

**JM Reyneke**  
University of the Free State  
reynekej@ufs.ac.za

**JL Pretorius**  
University of the Free State  
pretorjl@ufs.ac.za

DOI: <http://dx.doi.org/10.18820/2519593X/pie.v35i1.9>

ISSN 0258-2236

e-ISSN 2519-593X

*Perspectives in Education*

2017 35(1): 112-128

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# Aligning school discipline with the best interests of the child: Some deficits in the legislative framework

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## Abstract

*The best-interest-of-the-child concept should guide the legislative framework with regard to the approach followed as well as the disciplinary processes used in schools. Currently schools revert mostly to a retributive and adversarial approach to discipline that is not compatible with the best-interests-of-the-child standard. In this article, the provisions of section 8 of the Schools Act are scrutinised and it is concluded that these provisions are supporting an adversarial and punitive approach to school discipline. This is evident from the lack of prescriptions ensuring that sanctions serve the best interest of children, the insufficient provision for support measures and structures for counselling, the undue focus on the best interests of the transgressor and the lack of guidance concerning the appointment of an intermediary. The introduction of restorative discipline as an alternative approach to discipline is recommended. The latter approach is recommended, because it is submitted that amendments to the existing legislative provisions would not address the key objection to the legislative framework namely its retributive and adversarial character.*

**Key words:** *adversarial, retributive and punitive discipline; best interests of the child; restorative discipline; school discipline; support measures and structures for counselling.*

## 1. Introduction

The Constitution of the Republic of South Africa, 1996 (“Constitution”) provides, in section 28(2), that a ‘child’s best interests are of paramount importance in every matter concerning the child.’ In line with this injunction, the new Children’s Act 38 of 2005 (“Children’s Act”) and the Child Justice Act 75 of 2008 have developed a clear focus on the best interests of the child. In addition, several Constitutional Court judgments, in particular, *S v M* 2007 (2) SACR 539 (CC);<sup>24</sup>, elevated the best interests of the child to a constitutional right and have emphasised the need to give focused attention to these interests in all matters concerning the child. (See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC); par 17-18; *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC);par 41; *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC);par 29; *De Reuck v Director of Public Prosecutions, Witwatersrand*

*Local Division, and Others* 2004 (1) SA 406 (CC):432; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC):par 22).

One might argue that heeding this principle is nowhere more crucial than in constructing and implementing the school discipline regime. However, as will be shown, the same vigorous adherence to the best-interests-of-the-child constitutional obligation present in other child-related contexts, is not as conspicuous in the legal framework governing school discipline, in particular the South African Schools Act 84 of 1996 ("Schools Act").

## 2. Problem statement and aim

Discipline in the school educational setting should be understood as part of a teaching and learning process with two distinct aims. These are to create an orderly environment conducive to teaching and learning to enable the holistic development of every learner and to teach learners to behave in a socially responsible manner and to develop self-discipline, which ultimately, will result in respect for the rights and needs of others (*United Nations Convention on the Rights of the Child*, a 29; Hanberry 2009: 18; Reyneke, 2013:47). Not only should all disciplinary measures achieve the abovementioned two aims of education, but as noted above, they should also meet the constitutional imperative that the child's best interests are of paramount importance in every matter that concerns the child (Constitution, 1996: s 28[2] and [3]).

Despite several amendments to the Schools Act, it still suffers from serious defects when measured against the child's best-interests standard. In particular, this is evident from the lack of explicit prescriptions ensuring that disciplinary sanctions serve the best interests of the child; insufficient provision for support measures or structures for counselling; a narrow focus on the position of the transgressor; insufficient regulations to ensure the effective use of an intermediary during disciplinary hearings and failure to provide for exemption procedures.

It will be argued that the above-mentioned defects ultimately stem from the fact that the school discipline regime is still essentially legislatively premised and practically enforced in the majority of South African schools from a retributive (or punitive) perspective and in terms of an adversarial process. (Burton, 2008:28-30; De Wet, 2003:116; SAHRC, 2008:13; Wolhuter & Van Staden, 2008:396).

The aim of this article is to highlight the shortcomings of the existing provisions of section 8 of the Schools Act and to recommend further amendments to align the Schools Act properly with the latest constitutional imperatives and developments related to the best-interests-of-the-child standard. In particular, the advantages of approaching school discipline from a restorative justice perspective will be considered. The need to address the current defects and to find non-retributive alternatives is also highlighted by research that indicates how current punitive measures actually increase aggressive and other forms of unacceptable behaviour in schools (Gonzales, 2011; Ofer, 2011; Sprague, 2014).

