



SCHOOL: COLLEGE OF LAW AND MANAGEMENT STUDIES , AT UNIVERSITY OF KWAZULU NATAL

An Examination of South African School Act 84 of 1996 in particular relevance to Discipline in Schools

By

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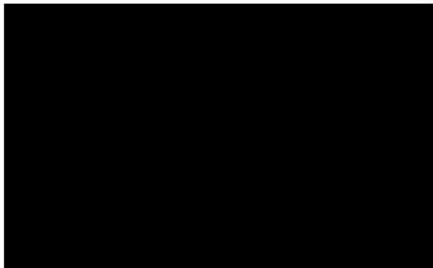
This mini dissertation is submitted in partial fulfillment of the requirements for the degree of Master of Laws in Child and Protection in the School of Law in College of Law and Management Studies at the University of KwaZulu-Natal.

THE 12TH OF JULY 2024

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LIST OF ABBREVIATIONS

ACRWC	African Charter on Rights and Welfare of a Child
CRC	Convention on the Rights of the Child
ECPD	Early Childhood Professional Development
MEC	Member of the Executive Council
SA	South Africa
SACE	South African Council for Educators
SASOP	South African Society of Psychiatrists
SGB	School Governing Body
UNCRC	United Nations Convention on the Rights of the Child
US	United States

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1 Introduction

The adoption of the South African Schools Act 84 of 1996¹ signalled the beginning of an era of concrete efforts to transform education in South Africa. This Act² recognised the achievements of democratic dispensation in South Africa and amended and repealed certain laws relating to the schooling system. The Act³ has, to a certain extent, redressed past injustices in educational provisions. South Africa previously had different education departments within the same country based on race, and the curriculum delivered was different, meaning that the country produced learners with unequal educational knowledge depending on the race of a child. The South African Schools Act 84 of 1996 was assented to on the 6th of November 1996 and became operational on the 1st of January 1997. The South African Schools Act 84 of 1996 provisions on discipline.

Sections 8⁴ and 9⁵ of the South African Schools Act 84 of 1996 deal with discipline and formal disciplinary hearings and thus lend themselves to scrutiny. Section 10⁶ deals with corporal punishment. To date, there has not been any published analysis on whether these sections of the Act have compelling principles on discipline in schools in the idea of the best interest of a child. For example, the discipline-related provisions of the Act have not been compared with other South African or international statutes involving children that are operational in achieving discipline in the child's greatest interests.

¹ South African Schools Act 84 of 1996

² Ibid

³ Ibid

⁴ Section 8. (1), Subject to any applicable provincial law, the governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents, and educators of school.

⁵ Section 9 (1), Subject to this Act and any other applicable provincial law, the governing body of a public school may after a fair hearing, suspend a learner from attending the school.

⁶ Section 10 (1), No person may administer corporal punishment at a school to learners.

1.2 Research goal

The objective of this study is to assess if the South African Schools Act 84 of 1996⁷ is explicit in delivering discipline in schools through Sections 8 and 9 and whether it is in line with the best interest of a child, according to Section 28(2) of the Constitution of the Republic of South Africa. This research will examine whether Sections 8⁸, 9⁹ and 10¹⁰ of the Schools Act are child-centred and are compliant with constitutional advancement on the best interest of a child notion based on criteria derived from operational legislation. The research will provide suggestions on how to address the weaknesses, if any, that are identified based on South African child-centred principles.

1.3 Problem Statement

The Constitution of the Republic of South Africa aims to create a cohesive, united legal system based on the fundamental principles of law that uphold the rights of every individual and uphold the democratic ideals of human dignity and equality.¹¹ All enabling legislation relating to achieving the best interest of a child should reflect this coherence. There is, however, a manifestation of ill-correction within South African public schools. A possible contributory factor to the discipline problem is that discipline-related sections of the Schools Act might not be aligned with legislation and constitutional imperatives. It seems there is a gap in research and literature about aligning sections 8 and 9 of the school Act and the best interest of a child. Accordingly, the alignment of the South African Schools Act 84 of 1996¹² and Child Justice Act 75 of 2008¹³ should be analysed to ascertain if the best interests of children are served in schools and whether there is room for improvement. Objective evidence of a gap in policy related to discipline may contribute to the possible amendment of the South African Schools Act 84 of 1996 on discipline in schools. Furthermore, the Child Justice Act 75 of 2008,¹⁴ the international comparison with the child-

⁷ South African Schools Act 84 of 1996

⁸ Section 8 (1), Subject to this applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents, and educators of the school.

⁹ Section 9 (1), Subject to this Act and any applicable provincial law, the governing body of a public school may, after a fair hearing, suspend a learner from attending the school.

¹⁰ Section 10 (1), No person may administer corporal punishment at a school to a learner.

¹¹ Section 7(1) of the Constitution of the Republic of South Africa.

¹² South African Schools Act 84 of 1996

¹³ Child Justice Act 75 of 2008

¹⁴ Ibid

centred discipline-related statutes, may provide alternative and effective ways to discipline. For example, some principles used in the Child Justice Act 75 of 2008,¹⁵ such as Section 1,¹⁶ section 9(1)(a)(b) and Section 10(a)(d), could be incorporated into the South African Schools Act 84 of 1996¹⁷ to help the schooling system minimise transgressions and deal with discipline issues before it becomes severe and uncontrollable at a school level.

1.4 Purpose Statement

This research aims to critically examine Sections 8¹⁸, 9¹⁹ and 10²⁰ of the South African Schools Act, with the aim of identifying areas for improvement related to discipline and evaluating their effectiveness in promoting child-centred excellent education for all individuals. The study seeks to highlight the strengths and weaknesses of these sections, informing recommendations for enhancing and ensuring that the education system prioritises the needs and well-being of children.

1.5 Research questions

1.5.1 Main question

To what extent are the provisions of Sections 8, 9 and 10 of the South African Schools Act 84 of 1996 relating to discipline aligned with the criteria of Child Justice Act 75 of 2008²¹ and with the Constitutional Court's declaration on the best interest of a child?

1.5.2 Research sub-questions.

- (1) What are the criteria for disciplinary principles in the best interest of a child based on the rulings or judgements of the Constitutional Court?
- (2) What are the criteria for disciplinary principles in the best interest of a child based on the Child Justice Act 75 of 2008?

¹⁵ Child Justice Act 75 of 2008

¹⁶ Every child who is alleged to have committed an offence and is under the age of 10 years, must be referred to a probation officer to be dealt with in terms of Section 9(1)(a)(b).

¹⁷ South African Schools Act 84 of 1996

¹⁸ Section 8 of South African Schools Act 84 of 1996

¹⁹ Section 9 of South African Schools Act 84 of 1996

²⁰ Section 10 of South African Schools Act 84 of 1996

²¹ Child Justice Act 75 of 2008

- (3) What amendments can be proposed to align the South African Schools Act 84 of 1996²² with the principles outlined in criteria 1 and 2, drawing on the best practices from international statutes, to ensure that the Act prioritises the best interest of the and upholds the rights of all learners, including those who have transgressed.

1.6 Research Method

The research method used in this study will be doctrinal research and literature review. The statutes referred to in this study are the Constitution of the Republic of South Africa, Children's Act 38 of 2005²³, Child Justice Act 75 of 2008 and South African Schools Act 84 of 1996. International Instruments such as the United Nations Convention on the Right of a Child, 1989²⁴ and 1990²⁵ – African Charter on the Rights and Welfare of a Child²⁶. Journal articles will also be examined in relation to legislation and international instruments. The information dealt with discipline in Sections 8, 9 and 10 on pupil discipline in schools. The researcher reviewed the history of the Act and selected sections relevant to discipline in schools. Therefore, the content of these sections was evaluated using objective criteria based on other legal statutes that involve the best interests of the child. Thus, the analysis was a qualitative examination of secondary information in multiple legal documents, as well as an evaluation of the statutes associated with authority in schools in South Africa and selected international comparisons. This study employs a comprehensive document analysis approach, utilising an in-depth examination and critical evaluation of relevant legal statutes to investigate and understand the nuances and implications of legislation thoroughly.

The researcher determined the discipline-related strengths and weaknesses of the Act as follows:

First, the researcher established objective criteria for discipline-related issues in the best interests of the child based on the Child Justice Act 75 of 2008²⁷ and other international child-centred instruments and on the pronouncements of the Constitutional Court on the best interest of a child concept.

²² South African Schools Act 84 of 1996

²³ Children's Act 38 of 2005

²⁴ United Nation Convention on the Right of a child

²⁵ African Charter on the Rights and Welfare of a child

²⁶ Ibid

²⁷ Child Justice Act 75 of 2008

Second, the researcher scrutinised the provisions of the South African Schools Act 84 of 1996²⁸ regarding school discipline to determine whether it is aligned with the criteria established in the first stage of the research.

Finally, the researcher has provided suggestions for improving the South African Schools Act 84 of 1996²⁹ with respect to discipline based on the weaknesses identified (if any) in its alignment with the criteria for the best interests of the child. These suggestions were derived from best practices selected in international statutes regarding disciplines that meet the requirements of criteria established in the first stage.

1.7 Scope of study

This study will not be looking at the whole South African Schools Act 84 of 1996³⁰ but will focus on issues of discipline at schools, which are essentially Sections 8, 9 and 10.

