of this general ban on corporal punishment in schools have become apparent. Learner discipline has become a serious problem in South African schools.[6] As a result, many educators blame the parlous state of poor discipline in many schools on the fact that educators no longer have an effective deterrent as a form of punishment. The majority of educators (58%) favour the reinstatement of corporal punishment in schools and many admit to the continued use of corporal punishment to instill discipline in schools.[7] Wolhuter and Van Staden[8] established that 85 percent of teachers are of

2 *Ibid*.
3 Rossouw & De Waal (2003).
4 S 10 SASA prohibits corporal punishment by anyone at a school.
5 *Christian Education South Africa v Minister of Education* [2000] JOL 7320 (CC). S 10 SASA prohibits corporal punishment by anyone at a school.
6 Wolhuter, Oosthuizen & Van Staden "Skoolfase/Leerderouderdom as Faktor in Leerderdissipline in Suid-Afrikaanse Skole" 2010 *T vir Christelike Wetenskap* 169-186.
7 South African Human Rights Commission (SAHRC) *Report on school-based violence* (2008) 1.
8 Wolhuter & Van Staden "Bestaan daar 'n dissipline krisis binne Suid-Afrikaanse skole? Belewenis van opvoeders" 2008 *T vir Geesteswetenskappe* 395.

the view that learner discipline problems make them unhappy in their work, and 79 percent have, because of learner discipline problems, at times considered to abandon the teaching profession.

Furthermore, a study by the South African Human Rights Commission in 2008 about school-based violence confirmed many media reports and complaints from educators that violence in many South African schools has reached alarming proportions.[9] Although serious misconduct only occurs intermittently, school-based violence in South Africa is a multi-dimensional phenomenon and depends on the context in which it arises. Bullying, gender-based violence, discrimination and violence, sexual violence and harassment, physical violence and psychological violence, describe some of the most prevalent forms that were identified by the Human Rights Commission. The strike in 2010 by members of the largest teachers union, the South African Democratic Teachers' Union, was characterised by intimidation, violence, vandalism, and general unlawful conduct by the teachers. School violence can lead to serious consequences that include suicide, limited concentration span, numeracy and literacy learning problems, poor performance in class, high absentee and dropout rates, being unmotivated in class and in general, loss of desire to succeed in life.[10] Schools that experience forms of violence cannot be regarded as democratic institutions where learners learn to live co-operatively for the common good.

As it happens, despite the *Christian Education* decision, many educators ignore the judgment and still illegally apply corporal punishment at schools with the approval of parents.[11] Morrell found that corporal punishment is still applied in South African schools despite its illegality and suggests that the general decline in discipline in South African schools is the most important reason for the phenomenon of continued use of corporal punishment.[12] The Human Rights Commission reported that corporal punishment is still applied in more than half of the schools (51.4%), with the Eastern Cape (65.3%), Mpumalanga (64.1%) and Limpopo (55.7%) reporting the highest incidences.[13] In view hereof the question arises whether the transition to democracy and the establishment of a human rights culture is at all compatible with order and discipline in schools

The aim of this article is to consider the compatibility of democracy (which incorporates human rights) with the maintenance of order and discipline in schools. The main contention of this article is that schools should and can be democratic where order and discipline is upheld with a shared concern for the common good. This article will develop this

9 SAHRC 1.
10 SAHRC 12.
11 Maree "Hitting the Headlines – The Veil on Corporal Punishment in South Africa Lifted" 2004 *Acta Criminologica* 72-85.
12 Morrell "Corporal punishment in South African schools: a neglected explanation for its persistence" *SA J of Ed* 292-299.
13 SAHRC 11.

contention by discussing the following: (1) the concept of democracy in education; (2) the legislation and case law that determine democracy in schools; and (3) methods to uphold democracy as well as learner discipline in schools.

2 Conceptualising Democracy in the Education Context

The concept "democracy" can be used in the primary restricted sense that refers to political rights (eg voting, regular elections, party political association and state power) or the term can be used in an extended sense that signifies a condition of society that places value on the resolution of problems of communal life through collective participation in societal institutions and deliberation that is characterised by a shared concern for the common good.[14] In this extended sense, the concept "democracy" includes the protection of basic human rights. Yet, schools must under no circumstances be politicised and the purpose of education is certainly not to practise party politics or to promote sectarian political interests at schools. Democracy in schools is not a continuous struggle for party political power, but should be a condition of a society that places value on the resolution of problems of communal life through collective deliberation and a shared concern for the common good.[15]

The term "democracy" is commonly invoked by people of quite different political or ideological persuasions and carries with it strong emotional and moral force.[16] Democracy is by its very nature a dynamic concept continually changing and developing according to every particular society's historical context and social complexities and therefore no definition can include all the variations to satisfy the proponents of each theory of democracy. Briefly, the main theories and models of democracy that have developed since the Enlightenment are representative (or indirect) democracy in terms of the republican theory, liberal democratic theory, elitist theory and social democratic theory. In addition, the models of democracy that have emerged in the modern age since the 1960s are participatory and deliberative democracy.[17] These theories have been discussed copiously elsewhere and in the interest of parsimony it will not be considered in further detail. The theoretical and philosophical models of education systems of different societies are

14 Dewey *Democracy and education: an introduction to the philosophy of education* (1966) 378.

15 *Ibid*.

16 Boomer *Democracy, Bureaucracy and the Classroom. (In: Democracy and Bureaucracy: Tensions in Public Schooling* (1990) 115; Myburgh "Ideological battle over meaning of democracy" 2004 *Focus* available at www.hsf.org.za/focus34/focus34myburgh.html (accessed 2013-03-23).

17 Cunningham *Theories of Democracy: a critical introduction* (2002); Blaug & Schwarzmantel (eds) *Democracy: A reader* (2000).

derived from and linked to the political and historical developments within each society.[18]

3 Democratic Schools in South Africa?

To many the phrase "democratic school" is an oxymoron. This might be because traditional school and classroom practise epitomised authoritarian power relations and undemocratic cultures. However, with the rise and ultimate ascendency of liberal democracy during the Twentieth century came a growing realisation and new awareness that democracy and education are intertwined and that schools should also be democratic institutions.[19] One traditional role of education is to transmit to new generations a continuing image of the community. Education is the culture, which each generation purposely transfers to those who are to be their successors.[20] Citizens in a democracy, especially a young developing democracy, do not simply arrive at political maturity and stand ready, willing and able to run its institutions, they have to be trained and educated to acquire the mindset, philosophy, knowledge and skills that are essential for a functional and substantive democracy.[21] In a democracy, the whole population must acquire a set of political and educational competencies that enable them to value and exercise their fundamental rights and to practice the commitments that go with it.[22] Schools are microcosms of society and accordingly the nature and practice of democracy in schools must be congruent with the schooling that citizens receive; otherwise, the educative force of the real environment would counteract the effects of early schooling.[23]

Dewey emphasised that schools are not only needed for educational but also for political reasons, because on the school, more than upon any other institution, will depend the quality and nature of the citizenship of the future.[24] After all, any political system shapes education and conversely education unquestionably determines the type of political system that a society will have.[25] In this regard, undemocratic features in society are reflected in the education system, and undemocratic practices in the education system and schools eventually become imbedded in the culture and ethos of a nation and society.[26] By the same

18 Dieltiens *Democracy in education or education for democracy: The limits of participation in South African school governance* (2000) (MEd dissertation University of the Witwatersrand) 44.
19 Carr & Hartnett *Education and the struggle for democracy* (1996) 20-26.
20 Parry & Moran *Democracy and democratization* (1994) 48.
21 Aspin "The Conception of Democracy: A Philosophy for Democratic Education" (1995) (in *Creating and Managing the Democratic School* eds Chapman, Froumin & Aspin)
22 Parry *et al*.
23 *Ibid*.
24 Dewey *op cit*.
25 Dieltiens 5.
26 Smit *A Model for Improving Democratic School Governance in South Africa* (2008) (PhD thesis North-West University Potchefstroom) 438.

logic, it is also true that democratic practices and teaching in schools leave indelible imprints on the youth that will eventually find expression in the life of a nation.

Since the late 1970s most developed liberal democracies have embraced participatory theories of democracy thus extending democratic principles from state institutions into all social spheres and institutions. Participatory democracy means that individuals or institutions should be given the opportunity to take part in the making of decisions that affect them. There are multiplicitous modes of participation including voting, campaigning, group activity, contacting representatives and officials, protesting, attending meetings, petitioning, fund-raising, canvassing and boycotting.[27] Participatory democrats emphasise that more participation leads to increased effectiveness[28] and that participation educates citizens and stakeholders to transform their interests for the common good.[29] Participatory democrats[30] have proposed ways to democratise workplaces, the family, media, neighbourhoods, universities, schools, and decision-making on human relations to the natural environment. Therefore, participative and deliberative democracy should ideally be extended to schools, classrooms and various other interactive or social relationships such as management, committee, union and parent meetings.

4 Democratic Features in the SA Schools Act

In keeping with the times the South African Schools Act[31] (SASA) includes participatory democracy features in terms whereof some state authority is devolved to local school communities known as School Governing Bodies (SGBs).[32] The reforms after 1994 unified the previously fragmented education system into one national system. Woolman and Fleisch[33] aver that SGBs operate as a fourth tier of government by virtue of the fundamental administrative, managerial and "political" functions that they undertake. As forums, SGBs have the makings of a great and unique South African democratic tradition.

The Constitutional Court affirmed the democratic design of SASA in the matter of *Head of Department, Mpumalanga Education Department v Ermelo High School* by stating:

27 Parry & Moyser "More Participation, More Democracy?" (1994) (In *Defining and Measuring Democracy* ed Beetham) 46.
28 Barber *Strong Democracy: Participatory Politics for a New Age* (1984) 150.
29 Pateman *Participation and Democratic Theory* (1970) 12.
30 Pateman; Held *Models of Democracy* (1987); Gould *Rethinking democracy: Freedom and Social Co-operation in Politics, Economy and Society* (1988).
31 84 of 1996.
32 Squelch *The establishment of new democratic school governing bodies: co-operation or coercion* (1998) 44-45.
33 Woolman & Fleisch *The Constitution in the classroom – Law and Education in South Africa 1994-2008* (2009) 166.