The background theoretical framework will be drawn from recent conceptualisations of transformative constitutionalism. The analysis will rely on a literature study focusing mostly on the provisions of the Constitution, section 8 of the Schools Act and case law where appropriate. After explaining the notion of transformative constitutionalism, a brief indication of the conceptual contours of the best-interest-of-the-child right will be given. The retributive

and adversarial features of the school disciplinary process will then be elucidated. Thereafter, the most important shortcomings of the legislative framework, when measured in terms of the best-interests-of-the-child principle, will be identified. In short, these shortcomings relate to aspects of the discipline regime that do not fully respect, protect, promote and fulfil learners' right to education, dignity, equality, personal security, education, social services and fair administrative action. In order for the law to be able to play its full part in addressing the multiple issues related to school discipline, the defects in school legislation need to be suitably remedied. In the concluding section, we indicate, in broad terms, a different approach to school discipline that could address most of the structural deficits of the current retributive and adversarial disciplinary system.

### 3. Conceptual framework

Hailbronner (2017: 2) indicates that there is a multitude of versions of the notion of transformative constitutionalism, but it is generally accepted that Karl Klare did the ground breaking theoretical work. He defined transformative constitutionalism as follows:

*By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connoted an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. (Klare, 1998: 150)*

Former Chief Justice Pius Langa linked the concept with the Epilogue of the Interim Constitution, which depicts the Constitution as a normative roadmap to lead

*a deeply divided society characterised by strife, conflict, untold suffering and injustice, ... [to] a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. (In Langa, 2006: 352)*

The Epilogue highlights the ideal that the Constitution is the beacon of hope and ultimate benchmark to address the injustice of the past, to heal the nation and to give guidance on how to secure a better future. Transformative constitutionalism encompasses the notion that the Constitution should play a determinative role in bringing about fundamental social and political change to improve the lives of people. (Hailbronner, 2017:7). Transformative constitutionalism captures the reality that transformation is a continuing process to define, refine and improve on the goals and imperatives set by the Constitution (Langa, 2006; 354; Hailbronner, 2017: 7). There will always be something more that can be done to respect, protect, promote and fulfil human rights even further. The state is obliged to play an active role in this process. For present purposes in particular, the notion of transformative constitutionalism requires reflexion on the transformative implications of the best-interests-of-the-child standard, captured in section 28(2) of the Constitution, for current school discipline laws and practices.

Transformative constitutionalism aims at establishing a society firmly rooted in the democratic values of human dignity, the achievement of equality and the advancement of human rights and freedoms (Constitution, 1996: s 1[a]). It also aims to ensure that there is a move away from "a culture of authority" to a "culture of justification – a culture in which

every exercise of power is expected to be justified” in terms of these founding values of the Constitution (Langa, 2006: 353). This justificatory burden applies to the decisions of all those who exercise authority in the educational setting, from the legislature, executive and judiciary to the functionaries of a particular school (Constitution, 1996: s 8[1] and [2]).

This implies, as Langa (2006: 357) indicates, that to give proper effect to the demands of transformative constitutionalism, one should realise that:

*At the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that informs laws themselves and judicial reaction to those laws. Purely formalistic reasoning tends to avoid that responsibility.*

It is therefore imperative to investigate the underlying principles or philosophies that underpin the existing legal provisions and practices with regard to school discipline, in particular the still prevailing retributive and adversarial nature of the disciplinary process. It will be argued that although not all the shortcomings of the school disciplinary system, when measured against the best-interests-of-the-child standard, cannot be attributed to it, the retributive and adversarial nature of the disciplinary process is a core contributory factor. Before the detail of the shortcomings is discussed, it is necessary to briefly consider the best-interest-of-the-child standard.

#### **4. The best-interest-of-the child standard**

Although it is impossible and undesirable to define the best interests of the child precisely and exhaustively, it can be useful if it is attributed some core meaning. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC): par 73 the court held in this regard:

*It is, as we put it in Sonderup, “an expansive guarantee” that a child’s best interests will be paramount in all matters concerning the child. This provision thus imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and the protection of children.*

The approach followed by the courts thus far in adjudicating matters involving the best-interests-of-the-child is in line with the principle that all constitutional rights are mutually interrelated and interdependent and form a single constitutional value system (*De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC):432; *S v M* 2007 (2) SACR 539 (CC): par 26).

The interrelatedness of the best-interests-of-the-child concept and the right to education is explained by the Constitutional Court in *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae* 2011 (8) BCLR 761 (CC) . The court found that the closure of a public school located on private property owned by a trust is unconstitutional despite the fact that the Department of Education failed to pay rent for the use of the private facilities. The court held that the closure of the school must be postponed until every child in that school was admitted to another school, since closure of the school would infringe on the learners right to education and is not in their best interests. The children’s best interests had to be given preference to the property rights of the trust.