Section 9³¹- Code of conduct, subject to any enforcement of the law, a governing body of a public educational institution must approve a Code of conduct for pupils after dialogue with students, carers, and teachers.

Section 9(5)³² -a Code of Conduct must include provisions regarding due process, ensuring the protection of the rights and interests of the learner and all other parties involved in disciplinary procedures.

The mini dissertation concentrates on sections 8, 9 and 10 of the South African Schools Act 84 of 1996³³ and will not involve any other sections of the Act.

No interviews will be conducted with any educators and learners.

²⁸ South African Schools Act 84 of 1996

²⁹ South African Schools Act 84 of 1996

³⁰ Ibid

³¹ Section 9 (1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with learners, parents, and educators of the school.

³² Section 9(5) of the South African Schools Act 84 of 1996

³³ South African Schools Act 84 of 1996

1.8 Ethical issues

The research in this study will mostly comprise desktop studies, literature reviews and reviews of secondary data. No information has been retrieved from children or educators. UKZN Research Ethics Committee-00013829 has granted this study exemption from Ethical Review

1.9 Division of Chapters

Chapter 1: An overview and rationale of the study.

Chapter 2: The research methodology literature review is explained in detail.

Chapter 3: Analysis of child law regarding discipline in schools, a closer look at Section 28(2) of the Constitution of the Republic of South Africa, Sections 6 and 7 of Children's Act 38 of 2005,³⁴ Section 5 of Child Justice Act 75 of 2008³⁵ and Sections 8, 9 and 10 of South African Schools Act 84 of 1996.³⁶

Chapter 4 Deals with International Jurisdictions of African countries such as Namibia and Zimbabwe. The study will also deal with USA law and United Kingdom school law, compared to the South African Schools Act 84 of 1996³⁷

Chapter 5: This study critically examines the South African Schools Act 84 of 1996, especially sections 8, 9 and 10, to identify the areas for improvement related to discipline and child-centred quality education. The research reveals that the current Act lacks clear guidelines for handling disciplinary cases involving multiple child offenders and neglects to prioritise the best interest of the child.

1.10 Conclusion

The above chapter of the mini dissertation shows compliance with the research, and it also illustrates the Acts, Legislations and Law Journals that will be used in this study since it is desktop research. The chapter also deals with research goals, which demonstrate the strengths and

³⁴ Children's Act 38 of 2005

³⁵ Child Justice Act 76 of 2008

³⁶ South African Schools Act 84 of 1996

³⁷ Ibid

weaknesses, if any, of the South African Schools Act 84 of 1996³⁸, in particular with reference to school discipline.

Chapter 1 also deliberates on the research approach used, the scope of the research, and the ethical considerations.

³⁸ Ibid

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

This unit presents an assessment of the writings related to learner discipline in South Africa within the South African Schools Act 84 of 1996.³⁹ The study starts by first presenting an overview of the South African historical context and how discipline was viewed in the past. Second, the chapter presents the opinions of various authors and their perceptions on how effective the Act⁴⁰ has fared in curbing incidences of learner indiscipline. The South African Schools Act 84 of 1996 does not operate in isolation but is supported by other domestic and international statutory instruments. The chapter also presents the legal framework of the laws supporting the South African Schools Act 84 of 1996.⁴¹ Finally, a theoretical framework underpinning the study is presented.

2.2 The perceived link between discipline in school and other embedded circumstances, such as corporal punishment

This section serves the purpose of showing the linkage connecting school discipline (Sections 8 and 9) and corporal punishment (Section 10) of the South African Schools Act 84 of 1996.⁴²

Before 1994, under an ethos of Christian Nationalist Education, which may be referred to as Christian-centric education or education with a Christian nationalist strategy and a culture of authoritarianism, corporal punishment was an essential part of South Africa's education structure. Corporal punishment was ubiquitous and practised solely in white single-sex boys' schools and extensively in all other institutions, excluding single-sex girls' schools, where it was restricted. The beginning of Bantu Education in 1955, as part of the apartheid regime, exposed learners, both girls and boys, to school beatings.⁴³ This was designed to prepare black children for a life of manual labour and subservience. Overcrowded and under-resourced classrooms characterised this system. Corporal punishment, including beatings, was a common method of discipline. Therefore, In South

³⁹ South African Schools Act 84 of 1996

⁴⁰ Ibid

⁴¹ South African Schools Act 84 of 1996

⁴² South African Schools Act 84 of 1996

⁴³ M Hunter and Morrel, "Corporal punishment, and gender equality: Regimes of care and Rights in South Africa." 2021

Africa, the school reform programme includes outlawing corporal punishment as a fundamental component. Chief Justice Pius Langa determined that a system that supports the use of violence as a means of authority does not support the Constitution. He said: “The deliberate infliction of pain with a cane on a tender part of the body, as well as the institutionalised nature of the procedure, involved an element of cruelty in the system that sanctioned it. The activity is planned; it is deliberate.”

“Whether the person administering the strokes has a cruel streak or not is beside the point. It could hardly be claimed, in a physical sense at least, that the act pains him more than his victim. The act is impersonal, executed by a stranger in alien surroundings. The juvenile is, indeed, treated as an object and not as a human being.”⁴⁴

Justice Sachs restated the sentiments expressed in the *Williams v Minister of Education* 2005(4) SA 462 (CC). This case is referred to as the landmark judgment, as it held that corporal punishment has no place in South African schools. He then said, regarding Section 12⁴⁵ of the last Constitution, that: “It should be noted that these rights to be violence-free are additional to and not substitutes for the right not to be punished in a cruel, inhuman, or degrading way. Under Section 7(2)⁴⁶, the state is obliged to respect, protect, promote, and fulfil these rights. It must accordingly take appropriate steps to reduce violence in public and private life. Coupled with its special duty towards children, this obligation represents a powerful requirement on the state to act.”⁴⁷

2.3 An Examination of the Concept of Discipline and Punishment

Venter and Van Niekerk have looked at punishment and discipline from Foucault’s theory, where he looked at discipline as a mechanism of power that regulates the behaviour of individuals in the social body by regulating the organisation of space, time and people’s activity and behaviour. Discipline has been used as a means to coerce unruly students into conforming rather than addressing the underlying issue driving their behaviour.⁴⁸ According to Venter and Van Niekerk,

⁴⁴ *Bhe and others v Khayelitsha* 2005 (3) SA 632 (CC)

⁴⁵ Constitution of the Republic of South Africa 1996

⁴⁶ Constitution of the Republic of South Africa 1996

⁴⁸ E Venter & L.J Van Niekerk, “Reconsidering the role of power, punishment, and discipline in South African schools, Koers.” 2011 76(2), p 243-260

punishment and discipline, even though specifically catered for in the South African Schools Act 84 of 1996⁴⁹, only reflect the imbalanced power dynamics between the school's administration and students. Venter and Van Niekerk, still drawing from Foucault's writings, argue that education is a correction from the point of limited knowledge to one of enlightenment. Therefore, as the authors perceive it, punishment extends the education process. To further strengthen their argument, the authors also invoke "Prussian military ideals of punctuality, discipline, neatness and submissiveness to authority," which they argue the school system as it is known is now based on. While noting the unfortunate situation that reprimand is still rife in South African schools, Venter and Van Niekerk suggest a change in teacher attitudes to determine more positive and constructive ways of maintaining discipline that does not involve punishment.⁵⁰

A larger body of literature points to the effectiveness not just of corporal punishment but punishment, especially as it exists now within the context of the South African Schools Act 84 of 1996.⁵¹ Maphosa argues that while learner indiscipline is rife in schools, the measures often undertaken by teachers, usually punitive measures, are inappropriate to the indiscretion of the learners. Using a mixed methods approach with educators involves a blend of both qualitative and quantitative methods; in the context of education, teachers may use a mixed method to investigate students' learning outcomes, may also analyse learners' performance data and conduct interviews of focus groups to understand learners. Some examples of mixed methods are exploratory sequential design and convergent parallel design. Maphosa came to the following conclusions. First, because educators rarely distinguish between minor and major forms of indiscipline and often choose punitive measures, educators have the erroneous conclusion that disciplining learners is synonymous with punishing them.⁵² Second, the author also concluded that punitive measures are still the preferred method of dealing with indiscipline rather than cooperative, proactive, and supportive disciplinary measures.⁵³

⁴⁹ South African Schools Act 84 of 1996

⁵⁰ E Venter and LJ Van Niekerk, 'Reconsidering the role of power, punishment, and discipline in South African Schools' (2014) 76(2), 243-260.

⁵¹ South African Schools Act 84 of 1996

⁵² C Maphosa, 'Discipline versus punishment, which way for educators in South African schools. International Journal on New Trends in Education and their Implications' (2011) 2(4), 76-87.

⁵³ Ibid

2.4 The Value of the South African Schools Act 84 of 1996

Vally, Dolombisa and Porteus argue that the measures established by the South African Education Act 84 of 1996 to curb learner indiscipline are inadequate.⁵⁴ The authors support their arguments by documenting some murders and homicides perpetrated by learners within the school environment.⁵⁵ Vally, Dolombisa and Porteus also point out that while often the world is engrossed by the mass shootings that happen in American schools with a high number of fatalities, the same situation prevails in South Africa, the only exception being that in South Africa, the perpetrators are underreported. While the authors concede that the country's history, especially institutionalised violence, plays a part in the indiscipline of learners, the measures embodied in the South African Schools Act are also inadequate, as testified by the high and increasing incidences of violence.⁵⁶

According to Kapuela and Ingrid Sibongile's observation, there are still concerns among policymakers and other people of influence within the Department of Education who are persuaded that only corporal punishment is the best course of action when dealing with learner indiscipline.⁵⁷ The results indicated that school principals viewed corporal punishment as a viable disciplinary measure; however, they remained hesitant to adopt alternate forms of punishment. This is caused by several reasons, including a lack of alternative strategies, perceived effectiveness, cultural or personal beliefs, a sense of control and a lack of support.