> A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it.[34]

Elections of members of SGBs take place every three years at schools across South Africa, which makes these elections as significant as the national, provincial and local government elections.[35] Every high school must have a representative council of learners.[36] Parents, learners, educators and school personnel may participate in the elections.[37] These provisions establish a form of representative democracy in schools. Democratic principles such as accountability, transparency and openness are implied by the provisions of SASA that require auditing of financial records,[38] annual approval of the school's budget,[39] due performance of governing body functions[40] and regular elections of members of SGBs. The principles of participative and deliberative democracy are apparent from the provisions that require approval of the financial governance by an annual meeting of the parents[41] and participation of interested stakeholders either as members of the SGB or as members of committees[42] serving under the SGBs. Most well functioning SGBs have committees that attend to matters such as finances, learner discipline, marketing, infrastructure, academic standards, culture, leadership, hostels, sport and parent liaison to name a few. Clearly therefore, SASA contains features of representative, participatory and direct democracy and is based on the underlying democratic principles of administration in terms of democratic values,[43] advancement of equity and redress[44] and public participation.

Sections 2, 6 and 10A of SASA determine that fundamental rights must be advanced and protected in schools. These provisions accord with liberal democratic theory that emphasises the basic human rights of every individual. It is therefore important that every school, every educator, school leader, administrator and every learner should ascribe to democracy as a foundational value by practising respect and tolerance, by purposely advancing equality, and by participating and deliberating in forums such as school governing bodies or learner

34 *Head of Department, Mpumalanga Education Department v Ermelo High School* 2010 2 SA 415 (CC) parr 57, 79.
35 S 23 SASA.
36 S 11(1) SASA.
37 Ss 11(2); 23(2), (9), (10) SASA.
38 Ss 42; 43 SASA.
39 Ss 23; 24; 38(2); 39(1) SASA.
40 Ss 20; 36; 37; 38 SASA.
41 S 38 SASA.
42 Ss 23; 24 SASA.
43 S 20(8) SASA.
44 Preamble; ss 20(8); 34(1) SASA.

representative councils. If this does not occur, then it is unlikely that a human rights culture will be established in schools or that the schools and the South African society will become mature democratic institutions.

5 The Rule of Law and School Rules

Section 1(a) of the Constitution determines that South Africa is a constitutional democracy and that it is *inter alia* founded on the on the values of supremacy of the Constitution and the rule of law. The supremacy of the Constitution means that everybody, including the state, all government institutions, schools, educators, parents and learners are subject to the Constitution. The fundamental assumption underlying the rule of law is that a law must apply equally to all and not be arbitrary in the scope of its application.[45] Although section 1(a) affirms human rights and freedoms, it must be remembered that every right has a correlative duty and free societies run the risk of becoming anarchies when individual liberties give rise to general lawlessness and disrespect for the rights of others. If a society (or a school) succumbs to violence or lawlessness, be it public or private, then it is an undemocratic society or institution. In addition, section 39(3) of the Constitution provides that:

> [t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

This means that all the legal rules and principles of the South African common law as well as all the legislation of the pre-constitutional era remain valid and enforceable insofar as it is consistent with the Bill of Rights. Thus, the principles and rules of the South African legal system remain intact and are not swept aside or replaced by the Constitution but must be developed to "promote the spirit, purport and objects of the Bill of Rights".[46]

It is a gross misconception to regard democratic schools as places where absolute, unmitigated freedom or lawlessness (anarchy) prevails. On the contrary, well-disciplined and orderly schools may well be democratic institutions, but do not of necessity imply rigid or autocratic systems. People living in a democracy are not free to live lawlessly, because a democracy is constituted by the fact that all the people have collectively agreed to abide by the established laws of a country and are subject to the rule of law. In order for a democracy to succeed these laws must be adhered to and should be enforced in terms of the rule of law. A feature of any democratic organisation or institution, such as a school, is that the rule of law applies which implies that the legal rules and principles are adhered to. Democratic schools are therefore per definition orderly organisations where all learners, educators and

45 Cheadle, Davis & Haysom *South African Constitutional Law The Bill of Rights* (2006) 30-38.
46 S 39(2) SA Constitution.

stakeholders must adhere to the law of the land, as well as to legitimate school and classroom rules that have been mutually agreed to by means of a participative process.

The purpose of SASA is to provide a uniform system for the organisation, governance and funding of schools and to establish a disciplined and purposeful school environment, dedicated to the maintenance and improvement of quality learning.[47] The Constitution enshrines the right to basic education[48] which implicitly places a constitutional duty on the state and every public school to provide education by ensuring a disciplined and orderly environment that is conducive to effective teaching and learning. One aspect of the right to basic education includes the rights of learners and educators to learn and teach in a safe environment, free from all forms of violence. The system of school governance enables SGBs to take specific regulatory and policy measures to improve the safety and well-being at schools. These measures include, among others:

(a) To adopt a Code of Conduct (section 8 and section 20(1)(d)).
(b) To conduct disciplinary hearings to suspend or recommend expulsion of ill-disciplined learners (section 9).
(c) To determine the times of the school day (section 20(1)(f)).
(d) To administer and control the school's property, buildings and grounds which are occupied by the school (section 20(1)(g).
(e) To recommend the appointment of educators at a school to the Head of Department (section 20(i).
(f) To recommend the appointment of non-educator staff at the school to the Head of Department (section 20(j)).

Although these measures do not, at first glance, seem to address school discipline and safety directly, each these measures contribute to the creation of an orderly, secure and respectful school culture and environment. Also, properly designed rules and policies can go a long way towards establishing safe schools.[49] Well cared for school facilities, clean and hygienic ablution facilities, functional equipment, well-maintained furniture and competent personnel create an atmosphere which is conducive to learning and instils a sense of security. It is well-known that unkempt facilities and poorly maintained property encourage vandalism, graffiti and petty forms of misconduct such as messing with water or littering, simply because it is more difficult to

47 Long title SASA: "To provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith". S 8(2) SASA provides that a school's code of conduct "must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process".
48 S 29(1)(a) SA Constitution: "Everyone has the right to a basic education, including adult basic education …".
49 Oosthuizen *A practical Guide to Learner Discipline* (2008) 4.

identify and punish the culprit(s).[50] There is also a direct correlation between the perpetration of petty misconduct and the prevalence of serious misconduct. Programmes and measures to clean up and maintain school environments have led to the reduction of both petty and serious forms of ill-discipline.[51]

Yet, despite these legislative powers some forms of misconduct such as freedom of expression and serious misconduct by learners (eg alcohol or illegal drug abuse, violence and assault, theft, dishonesty) have been particularly difficult for several schools to deal with in view of the constitutionally protected human rights. The manner in which the courts have adjudicated these cases of learner misconduct will be considered in the following section.

6 Upholding Learner Discipline in Schools – Adjudication by the Courts

6 1 Freedom of Expression and School Discipline

Section 16(1) of the Constitution provides that:

> [e]veryone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity; and academic freedom and freedom of scientific research.

However, section 16(2) of the Constitution contains internal limitations which demarcate the extent of constitutional free expression and prohibits "propaganda for war; enticement of imminent violence; advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

South African courts have *inter alia* been called on to apply the constitutional standards to determine the limits of freedom of expression in the education or school context concerning physical symbols (*Antonie*,[52] *Pillay*)[53] personal expression (*Williams*),[54] publication of untrue statements in the media (*Hamata*),[55] student protests (*Ngubo*)[56]

50 Wilson & Kelling "Broken Windows" (1997) (in *Critical Issues in Policing: Contemporary Readings* eds Dunham & Alpert); see also Wagers *Broken Windows Policing: The LAPD experience* (2008) (PhD thesis State University of New Jersey). 'Broken windows' policing has been credited with the historic successes in crime reduction in New York, Los Angeles and schools in America.

51 *Ibid*.

52 *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2000 4 SA 738 (WC).

53 *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

54 *Western Cape Residents' Association obo Williams v Parow High School* 2006 3 SA 542 (C).

55 *Hamata v Chairperson, Peninsula Technikon* 2000 4 SA 621 (C)

56 *Acting Superintendent-General of KwaZulu-Natal v Ngubo* 1996 3 BCLR

and student-generated electronic cyber expression created outside the school setting but having an effect on school discipline (*Le Roux*).[57]

In *Western Cape Residents' Association obo Williams v Parow High School*[58] the parents of a Grade 12 girl, B, applied for an urgent interdict to compel the school to allow her to attend the matric farewell function. The school had refused *Williams* permission as a result of her continued ill-discipline during the course of the year. *In casu* there was no statutory provision or common law rule that granted the learner a right to attend the matric farewell function. In determining whether a rule should be developed to give effect to the Constitution, the court considered the arguments that the learner's dignity, equality and freedom of expression had been infringed by the school's refusal. However, the Court found that the attendance of a matric farewell function was a social activity and, as such, was a privilege and not an enforceable right. Also, the court considered the interests of the school, the other learners and the applicant and determined on balance that:

> Two of the important lessons that a school must teach its learners are discipline and respect for authority. The granting of privilege as a reward for good behaviour is one tool that may be used to teach such lessons. The withholding of such privilege can therefore not be claimed as an infringement of a right to equality or to dignity. Indeed, the granting of the privilege in the absence of its having been earned may well constitute an infringement on the rights to equality and dignity of those who have merited the privilege. The right to freedom of expression, of course, does not equate to a right to be ill-disciplined or rude. The system of rewards for good behaviour permeates all walks of life and to learn the system at an early age can only benefit the learner later on in his or her life. I see nothing of constitutional concern in the use of such a system in schools.[59]

The court supported the role of the school to educate the learner towards proper behaviour and therefore a learner's wish to express herself at a matric farewell dance was justifiable limited by the school's obligation to maintain order and discipline and to educate all learners.

In *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department*[60] the School Governing Body suspended a learner from school for wearing dreadlocks in contravention of the school's uniform dress code. The student, *Antonie*, was a Rastafarian and wore dreadlocks as part of her religious practice. The school could not show that the right to basic education or any other fundamental right in terms of the Bill of Rights had been infringed, because the learner's dreadlocks had not caused a substantial disruption of school discipline

369 (N).

57 *Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as amici curiae)* JOL 27031 (CC) (2011).

58 *Western Cape Residents' Association obo Williams v Parow High School* 544.

59 *Ibid* 545B-C.

60 *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2000 4 SA 738 (WC).

and did not prevent others from receiving education. Van Zyl J held that the infringement of the school's uniform dress code was not a serious misconduct and did not warrant suspension. In a similar matter of *MEC for Education, KwaZulu-Natal v Pillay*, the Durban Girls High School wanted to prohibit the learner from wearing a gold nose-stud to school as its contravened the school's uniform dress code. Although the school was concerned that the conduct of *Pillay* would create a precedent and incite other girls to follow the fashion trends of piercing their noses, the school could not present any evidence to show that *Pillay's* conduct had negatively affected the discipline of others. The Constitutional Court upheld the right of *Pillay* to freedom of expression in keeping with her South Indian family traditions and culture.[61] Yet, Langa CJ (for a unanimous court) reiterated that this case was not about the constitutionality of school uniforms and emphasised that school uniforms served admirable purposes. Therefore, although the court ordered the schools to grant an exemption from the provisions of its dress code as it was not regarded as a factor that would negatively affect the discipline of other learners, the Constitutional Court was by implication still mindful of maintaining school discipline.