Section 8(1) of the Children's Act makes provision for additional children's rights that are not contained in the Constitution. These rights supplements the constitutional rights contained in section 28 of the Constitution. One of these rights is the child's right to participate in proceedings where decisions will be taken that will affect the child (Children's Act: s 10). In *MEC for Education, KwaZulu-Natal v Pillay and Others* 2008 (1) SA 474 (CC) the court emphasised the importance to prepare the child for responsible adult life and respect for human rights by expecting learners who want to be exempted from school rules to motivate why they should be so exempted. In this case the court also highlighted the importance of children's right to dignity, non-discrimination, the right to be heard as well as their right to practice their religion. The same sentiments are found in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC), where the Constitutional Court held as follows with regard to the role of Constitutional values in the interpretation of section 28(2):

*Section 28(2) must be interpreted so as to promote the foundational values of human dignity, equality and freedom. These founding values are given effect to in the Bill of Rights, which is the cornerstone of our constitutional democracy. Section 28(2), which is part of the Bill of Rights, protects the dignity of the child and advances the child's equal worth and freedom by proclaiming that "[a] child's best interests are of paramount importance in every matter concerning the child".*

Although the Constitutional Court therefore often refers to other constitutional rights when considering whether a specific decision, conduct or provision is in the best interests of the child, there are also instances where the courts interpreted section 28(2) of the Constitution as a self-standing right. This means that even if the courts do not refer to any of the other rights in the Constitution, it can still find that conduct, decisions or legislative provisions are unconstitutional by simply finding that it is not in line with the best-interest-of-the-child standard.

## **5. The retributive and adversarial nature of school disciplinary processes**

The retributive approach to wrongdoing or crime has its roots in ancient history and Biblical times where people lived by the maxim 'an eye for an eye and a tooth for a tooth' (Fish, 2008; Gerber and Jackson, 2013: 62; Collica-Cox and Sullivan, 2017:43). Individuals were responsible to seek their own justice. From about the eleventh and twelfth centuries the State started to intervene and notions such as settling scores, revenge, vengeance, retaliation were tempered with the development of ideas such as proportional punishment and just deserts. In ancient times, the focus of the justice process was to ensure that the individual receives justice. The focus was thus on the victim of the wrongdoing. However, as the state's role in the justice process increased the focus gradually moved from the needs and interests of the victim to the transgressor (Redekop 2008; Fish 2008; Bedau, 1978). During the inception of this transition from focusing on the victim to focusing on the transgressor, the state only assisted individuals in the justice process by providing investigation services. Later the services of an independent third party were made available to give impartial judgements only when community members brought their claims to the courts. However, over time, this changed and eventually courts could act on its own accord without complaints being received directly from community members (Redekop, 2008). As state power increased, the needs and interests of the victim decreased even further in the criminal justice process and crime or wrongdoing was considered a crime against the king or state (Redekop, 2008).

The state thus inserted itself into the adversarial process where the parties to wrongdoing no longer were in a position to resolve their own conflicts or have the harm done addressed in a way that focused on the needs and interests of the victim. Ultimately, the State took full control of the criminal justice process by making the laws, enforcing the laws, investigating crimes and eventually presiding over the proceedings in a formal trial and sentencing proceedings in a court. Sentencing takes the form of some punishment so that transgressors can pay their dues to society. The state decides not only who is guilty of what, but also what would constitute a reasonable punishment for breaking the rules (Margrain & Macfarlane, 2011:19). To address wrongdoing against members of the community thus became institutionalised and it is up to the State to decide on the process and the outcome

The retributive approach used by the state to deal with crime became part of the way wrongdoing is addressed in other spheres of life as well. This historically ingrained system is in most instances also used by parents and by schools to maintain discipline. In this context, the retributive approach is premised on the idea that in order to learn from their mistakes and to be taught respect for rules children need to be punished consistently (Collica-Cox and Sullivan, 2017:44). Other terms normally associated with this form of school discipline include “punitive discipline” (Oosthuizen, Wolhuter & Du Toit, 2003:469-470); “corrective discipline” (Joubert & Prinsloo, 2008:107); and “authoritarianism” (Reyneke, 2013). It displays clear parallels with the traditional punitive aims of punishment found in the criminal justice system namely retribution, revenge, deterrence and rehabilitation. General features of a retributive approach to discipline include authoritarianism, dominance, control, and power relations. This is evident from the powerful position educators hold and are in a position where they can make the school or classroom rules on their own without consulting learners, decide who transgressed the rules and what an appropriate punishment will be. Since they are in a position of authority, they can control the whole discipline process. Actions against transgressors are reactive in nature, focusing on establishing guilt for the breach of school rules, with the conventional aims of punishment guiding the imposition of penalties (Aull, 2012:179-180; Bloomenthal, 2011:303-304; Morrison & Vaandering, 2012:140).