Kapuela highlights that one of the most ineffective but indirect tools provisioned within the South African Schools Act 84 of 1996 is the requisite for schools to set up School Governing Bodies.⁵⁸ SGB has powers and functions at school after being elected, such as being responsible for admission policy, ensuring that the school offers a balanced and appropriate curriculum and language policy, and being responsible for religious policy and discipline. The inefficiency lies in

⁵⁴ S Vally, Y Dolombisa and K Porteus 'Violence in South African Schools, Current issues in comparative education' (1999) 2(1), 80-90

⁵⁵ S Vally, Y Dolombisa and K Porteus 'Violence in South African Schools. Current issues in comparative education' (1999) 2(1), 80-90

⁵⁶ Ibid

⁵⁷ Ingrid Sibongile Kapuela 'Discipline in schooling: A Study of rural Secondary School in KwaZulu-Natal' (Unpublished Ph.D. Thesis, University of Zululand) (2014) 10-15

⁵⁸ R Maestry and J Khumalo, 'Educators' disciplinary capabilities after the banning of corporal punishment in South African schools, South journal of education' (2012) 30(3)

the fact that a majority of schools face the issue of having dysfunctional individuals within their governing bodies. While the South Africa Schools Act 84 of 1996 has several tasks and responsibilities for the School Governing Bodies, one of these tasks includes setting up Learner Codes of Conduct.⁵⁹ This is important because SGBs are comprised of several stakeholders, including learners, educators, parents, and guardians. With a cross-section of people, the code that is developed, which will enforce learner discipline within schools, ensures that it captures everyone's best interests and concerns and that fairness is baked into the system. To highlight their point that the SGB implementation of the rules is weak and affects the South African Schools Act, Maestry and Khumalo surveyed the Northwest Province. The results from the study indicated that most stakeholders, such as SGB participants, were not aware of the Code of Conduct, some did not know what it was, and some were illiterate, meaning they could not even read the Code. The authors concluded that the South African Schools Act 84 of 1996 is not weak but poorly implemented, especially in designing the Code of Conduct and its enforcement.⁶⁰

Reyneke is of the opinion that “failing to uphold learner discipline should not be placed on the South African Schools Act or any of its provisions. Rather, according to the author, the problem is part of a more pervasive problem of broken homes, dysfunctional families and a general lack of moral teaching in the upbringing of the children.”⁶¹ Considering how pervasive and widespread the problem is, the author feels that a single piece of legislation, like the South African Schools Act 84 of 1996, is hardly adequate to address the situation that has played out in classrooms in the form of learner indiscipline.⁶² Segalo and Rambuda point to the problem of violent attacks on teachers by learners as part of the culture of violence that has affected schools.⁶³ Bayaga and Jaysveree also support this view and observe that instead of relying on the South African Schools

⁵⁹ Section 8 of South African School Act 84 of 1996

⁶⁰ R Maestry and J Khumalo ‘Governing Bodies, and learner discipline: Managing rural schools in South Africa through a code of conduct’ (2012) 32(1) South African Journal of Education 97-110

⁶¹ RP Reyneke ‘Restoring our children: Why a restorative approach is needed to discipline South African children. Perspective in education’ (2015) 33(1) 385-400

⁶² L Segalo and AM Rambuda, ‘South African Public School teachers’ view on Right to discipline learners, South African Journal of Education’ (2018) 38(2), 1-7

⁶³ L Segalo and AM Rambuda, ‘South African public school teachers’ view on right to discipline learners, South African Journal of Education’ (2018) 38(2), 1-7

Act 84 of 1996⁶⁴ to maintain learner discipline within schools, parents and guardians and the community need to play an increasing role in the moral upbringing of children.⁶⁵

While several studies concur that the South African Schools Act 84 of 1996 does help significantly in learners' indiscipline through the establishment of School Governing Bodies, some other authors offer dissenting views. For example, Tsotetsi, van Wyk and Lemmer feel that the effectiveness of school government bodies has been overestimated.⁶⁶ Their observation is based on two key observations. First, the SGB, even in areas where they are functional, and all members are literate. The SGB has many responsibilities, which range from sourcing funds and other resources to supplement those provided by the state, supporting school staff, dealing with the disciplinary hearing of educators and other school authorities, and recommending the appointment of teaching staff. Issues of learner indiscipline are just one issue of the many they have to deal with and are usually not even a priority.⁶⁷ Second, and most importantly, SGB staff, within the South African Schools Act, can only suspend pupils for a period not exceeding one week.⁶⁸ The South African Schools Act 84 of 1996 must be improved to minimise most of the issues highlighted by the authors above. The South African Schools Act 84 of 1996 must have guidelines on the monitoring process during the election of the SGB and emphasise that at least one member of the SGB be a legal person to help develop and implement effective school policies.

2.5 Legal Framework on Learner Discipline in South Africa

Some studies have also traced the legal framework in schools to arrive at the current state of the South African Schools Act. Vally, Dolombisa and Porteus contribute to this strand of scholarship by highlighting some of the earlier pieces of legislation used to administer education in South Africa while subjugating Black people.⁶⁹ Some of these legislations include the National

⁶⁴ South African Schools Act 84 of 1996

⁶⁵ A Bayaga and L Jaysveree, 'Moral degeneration: Crisis in South African Schools. Journal of Social Science' (2011) 28(3), 199-210

⁶⁶ S Tsotetsi, S Van Wyk and E Lemmer, 'The experience of and need for training of school Governors in rural schools in South Africa. South African Journal of Education' (2008) 28(3), 385-400

⁶⁷ Ibid

⁶⁸ Section 9(1)(b) of South African School Act 84 of 1996

⁶⁹ S Vally, Y Dolombisa and K Porteus, 'Violence in South African Schools. Current issues in comparative education' (1999) 2(1), 80-90

Education Act of 1967,⁷⁰ the Indian Education Act of 1965, the Coloured Persons Act of 1963, the Extension of University Education Act of 1959, and the Bantu Education Act of 1953. The South African Schools Act 84 of 1996 provided the framework for a unified school system, codified compulsory education for children between seven and fifteen and abolished corporal punishment and admissions tests.⁷¹

Working in tandem with the Constitution of the Republic of South Africa, the South African Schools Act 84 of 1996⁷² protects children's human rights and ensures that they are treated humanely. Section 10⁷³ of the Constitution of the Republic of South Africa stipulates that every individual possesses an innate worth and is entitled to the preservation and safeguarding of their worth. Section 12(1) (c), (d), and (e) establish that every individual possesses an entitlement

- (1) to be exempt from any violence originating from either public or private entities;
- (2) not be subjected to any form of torture and;
- (3) the individual shall not be subjected to any form of treatment or punishment that is inhumane, obscene, or degrading.

“The South African Schools Act 84 of 1996 upholds the right to humane treatment by prohibiting corporal punishment. Corporal punishment is explicitly banned under the Schools Act, ensuring learner's dignity and well-being. The South African Schools Act 84 of 1996 promotes positive discipline by prohibiting the use of corporal punishment.”

Section 10 (1) of the South African Schools Act expressly states that no corporal punishment shall be administered to a learner within the school environment. Olivier & Venter observed that this restriction placed on learners is frustrating to educators who, for some time, could administer corporal punishment to learners as part of the disciplinary process.⁷⁴ Section 28 of the South African Constitution, which forms an integral part of the Bill of Rights, stipulates the following provisions: Section 28(1)(d) guarantees the right to be shielded from maltreatment, abuse,

⁷⁰ The National Education Act of 1997

⁷¹ S Vally, Y Dolombisa and K Porteus, 'Violence in South African Schools. Current issues in comparative education' (1999) 2(1), 80-90

⁷² South African Schools Act 84 of 1996

⁷³ Section of the South African Schools Act 84 of 1996

⁷⁴ D Venter and M Olivier, 'The extent and cause of stress in teachers in George Region, South African Journal of Education' (2003) 23(3), 186-192

exploitation, or degradation; Section 28(1)(h) ensures that the primary consideration in any matter involving a child is the child's best interests; and Section 28(2) emphasises that the interests of children take precedence in all matters pertaining to the child. This Section emphasises the importance of ensuring the well-being, safety, and development of children and prioritises their best interests in all decisions affecting them. It also highlights the responsibilities of parents, caregivers and the State to offer appropriate care, support, and safety for children. In the absence of corporal punishment, the South African School Act 84 of 1996 maintains that the relationship between educators and learners needs to be based on responsibility, dignity, respect, and mutual tolerance. In order to emphasise this point, the Department of Basic Education asserts that "discipline ought to be remedial and instructive, rather than retaliatory and penalising."⁷⁵

2.6 International Instruments on discipline and rights of a child

The South African government duly ratified the Convention on the Rights of the Child (CRC) in 1995. South Africa is legally obligated to implement reforms that align South African child law with the provisions of Article 19(1) of the Convention on the Rights of the Child (CRC),⁷⁶ which requires the following:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” Article 16(1) ⁷⁷of the ACRWC contains a similar provision to Article 19(1)⁷⁸ of the CRC.