The matter of *Le Roux v Dey*[62] involved the harmful abuse of freedom of expression when *Le Roux* created a computer image at his home in which the faces of the principals and deputy principal of his high school were super-imposed on an image of two naked gay bodybuilders sitting in a sexually suggestive posture. The image was circulated it to many other learners and eventually placed on the school's notice board. The Constitutional Court dismissed the learners' defence that it was done in jest as a school boy prank. The Court rejected the contention that the freedom of expression should be allowed and held that the manipulated computer image was insulting, offensive or defamatory. The learners were ordered to apologise and to pay compensation to the plaintiff.

These decisions affirm that the courts have interpreted the constitutional right to freedom of expression in favour of maintaining learner discipline at schools.

6 2 Serious Misconduct and Expulsion of Learners

In instances of serious misconduct, SASA provides in section 9(1)(a) that the governing body of a public school may, after a fair hearing, suspend a learner as a corrective measure for a maximum of one week (five school days). As an alternative, section 9(1)(b) determines that a governing body may suspend a learner with the recommendation of expulsion from the school, pending the decision of the head of the provincial department of education. However, schools have at times struggled to expel ill-disciplined learners because of a reluctance on the

61 *Western Cape Residents' Association obo Williams v Parow High School* 2006 3 SA 542 (C).
62 *Le Roux v Dey.*

part of the provincial education Heads of Department (HoDs) to affirm a recommendation of expulsion. It seems that the education authorities have not come to terms with the democratic requirement that the rule of law should be maintained and that schools should be supported in their effort to "establish a disciplined and purposeful school environment".[63]

A case in point is the matter of *Maritzburg College v Dlamini NO*[64] where three learners at the school were involved in an incident in which they had consumed alcohol and had smashed a window of a hired bus. A bottle of brandy was discovered in one learner's kitbag. A proper and fair disciplinary hearing was held and the three learners were found guilty of serious misconduct involving use of alcohol and vandalism. The governing body suspended the learners and recommended expulsion to the HoD. The HoD of KwaZulu-Natal neglected to decide the matter for 21 months. When court action by the school was imminent the HoD decided that it was unlawful to suspend learners pending his decision. The court held that the school's action was lawful and that suspension pending final decision by the HoD was correct. The High Court ordered the expulsion of the learners from the school and therefore affirmed that discipline should be upheld in schools.

In *Phillips v Manser*[65] the court confirmed the legality of school governing body's decision to suspend a learner from attending the school for serious misconduct pending a decision by the HoD to expel the learner. The learner was found guilty of several instances of serious misconduct which *inter alia* included assault of another learner, dishonestly forging letters, writing graffiti on school furniture and inhaling chloroform in the science laboratory. The learner, Phillips, applied to court to review the governing body's decision and contended that his right to basic education in terms of section 29(1) of the Constitution would be infringed. The court held that the fundamental right to basic education applies only for the duration of a learner's compulsory school age, ie when a learner becomes 15 years old or finishes grade 9, whichever is the first to occur. It is the duty of the provincial HoD to make other arrangements to accommodate expelled learners. Phillips also contended that the school did not have a code of conduct and that the HoD failed to timeously confirm the expulsion within 14 days of the governing body's recommendation. Kroon J found in favour of the school and held that the procedure was fair and the substantive decision was just and therefore the HoD was obliged to confirm the expulsion. The court held that the HoD has a limited discretion to decline the recommendation to expel an ill-disciplined learner and affirmed that the right to basic education lasts until a learner reaches the age of 15 years or attains grade 9, whichever occurs first. Again, this decision by the court affirms that the constitutional right to basic education is limited if learners commit serious misconduct.

63 Long title SASA.
64 *Maritzburg College v Dlamini NO* [2005] JOL 15075 (N).
65 *Phillips v Manser* [1999] 1 All SA 198 (SE).

In *Pearson High School v Head of the Education Department Eastern Cape Province*[66] the school launched and urgent application for review and setting aside of the HoD's decision that a learner of the school may not be expelled. The HoD required of the school to assist the learner with guidance and counseling and more "fairness and compassion". During a fair hearing the learner had been found guilty by the disciplinary committee of *inter alia* purchasing, possessing, smoking and secreting dagga.[67] The court set the HoD's decision aside and ordered the expulsion of the learner.

In the matter of *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province*[68] the HoD of the Eastern Cape, ignored a recommendation by the SGB to expel a learner. The school sought the review of the HoD's decision not to expel an ill-disciplined learner. The 13 year old learner had been found guilty by the governing body's disciplinary committee of serious misconduct including frequent assault of boys and girls, sexual molestation of girls, threats and bad language towards teachers. The parents of the learner were reluctant to accept any responsibility for the upbringing of their child. The HoD initially gave no reasons for his decision and after many protracted delays eventually averred that the disciplinary procedure was unfair and that psychological counselling should be provided for the learner. The school contested these reasons as factually inconsistent with the findings and thus unreasonable. The matter became moot when the learner did not renew his registration for the following academic year at the school. No finding was made on the merits, but the court awarded costs at party and party scale (ie not punitive costs) against the Member of the Executive Council.

In *Tshona v Victoria Girls High School*,[69] the learner had a previous record of misconduct and had previously received a suspended expulsion. Thereafter the learner behaved in an ill-disciplined manner again. A notice to attend the disciplinary hearing was received and signed for by the learner and was sent to her parents. Neither attended the hearing. The disciplinary committee continued in their absence and heard evidence on the misconduct. The learner was found guilty in her absence and was expelled from the hostel. In an urgent application to court the learner's lawyer argued that section 9(1) and (2) of SASA required the HoD's approval of the expulsion decision from hostels. In other words, it was argued that expulsion from a school should be understood to include expulsion from a hostel. The court rejected this argument and held that a learner's right to attend a school and receive basic education is not infringed by expulsion from a hostel. The court

66 *Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck)
67 Colloquial term for marijuana.
68 *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB).
69 *Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E).

awarded a punitive cost order (*de bonis propriis*) against the learner in favour of the school.

These cases confirm that the courts have consistently interpreted the Constitution and legislation as supportive of the maintenance of school discipline.

6 3 Administrative Justice and Fair Process – Courts Defer to Schools

The Constitution also promotes rational decision-making by the state and its functionaries as opposed to arbitrary exercise of public power. The constitutional provisions are designed to ensure openness (transparency), fairness, accountability and legitimate decision-making in a democracy. The High Court has jurisdiction to review administrative action and the Constitutional Court is the final court to adjudicate constitutional matters. According to section 33 of the Constitution everyone has the right to administrative justice:

> 33. Administrative justice.
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights …

Reasonableness in terms of section 33(1) implies a decision that is "structured" in a rational fashion.[70] This means that the decision must be supported by the evidence and information before the administrator and the reasons given for it. Reasonableness also implies reasonable effects, also known as proportionality.[71] The principle of ensuring fair procedure ("due process") and substantively correct decisions is illustrated by several cases involving ill-disciplined learners.

In the matter of *Van Biljon v Crawford*,[72] a learner was dishonest during an examination and illegally used "crib notes". During an informal hearing or enquiry that was held in the principal's office, the learner admitted the misconduct. As punishment the learner was demoted and lost his prefect badge. Thereafter the learner contested the procedural fairness of the informal hearing and denied guilt in the matter. It was argued that the hearing had not complied with the Department's guidelines for a fair disciplinary hearing. The court upheld the precedent set in *Shidiak v Union Government,*[73] which provides that if an official (such as the principal *in casu*) is charged with a duty and exercises his discretionary competency by applying his mind and deciding in good faith, ie *bona fide* not *mala fide,* then the court is not entitled to replace

70 Hoexter, Lyster & Currie (ed) *The New Constitutional and Administrative Law Vol 2* (2002) 181.
71 *Ibid*.
72 *Van Biljon v Crawford* unreported case 475/2007 (EC).
73 *Shidiak v Union Government (Minister of the Interior)* 1912 AD 642.

the official's decision by its own. The court also found that the procedure followed during the informal hearing did not have to comply strictly with the guidelines for section 9 of SASA, because the punishment did not involve suspension or expulsion from a school. Therefore, *Van Biljon* confirms that as long as it is procedurally fair and the decision is substantively just, then an informal hearing may be held in respect of school matters that will not lead to suspension or expulsion. The court will defer to the principals if they exercise their discretionary competencies reasonably and in good faith.

In *Governing Body, Tafelberg School v Head, Western Cape Education Department*[74] the learner concerned, who was then a 14-year-old boy, admitted to, and was duly found guilty by the school of the theft of a computer hard drive from the school. The governing body recommended expulsion of the learner, but the HoD decided against expulsion. It appeared that the HoD had based his decision to re-admit the learner on several written submissions made by the learner's parents and that the school governing body had not been provided with copies or afforded an opportunity to respond to the parents' representations. It was contended on behalf of the school that the procedure adopted by the HoD was unfair and in breach of the tenets of natural justice and that his decision consequently had to be set aside. The court held that the maintenance of proper discipline amongst a school's learners was of fundamental importance to those in authority at any decent school and, in particular, to its governing body. This was reflected in section 9(1) of SASA, which clothed the governing body of a school with powers calculated to enable it to enforce school discipline. Thring J found that the HoD's decision had had a materially adverse effect on the school governing body's interests in maintaining proper discipline. The court decided not to simply substitute its own decision for that of the person whose function it was to make that decision (in this case the HoD), especially if it was discretionary in nature. Accordingly, the decision of the HoD was set aside and the matter referred back to him so that he could properly reconsider his decision by taking the submissions of the school governing body into account.

The outcome of these cases affirm that the requirements of procedural fairness in maintaining learner discipline in schools accords with the democratic principles of openness and the common law rules of natural justice. However, *Maritzburg College, Pearson* and *George Randell* illustrate the very unsatisfactory results for schools that were obliged to approach the courts for relief because the HoD refused expulsion of ill-disciplined learners for spurious reasons. Similar situations occur all too frequently in practice, while most schools do not have the heart or means to pursue litigation. This discourages educators and school leaders to take effective steps to remedy ill-discipline among learners and is one of the causes of poor discipline in schools.