Toews (2006:17) and Hanberry (2009:16) summarises the retributive approach by stating that it focuses on the following three questions: Which rule was broken? Who broke it? What is an appropriate punishment for breaking the rule? The needs and interests of the victims or those harmed by the misconduct are not included in the primary focus of the process.

These retributive roots is clearly visible where disciplinary hearings are held by the school governing body (SGB) or its disciplinary committee in terms of section 8 of the Schools Act.

Although some schools have also implemented positive disciplinary measures, once a learner commits an act of serious misconduct, formal disciplinary proceedings will normally follow. The SGB is responsible for conducting disciplinary proceedings in instances of serious misconduct. These proceedings must comply with strict procedural prescriptions, focusing on the rules of natural justice, administrative fairness, strict time frames, and on prescriptions as to how to conduct a hearing (Hopkins, 2002:145). Sections 8 and 9 of the Schools Act envisage that these disciplinary proceedings will be adversarial in nature because the terms typically used in an adversarial criminal court context are used to depict the key features of the process. These include: “witness”, “testify”, “evidence”, “examination, cross-examination and re-examination”, “fair hearing”, “found guilty”, and “appeal against a decision”. A provision, similar to that of the *Criminal Procedure Act* 51 of 1977 concerning the appointment of an



intermediary is also included. This reinforces the impression that these proceedings are very similar to court procedures.

In recognition of the fact that disciplinary proceedings are substantially adversarial in nature, the legislator added and refined some protective measures in 2002 through the *Education Laws Amendment Act 50 of 2002*, and in 2007 through the *Education Laws Amendment Act 31 of 2007*. The aim of the amendments was to assist and protect learners involved in disciplinary proceedings. However, this did not change the retributive nature of the process, as will become more evident in the discussion that follows. The analysis will inform the conclusion that the existing provisions of the Schools Act are not in the best interests of children.

## **6. Lack of prescriptions ensuring that sanctions serve the best interests of the child**

The educational deficits of a disciplinary process with a mainly punitive focus are nowhere more clear than in the non-alignment of sanctions with the constitutional best-interests-of-the-child standard. Despite strict procedural prescriptions regarding the suspension and expulsion of learners, there are no provisions as to what should happen to the learner while he or she is suspended or awaiting expulsion. (Cf Schools Act: s 9) In practice, this will mean that suspended learners or learners awaiting the decision of the MEC on their expulsions will not be attending school, but will be legally staying at home. No legislative prescriptions state that these learners should attend; for instance, anger management classes or counselling sessions. Thus, they are out of school for some time, and then where applicable, return to school, the same school or to another school without any obligatory intervention to address the underlying problems or to enhance their best interests.

Without any rehabilitation programmes attached to the suspension, the latter can only be regarded as purely authoritarian, punitive and retributive in nature. The underlying premise is that improper behaviour at school deserves being excluded from the school society. It is reminiscent of the retributive criminal justice system where offenders are removed from society when sentenced to jail. The exclusion from society and the accompanying stigmatisation should then deter criminals from reoffending. The only difference is that prisoners are exposed to rehabilitation programmes while they are incarcerated. When suspension is not attached to adequate rehabilitation or support programmes, it serves only to punish transgressing learners. Troubled children need help, yet what the law requires and what is offered in practice - as we shall show in the next section - are distressingly inadequate. (Cf Braithwaite, 2002: 565-567; Mujuzi, 2003: 166-169)

The same applies to instances of a less serious nature where formal disciplinary proceedings are not held. The Schools Act deals only with the drafting of the code of conduct, formal disciplinary hearings, search and seizures, the suspension and expulsion of learners after serious misconduct, and the prohibition of corporal punishment. There are no legislative provisions regarding informal discipline in schools, except that the SGB is responsible for the drafting of the code of conduct after consultation with various stakeholders. Since most educators are still inclined to apply a punitive and retributive approach to discipline, the question arises whether this approach is in the best interests of learners and therefore, whether they live up to the constitutional standard. Learners are often sent out of class, put in detention, compelled to do community service, do additional homework or have other forms