⁷⁵ Department of Basic Education, Republic of South Africa 2010. Building a culture of responsibility and humanity in our schools: A guide for teachers, Pretoria

⁷⁶ Convention on the Rights of the Child (CRC) Article 19(1)

⁷⁷ African Charter on the Rights and Welfare of the Child (ACRWC) Article 11(5)

⁷⁸ Ibid

Article 11(5)⁷⁹ of ACRWC further states the following: “Each state has its Parties to the present Charter shall take all necessary legal actions to ensure that a child who is subjected to schools or parental discipline shall be safeguarded and provided with adequate protection.”

Article 3, paragraph 1 of the United Nations Convention on the Rights of the child, gives the child the right to have his or her best interest assessed and considered as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The full application of the concept of the child’s best interest requires the development of a right-based approach engaging all actors to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.

Comparative legal analysis on the child’s best interest according to CRC

The Committee underlines that the child’s best interest is a threefold concept:

(a) Substantive right

The right of the child to have his or her best interest assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on issues at stake and guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general -Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self -executing) and can be involved before a court.

(b) A fundamental interpretation and legal principle

If a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

⁷⁹ African Charter on the Rights and welfare of the child (ACRWC) Article 11(5)

(c) A rule of procedure

Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.

Assessing and determining the best interest of a child requires procedural guarantees. Furthermore, the justification of the decision must show that the right has been explicitly considered. In this regard, the State parties shall explain how the rights have been explicitly taken into account in the respective decisions, that is, what has been considered to be the child's best interest, what criteria it is based on, and how the child's interests have been weighed against other considerations, be the broad issues of policy or individual case.

The African Charter on the Rights and Welfare of the Child or a learner - Article 11(3)⁸⁰ states that the values of dialogue, mutual respect and understanding shall inspire discipline in schools.

Article 16 of the ACRWC states that parties shall protect the child from all forms of abuse, including physical, mental and emotional violence; no child shall be subjected to torture, cruel, inhuman, or degrading treatment or punishment.

While there are marked differences between child welfare and learner discipline, some authors believe there is a need for greater cooperation and implementation of the South African Schools Act 84 of 1996⁸¹ and the Child Justice Act 75 of 2008,⁸² which commenced in 2010.⁸³ This is because of the contact points and areas of overlap between the two Acts. The South African Schools Act specifically works with the management of schools, with only limited sections dealing with learner discipline.

The Child Justice Act 75 of 2008⁸⁴ focuses on developing a criminal justice system specifically designed for minors who break the law. This is done to guarantee that children are treated in a way

⁸⁰ African charter on the Rights and Welfare of the child,(ACRWC) , Article 11(3)

⁸¹ South African School Act 84 of 1996

⁸² Child Justice Act 75 of 2008

⁸³ M Reyneke, 'Realising the child's best interests: lessons from the Child Justice Act to improve the South African Schools Act' (2016) 19(1) Electronic law Journal/Potchefstroomse Elektroniese Regsblad

⁸⁴ Child Justice Act 75 of 2008

that considers their age, level of maturity, and developmental requirements. The aim is to hold children responsible for their actions while also safeguarding their rights. Furthermore, it is essential to note that this legal provision also encompasses the well-being of the child, explicitly forbidding the utilisation of physical discipline and other forms of punitive actions intended to cause harm. The authors argue that considering how there are areas of overlap between the two Acts, they should always be read together, especially with issues of learner discipline, considering how they complement each other. The author argues that after passing several landmark judgements by the Constitutional Court that affect the two Acts, there is a need to review both legislations and bring them in line with each other while also taking cognisance of the landmark judgements passed by the Constitutional Court.⁸⁵

2.7 Conclusion

This chapter presented an outline of the literature regarding the impact of the South African Schools Act on curbing the incidence of learner indiscipline. It also demonstrated the connection between school discipline, which is Sections 8 and 9 of the Constitution of the Republic of South Africa, and Section 10, which deals with corporal punishment. Some areas specifically viewed include a historical synopsis of South African education, specifically before 1994 and under an ethos of Christian Nationalist Education,⁸⁶ where corporal punishment was an integral part of the South African education system and the introduction of Bantu Education in 1953.⁸⁷ A legal framework, an overview from independent authors on the effectiveness of the South African Schools Act 84 of 1996.⁸⁸ It is evident from the authors that the culture of authority that legitimates the implementation of violence in schools is incompatible with the values in the Constitution of the Republic of South Africa. A theoretical framework to give context to the study was also presented.

⁸⁵ M Reyneke, 'Realising the child's best interests: Lessons from the Child Justice Act to improve the South African Schools Act' (2016) 19(1) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad

⁸⁶ Christian Nationalist Education of 1948

⁸⁷ Bantu Education Act 47 of 1953

⁸⁸ South African Schools Act 84 of 1996

CHAPTER 3: THE BEST INTEREST OF A CHILD

3.1 Introduction

The primary concern is the well-being of a person under the age of legal adulthood, which is not only a well-established legal principle protected by the Constitution but also a constitutional entitlement that can be addressed in a court of law. What does the concept of "paramountcy" involve in relation to the best interest of a child? Considering that the most important factor in any issue involving a child is the child's best interests, it is reasonable to expect a child-centred approach under both the School Act 84 of 1996 and Child Justice Act 38 of 2005.

3.1.1 *Section 28(2) of the Constitution*

Section 28(2)⁸⁹ of the Constitution and the subsequent interpretations of this clause by the Constitutional Court emphasise the necessity of adopting a child-centric approach in all matters relating to children. In the case of *S v M*⁹⁰ 2008 SA 232 (CC). The Constitutional Court heard an appeal regarding the custody and care of a minor child. The child's mother (M) and father (S) were divorced, and disputes arose over the child's residence and contact arrangements. The father sought to have the child placed in his care, while the mother opposed this, citing concerns about the father's behaviour and ability to care for the minor. This judgment reinforced the importance of prioritising the best interests of the child in all decisions affecting their care and wellbeing. It emphasised that the child's interest must be deemed important, even if this means that the interests of adults are fully met. The judgment has had a notable influence on family law and child custody disputes in South Africa and has informed the development of child protection policies and practices. The standard of the best interest of the child is relevant to the execution of all legislation pertaining to a minor, whether it be for a particular group of children or children in general. This standard also applies to any procedures, measures, and decisions initiated or made by any organ of the state in relation to children.

⁸⁹ Section 28(2)- A child's best interest is of paramount importance in every matter concerning the child.

⁹⁰ *S v M* 2008 3 SA (CC) – where a court considered the best interests of a children, who were not even sentenced before the court, in sentencing of their mother.

3.1.2 Section 6 and 7 of Children's Act 38 of 2005

Section 6⁹¹ of Children's Act 38 of 2005 specifies that the first factor to be taken into account in all legal situations concerning a child is the kid's best interests. When considering the child's best interest, it is important to carefully consider the subsequent factors: The well-being of the child in relation to their physical, mental, and psychic condition. Section 6 of Children's Act 38 of 2005 is a highly debated issue in South African family law, and numerous authors have provided their perspectives and explanations. Here are some perspectives from other authors. Leading experts in child law such as Professor Julia Sloth-Nielsen, Author R. Cooke, J. Jamieson and Professor Ann Skelton all agree that Section 6 embodies the "best interests of the child" principle, which is a cornerstone of international and domestic child law.⁹² Section 6 requires courts to prioritise the child's interests above those of the mother and father or other adults.⁹³ It is not only a principle but also a provision that empowers courts to make decisions that protect the child's well-being.⁹⁴ Section 6 has been instrumental in redirecting attention from the rights of parents to the needs and interests of the child. These authors, among others, have contributed to the understanding and application of Section 6, reinforcing its significance in ensuring the well-being and protection of children in South Africa.⁹⁵

Section 7⁹⁶ of Children's Act 38 of 2005 pertains exclusively to singular children and does not encompass collectives of children or children as a whole. Section enshrines the fundamental rights of children in South African law, emphasising their rights to dignity, protection, care and involvement in issues affecting their lives. It emphasises that a child's best interests must be the paramount consideration in all decisions affecting their life and provides a comprehensive list of factors to be considered in determining those best interests; the Child Justice Act 75 of 2005⁹⁷

⁹¹ Section 6(2) all proceedings, actions or decisions in matter concerning a child must-respect, protect, promote, and fulfil the child's right set out in the Bill of Rights, the best interests of the child standard set out in section 7.

⁹² J. Slot-Nielsen, *Child law in South Africa* (2009)

⁹³ R. Cooke, J. Jamieson & R. Skelton, *Family Law in South Africa* (2010)

⁹⁴ A. Skelton, *Principles and Perspective* (2010)

⁹⁵ M Van Niekerk 'The Best interest of a Child in South Africa Family Law' (2010), *Journal for Judicial science*.

⁹⁶ Section 7(1) whenever a provision of this Act requires the best interests of the child standard to be applied.