74 *Governing Body, Tafelberg School v Head, Western Cape Education Department* 2000 1 SA 1209 (C)

7 Limitation of Rights

The general limitation clause and other limitation provisions in the Bill of Rights are further confirmation that democracy is compatible with the maintenance of learner discipline in schools. A democratic society should always be subject to the rule of law otherwise the powerful tend to abuse their power (political/administrative, physical, cultural or financial) to the detriment of the common good. For this reason it is essential that individual rights and liberties may and should be limited where necessary without diminishing its core essence. Compliance with the rule of law and requirements of legality is a pre-requisite to any litigation and is in the long term best interest of the children and people in the South Africa.[75] Although the Constitution is supreme, section 7(3) affirms that the fundamental human rights are not absolute and are subject to limitations or restrictions in terms of section 36 or elsewhere in the Bill of Rights. In the matter of *De Reuck v Director of Public Prosecution*[76] Epstein J linked the limitation of rights to the balancing process by stating:

> I reiterate that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can operate only on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the rights exercised by another and, where rights come into conflict, a balancing process is required.

The boundaries of human rights are set by the rights of others and by the legitimate needs of society.[77] Generally, the legitimate needs of society that justify the imposition of restrictions on human rights are: public order, safety, health, morals and democratic values. The nature and practice of law requires continuous balancing of rights and values. It is the particular domain of the courts to strike a balance between the claims and duties, liberties and vulnerabilities, entitlements and liabilities of parties involved in a legal dispute. However, this does not mean that rights can be limited for any reason or by any societal rule. All rights, albeit fundamental human rights or non-fundamental rights, may be limited in accordance with the law. The courts have the judicial authority to adjudicate whether the limitations or infringements of rights are in accordance with the law. Fundamental rights may be limited in the following ways:

> (a) Limitation in terms of the general limitation provision, section 36 of the Constitution.

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75 *The Governing Body of Mikro Primary School v Western Cape Minister of Education* case 332/2005 (WC) 50: "It is difficult to imagine how it could ever be in the best interests of children, in the long term, to grow up in a country where the state and its organs and functionaries have been elevated to a position where they can regard themselves as being above the law, because the rule of law has been abrogated as far as they are concerned".

76 *De Reuck v Director of Public Prosecution* 2004 1 SA 406 (CC) 89B.

77 Currie, De Waal & Erasmus *The Bill of Rights Handbook* (2006) 144.

(b) Definitional demarcation of a right.
(c) Specific limitations of a right.
(d) Suspension of rights during a state of emergency in terms of section 37 of the Constitution.

The general rule is the protection of an individual's right or freedom; the limitation is the exception.[78] Usually, no matter how important a collective goal is, it cannot be pursued in a manner which violates individual rights. Accordingly, the limitation clause in the Bill of Rights, section 36,[79] provides a mechanism in terms whereof individual rights must by occasion give way to social concerns of overriding importance.[80] Woolman avers that the general limitation provision in the Bill of Rights is probably the most important section in the Constitution;[81] not because the fundamental rights are unimportant, but because the general limitation provision applies to and regulates all cases that involve conflicting fundamental rights. Woolman describes this process as a "cost-benefit analyses" in terms whereof the cost and benefits of the affected parties must be weighed against each other to strike an appropriate balance.[82] In other words, the balancing of rights would require that the equilibrium is re-established by bringing equally important rights to an even keel.

The limitations analysis requires that the least restrictive means of limiting fundamental rights must be favoured and applied. If punishments for infringement of school rules can be made less restrictive and still achieve the same objective, then it should be done. For instance, if a learner has committed misconduct such as disrupting a class by boisterous behaviour, then the learner can be disciplined without having to be suspended from school. The learner's right to basic education will in so doing be brought into balance (equilibrium) with the school's right to maintain discipline. Neither the school not the learner's rights are limited in their entirety, but the extent of the right of the learner is adjusted.

School principals responsible for the professional management, governing bodies responsible for governance of schools and educators responsible for teaching and classroom management, can apply the

78 *Ibid*.
79 S 36 Constitution – 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.
80 Currie *et al* 145.
81 Woolman "Limitation and suspension" (1996) 60 (in *Constitutional Law of South Africa* eds Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman).
82 *S v Makwanyane* 1995 6 BCLR 665 (CC).

section 36 balancing process by establishing the proportional weight of conflicting rights in a variety of situations. At times it will be required of educators to make snap decisions in a classroom concerning such conflicting rights. It is understandable that such "spur of the moment" decisions will not always be as accurate as a judgment of a court, because the latter has the convenience of the lengthy legal process, copious legal argument and time to reflect and consider the issues. Nevertheless, it is necessary that educators should practice and become *au fait* with the process of balancing conflicting rights in classroom situations. This will enable educators to become more assertive in maintaining discipline. Not only will the consistent demonstration of the balancing process contribute to the learners' understanding of their fundamental rights and the limitations thereof, but the learners will also be empowered with life skills to manage conflict in accordance with constitutional principles. In the long run, it will be to the distinct advantage of the South African society as a whole if a culture of respect for fundamental rights and the constitutional process of balancing rights is taught in schools as part of the socialisation function of education.

9 Discussion: Establishing Disciplined and Democratic School Cultures

Education is probably the most important instrument for cultivating a human rights culture and establishing a consolidated and substantive democracy. Learners have to be prepared for their future responsibilities as citizens of a democratic society. As learners are not born with an understanding of the principles of democracy, public schools function as the nurseries of democracy.[83] Democratic values and principles cannot successfully be affirmed and transmitted to learners if an education system is bureaucratic or displays autocratic values and principles. If a school is run by autocrats, it is not likely to produce democratically minded citizens. It follows that one cannot achieve a good democracy without a good education. Most schools have traditionally functioned and continue to function as semi-autocratic organisations. Yet, democratisation of schools requires an inculcation of knowledge, values and attitudes into substantive democratic practice by means of education.[84] Therefore, the philosophy of education in a democracy requires that the education system should be one in which schools are

> mselves organised democratically to promote a mode of associated living embedded in a culture of social relationships and social intelligence which is the prerequisite to individual freedom and growth.[85]

This implies that the nature and practice of democracy in societal institutions, such as schools, must be congruent with the education that

83 Steyn, Du Plessis & De Klerk *Education for democracy* (1999).
84 Chapman, Froumin & Aspin (eds) *Creating and managing the democratic school* (1999) 58.
85 *Ibid*.

citizens receive; otherwise, the educative force of the real environment would counteract the effects of early schooling.[86]

It is a misconception to regard democratic schools as places where unmitigated freedom or anarchy prevails. On the contrary, orderly and well-disciplined schools can function democratically. Any democratic organisation or institution, such as a school, should per definition be orderly organisations where all the learners, educators and stakeholders must adhere to legitimate school and classroom rules that have been mutually agreed to by means of a participative process and to the law of the land.

The aim of education in a democracy is to gain knowledge useful for real life, to build moral character and the growth of the whole person: intellectually, personally, socially and professionally.[87] Yet, schools must under no circumstances be politicised and the purpose of education is certainly not to practise party politics or to promote sectarian political interests at schools. Democracy is not a continuous struggle for political power, but should be a condition of a society that places value on the resolution of problems of communal life through collective deliberation and a shared concern for the common good.[88]

Therefore, democratic values and attitudes such as respect for human dignity, the achievement of equality, the advancement of freedoms, tolerance, responsiveness and accountability cannot be instilled by merely conferring political rights to citizens or by establishing formal democratic institutions, but also need to be educated and demonstrated by example and application in the education system and schools. The usual characteristics of democratic schools are adequate stakeholder participation; unselfish civic-minded attitudes; power neutrality; adherence to the law; fair procedures and just administration; accountability; openness and transparency; and the advancement of human rights. All these characteristics imply that the conditions and environment in schools should be well ordered and disciplined.

10 Conclusion and Recommendations

The court decisions affirm that the constitutional standards and fundamental rights support the maintenance of learner discipline in schools. Also, SASA contains numerous provisions to enhance learner discipline. Only the prohibition of corporal punishment at schools has hampered the maintenance of learner discipline to some extent. However, not only does the fundamental right to freedom and security of person protect an individual against public violence by the state, but it also protects every person's physical and psychological integrity against private violence. Democratic schools should by definition be safe schools

86 Parry *et al* 48.
87 Dewey *op cit*.
88 *Ibid*.

where learners are able to learn in a disciplined and purposeful environment. In this regard, the nature and extent of poor discipline in many South African schools is a grave cause for concern.

When not threatening school discipline, the South African courts have ruled in favour of upholding students' rights to freedom of expression. However, when the exercise of free expression has been harmful to persons, educational institutions or individuals, or has substantively affected school discipline, the courts have limited learners' rights to free expression in order to protect the safety of persons, and the dignity of individuals or the discipline at schools. The *Phillips* decision has affirmed that the right to basic education is not absolute and that learners who commit serious misconduct may justifiably be expelled in order to maintain an orderly and disciplined school environment.

The examples of the *Tafelberg, Pearson, Maritzburg College* and *George Randell* cases provide substantiation of the fact that provincial administrators at times display attitudes averse or indifferent to the democratic principles of responsiveness, accountability and transparency. This constrains participation by stakeholders in education whose rights or legitimate expectations are materially and adversely affected.

The present provisions of SASA place an unfair burden on schools that, in practice, have no other effective means of dealing with serious misconduct. A week's suspension is ineffectual, because learners usually regard it as a holiday or welcome rest from school obligations. As a result of administrative injustice and obstructionist attitudes of the education authorities schools struggle to expel learners. This undermines the democratic design of SASA and causes educators to feel disempowered in the human rights environment. In order to address this shortcoming it is recommended that section 9 of SASA should be amended to allow for lengthy suspension of up to 180 school days (ie one school year). This will convey a strong message of support for educators that may otherwise consider leaving the profession as a result of ill-discipline at schools.

In order to further the democratisation of schools in South Africa it is imperative that all available policy, regulatory and administrative measures should be implemented and that effective legal remedies should be developed and extended to ensure the establishment of a purposeful learning environment.

Keeping children safe whilst playing sport: What can South Africa learn from the United Kingdom experience?

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OPSOMMING

Om Kinders Veilig te Hou Terwyl Hulle aan Sport Deelneem: Wat kan Suid-Afrika uit die Ervaring in die Verenigde Koninkryk Leer?