of punishment imposed without the underlying reasons for the misconduct being addressed. (Burton, 2008:28-30; De Wet, 2003:116; SAHRC, 2008:13; Wolhuter & Van Staden, 2008:396). A retributive approach to discipline is not in line with the child's best interests and is also not in line with the right to a basic education and the aims of education as contained in the United Nations Convention on the Rights of the Child (CRC), (1989). In terms of section 28 of the CRC, State parties have an obligation to ensure primary education that is compulsory and free and are encouraged to develop and make secondary and higher education available and accessible. Section 29 of the CRC provides the aims of education and it is clear from section 29(1) that the holistic development of the child is a primary consideration. Section 29(1) (b)-(e) focuses on the child's relationship with others. In essence, children should be taught to respect the human rights of others and should be adequately prepared for responsible adult life (Reyneke, 2013: 286-289).

The CRC, article 29 makes clear that the aims of education are much broader than the mere attainment of academic skills; it also explicitly requires State parties to ensure that children are taught acceptable social behaviour. To act in a socially acceptable manner is a social skill that must be taught. To punish children for not acting accordingly, without a concerted effort to integrate the teaching of acceptable behaviour into the same process, is to disconnect the disciplinary proceedings from the broader aims of education (Reyneke, 2013:286-289). Furthermore, the failure to remove barriers to learning proper social skills through adequate support structures and measures for counselling is to deny children their right to education. Any disciplinary measure must be measured against the aims of education and if those measures do not contribute towards the holistic development of the child and teach the child to act in a socially acceptable way, it is merely punishment and therefore not acceptable. It is thus necessary to find alternative measures to deal with school discipline that are in line with learners' right to education and in their best interests (Reyneke, 2013:286-289). The inadequacy of the existing provisions of the Schools Act to attain the abovementioned goals of education and discipline is further highlighted by the insufficient provision for support measures or structures for counselling in the legislation.

## **7. Insufficient provision for support measures or structures for counselling**

Section 8(5)(b) of the Schools Act does prescribe that the code of conduct must make provision for "support measures or structures for counselling a learner involved in disciplinary proceedings". Although this section ostensibly addresses some of the concerns raised in the previous section, and appears to heed the provisions of section 28(1)(c) of the Constitution regarding children's right to social services, it is still not fully compliant with the best-interests-of-the-child standard. Close scrutiny of the abovementioned section of the Schools Act reveals several flaws namely:

Firstly, there is some uncertainty with regard to the question whether "a learner" refers to the transgressor only or to other learners involved in the disciplinary proceedings. Other learners that might be involved in disciplinary proceedings are, for instance, witnesses or the complainant.

Secondly, the obligation to provide for support measures or to provide counselling structures "for learners involved in disciplinary proceedings" is technically applicable only to instances of serious misconduct because a disciplinary hearing is held only in such instances.



(Schools Act: s 9(1)-9(1)(A)) This is cause for concern because support measures and counselling structures are essential in the prevention of misconduct. Thus, learners have to misbehave before legislation requires the SGB to ensure that these services are available. In addition, it also only makes provision for learners *involved* in the disciplinary proceedings. This implies that these services are compulsory only for those learners who are part of the disciplinary process and do not include learners who are not directly involved in the disciplinary proceedings, but who are affected by the misconduct. Apart from being discriminatory, this is an infringement of the rights of child victims and third parties to have their best interests respected and protected, and, most importantly, promoted through support and counselling (Constitution: s 28(1)(c)).

Thirdly, although it is laudable that the code of conduct must include provisions regarding support measures or structures for counselling a learner involved in disciplinary proceedings, no guidelines are provided to indicate the extent of the required support measures or structures for counselling. "Extent" here refers to the nature of the intervention; for example, support by a life-orientation educator only or the appointment of a full-time professional counsellor. Since the extent of available support measures or structures for counselling is at the discretion of the SGB, the door for decisions that might not be in the learner's best interest is inevitably opened.

Fourthly, the Act provides no indication of what types of training and expertise are required before counselling can be provided for learners (Cf Social Service Professions Act 110 of 1978; Health Professions Act 56 of 1974). Interventions by lay people might not be in the best interests of learners and might even be detrimental to them.

Fifthly, the word "or" is used. Thus, provision for either support measures or structures for counselling are compulsory. If the SGB decides to provide support measures, but counselling is required in a specific instance, will support measures suffice? In addition, who should provide the support or counselling? If educators should provide it, are they properly trained for these purposes? Counselling structures should probably also include access to the services of professionals. To what extent, therefore, will the SGB be responsible for providing support measures or counselling services in the code of conduct if such measures or services are not readily available, for instance in rural areas? (Cf *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC)).