⁹⁷ Child Justice Act 38 of 2005

refers to the best interest of children in the preamble. However, the sections refer to the best interest of the child, as Section 35(1) and Section 65(2) of Child Justice Act 75 of 2008.⁹⁸

3.1.3 Section 39(1) and Section 5 of Child Justice Act 75 of 2008

The implication is that a child who breaks the law or who is a victim of the contravention, a bystander minor and a minor in a community that is impaired by the offence must be given the benefit that is in the best interest of the child's rights as much as possible in the context of school discipline as well as Child Justice context. The South Africa School Act 84 of 1996 is in contrast to the Constitution in child-centred obligation; it lacks an express child focus.

The theory that the School Act 84 of 1996⁹⁹ lacks focus on the child's best interest is based, among other things, on the child's unfriendly processes as well as the legislation's lack of focus on what the children of various age groups need.

3.1.4 The facts that support the above information

The Constitutional Court emphasised the need to make a distinction between adults and minors in the following case: Constitutional Court in *Centre for Child Law v Minister for Justice and Constitutional Development*,¹⁰⁰ where it held: The segregation between adults and children, which confers certain benefits. The legal framework establishes a clear differentiation between individuals who have reached the age of majority and those who are under the age of 18, thereby requiring that they be subject to distinct treatment when exercising authority over them. It is crucial to recognise, however, that the School Act does not distinguish between learning for adults and learning for children; rather, it covers all types of schooling for pupils in grades R through 12.

Any individual who receives education or is required to get educated under the conditions of the South African Schools Act 84 of 1996¹⁰¹ is called a learner.

The term "child" has not been explicitly defined within the provisions of the School Act, yet it has been employed on two separate occasions within the said Act. The School Act does not make any explicit reference to the 'best interest' of the child, with the exception of Section 8 A, which pertains

⁹⁸ Child Justice Act 38 of 2005

⁹⁹ South African Schools Act 84 of 1996

¹⁰⁰ *Centre for Child v Minister for Justice and Constitutional Development* 2009 SA 632 (CC)

¹⁰¹ South African Schools Act 84 of 1996

to "search and seizures". It is important to note that this particular provision was incorporated into the Act in 2007.

Section 8 of the Schools Act fails to demonstrate the legislator's recognition of the unique challenges faced by misbehaving children as learners, particularly when compared to the treatment of adult learners. This strengthens the argument that the School Act does not adequately prioritise the best interests of the child. The legislator regrettably neglects to differentiate between the needs and interests of students who engage in unlawful behaviour, their victims, and the broader community.

On the other hand, it is important to note that the Child Justice Act places a distinct focus on individuals who are below the age of 18. This can be observed through the preamble of the Act, the specific definition assigned to the term 'child', and the explicit mention of the Justice Act's different protocols that are applicable to juveniles who have engaged in unlawful behaviour.

Section 9(1)(b)¹⁰²- states that if a police officer has good reason to believe that a child who is suspected of committing a crime is younger than ten years old, they cannot arrest the child. Instead, they must take the child to their parents or another responsible adult as soon as possible. If, on the other hand, neither parent is present or it is not in the child's best interest to be given to their parents, the child should be taken to a suitable child and youth care centre. The probation officer should also be informed of this circumstance.

Section 24(3)(a)¹⁰³- when contemplating the potential release of a child pursuant to subsection two, the Presiding officer is obligated to consider the recommendations outlined in the probation officer's assessment report, as well as any other pertinent factors. This includes giving due consideration to the best interests of the child.

Section 30(3) (a)¹⁰⁴ –Prior to determining whether to incarcerate or continue to incarcerate a juvenile, the Presiding officer is required to take into account any suggestions pertaining to placement as outlined in the Probation officer's assessment report, the information specified in

¹⁰² Section 9(1) (b) of the Child Justice Act 75 of 2008

¹⁰³ Section 24(3)(a) of the Child Justice Act 75 of 2008

¹⁰⁴ Section 30(3)(a) of the Child Justice Act 75 of 2008

Section 40(2), and any pertinent evidence presented to him or her. This includes, if applicable, evidence concerning the child's best interests.

3.2 The age difference between learners

The notion of the best interest of the child applies to all individuals under the age of 18. Consequently, it is expected that the needs and interests of a 7-year-old learner who has transgressed and an 18-year-old learner who has transgressed would likely differ. Despite both being learners, the distinction lies in the fact that one is a minor and the other is an adult. These sentiments are well explained in the Child Justice Act 75 of 2008,¹⁰⁵ which has a clear emphasis on the developmental capacities and requirements of children of varying ages who engage in transgressive behaviour. Children under the age of 10 are not subject to criminal liability for the offence in question. Minors aged 10 to 14 may be subject to criminal liability solely if they have attained a sufficient level of intellectual and emotional development to comprehend the ramifications of their conduct. Minors aged 14 to 18 may be subject to criminal liability, although the court is obligated to take into account their age, level of maturity, and other relevant factors in order to determine a suitable sentence.

3.3 Criminal Capacity

According to Reyneke, “Even though criminal capacity should not and could not play a decisive role in school discipline, the regulatory developments regarding the criminal capacity of children should at least have sensitised the legislators and educational authorities to the need to re-evaluate the appropriateness of one size fit all learners and children approach of Section 8¹⁰⁶ and Section 9 of the School Act 84 of 1996.”¹⁰⁷

It is crucial to acknowledge that the legal determination of criminal capacity in children has been modified from the previous common law standard of 7 years of age to now 10 years of age. Additionally, it should be noted that children who are older than 10 years of age but younger than

¹⁰⁵ Child Justice Act 75 of 2008

¹⁰⁶ Section 8 of the South African Schools Act 84 of 1996

¹⁰⁷ Section 9 of South African Schools Act 84 of 1996

14 years of age are assumed to lack the requisite criminal capacity- Section 7 of Children's Act 38 of 2008¹⁰⁸

The legislator is legally obligated to conduct a reassessment of the raised age of criminal capacity within five years from the initiation of the Act, with the purpose of determining whether it would be appropriate to increase the age of criminal capacity further –Section 8 of Children's Act 38 of 2008.¹⁰⁹

In contrast to the Child Justice Act, the School Act does not differentiate between different learning age groups. Only when a student is enrolled in school and meets the required school-going age is their age mentioned -Section 3(1) of South African Schools Act 84 of 1996.¹¹⁰

The issue of age difference demonstrates that Section 8 of the School Act lacks clear guidelines on how to deal with the age difference of children breaking the law in schools, while the Child Justice Act is more detailed on how to deal with children violating the law. This is also based on their ages.

3.4 Over-age learners in Education

South African Schools Act 84 of 1996,¹¹¹ the implicit focus is on individuals below the age of 18, as this aligns with the conventional school attendance age. However, the actual situation in real life diverges from this. There is a significant population of learners who are over 18 years old and are therefore not eligible for the benefits provided by the best interest of the child provision, yet the South African Schools Act 84 of 1996¹¹² does not differentiate between different age groups of learners when it comes to matters of school discipline. The South African Schools Act 84 of 1996¹¹³ does not address the issue of significant age disparities among students in the same class.¹¹⁴

¹⁰⁸ Section 7 of Children's Act 38 of 2008

¹⁰⁹ Section 8 of Children's Act 38 of 2008

¹¹⁰ Section 3(1) of South Africa Schools Act 84 of 1996

¹¹¹ South African School's Act 84 of 1996

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ M Reyneke, 'Realising the child's best interests: lessons from the Child Justice Act to improve the South African Schools Act' (2016) 19(1) Electronic law Journal/Potchefstroomse Elektroniese Regsblad

3.5 The challenge between minor learners and adult learners in schools

Should a student at the mandatory school age (15 years old) be dismissed from their current school, the head of the Department of Basic Education must find them a new placement- Section 9 (5) of South African Schools Act 84 of 1996.¹¹⁵ The Head of Department must find a new school for a minor learner only. There have been various debates in terms of the learners in the age range of 15 to 18 since Section 28 (1)¹¹⁶ of the Constitution of the Republic of South Africa states that the “best interests of every child under 18 years are of predominant importance. There exists a lacuna in the Act above with respect to the rights and interests of individuals between the ages of 15 and 18 who exhibit behavioural issues. Presently, it is within the purview of the Head of Department to exercise their discretion in order to ascertain that the alternative placement is in the utmost best interests of the learner.” –Section 9(5) of the South African Schools Act 84 of 1996.¹¹⁷ “if we consider that the right to basic education aligns with the compulsory school attendance age, it can be argued that learners between 15 and 18 years old also have the right to further education, as an extension of their fundamental rights to education.”

The requirement that education be made gradually available in compliance with the relevant legal framework applies to the right to education. Thus, the State may constitutionally limit the right of said learners to pursue higher education due to a lack of specialised facilities and an inadequate ability to handle students who display disciplinary concerns.

This is in sharp contrast to provisions of Section 28(2) of the Constitution of the Republic of South Africa,¹¹⁸ which stipulates that the paramount consideration is the best interest of every child who is below the age of 18 years. A school has students who attend school from grade R to Grade 12, but these students have a significant disparity in terms of their ages. There exist individuals who have attained the age of 18 and are currently enrolled in an educational institution. Suppose these learners were to violate the code of conduct in school. The Principal and the SGB rely on Sections 8 and 9 of the School Act, which are pertinent legal provisions. In my professional opinion, this

¹¹⁵ Section 9 (5) of South African Schools Act 84 of 1996

¹¹⁶ Section 28(1) of South African Schools Act 84 of 1996

¹¹⁷ Section 9(5) of South African Schools Act 84 of 1996

¹¹⁸ Section 28(2) of the Constitution of the Republic of South Africa

law appears to be restrictive and unjust in its treatment of Grade R learners, who should not be subjected to the same standards as Grade 12 students who are over the age of 18.