Sportbeheerliggame het ernstige problem in die gesig gestaar met kinderbeskerming en was dikwels nie toegerus om die problem te hanteer nie. 'n Sleutelvraag was of daar van sportbeheerliggame verwag is om die problem alleen die hoof te bied en of kinder beskerming in sport deel moes uitmaak van 'n breër holistiese stelsel van kinderwelsyn wat ook ander organisaies moes insluit. Die Verenigde Koninkryk het daarna gestreef om 'n beskermende raamwerk van kinderwelsyn dwarsoor alle sport te bewerkstellig wat deur sportbeheerliggame afgedwing word, en fokus op onderrig en opleiding van vrywilligers wat by sport betrokke is. 'n Sleutelpunt was die skepping van die *Child Protection in Sport Unit* binne die *National Society for the Prevention of Cruelty to Children*. Die *Safeguarding Vulnerable Groups Act 2006* het 'n sentrale ligaam, die *Independent Barring Board*, later verander na die *Independent Safeguarding Authority* ingestel wat verantwoordelik is vir die bedryf van 'n keuring- en uitsluitingskema. Sport klubs val binne die omskrywing van "*Regulated Activity Provider*" en moet die status van enige persoon wat gereeld by bedrywighede betrokke is en kontak met kinders het, nagaan. Aanvanklik is die vlak van bedrywighede wat as gereelde kontak beskou is, taamlik laag gestel sodat 'n groot aantal aktiwiteite en persone binne die omskrywing sou val. Latere hersienings het voorgestel dat die vlak van bedrywighede beter omskryf en op 'n hoer vlak gestel word ten einde die proses meer vaartbelein te maak. In Suid-Afrika, bevorder Sport en Ontspanning Suid-Afrika gestruktureerde deelname aan sport- en ontspanningsbedrywighede in skole en die opheffing van sport in skole en sportklubs. Die Suid-Afrikaanse sportsektor moet ook die problem van seksuele teistering en misbruik is sport aanspreek en kan in hierdie verband gerus uit die ondervinding in die Verenigde Koninkryk leer.

1 Introduction

The United Kingdom (UK) has sought to establish a protective framework of child welfare across sport enforced through sports governing bodies, concentrating on education and training for volunteers.[1] Whilst this has

1 The UK does not have one single unified legal system but the child protection legislation across England, Wales, Scotland and Northern Ireland is "fundamentally similar". Williams "Human Rights v Human Responsibilities: Striking a Balance Between the Rights of Child Athletes and the Resulting responsibilities of Volunteers in Sport" 2009 *Cambrian LR* 76-92, 77.

been developed, governments have also introduced specific legislation to institute a rigorous system of vetting and barring to check individuals and exclude those considered unsuitable from working with children. By including sport within this scheme it is suggested that it should be viewed within a wider child protection framework and that internal strategies were insufficient on their own.

However the comprehensive vetting and barring scheme (VBS) attracted widespread criticism in terms of its breadth and depth of coverage leading to proposals for reform. A change of government in 2010 quickened the pace and desire for change and a further review of the scheme has been conducted with a view to cutting it back further. Contemporaneously numerous reviews have been instigated across a range of areas that interlink with child protection in sport. The fundamental difficulty is achieving a balance between keeping children safe and maintaining a system that does not deter the volunteer culture that is essential to the maintenance of sporting opportunities. This article considers the legislative framework in operation in the UK and the amendments that have been introduced and highlights the problems that such legislation can unwittingly contain. Given the growing recognition of the civic significance of sport within South Africa, the UK experiences can provide a constructive contribution to the ongoing policy discussions.

2 Promoting Sport for Children and the Volunteer Culture

Sport for children is generally viewed as an important cultural activity however it may be described, and this is specifically recognised in the United Nations Convention on the Rights of the Child:

> Article 31
> (1) States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
> (2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Encouraging children to participate in sporting activities has been a continuing UK Government policy since 1991 when inclusion in the National Curriculum started a significant change in the perception and role of Physical Education and School Sport (PESS) which had previously been somewhat marginalised.[2] This transformation included an increased political commitment, the setting of targets, increased funding (including lottery money) and the development of specialist sports

2 Houlihan & Green "The changing status of school sport and physical education: explaining policy change" 2006 *Sport Ed and Society* 73-92.

colleges.[3] Carter[4] optimistically noted that "the decline in P[hysical] E[ducation] and school sport has been reversed". This he attributed to policy setting and an investment of some £1.5 billion. However Green has noted that the prioritisation of young people through a policy of using sport and physical exercise as a vehicle to deliver welfare objectives may leave some other groups such as the elderly disadvantaged.[5] Interestingly the School Sports Partnerships that were an important part of the infrastructure for the delivery of sport, under the previous administration were initially abolished by the incoming 2010 coalition government. However after widespread protest some limited funding it was restored.[6] In 2011 the Secretary of State for Education announced a review of the national curriculum but in terms of PE it was made clear that it would remain as a central tenet:

> Children need access to high quality physical education. Physical education will, therefore, also remain a compulsory part of the National Curriculum at all four key stages and the first phase of the review will advise ministers on a much simplified and less prescriptive programme of study. This is also for introduction in 2013. It is proposed the revised curriculum for physical education will set out a clearer expectation that all pupils should play competitive sport, and will retain the expectation that all children learn to swim.[7]

Such support for promoting physical education is linked to concerns around the transition of taking part in recreation in adulthood and the physical and mental health of the population at large. There is a sharp drop off in participation in exercise post school that makes instilling a lasting exercise ethic a key challenge.[8] There is no clear understanding as to why individuals do not take part in sport and physical activity particularly at different stages of life.[9] The limited research evidence makes both the construction and the implementation of policy more difficult although there are examples from other countries that can be drawn upon.[10] It has been identified that there are diverse influences on participation in physical activity and as a consequence health policy

3 *Ibid*.
4 Carter *Review of national sport effort & resources* (2005) 7. To monitor participation the Department for Culture Media and Sport (DCMS) commissions an Annual Statistical Report, *Taking Part: The National Survey of Culture, Leisure and Sport* (DCMS 2006, 2007, 2008, 2009, 2010, 2011). The questionnaire is updated at intervals to reflect the changing circumstances.
5 Green *Review of national sport effort & resources* (2007).
6 The School Sports Partnership was one of the 8 strands of the previous Government's PE, School Sport and Club Links (PESSCL) policy – see www.parliament.uk/briefing-papers/SN06052.pdf (accessed 2013-02-12).
7 http://www.education.gov.uk/inthenews/inthenews/a0073149/national-curriculum-review-launched (accessed 2012-06-17).
8 Carter *op cit*.
9 Allender, Cowburn & Foster "Understanding participation in sport and physical activity among children and adults: a review of qualitative studies" 2006 *Health Ed Research* 826-835.
10 Carter *op cit*.

needs to adopt a multi faceted solution.[11] One of the major difficulties in terms of sports policy in the United Kingdom is the sheer number of parties involved in delivery and the complexity of the relationships. For example sport is within the jurisdiction of the Department of Culture, Media and Sport but responsibility for schools and the curriculum, which includes physical exercise, is located within the Department for Education (DofE). Carter[12] proposed a cross departmental Sports Cabinet Committee to improve co-ordination. Aside from the Government Departments other relevant bodies include the schools themselves, Sport Governing Bodies and regional or County Associations, sports clubs and private providers. There are also relevant non-departmental public bodies the most important of which is Sport England.[13] Thus the overall picture of the provision of children's sport indicates a complex and piecemeal approach. To overcome some of these problems Carter recommended that the Government:

> [d]evelop, communicate and embed a 'single system' for sport in the community from Government to grass-roots-by investing in clubs, coaches and volunteers, strengthening school-community links and integrating talent pathways for aspiring performers.[14]

South Africa is also engaged in developing a clear strategy to promote participation in sport. The 2011 Sport and Recreation South Africa (SRSA) *White Paper* set out the Government's mission:

> [t]o maximise access, development and excellence at the levels of participation in sport and recreation in order to improve social cohesion, nation building and the quality of life of all South Africans[15]

Sport, in South Africa, is also increasingly being viewed, as it has in other countries, as a valuable social policy that can bring a host of benefits throughout society:

> For every rand invested in sport there are multiple social benefits such as long term health benefits, stronger and more secure communities, social cohesion, crime reduction, psychological well-being, improved productivity and employment opportunities where participants benefit from developing and improving a variety of skills. Sports programmes can also empower and promote the inclusion of marginalised groups.[16]

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11 Biddle, Gorely & Stensel "Health-enhancing physical activity and sedentary behaviour in children and adolescents" 2004 *J of Sports Sciences* 679-701.

12 Carter *op cit*.

13 Sport England "works to build the foundations of a world-class community sport system by working with national governing bodies of sport, and other funded partners, to increase participation and improve performance at all levels of English sport"; http://webarchive.nationalarchives.gov.uk/20121015000000/http://www.direct.gov.uk/en/Dl1/Directories/DG_10012236 (accessed 2013-02-12). There are equivalent bodies for Scotland, Wales and Northern Ireland.

14 Carter 28.

15 Sport and Recreation South Africa (SRSA) (2011) *The White Paper On Sport and Recreation for the Republic of South Africa* 24.

16 SRSA 16.

Whilst there is no doubting the importance of a clear and coherent national policy on sport there is also a concomitant need to construct a framework for the actual delivery of sport and recreation. The *White Paper* recognises the number of role players involved but also the need for one central authority and a national strategy. It is clearly a mistake to create, albeit unwittingly, an overly complex model of delivery. However there will inevitably be a large number of different groups involved given the diverse nature of the area.

In the UK sports clubs and private providers now occupy a much greater role in two distinct ways. First schools have brought in external expertise that may be part of Community Outreach programmes by professional sports clubs.[17] By offering extra school activities such clubs establish a stronger relationship with the community. Secondly amateur clubs provide an alternative location for participation in sports. These may be either specialist junior clubs or youth sections of adult clubs. Both of these models, the "in" and "out of" school, raise two questions related to the personnel involved in coaching.[18] There is the child protection dimension that has become a prominent issue in children's sport.[19] There is also the separate, though allied point, about the qualifications of those involved given that they will not ordinarily have the specific educational credentials required of teachers. This is more likely to be an issue where those involved are volunteering and not professional coaches. Volunteers may be required to obtain some level of qualification but a distinction can be drawn between volunteers who coach and those who coach as a paid occupation.

Sports clubs are essential to the delivery of children's sport outside of the school environment.[20] According to Nichols there are somewhere in the region of 150,000 sports clubs in the UK staffed by volunteers.[21] However the level of volunteering in the UK generally compares poorly

17 See for example the activities established by Brentford FC a professional English League Division 1 Football Club http://www.brentfordfccst.com (accessed 2013-02-12). See also http://www.saracens.com/sport-foundation-2/ (accessed 2013-02-12).