Sixthly, although a SGB might be in favour of support measures or structures for counselling, financial constraints and the scarcity of skilled people and proper structures to provide counselling might have a negative impact on the provisions eventually included in the code of conduct. In view of these practical problems, the SGB might include only the most basic of support measures in the code of conduct. However, these measures might not suffice to address the needs of the learners and thus be inadequate to promote their best interests. This raises the question of the responsibility of the state, and of provincial departments of education in particular, to ensure that the necessary support measures and structures for counselling are available. Apart from the fact that the lack of these will not be in the best interests of the learners of a particular school, such a lack of support measures and structures for counselling are also a form of unfair discrimination, because essential support measures and counselling structures might be available to some children only (Constitution, 1996: s 9).

Matters are further complicated by the provisions of section 28(1)(c) of the Constitution, which states: "Every child has the right to basic nutrition, shelter, basic health care services and social services." Unlike other socio-economic rights, this section does not provide that the

child has a right to “access”, but that she or he has a direct right. In addition, these rights of children are not subject to the progressive realisation criterion applicable to socio-economic rights generally. Furthermore, children are the only vulnerable group that has an explicit constitutional right to social services (Cf Constitution, 1996:s 26-27). Yet, it should be kept in mind that despite the lack of internal qualifiers regarding the availability of resources and the progressive realisation of rights found in other socio-economic rights provisions, this right is still subject to the reasonable and proportional limitation of rights found in the limitation clause (Constitution, 1996:s 36). However, if rights cannot be reasonably limited “the absence of any internal limitation entrenches the rights as unqualified and immediate” (*Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T):227).

This raises a number of questions: What do social services comprise in general, and in the school disciplinary context in particular? Which social services must be guaranteed by government to ensure that every child is in a position to enforce this right in the school disciplinary context? Are the departments of education at liberty to require schools to provide social services for learners, without financial assistance, in order to shoulder this responsibility of the state?

## 8. Narrow focus on the position of the transgressor

A retributive approach to misconduct and the implementation of an adversarial process to deal with it inevitably leads to a focus on the transgressor. The primary aim is to find the transgressor guilty and to punish him or her accordingly (Hopkins, 2002:145-149). However, misconduct also influences the best interests of victims of, and third parties to, misconduct. (Hansberry, 2009: 17) An overly narrow focus on the transgressor can constitute an undue dilution of the constitutional obligation to respect, protect, promote and fulfil the best interests of all the children concerned in a matter (Cf *Head of Department, Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC):par 80).

The only explicit reference to the interests of other parties involved in disciplinary proceedings is to be found in section 8(5)(a) of the Schools Act, which deals with their due-process interests. The provision distinguishes between the transgressor and “other parties”, but does not distinguish between the interests of adult “other parties”, such as educators, or children as “other parties”. One would expect there to be a difference between the levels of safeguarding the interests of children as opposed to the interests of adults. In addition, the paramount-importance requirement is applicable only to children and not to adults (Constitution, 1996:s 28(2)&(3)).

The impact of undisciplined conduct on other learners is often ignored or underplayed and should be properly considered in disciplinary measures to ensure that the best interests of all the learners are served. Failing to consider the best interests of the victims of and third parties to misconduct also constitutes an infringement of their right to equality and their right to dignity. (Constitution, 1996:s 9-10). The best interests of all children are equally important. However, the existing legal framework does not explicitly direct decision-makers accordingly, thereby risking an overemphasis of the best interests of the transgressing learner to the detriment of other children.

The interests of non-transgressor parties are only acknowledged in a limited sense in section 8(5) of the Act. It requires the code of conduct to contain provisions of due process safeguarding the interests of the transgressor and other parties. “Due process” here refers to

procedural due process, which concerns the application of fair procedures. Substantive due process refers to the appropriateness and fairness of rules (Joubert & Prinsloo, 2008:130). This section thus only ensures that a fair process is followed. It does not explicitly oblige the SGB to ensure that all the other interests of all the learners in the school are also safeguarded and treated of paramount importance during the disciplinary proceedings.

## 9. The role of the intermediary

The way in which the Act fails to compensate for the adverse effects of the adversarial nature of the school disciplinary process, is also evident in the inadequate provision made for the protection of child witnesses in this context. Section 8(7) of the Schools Act provides that if a child under the age of 18 years will be exposed to undue mental stress or suffering while testifying at disciplinary proceedings, the SGB “may, if practicable, appoint a competent person” to act as an intermediary. However, a Constitutional Court judgement explicitly pronounces on the unacceptability of exposing children to mental stress and suffering during court proceedings (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC)).