One must, therefore, evaluate whether the aforementioned children's entitlement to additional education is appropriately restricted or not while duly considering the paramount importance of the child's best interest. The paramount consideration in the Child Justice Act¹¹⁹ is the unequivocal prioritisation of the best interest of a child, and it is abundantly clear from various provisions of the Justice Act that all procedures are designed to advance the paramount welfare of the child. Moreover, it is imperative that all parties involved, including law enforcement officials, legal representatives, probation officers, Inquiry Magistrates, and the Child Justice Court, adhere to the explicit instructions set forth by legislators in the Act, which emphasise the paramount importance of safeguarding the best interests of the child. These provisions also grant the various parties involved distinct responsibilities.

Section 9(1) (b) of Children's Act 38 of 2008.¹²⁰ In the context of school discipline, it is the duty of the School Governing Body (SGB) to oversee and carry out a formal hearing. Additionally, all educators bear the responsibility of upholding disciplinary measures within their classrooms and on the school premises. However, it is worth noting that none of them are explicitly cautioned in the School Act to discipline learners within the parameters of the best interest of the child standard. There is a notable absence of any indication as to what would be considered the paramount consideration for the child's welfare in accordance with the South African Schools Act 84 of 1996. Consequently, it is incumbent upon the School Governing Body (SGB) and educators to exercise their judgment in ascertaining the scope and extent of this constitutionally protected entitlement. This presents a significant obstacle to the fulfilment of the child's rights to the best interests, as most of the School Governing Body (SGB) members and educators lack legal expertise, lack access to legal resources, and cannot stay updated on the latest advancements in the comprehensive best interests of the child principles.¹²¹

¹¹⁹ Child Justice Act 75 of 2008

¹²⁰ Section 9(1)(b) of children's Act 38 of 2008

¹²¹ J Karlsson, 'The role of Democratic Governing Bodies in South African Schools' (2010) 327-336

3.6 The Constitution of the Republic of South Africa imperatives in this study

The Constitution of the Republic of South Africa¹²² is considered the founding legal document in South Africa, and all legal documents should be in line with it. It is, therefore, crucial to include in this study in relation to South African Schools Act 84 of 1996¹²³ and other children's law documents. This is done to clarify the role of the Constitution of the Republic of South Africa and to check and verify whether the School Act 84 of 1996¹²⁴ and other child laws are in line with it.

As alluded to previously, the study concentrates greatly on Sections 8, 9 and 10 of the South African Schools Act 84 of 1996. What has transpired from the study is that it is crucial to keep in mind the scope and the content of the right to equality and human dignity according to Section 28(1) of the Constitution, which states that: ‘Every child has to be protected from maltreatment, neglect, abuse or degradation’ and

Section 10¹²⁵ of the Constitution says:” Everyone has inherent dignity and the right to have their dignity respected and protected.”

These are the principles that influenced the South African Schools Act 84 of 1996¹²⁶ because it had to construct a system that was to redress the past injustices in education and to provide a single system of education that would be highly progressive and respect human dignity and the rights of a child.¹²⁷

Section 10 of the South African Schools Act 84 of 1996 states that “No person may administer corporal punishment at a school to a learner” This on its own is to protect the rights of children from the abuse, which is evident in Section 28(1)¹²⁸ of the Constitution, this shows that the importance of the Constitution is influencing other legislations.

¹²² Constitution of the Republic of South Africa 1996

¹²³ South African Schools Act 84 of 1996

¹²⁴ Ibid

¹²⁵ Section 10 of the Constitution of the Republic of South Africa

¹²⁶ South African Schools Act 84 of 1996

¹²⁷ Ibid

¹²⁸ Section 28(1) of the Constitution of the Republic of South Africa ,1996

Section 28(2) of the Constitution of the Republic of South Africa states that “A child's best interests are of paramount importance in every matter concerning the child.”

This gives rise to Section 8(2)(1) of the South African Schools Act 84 of 1996, which states that "a code of conduct is intended to create a disciplined and focused school environment committed to enhancing and preserving the quality of the learning process," in accordance with Section 28(2) of the Constitution of the Republic of South Africa. The connection between the two legal documents is established in Section 8(6) of the South African Schools Act 84 of 1996, which states that "a learner must be accompanied by his or her parent or a person appointed by the parent to a disciplinary proceeding." This is due to the legal principle of the best interest of a child. Although it is limited in its application since the South African Schools Act does not explicitly mention children within the context of legislation, it is important to consider the potential implications and legal explanations that may arise.¹²⁹

Just administrative Action, according to Section 33 of the Constitution of the Republic of South Africa,¹³⁰ states that “the right for a person to have an administrative justice is unbiased, lawful, and procedural fair; this indicates that the right of learners to education is in line with the code of conduct in the School Act and the disciplinary processes must be in line with the Constitution of the country.” Although the School procedures are not fully implemented because there are no proper law experts in school governing bodies, some of the parents are not well educated. This compels the Department of Basic Education to train parents. These parents are trained in workshops organised by the Department of Basic Education; this happens after the parents are elected as members of the School Governing Bodies, which also includes people with law background in School Governing Bodies.¹³¹

¹²⁹ RP Reyneke ‘Restoring our children: Why a restorative approach is needed to discipline South African children. Perspective in education’ (2015) 33(1) 385-400

¹³⁰ Section 33 of the Constitution of the Republic of South Africa, 1996

¹³¹ Section 16(1)(a) of South African Schools Act 84 of 1996

3.7 Formal proceedings

Schools Act provides in Section 20(1) (a)¹³² that one of the functions of the School Governing Body (SGB) is to advocate for and protect the best interest of the 'school'.

According to the Constitution, it is mandated that the most important consideration in any matter pertaining to the child is the child's best interest -Section 28(2)¹³³ of the Constitution of the Republic of South Africa, a conflict arises between the competing interests of the school, its learners, and the best interests of an individual child or a group of children who are subject to a formal disciplinary hearing.

The Constitution guarantees the right to basic education for all for all in section 29. Schools have the freedom to manage their affairs, including curriculum, language, and religion. Schools must ensure equal access to education for all, regardless of race, gender, or disability. Schools are also accountable to the state and parents for providing quality education.

3.8 Individual groups of children

Best interests: The Constitution requires that the best interests of children be paramount in all matters affecting them. Children have the right to participate in decisions affecting their lives, including education.

3.9 Conclusion

It is important to note that distinguishing between adults and children was emphasised by the *Constitutional Court in Centre for Child Law v Minister for Justice and Constitutional Development*.¹³⁴ This was a landmark judgment in South African law, dealing with the rights of children and the Constitutional imperatives to prioritise the best interest of a child.

The Constitutional Court held that the detention of children in adult prisons was indeed unconstitutional, as it exposed them to physical and emotional harm and failed to prioritise the best interests. The Court emphasised that the state had a Constitutional obligation to ensure the

¹³² Section 20(1)(a) of the South African Schools Act 84 of 1996

¹³³ Section 28(2) of the Constitution of the Republic of South Africa

¹³⁴ Centre for Child Law V Minister of Justice and Constitutional Development and Others 2009 SA 22 (C)

protection and well-being of children and that this obligation took precedence over other considerations, such as punishment or deterrence.

The court has issued an order mandating the State to create distinct facilities for the confinement of minors and to guarantee the safeguarding of their rights in accordance with both International and domestic legal frameworks. The judgement above serves to underscore the fundamental tenet that the paramount consideration in all matters pertaining to children is their best interests. Furthermore, it brings to the forefront the crucial significance of safeguarding children from any form of harm and guaranteeing their inherent dignity and overall welfare. This case law has had a substantial impact on the safeguarding of children's rights in South Africa and has guided the formulation of policies and implementation of practices in the areas of juvenile justice, child protection, and social development. It has been determined that Schools Act 84 of 1996¹³⁵ implicitly places its emphasis on individuals under the age of 18, as this is traditionally considered the typical age range for school-going children. However, it is important to acknowledge that a significant population of learners is above the age of 18. The South African Schools Act 84 of 1996¹³⁶ fails to address the common phenomenon of significant age disparities among learners in the same classroom.¹³⁷

¹³⁵ South African Schools Act 84 of 1996

¹³⁶ South African Schools Act 84 of 1996

CHAPTER 4: REGIONAL AND INTERNATIONAL STANDARDS ON DISCIPLINE IN SCHOOLS

4.1 Introduction

It is of utmost importance to engage in a thorough examination of how different jurisdictions address the matter of disciplinary measures within educational institutions. A comprehensive comparative analysis of discipline policies in educational institutions across various jurisdictions is crucial in this study. The chapter focuses on the United States of America, the United Kingdom, and selected African countries, notably South Africa, Namibia and Zimbabwe. These nations were chosen for their developed education systems, providing valuable insights for improving discipline management in South African Schools. The objective is to conduct a comparative analysis of school discipline policies and practices in the United States, United Kingdom, South Africa, Namibia, and Zimbabwe, and to identify potential revisions or enhancements needed for South Africa's Schools Act 84 of 1996.¹³⁸