18 The school system in England is generally organised on an infant/primary and senior school basis. The former is for children aged 5-11 and the latter 11-18. Currently children may leave school at the end of the academic year in which they become 16 though this is being raised to 17 from 2013 and 18 from 2015. Children after the age of 16 can however engage in education and training outside of the school environment. In relation to the delivery of sport at primary school level one issue that has been raised is the shortage of male primary school teachers. In 2011 it was reported that one on four primary schools had no male teacher registered; http://www.bbc.co.uk/news/education-14748273 (accessed 2013-02-12).

19 Brackenridge "'… so what?' Attitudes of the voluntary sector towards child protection in sports clubs" 2002 *Managing Leisure* 103-123.

20 Whilst PE is a compulsory part of the national curriculum at all ages participation in competitive inter-school sport is not generally a "requirement".

21 Nichols *Active Citizenship: The Role of Voluntary Sector Sport and Recreation* (2003).

with other European countries.[22] In 2002 Sport England estimated there were 1.5 million sports volunteers that accounted for a quarter of all volunteering.[23] Although the overwhelming majority of those working in sports clubs are volunteers, with few paid employees, it is not clear that they are a part of a homogenous group and that sports volunteers may not share the same motivation as those volunteering in other sectors with sport based more on a form of "mutual production and consumption".[24] In terms of motivation to volunteer to coach junior sport there are several factors to consider and understanding the strength of motivating factors is important to be able to ascertain what may act to discourage volunteers. Requirements to obtain qualifications may be imposed such as the completion of a Sports Governing Body approved training course particularly if the club is in receipt of public grants or has achieved a certain status such as "Clubmark" that brings with it a higher level of regulation.[25] So enthusiastic parents may not be able to formally "coach" unless they obtain an appropriate qualification. There may be further requirements with respect to undertaking a Criminal Records Bureau check.[26] However not all clubs will enforce all of the requirements. Those volunteers who do undertake coaching courses should have a greater understanding of strategies and approaches. Alternately coaches may feel, particularly at the outset that they are ill equipped for the role and the expectations that parents may bring. A survey of 25, mainly male, volunteer sports coaches found concerns centred around "negative parental behaviours, a lack of mentorship, pedagogical aspects of working with children, and concerns with appropriate and legal boundaries of working with children".[27] This suggests something of a dichotomy as too much training and regulation may deter some volunteers from coming forward in the first instance but others in post may want a greater degree of help and support. It is apparent that Government has increasingly seen sport as a means of delivering a range of social policies and the environment outside of the school is critical. Within this environment there are less prescribed controls than within formal education structures. Volunteers are an integral part of sports clubs that could not operate without them given the limited resources available. Unfortunately sport has become a site for serious child abuse

22 See Coalter "Sports Clubs, Social Capital and Social Regeneration: 'ill defined interventions with hard to follow outcomes?'" 2007 *Sport in Society* 537-559.

23 *Sports Volunteering in England in 2002* (2002).

24 Coalter 551.

25 Clubmark is an accreditation system set up for sport clubs to ensure good practices are in operation. http://www.clubmark.org.uk/about/about-clubmark (accessed 2013-02-12).

26 Such a check will reveal whether the applicant has any formal convictions and also cautions and warnings. http://www.direct.gov.uk/en/Employment/Startinganewjob/ DG_195809 (accessed 2013-02-13).

27 Wiersma & Sherman "Volunteer Youth Sports' Coaches' Perspective of Coaching Education/Certification and Parental Codes of Conduct" 2005 *Research Quarterly for Exercise and Sport* 324-338, 335.

to take place that has caused consternation both within and well beyond sport.

In South Africa the *White Paper* also envisages a greater role for private sector sport particularly with respect to the workplace.[28] Schools have the primary role in the provision of children's sport – indeed *Strategic Objective 1* is school sport. Parallels with the UK determination to reinvigorate school sport can be drawn as one of the Policy directives based on *Strategic Objective 1* is to "[a]dvocate and lobby for the reintroduction of structured physical education in all schools and elevate sport in schools as a matter of priority and urgency".[29]

However, South African schools are not envisaged as the sole site of sport delivery as *Strategic Objective 11* specifies the role of Clubs as an integral part of the framework. In partnership with the development of Clubs is the aim to develop an appropriate coaching framework. Similarly there is the identified need to support volunteers, who are seen as crucial to the delivery of sport, through additional training and support. An interesting policy directive is to "establish and maintain a register of trained volunteers".[30] Once a register of volunteers is in place it is of course much easier to operate a scheme of vetting if this is subsequently deemed necessary. Bora[31] explored the development of social capital through community clubs and noted the benefits brought to the individual that volunteering and coaching could bring. This is borne out by the UK experience where clubs are overwhelmingly reliant on volunteers and a key issue is how to support and maintain this culture and not deter volunteers.

3 The Abuse of Children in Sport and Beyond

The civil law, through the tort of negligence, has been used as vehicle for children injured in sport and recreation, through fault, to obtain compensation for their injuries.[32] Contemporaneously governing bodies have also sought to alter some of the practices and the rules of sports to make playing safer.[33] This might be either to avoid liability or as a consequence of claims. Whilst physical injuries can easily be recognised the abuse of children in sport within the UK has, until relatively recently,

28 SRSA 31-32.
29 *Idem* 29.
30 *Idem* 39.
31 Bora "Building Social Capital Through an 'Active Community Club'" 2006 *Int Review for the Sociology of Sport* 283-294.
32 Greenfield, Osborn & Rossouw "The juridification of sport: a comparative analysis of children's rugby and cricket in England and South Africa" 2011 *J for Juridical Science* 85-104.
33 *Ibid*.

been largely hidden. Boocock[34] notes that:

> [s]wimming was the first sport forced to face up to the seriousness of child abuse following the conviction of Olympic swimming coach Paul Hickson in 1993 for 15 offences including 2 rapes and indecent assaults committed against athletes he was responsible for coaching.

Serious issues of child abuse were identified with respect to swimming in a number of countries including Ireland.[35] There are numerous other examples, across different sports, of coaches being convicted of abuse.[36] Brackenridge *et al* point out that abuse in sport was known about but not acted upon for different reasons.[37] Sport Governing Bodies faced serious problems in addressing child protection issues and were often ill equipped to deal with the problem. Boocock[38] (cites an unpublished report by White) showing that "fewer than half of grant aided bodies had in place a child protection policy or responsible child welfare officer". A key question was whether sports governing bodies were expected to tackle this issue alone or whether child protection within sport should be part of a broader holistic system of child welfare encompassing other agencies. Nichols and Taylor[39] raise the important point about whether volunteer run clubs can be reasonably expected to achieve the same level of care as professional organisations.

Even if a holistic approach was not adopted sports governing bodies needed to act to, at the very minimum, restore public confidence that children were safe when engaging in sport. A key point was establishment of the Child Protection in Sport Unit (CPSU) within the NSPCC.[40] The overall result was the production of the "Child Protection in Sport Action Plan" that provided a clear framework encompassing the dissemination of increased knowledge of the problem, training of specialist child protection officers and the establishment of reporting mechanisms coupled with strategies to prevent opportunities for potential abusers to gain access to victims. A vital issue was how sports governing bodies could be encouraged or persuaded to both adopt and

34 Boocock "The Child Protection in Sport Unit" (2002) *J of Sexual Aggression* 99. Hickson was originally charged with 17 counts, was acquitted of 2 and sentenced to 17 years imprisonment, reduced to 15 years on appeal; *R v Hickson* 1997 CrimLR 494.

35 McCarthy *Deep Deception* (2009). McCarthy's work offers a perceptive insight into how abuse occurs and the possible reactions of some within the higher echelons of the administration of the sport. It is a disturbing account but insightful case study of what can happen.

36 Williams "Government Sponsored Professional Sports Coaches and the Need for Better Child Protection" *Ent Law* Spring 2003 55-84.

37 Brackenridge, Bringer & Bishopp "Managing Cases of Abuse in Sport" 2005 *Child Abuse Review* 259-274.

38 Boocock 100. White *Report on child protection policy development in national governing bodies of sport* (1999).

39 Nichols & Taylor "The Balance of benefit and Burden? The Impact of Child protection Legislation on Volunteers in Scottish Sports Clubs" (2010) *Eur Sport Management Quarterly* 31-47.

40 See Boocock *op cit*.

implement robust policies. The solution was found by linking receipt of funding to the requirement to embrace the new protection agenda.[41] These new policies permitted the recording and analysis of data relating to the number and type of cases of abuse opening up a new research agenda.[42]

Since the difficult period from the mid 1990s when sports governing bodies faced a seemingly impossible task, a new approach has been forged. A comprehensive training and educational framework has been established and knowledge of the issue widely disseminated. Different strategies have been adopted in different sports.[43] Sports clubs seeking accreditation and participation in organised competition will have to appoint welfare officers and incorporate appropriate policies. However White's view, in 1999, that child protection in sport needed to be considered as part of the wider system of child welfare was a perceptive one and the major legislative impact resulted from the tragic murder of two girls outside of the sporting environment. The Safeguarding Vulnerable Groups Act 2006 (SVGA) was introduced following the recommendations of the *Bichard Report* that was established after the horrific murders of Jessica Chapman and Holly Wells.[44]

The fulcrum of the legislation was the establishment of a central body, the Independent Barring Board, later changed to the Independent Safeguarding Authority (ISA) responsible for the operation of the Vetting and Barring Scheme.[45] There were two distinct elements to the scheme, vetting and barring and the latter aspect has been subject to judicial challenge.[46] The scheme was launched in October 2009 with referrals for

41 Boocock 101 notes that "[b]y March 2001 all 558 publicly funded governing bodies had in place child protection policies and many other sports organisations have since been working to include child protection policies within their guidelines".

42 Brackenridge *et al op cit*.

43 See the implementation of a child protection scheme within tennis instigated by the Lawn Tennis Association using coaching qualifications as a means of addressing child protection issues, Turner & McCrory "Child protection in sport" 2004 *Br J of Sports Med* 106-107.

44 School caretaker Ian Huntley murdered the two ten-year old girls in 2002. Huntley was convicted in 2003 and sentenced to life imprisonment. The terms of reference for Bichard were to inquire into "child protection measures record keeping, vetting and information sharing in Humberside Police and Cambridgeshire Constabulary". *The Bichard Inquiry Report* (2004).

45 The name change is contained in s81 Police and Crime Act 2009. The ISA was given 4 main functions (i) To maintain a list of individuals barred from engaging in *regulated activity* with children; (ii) To maintain a list of individuals barred from engaging in *regulated activity* with vulnerable adults; (iii) To maintain both barred lists; and (iv) To reach decisions as to whether to remove an individual from a barred list. The Government has renamed it the Disclosure and Barring Service (DBS) encompassing the Criminal Records Bureau.