Research pertaining to the impact of the criminal justice system on child witnesses and child victims of crime indicates that being a witness and/or a victim in an adversarial system could be very traumatic for a child. In addition, children often find it difficult to articulate their case (Cassim, 2003:70-72; Clark, Davis & Booyens, 2003:43-44; Hollely, 2002:14-15; Müller, 2003:2-9.). Different factors, such as language development, suggestibility, age and developmental stage, the child’s personality, and the trauma caused during the incident play a role in the quality of the evidence provided by a child. Expert knowledge is therefore necessary to elicit, understand and interpret the evidence of a child, especially that of younger children exposed to traumatic experiences (Louw, 2004a:3-15; 2004b:16-24; 2005a:19-28; 2005b:18-27). Therefore, special measures, such as the appointment of an intermediary were put in place in the criminal justice system to support and assist the child during a trial and to prevent secondary victimisation as far as possible (Cf Criminal Procedure Act 51 of 1977, s 170A[1]: evidence through an intermediary; s 153: in camera proceedings; s 158[5]: use of closed-circuit television or similar electronic media; and s 164[1]: oath and affirmation. See also Cassim, 2003:70-72; Hollely, 2002:14-15; Davis & Saffy, 2004:17-23 on the effectiveness of court-support and court-preparation measures).

It is clear from case law (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC); *Klink v Regional Court Magistrate NO and Others* 1996 (3) 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]) and criminal law regulations (GN R 1374/1993; GN R597/2001) that the appointment of intermediaries is a complex matter with several constitutional implications, and should therefore be properly regulated. Yet, there are no regulations with regard to the appointment, qualifications, experience, duties or training of intermediaries in the context of school disciplinary proceedings. Even more alarming is the fact that properly trained legal experts adjudicate the appointment of intermediaries in the criminal justice system, while these decisions are left to lay people in the school disciplinary context, without any guidance

from the legislator. The best interests of children are therefore clearly at risk and the legislator should therefore follow the guidance provided by the courts in the abovementioned cases to align the Schools Act with the constitutional imperatives.

Another worrying aspect of the provision is that an intermediary may be appointed “if practical”. This opens the door for discrimination against learners in, for instance, rural areas where there are fewer professionals available (Cf Constitution, 1996:s 9). Teachers and former teachers can act as intermediaries in terms of the criminal law regulation. Thus “professionals” will be available, but the impracticality lies in the fact that they will probably not be appropriately trained to act as an intermediary. Apart from the lack of training, there are also no guidelines to assist educators on what is expected of them in such a situation. The absence of a closed-circuit television (CCTV) system or a one-way mirror can also make it futile to use an intermediary (Reyneke & Kruger, 2006:87-89). No child should be exposed to undue mental stress and suffering while testifying. Nevertheless, the legislation and regulations do not make any provision for ensuring that this is practicable. Overall, this result flies in the face of the principle established by the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC): par 44, that substantive equality requires responsiveness to differing degrees of deprivation in devising measures to realise access to resources. The most vulnerable and those who suffer the worst forms of deprivation should therefore be a special focus of such programmes.

## 10. Lack of exemption provisions

The retributive approach is characterised by authoritarianism and strict adherence to rules. In contrast to this position, the Constitutional Court found in *MEC for Education, KwaZulu-Natal v Pillay and Others* 2008 (1) SA 474 (CC) that a one-size-fits-all approach to school rules is not compatible with the right to dignity since this right entails that one should be allowed to be who you are. Learners should therefore be allowed to apply for exemption from school rules if those infringe on their dignity or religious rights. It should be noted that the court requires these learners to motivate why they want to be exempted, not to punish them but to assist decision makers and other learners to understand their specific needs and beliefs. By allowing learners to express themselves during such an exemption process, learners’ right to participate in decisions that affect them is also given effect to. The Schools Act does not make provision for any exemption regarding adherence to school rules. On the contrary, section 8(4) of the Schools Act provides that: “Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.”

The *Pillay* case was decided in 2008 and the Schools Act was amended in 2011, but the legislator failed to use the opportunity to bring the Act in line with the prescriptions of the Constitution. The legislator therefore missed an opportunity to adhere to the precepts of transformative constitutionalism and failed to promote and fulfil children’s best-interests right.

## 11. Restorative discipline as an alternative

Despite attempts by the legislator to move away from a punitive and retributive disciplinary system, the legislation and the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (“Guidelines”) do not really provide proper guidance on what an acceptable alternative to a punitive system should look like. Furthermore, the examples of acceptable disciplinary measures provided in the Guidelines (Cf par 10 of Guidelines) are still punitive in nature, and formal disciplinary proceedings are also very

adversarial in nature. Legislation and the Guidelines should be more instructive as to what would constitute alternative disciplinary measures complying with the best-interests-of-the-child standard.