4.2 Namibia

Namibia attained independence from South Africa in 1990; consequently, in Namibia, a significant portion of South African law was amalgamated, encompassing legislation, traditional law, and constitutional law.¹³⁹ Republic of Namibia Education Act 16 of 2001¹⁴⁰ was published in a Government Gazette on the 27th of December 2001, and assented to on the 11th of December 2001 and commenced on the 28th of October 2002.¹⁴¹ According to the general rules of conduct of learners in Namibia, the Minister makes general rules on the conduct of learners that must be included in the students' Code of conduct of all learning institutions.¹⁴² According to Section 56¹⁴³

¹³⁸ South Africans Schools Act 84 of 1996

¹³⁹ July Sloth-Nielsen, Lorenzo Wakefield and Nkatha I Murungi, 'Does the Differential criterion for vesting, parental Rights, and responsibilities of unmarried Parents, violate international law. A legislative and social study of Three African Countries Journal of Africa Law' (2011) 55(2), 203-229

¹⁴⁰ Republic of Namibia Education Act 16 of 2001

¹⁴¹ Republic of Namibia Act 16 of 2001

¹⁴² Section 43(1) of Republic of Namibia Education Act 16 of 2001

¹⁴³ Section 55 of Republic of Namibia Education Act 16 of 2001

on corporal punishment, it is misconduct to use corporal punishment in schools. Section 57¹⁴⁴ stipulates that in the event that the principal of the state school possesses reasonable grounds to suspect that a student at the school has engaged in wrongful behaviour, the principal is authorised to accuse the student formally in writing of said misconduct.

Furthermore, the principal retains the authority to temporarily suspend the student at any point prior to the formal accusation being made.¹⁴⁵ A learner is eligible for suspension if the severity of their misconduct necessitates their removal from the educational institution and if such action is deemed to be in the best interest of the educational institution or the public interest. According to Section 58(1)¹⁴⁶, The Secretary of the Ministry of Education, hereinafter referred to as "the Secretary", shall, within 14 days from the date of receiving the report of the school board and all accompanying documents submitted to the Permanent Secretary pursuant to Section 57 (7) (c)¹⁴⁷, engage in the requisite legal measures and, following careful evaluation of said recommendation and documentation, have the authority to remove a student from the public educational institution.

4.3 Zimbabwe

Zimbabwe ratified the African Charter on the 19th of January 1992 and adopted the Children's Act in 2001.¹⁴⁸ According to Section 68¹⁴⁹ of the Zimbabwe Education Act, "the responsible authority of every school shall draw up a disciplinary policy for the school in accordance with the standards set out in regulations prescribed by the Minister. no, one is allowed to physically or psychologically torture or to cause cruel, inhuman, or degrading treatment or punishment. Disciplinary measures must be moderate, reasonable, and proportionate in light of the conduct, age, sex, health, and circumstances of the pupil concerned, and the best interests of the child shall be paramount. No pupil may be suspended from school without first being granted a reasonable

¹⁴⁴ Section 57 of the Republic of Namibia Education Act 16 of 2001

¹⁴⁵ Section 58 of Namibia Education Act 16 of 2001

¹⁴⁶ Section 58(1) of Education Act 16 of 2001

¹⁴⁷ Section 57(7)(C) of Education Act 16 of 2001

¹⁴⁸ B Bhaisen, 'Zimbabwe Children's Act alignment with international and domestic legal instrument: Unravelling the gaps' (2016) 6 African Journal of Social Work.

¹⁴⁹ Section 68 of Zimbabwe School Act 16 of 2001

opportunity, with the support of his or her parents, to make representations with respect to the proposed suspension. Under no circumstances is a teacher allowed to beat a child.¹⁵⁰

4.4 United States of America

The use of ‘zero-tolerance policies’ is a concept used in the United States of America that connects school policies with their juvenile justice system. The ‘zero-tolerance policy’ is not flexible. It is retributive and is not regarded as child-friendly.¹⁵¹ As of now, out of fifty-five “countries in Africa, only 49 have accepted the agreement.¹⁵²“ The African Charter on the Rights and Welfare of the Child is a legally binding regional instrument that addresses and provides solutions for the distinct and exceptional challenges faced by the African continent. It was established in response to Africa’s perceived underrepresentation in the United Nations Convention on the Rights of the Child. This led to a desire for a region-specific instrument that reflects African values, cultural diversity, and the different challenges facing the continent’s children.¹⁵³

In the USA, two methods are used: in-school suspension and out-of-school suspension. It is said that the inappropriate behaviour of students in schools is not new in public education; this has occurred since the early beginning of the public school system.¹⁵⁴ The undisciplined students have been addressed in educational institutions through disciplinary measures, such as verbal admonishment, reprimands, physical discipline, after-school confinement, in-school suspension, out-of-school suspension, and monetary penalties.¹⁵⁵ The school Principals’ use of out-of-school suspension began as a method to reduce student misbehaviour in the 1960s and is still being implemented.¹⁵⁶ Parents and communities were unhappy with the application of the out-of-school suspension since it removed learners from schools and classrooms, which promoted poorer behaviour.¹⁵⁷ The findings from the previous research studies, which scrutinised the issue of school

¹⁵⁰ Ibid

¹⁵¹ American Psychological Association Zero Tolerance Task Force 2008. *American Psychologist* 852-862.

¹⁵² Website of the African Committee of Expert on the Rights and Welfare of child, ACERWC. <https://www.acerwe.africa/ratification-table/acced> on the 21 January 2023

¹⁵⁴ RC Morris and AC Howard, ‘Designing an effective in-school suspension program. Clearing House’ (2003) 76

¹⁵⁵ RJ Skiba and R Peterson, ‘The dark side of zero tolerance: Can punishment lead to safe schools?’ (1999) 80, 372-380

¹⁵⁶ AT Adams, ‘The status of school discipline and violence,’ (2000) (ERIC Document Reproduction Service No. ED 439177).

¹⁵⁷ Hochman & Worner, 1987, Sauter 2001.

suspension, have yielded data that unequivocally demonstrates a correlation between student suspensions and the propensity to engage in recidivist behaviour, thereby resulting in subsequent suspensions being imposed upon said students in due course.

Notwithstanding these findings, 'out-of-school suspension' has consistently emerged as the prevailing disciplinary measure employed in response to student misconduct.¹⁵⁸ It has come to light that the out-of-school suspension has been utilised for minor transgressions, contrary to its initial purpose of addressing significant violations of school policies and more severe instances of inappropriate conduct.¹⁵⁹ The most common grounds for student suspension included acts of physical aggression, verbal disrespect, and the use of profanity towards school staff.

Nevertheless, in light of the ongoing controversy surrounding out-of-school suspension and the concerns regarding the lack of supervision for students during the suspension period, there has been a recent emergence of utilising in-school suspension as an appropriate substitute for out-of-school suspension.

Notwithstanding the fact that in-school suspension has persisted in its utilisation since that time, it has not been devoid of controversy. The imposition of both in-school suspension and out-of-school suspension for learners has also resulted in multiple procedural hearings.¹⁶⁰ According to the provisions set forth in the South African Schools Act, it is stipulated that a learner possesses the entitlement to a just and open disciplinary procedure, which encompasses the right to receive notification regarding the involvement of a parent, guardian, or legal representative in relation to the allegations and charges being presented.

The Fifth and Fourteenth Amendments in the United States of America Constitution provided individuals with due rights. The aforementioned rights were initially called into question in the legal matter of *Dixon v Alabama*, wherein a higher education institution expelled students from their academic pursuits without affording them the requisite procedural safeguards guaranteed by

¹⁵⁸ GM Morrison and R Skiba, 'Promised and perils. Psychology in Schools' (2001) 38, 173-184.

¹⁵⁹ JG Amuso, 'The Occurrence of student absenteeism from the regular school setting and student achievement on the seventh-grade mathematics Mississippi curriculum test' (Doctoral dissertation) (2007) Available from ProQuest Dissertations and Theses database. (UMI No. 33300838)

¹⁶⁰ BR Troyan, 'The silent treatment: Perpetual in school suspension and educational rights of students. Texas Law Review' (2003) 81, 1637-1670

the due process clause.¹⁶¹ In 1975, the court affirmed the duties of schools to provide due process rights to pupils who obtained school suspension for a short period and were eventually dismissed.¹⁶² In addition to court rulings affecting student suspension and expulsion, federal and state laws have influenced how discipline in schools is currently conducted; examples include the Gun Free Schools Act of 1994, which was introduced as part of the Strengthening America's School Act of 1994.¹⁶³ The Gun Free Schools Act of 1994 mandated that all states, “in receipt of federal funding, establish discipline policies encompassing the expulsion of a student from school for a minimum duration of one school year should say student be found to have brought a weapon onto school premises.”¹⁶⁴

The zero-tolerance policies originated from drug enforcement policies that evolved during the 1980s at both the federal and state levels.¹⁶⁵ Zero-tolerance emerged as a legal concept in the 1980s, denoting a set of policies that prescribed harsh penalties for all infractions. By the latter part of the 1980s, educational institutions began adopting zero-tolerance policies, which entailed the suspension and expulsion of learners for specific transgressions.¹⁶⁶ Examples of student behaviour categorised into zero-tolerance policies encompass drug possession, engagement in gang activity, and student possession of weapons. Over time, school districts have established zero-tolerance policies throughout the United States regarding conduct such as tobacco use or possession, school disturbances, and other behaviours that are less severe and less violent.