46 The Barring aspect has been subject to judicial review on compatibility with the Human Rights Act 1998; *R v Secretary of State for the Home Department* [2010] EWHC 2761.

those convicted or cautioned for offences against children.[47] From July 2010 new staff and volunteers could register with the ISA with compulsory registration from November 2010.

The essence of the SVGA was the use of defined activities as either "regulated" (section 5) or "controlled" (section 21). It is from these that the various offences flow. Sport is captured by the definition of regulated activities found in Schedule 4 Part 1:

> 2(1)(a) any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children.

So a typical weekly team coaching session would be covered, as would competitive matches. Similarly a sports club is determined as a "Regulated Activity Provider" (RAP) within section 6 which then imposes a range of obligations related to the purposes of the SVGA including checking the status of the individual engaged in the regulated activity. For example Section 11 makes it an offence for an RAP to permit someone to engage in the regulated activity without checking his or her status with respect to monitoring. A key aspect was to determine how often contact with children must be to trigger a requirement for registration – the "frequency" question. Given the consequences of an activity being caught by the provisions for both the individuals and providers this is a crucial element. There are two separate limbs to cover both "regular" and "irregular" contact. Schedule 4 Part 1 Section 1(1)(b) determined that a regulated activity is "carried out frequently by the same person or the period condition is satisfied". Interestingly "frequently" is not defined in the legislation but given its normal usage and subject to guidance issued by the Secretary of State.[48] The original statutory provisions referred to the period condition as being overnight or more than 2 days in a 30 day period.[49] Thus adults who carried out any of the regulated activities (which itself was broadly defined, see above) would be subject to the scheme if the activity took place frequently (once a month or more) or intensively on 3 or more days in a 30-day period.

It was clear that the fairly low level of contact that triggered a requirement to register would encapsulate a huge range of activities by volunteers with children that had previously been uncontrolled. The legislation sought to introduce a comprehensive scheme that would impose conditions and sanctions on both individuals and organisations some of which would be ill equipped to deal with the requirements. Given the sheer size and complexity of the exercise it seems likely that there would be a degree of non compliance even if unwittingly. Interestingly

47 The concept of maintaining lists of those considered undesirable in terms of working with children is not a new one and one aspect of the role of the ISA was a consolidation of lists that were maintained under for example The Protection of Children Act 1999 and The Education Act 2002.

48 See the Explanatory Notes that are issued with the Primary Legislation.

49 Sch 4 P 3 10(1) Safeguarding Vulnerable Groups Act 2006.

the survey of Scottish sports clubs showed a surprisingly low level of checking under the existing vetting scheme. It indicated that of the 52 clubs surveyed 16 had not undertaken any disclosure checks in the previous two years.[50] Furthermore of the 744 current volunteers only around two thirds had been checked. The proposed new scheme was a huge undertaking but the sheer enormity needs to be set against the revulsion of the Soham murders and the apparent deficiency in existing provisions.

4 Concerns about the VBS

Further questions about the extent of the scheme and who would be covered were raised on a number of fronts. A group of distinguished authors of children's books indicated they would not be prepared to be vetted and as a consequence would no longer visit schools to talk about their work.[51] These concerns were fuelled by the fear that the scheme would encompass up to 11.3 million adults, around one in four who would come into contact with children. Potentially this would have led to the creation of the most extensive database of its kind in the world. The list of those required to register because of their interaction with children seemed endless, including not only sports coaches, but also coach drivers with education contracts and potentially school governors. It was apparent that there was a degree of hostility from some of those who were volunteering to work with children, to the very idea of being checked and registered on the database. This led to concerns that the number of volunteers would lessen. Accordingly the then Secretary of State for Children, Schools and Families, Ed Balls, requested Sir Roger Singleton to review the level of interaction with children that required registration, effectively where the line should be drawn.[52] As Balls noted "a critical point is deciding how precisely the 'frequent or intensive' principle ... should be applied to real life situations".[53] Singleton applied two basic principles. First that parental choice in child care was essentially a private matter at the discretion of parents but that once the child was in a situation, such as a sports club, where the parent was no longer choosing who was responsible for the child, a check was required.

50 Nichols & Taylor *op cit*.

51 Philip Pullman author of the Dark Materials trilogy indicated his disquiet: "This reinforces the culture of suspicion, fear and mistrust that underlies a great deal of present-day society. It teaches children that they should regard every adult as a potential murderer or rapist". Green "Authors boycott schools over sex-offence register" *The Independent* 2009-07-16. See also for criticism of the original Bill, Williams "The potential of the Safeguarding Vulnerable Groups Bill for children's sport" 2006 *Ent and Sports LJ* http://www2. warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number1/williams/williams.pdf (accessed 2013-02-12).

52 Sir Roger Singleton's Report was accordingly entitled "Drawing the Line" (2009) http://dera.ioe.ac.uk/9818/ (accessed 2013-02-12)

53 Balls e-letter to Barry Sherman MP 2009-11-14 http://webarchive.nationalarchives.gov.uk/20100202100434/http://publications.everychildmatters.gov.uk/eorderingdownload/dcsf-01122-2009.pdf (accessed 2013-02-12).

So a private music tutor would fall under the former but music lessons at external premises the latter. Secondly that the statutory provisions should be the minimum necessary but with flexibility for organisations to check staff if they so desired even if not required by the legislation.

Singleton's method of reducing the overall impact of the scheme was to reconsider the question of frequency of contact that brought the scheme into operation. Singleton[54] noted the issues:

> I have had regard to the need for the application of the scheme to be proportionate to risk, to be clearly understandable, to be affordable, and not to discourage those thinking of volunteering to work with children.

A real problem was to devise a definition that dealt with the huge range of activities where an adult might come into contact with a child outside of the family setting. Starting with a broad classification of "activities" inevitably meant this would be problematic. Singleton altered frequency from the original once a month to once a week or more thus only requiring those with a much heavier involvement, weekly rather than monthly, to be covered. Part of the justification was that irregular contact allowed a potential abuser far less opportunity to build a relationship with the child. The "intensive" element which is less regular, Singleton suggested should be set at four times a month bringing it in line with the test for regularity. This, he thought, would have the advantage of permitting potential volunteers to undertake a trial period before any firm commitment was made and without the necessity for vetting. The criticism raised by the peripatetic groups such as the children's book authors was dealt through recommending that registration should only be required if it was the same group of children involved rather than concentrating on the same activity being carried out. Thus a visit to the same school but working with a different age group would not contribute towards the definition of regular contact. Singleton also tidied up a number of allied points around issues such as overseas visitors and host families. It was estimated that the Singleton's reforms would have reduced the numbers required to register with the ISA from some 11 million to around 9.3 million. This is still an astonishingly large number so the essence of the scheme was retained.

Balls[55] indicated that the Government accepted Singleton's ten recommendations in their entirety and stressed the need to find the appropriate balance:

> Our aim throughout has been to develop an approach which is proportionate, balanced and effective, with the scheme operating in a way which is neither burdensome nor bureaucratic, or off-putting to potential volunteers in children's settings, while still meeting the concerns of parents.

54 Singleton *op cit*.
55 Balls Response to Singleton 2009-12-14 http://isa.homeoffice.gov.uk/default.aspx?page = 451 (accessed 2013-02-12).

The recommendations were broadly welcomed by a range of voluntary groups who had been concerned about the stringency of the original proposals.[56] However amendments to the scheme were largely overtaken by political events as the incoming coalition government of 2010 sought yet a further review.[57] The Government committed itself to reform of the Vetting and Barring Scheme in its outline programme: "We will review the criminal records and vetting and barring regime and scale it back to common sense levels".[58] Accordingly a Review across the 3 Government Departments for Health, Education and the Home Office was set up in October 2010 and reported in February 2011.[59] The thrust of the review was to:

> [c]consider the fundamental principles and objectives behind the vetting and barring regime, including:
> evaluating the scope of the scheme's coverage
> the most appropriate function, role and structures of any relevant safeguarding bodies and appropriate governance arrangements
> recommending what, if any, scheme is needed now; taking into account how to raise awareness and understanding of risk and responsibility for safeguarding in society more generally.[60]

This was an internal review conducted inside Government swiftly carried out with the intention of providing a method of reducing and reshaping the existing scheme. A central barring scheme was to be maintained – it would have been surprising if this had been jettisoned given the long history of the operation of "lists" of those considered unsuitable to work with children. This was in any event the less controversial aspect of the scheme although the Royal College of Nursing's judicial review had previously challenged it. In terms of registration however a new approach was adopted with the proposal to scrap the principle completely. Coupled with a far tighter definition of what amounted to a regulated activity the emphasis of the VBS was shifted. The rationale was the fear of discouraging potential volunteers and the disproportionate nature of the original scheme.

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56 http://news.bbc.co.uk/1/hi/education/8410912.stm (accessed 2013-02-12).

57 In his Oct 2011 Party Conference speech Prime Minister David Cameron said: "This isn't how a great nation was built. Britannia didn't rule the waves with arm-bands on. So the vetting and barring scheme – we're scaling it back. CRB checks – we're cutting them back. At long last common sense is coming back to our country".

58 As the coalition consisted of two independent parties (the Conservatives and Liberal Democrats) a new policy agreement was required and duly published. http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf 20 (accessed 2013-02-12). Common sense is of course a difficulty standard to legislate towards.

59 The Review was carried out by a group of civil servants; gathering information from the organisations, agencies and other bodies involved in the vetting process, seeking the views of a wide variety of external stakeholders. (DofE 7). https://www.education.gov.uk/publications/eOrderingDownload/vbs-report.pdf (accessed 2013-02-12).

60 http://www.homeoffice.gov.uk/publications/crime/vbs-report?view = Binary 7 (accessed 2013-02-13).

Thus the new scheme would only cover those "who may have regular or close contact" with vulnerable groups. Furthermore "regulated activity roles will be redefined and will be the only ones covered by this new barring scheme. Bars will continue to apply to both paid and unpaid roles".[61] Of course what matters is how regulated activity is to be defined though the review suggested that; "a volunteer touchline judge at a children's football match" would not be covered.[62] The ability of employers or providers of activities to carry out a Criminal Records Bureau check will be maintained so the shift, outside of a regulated activity, is onto those bodies to determine whether a check is required. In sport the governing body may decide that certain roles, even if outside of the "regulated activity" definition in the Statute, require checking. The detailed parameters of the new scheme are not yet set out as it requires amendment to the SVGA and statutory guidance.[63] It is however clear that the approach recommended by Bichard and embraced by the previous government will be substantially reversed. However the same problem still exists which is where the line over checking is to be drawn and what role will be just outside it. What needs to be determined is how those delivering sport to children will operate the new scheme and the potential costs. Even if the new scheme is less rigid it is still not clear whether legislation on its own is an effective vehicle in this field.