We started our discussion with the argument that the punitive, authoritarian and retributive approach to discipline is at the heart of the criticism against the existing provisions of the Schools Act. It is further contended that it is possible to address some of the criticism against the legislation by way of amendments but mere amendments would not significantly alter the punitive and retributive approach to school discipline. At the most, such a legislative approach can provide only limited respect for and protection of children's rights, and only on condition that the legislation is carefully crafted and that those who are responsible for its implementation follow the prescriptions meticulously.

As an alternative, the restorative approach to discipline entails a process that appears to be more aligned with a holistic and educationally attuned conception of the best interests of the child. The idea of restorative discipline is founded on the restorative justice philosophy that provides an alternative framework to think about wrongdoing (Zehr, 2002:5). Hansberry (2009:119) defines restorative justice as follows:

*An approach to addressing wrongdoing (or conflict) that focuses on repairing harm. Unlike traditional (retributive) processes, justice is not achieved by penalizing or punishing wrongdoers, but through asking wrongdoers to take responsibility for the harm they've caused. Those harmed are asked to identify their needs. It then becomes the obligation of the wrongdoer(s) to make [an] attempt to put things right (restore) by responding to the needs of those harmed through symbolic or tangible actions.*

In the school discipline context, the same restorative principles are used to address misconduct. This approach to discipline leads to the implementation of a process which respects, protects, promotes and fulfils not only the transgressing learner's right to dignity, but also the dignity of everyone who is affected by the misconduct, such as the victim, third parties, and the educator. Unlike the retributive approach, this approach entails a process of deliberation and collaboration to find solutions to problems and to fix the harm caused by the misconduct (Hansberry, 2009: 21; Margrain & Macfarlane, 2011:19). It is also in line with children's right to participate in matters that affect them (Reyneke, 2013). The restorative approach focuses on empowering children to know how to deal with a similar situation in future. Thus, the disciplinary process becomes firmly embedded in children's right to education, which requires the holistic development of the child and specifically includes the skill to peacefully co-exist with others, to respect the rights of others and to solve conflict in a way that is compliant with the human rights of everyone involved in a matter. The restorative approach to discipline focuses on the needs and interests of everyone involved in a matter. (Hansberry, 2009: 21; Margrain & Macfarlane, 2011:19). From a children's rights perspective, it means that the best interests of all the learners will be addressed on an equitable basis. If it transpires during the restorative discipline process that some of the participants need specific social services or other forms of support, the necessary arrangements can be made to ensure access to the required support (Vaandering, 2014: 66).

In contrast to the retributive approach, where the focus is on who broke the rules and what would constitute an appropriate punishment, the restorative approach emphasises the needs and interests of all children. This approach can be summarised by asking the following questions: What happened? Who was harmed through the unacceptable conduct? How can we fix the harm done? What can we do differently when confronted with the same situation in

future? This approach clearly seeks to uncover the needs and interests of everyone involved in a situation and to address it appropriately. It is also empowering since it teaches learners how to act differently in future. (Toews, 2006:21; Hansberry, 2009: 21; Vaandering 2014:66)

This approach to discipline requires schools to introduce mutually agreed to values that will guide the conduct of all stakeholders in the school community (Toews, 2006:23). The focus of this approach is first and foremost the prevention of misconduct through explicit efforts to develop relationships among everyone in the school community. If there is any transgression the process will focus on fixing the harm caused to others. The focus of the restorative approach is thus on building, maintaining and mending relationships which aligns perfectly with a human rights culture. A human rights culture is considered to be in the best interests of all children (Sprague, 2014).

## 12. Conclusion

The Constitution should play a decisive role in transforming the South African society in general and school discipline in particular to give effect to the constitutional values of human dignity, equality and freedom and to constitutional rights, such as the right to education, non-discrimination, social services, and administrative justice. Real transformation is necessary to give effect to these Constitutional imperatives.

A school discipline system characterised by punishment, retribution and adversarial processes cannot give proper effect to the transformative aspirations of the Constitution. It is evident from the discussion that the existing legislative provisions captured in section 8 of the Schools Act should be amended to address the highlighted shortcomings. These shortcomings impact on its ability to give proper effect to children's best-interests-of-the-child right.

Most importantly, the legislator should address the problem that lies at the heart of the criticism against the legislative provisions, namely the fact that it is fundamentally retributive and adversarial in nature. An opportunity to direct educators towards measures, such as restorative discipline that will rather respect, protect, promote and fulfil the best-interests right of children should therefore be seriously considered in any amendment to the existing legislative regime.

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