5 Government Intervention and the Problems of a Legislative Approach

A question for all governments is the extent to which sport is subject to political direction and regulation. As noted above sport can be a vehicle for a variety of political aims ranging from health through education to the criminal justice:

> As the economic and civic status of sport gains in importance for a country, the government typically takes a more active role in how sport is run, either directly through legislation or indirectly through incentives such as tax breaks or grant criteria.[64]

Keeping children, who are playing sport outside of the school environment, safe is a priority because of the publicised examples of abuse within and outside the sporting setting. However there is a clear danger that a very strict regime of regulation may act to deter volunteers who are the very lifeblood of sports clubs. This is the simple superficial critique of an overly bureaucratic system that can be observed through

61 Department of Education 17.
62 *Ibid* 17. It is perhaps a little churlish to note the confusion in the terminology. The correct terms are touch judges in Rugby Union and assistant referees (formerly linesman) in football.
63 The Government introduced legislation in 2010, the Protection of Freedoms Bill, to enact the Review's recommendations, which is now in place.
64 UNICEF (2010) 20 http://www.unicef-irc.org/publications/pdf/violence_in_sport.pdf (accessed 2013-02-12).

survey analysis of volunteers. There is however a further possibility that the system is ignored as its values are not internalised and adopted with any vigour what might be termed a lip service approach. Furthermore child protection may be seen as the sole responsibility of the designated welfare officer creating something of a vacuum.

The 2011 review drew out two criticisms of the central barring scheme. First, that those carrying out checking rely too much on whether the person being vetted is barred or not to the exclusion of a more holistic overview. Described as a "tick box" approach "rather than following the range of other checks and safeguards which should be in place".[65] The underlying problem is that a central scheme promotes a culture of disempowerment by shifting responsibility for the individual onto the State agency. The second perceived criticism was the "erosion of trust" between the various parties and that checking somehow implied suspicions about the motives of well meaning volunteers. Implicit within the review was a criticism of over reliance on the legislative approach:

> 'Blanket' approaches such as the VBS have the potential to place the emphasis on safeguarding in the wrong place – on the State rather than on employers and individuals. That encourages risk aversion rather than responsible behaviour. And it is the effective management of risk rather than aversion of risk which is most likely to protect vulnerable people.[66]

There is merit in this evaluation that legislation may produce a risk aversive strategy and lead to an assumption that a positive outcome to a check is all that is required to keep children safe and create a false sense of security. It becomes someone else's responsibility, in this case the ISA, to carry out the necessary check. The Review promotes a shift in the burden for safeguarding more squarely onto employers and managers of volunteers.

This critique might similarly be applied to the internal protective regime that is used within sports and policed downwards through governing bodies. If child protection is delegated specifically to one named individual and the principles not specifically internalised the risk is that child welfare becomes the responsibility of that one person and not everyone. Measurement of the readiness of organisations to adopt and embrace change is an important dimension to the research into the effectiveness of child protection policies. For the work with the Football Association Brackenridge *et al* developed and applied the idea of "Activation States":

> The term 'Activation States' was adopted to indicate the level of activation of each stakeholder group towards CP (child protection) in football. Five states were identified:
> Inactive i.e. demonstrating no knowledge or commitment to CP
> Reactive i.e. demonstrating reluctant commitment and engagement.
> Active i.e. demonstrating satisfactory awareness and involvement.

65 Department of Education 13.
66 *Idem* 14.

> Proactive i.e. demonstrating full commitment and advocacy.
> Opposed i.e. either overtly critical of, or covertly against, the CP initiative.[67]

The essence of this model is that it provides a framework to measure individual perspectives on child protection but also to draw out inconsistencies, For example someone involved in running of a sports team may be active in recognising the issue of child protection but failed to have contributed and accordingly be considered inactive. This multi-layered approach permits a more intensive interrogation of the strengths and weaknesses that may exist within organisations.

The 2011 review hints at the outset how the problem could be re-considered:

> Responsibility for protecting children and vulnerable adults sits with individuals, their families, the wider community, employers, service providers and regulators as well as Government and Parliament, where the overarching legislative framework is set for any national systems of public protection.[68]

What is missing from the remainder of the review's analysis is the role of parents and other adults within the community. Those best placed to judge the behaviour of coaches are the athletes themselves and the parents of all those in the coach's care. Unfortunately sport may be seen by some as a form of cheap child minding enabling the parent to drop off the child and return at the end of the session. This point is well made by Norman Brooks a former national athletics coach who questions why parents are prepared to leave their children without making sufficient checks.[69] What is not clear is whether parents would take more care if the raft of child welfare policies were not in place. Put crudely, does knowledge that there is a regime of "protection" reassure parents to the extent that they do not carry out their own fundamental checks to ensure their child is safe. At the most simplistic level this would involve remaining at the training session or match and sharing experiences with other parents. The over emphasis on checks may also lead to parents ignoring other "means" of ensuring that a child is safe.[70] However this critique goes beyond the individual relationships to the broader message that a national vetting scheme communicates:

> The implementation of a national vetting scheme directly challenges positive assumptions about the relationship between adults and children that until recently were taken for granted. The demand that adults be licensed before they can engage with children signals the sentiment that it should no longer be presumed that adults will have a positive, protective influence upon children.[71]

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67 Brackenridge, Pawlaczek, Bringer, Cockburn, Nutt, Pitchford & Russell "Measuring the impact of child protection through Activation States" 2005 *Sport, Ed and Society* 247.
68 Department of Education 6.
69 Downes "Every Parent's Nightmare" *Observer Sport Monthly* 2002-04-02.
70 Furedi & Bristow *Licensed to Hug* (2008).
71 *Idem* 26.

The balance of the relationship between adults and children is clearly an important consideration for those countries that are developing policies in this area. This goes beyond both the need to encourage volunteers and the sporting environment. The UNICEF policy noted above suggests an increasing role for government, in countries such as South Africa, when sport develops greater importance. It can also be the case that government can drive the agenda to promote sport through legislative intervention. This is acknowledged by the SRSA *White Paper* observing that to give effect to its proposals "it may be necessary to amend and/or promulgate further legislation".[72] One aspect of a new regulatory framework is the enactment of a Code of Conduct outlined in the *White Paper* and the *National Sport and Recreation Strategic Plan 2011*. A key element of the Code relates to abuse: "the South African sport sector should also deal with the issue of sexual harassment and abuse in sport".[73] Duffy also notes that the need for "policies relating to child protection and police clearance" were raised in an audit of coaches.[74] Clearly there are both external and internal pressures on South African sport to address issues around child protection and there needs to be debate as to what these policies should be. As part of this discussion South African schools and clubs need to consider how to effectively harness parents and other volunteers, many of whom already play a significant role in school governance. Training and education of parents is an important aspect in the framework to promote sport and protect children.

6 Conclusion

Sport in the UK has had to face up to a serious situation that attacked its very core values. Although it might be argued that these were isolated incidents in certain sports it was apparent that there was a paucity of formal mechanisms to discover, record and investigate instances of abuse. So in actuality the degree of the problem was unknown. There has undoubtedly been a transformation in the last twenty years that has sought to recognise the potential seriousness of the issue and instigate a change of culture from general indifference to one of realisation and action. Governing bodies now have a raft of policies and procedures that are designed to safeguard children. These though have to be delivered at a local level which further strains limited resources and the potential effect of such measures on the volunteering culture is largely unknown. Conversely evidence needs to establish whether the protective regime also deters those viewed as unsuitable. It is of course possible that the child protection measure neither deters good volunteers nor the unsuitable. As Nichols and Taylor[75] observe "research evidence is

72 SRSA *op cit*.
73 *Ibid* 51-52.
74 Duffy *South African Coaching Framework: Scoping Report* (2010) 25.
75 Nichols & Taylor 36.

necessary to inform changes in the legislation and development of policy to support sports clubs".

Contemporaneously the role of the Social Services has come under the spotlight because of several tragedies and this has produced an increasingly rigorous legislative framework on the back of numerous Government initiated inquiries. It is clear from the current changes that this Government doesn't view legislation as the most effective tool to keep children safe but as one of a series of measures. This policy transformation can be set against a wider Government agenda of a reduction in the role of the State and the adoption of Prime Minister Cameron's "Big Society" idea. Promotion of a volunteering culture within community led initiatives clearly falls squarely within this concept.

Greater research and analysis of the problem is required to identify successful strategies and these may need to be tailored to individual circumstances. The most recent and comprehensive report of children's experience of participating in sport was carried out between 2007 and 2010. One of the principal aims of the work was to inform sports governing bodies of the issues, "enabling them to more effectively target policy, resources, training and support".[76] It paints a largely positive picture of children's involvement in sport but that "sitting alongside the considerable benefits of participating in sport were a range of more negative and harmful experiences".[77] It is important that harmful behaviour is identified and acted upon whatever the source. The key is to find the suitable vehicle to change behaviour and practices in order that policy goals around sport can be fulfilled and children protected.

For countries with a less developed regulatory framework of sports governance there will be the initial need to recognise the problem and then establish an appropriate protective regime. The *UNICEF Report* proposes the development of a Code of Conduct "framed by child rights" and such rights would need to be articulated and legislated for. Once established for such rights to be effective an effective reporting system for abuses would have to be established. As the *UNICEF Report* suggests, "every country should identify a designated authority with responsibility for child protection in sport".[78] Countries, such as South Africa, will have to consider what type of authority and framework will work best within its own cultural and sporting framework. Meanwhile for the UK a fundamental issue is to consider how the legislation needs to be

76 Alexander, Stafford & Lewis *The Experience of Children Participating in Organised Sport in the UK* (2011) 6.

77 Alexander et al 94-95. There is insufficient room in this article to go into detail of the results but the size and recent nature of the survey stress its importance and it identifies some broader issues: "One of the main findings from this research relates to children's experiences of sports as they move into and through puberty. Information from other fields of study is beginning to document the extent to which young people, girls in particular, are preoccupied with weight, look and appearance. This study highlighted the way these preoccupations play out in sport".

78 UNICEF 27.

incorporated, as part of a wider structure, with responsible parents at the centre. The need to involve and align the wider community with a dynamic and positive sporting culture for children is a fundamental challenge for all countries.

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