The implementation of 'The No Child Left Behind Act of 2001' by the US Department of Education Act of 2004 played a pivotal role in the ongoing advancement of zero-tolerance policies. These policies have provided teachers with the authority to partially remove students who exhibit violent behaviour or persistent disruption from the classroom. The policy is a manifestation of the school districts' commitment to ensuring safety and holding themselves accountable in public schools throughout the United States.¹⁶⁷ Under the provisions of the South African Schools Act 84 of 1996,

¹⁶¹ Dixon v Alabama

¹⁶² Goss v Lopez.

¹⁶³ U.S. Department of Education 1994

¹⁶⁴ Gun Free School Act, 1994. Para. 2

¹⁶⁵ Skiba and Peterson ,1999

¹⁶⁶ Ibid

¹⁶⁷ RC Byrd, Stronger accountability: Key policy letters signed by the education secretary or deputy secretary. U. S. Department of Education. (2001) Retrieved from <http://www.ed.gov/policy/elsear/guid/secletter/010517.html>.

the guarantee of due process is upheld by means of the following prescribed procedures. A learner shall be duly notified in writing of the allegations and charges levied against them.¹⁶⁸ A learner has a right to a fair and transparent hearing.¹⁶⁹

4.4.1 *In-School moratorium*

Parents are worried about this type of punishment since learners miss their right to education during this period. Within the confines of most in-school suspension classrooms, students are expected to engage in independent study of assignments designated by the teacher. Regrettably, they are not afforded the privilege of seeking clarification or receiving additional guidance on the subject matter should they require further assistance with a given task.

The Commission for Positive Change in the Oakland Public Schools has expressed additional concern regarding the implementation of in-school suspension programmes. Their conclusion highlights the detrimental impact of in-school suspension on students' self-esteem, as well as its contribution to an increased rate of student dropouts. Under the South Africa School Act, there are established procedures designed to safeguard the fair treatment of learners and protect their rights throughout disciplinary proceedings.

4.4.2 *Out-of-School Abeyance*

In more recent years, the utilisation of in-school suspension has been employed as an alternative intervention instead of resorting to out-of-school suspension. Several educational institutions employ out-of-school suspensions as a means of adhering to zero-tolerance policies and expelling students in order to uphold a secure educational environment. Out-of-school suspension was initially designed to administer disciplinary measures to students and notify parents of student misconduct. The assignment of out-of-school suspension as a school consequence is often perceived as a clear-cut measure, as it mandates the student's absence from school for a specified duration.¹⁷⁰ One concern with assigning students out-of-school suspension is that students who are subjected to such disciplinary action are typically those whose academic performance is subpar. Upon resuming their academic pursuits following an out-of-school suspension, numerous students

¹⁶⁸ Section 9(1) of the South African Schools Act 84 of 1996

¹⁶⁹ Section 9(2) of the South African Schools Act 84 of 1996

¹⁷⁰ Out of School Suspension in California: The Journal of Negro Education, 8(2),150-163

who have been subjected to said suspension often discover that they have incurred a substantial backlog of assignments, rendering it exceedingly difficult for them to make up for the missed coursework effectively. This frustration may potentially serve as the ultimate catalyst prompting students to withdraw from educational institutions, thereby exacerbating the pressing concern surrounding student dropout rates.

Furthermore, it is imperative to consider that the act of suspending students may inadvertently perpetuate undesirable conduct rather than effectively curbing it. This is due to the fact that when students are subjected to suspension, they are consequently removed from the overall educational milieu. Under Texas law, it is stipulated that the maximum duration for a student's suspension as a result of an offence is three consecutive school days.¹⁷¹ However, a student can be suspended repeatedly without a limit for separate behavioural infractions.

4.4.3 Disciplinary Alternative Education Programmes

A commitment to a school district's disciplinary alternative education programme carries more weight than being assigned in-school suspension or out-of-school suspension. Certain student misconduct, such as making terrorist threats and engaging in substance abuse offences, may lead to the student being placed in a disciplinary alternate education programme as mandated by the law. Nevertheless, learners may also find themselves enrolled in a school district's disciplinary alternative education program at the discretion of school administrators for transgressions that contravene the school's Code of Conduct. While there are no specific limitations imposed on the duration of a student's stay in an alternative programme, it is customary for students to typically remain enrolled for a period ranging from 30 to 45 school days.

Educators and stakeholders also expressed apprehensions over the allocation of pupils to alternative educational courses as a consequence of student misbehaviour. An issue of concern is the training of teachers. The majority of instructors possess certification in a single subject area and lack the necessary preparation to instruct students in a disciplinary alternative education course.

¹⁷¹ Section 37.005 of Texas Education Code

Another issue associated with disciplinary alternative education initiatives is the difficulty of interacting with pupils who are enrolled in these programmes. A significant number of students are enrolled in alternative education programmes due to their persistent disruptive behaviour, refusal to accept repercussions, incorrigibility, aggression, and other problematic behaviours. Disciplinary alternative education programmes provide additional services that students might lack otherwise, including supervised counselling, social work intervention, and non-traditional schedules. These services can be beneficial for students who display behavioural issues in a traditional school environment.

4.5 United Kingdom

In England, schools have the authority to discipline students for misbehaviour in accordance with the school's behaviour policy and the UK's education regulations. The school principal can exclude a child if they have misbehaved in or outside school. A head teacher may not exercise the power under Section 57A (1) of the England Education Regulation no. 1033 of 2012¹⁷² to exclude a pupil for one or more fixed periods if, as a result, the pupil would be excluded for more than forty-five school days in any school year. There are two types of exclusion in English schools:

- I. Fixed period (suspension) and Permanent (expelled).
- II. Section 5 (1) When the head teacher decides to exclude a pupil for a fixed period, the head teacher must do so without delay.
 - a) Inform the relevant person of the period of the exclusion and the reasons for it,
 - b) Give the relevant notice in writing stating the following matters.
 - (i) The period of exclusion and the reasons for it.
 - (ii) The relevant person may make representations about the decision to the governing body, and where the pupil is not the relevant person, the pupil may also be involved in the process of making representations and explaining how the pupil may be involved.

According to paragraph 3 of the UK Act, the head teacher may decide to exclude a pupil permanently. The results are that the pupil loses an opportunity to take a public examination or a

¹⁷² Section 57 A (1) of the England Education Regulation no. 1033, of 2012`

National Curriculum test; thus, the head teacher, according to Section 3 of the England Education Regulation¹⁰³³ of 2012, must, without delay, inform the governing body and local authority of the period of exclusion and give the relevant person notice in writing and tell the person about their rights to appeal by making representation.

4.6 The Role of the School Governing Bodies in Schools

As soon as the governing body is informed under section 5 (3)¹⁷³ about the permanent exclusion of a learner. The Governing Body must decide whether or not the pupil should be reinstated.

The governing body must:

- (a) Consider the interests and circumstances of the excluded pupil and the person working at the school.
- (b) Consider any representation about the exclusion made to the governing body.
- (c) Take reasonable steps to arrange the meeting to hear the side of the head teacher and the representation of the pupil.

The local authority representative

If the governing body decides that the pupil should be reinstated, they must, without delay, direct the school principal accordingly and inform the relevant person and the local authority of their decision and reasons for it in writing.¹⁷⁴ The Principal must comply with the direction of the governing body to reinstate the pupil.¹⁷⁵ If the governing body decides not to reinstate the pupil, they must, without delay, inform all stakeholders in writing that the relevant person may apply for the governing body's decision to be reviewed by a review panel.¹⁷⁶

The relevant person may, at their own expense, appoint someone to make representation for the review, and the relevant person may issue a claim under the Equity Act 2010.

¹⁷³ Regulation 5(3) of England Education Regulation no. 1033 of 2012

¹⁷⁴ Section 6-England Education Regulation No.1033 of 2012

¹⁷⁵ Section 5-England Education Regulation No.1033 of 2012

¹⁷⁶ Section 6 Of the England Education Regulation No.1033 of 2012

4.7 Reconsideration and potential update by Governing Body following a comprehensive review.

If the reviewing panel suggests reconsidering the governing body's decision to uphold a permanent exclusion or even overturns such a decision, the governing body is required to reassess its original ruling and potentially reinstate the learner in question. This means that the governing body must re-examine its initial decision, taking into account the review panel's recommendations, and possibly reverse its decision to exclude the learner permanently.

The governing body must inform the relevant stakeholders of the considered decision and reasons without delay. The local authority must, on request, forward to the Secretary of State any information they have received from the principal, governing body, or review panel under Schedule 1 of the England Education Regulation no. 1033 of 2012.¹⁷⁷

4.8 Conclusion

In comparison to African nations, the South African Schools Act 84 of 1996 is more progressive in ensuring that the opinions of children are taken into account in issues that impact them. The South African Schools Act 84 of 1996 is distinctive in its approach to addressing the rights of children within the framework of punishment. The majority of schools in South Africa utilise a retributive disciplinary method.¹⁷⁸ The Schools Act of the two neighbouring countries, Namibia and Zimbabwe, shows the utilisation of adversarial measures, although there are some points of intersection between the Schools Act in Southern African countries. In Namibia, the Minister of Education holds significant authority in shaping the education sector, as they are responsible for establishing general rules governing learner conduct. Similar to South Africa, Namibia has abolished corporal punishment as a means of discipline, instead promoting alternative methods that prioritise positive reinforcement and constructive correction. This aligns with the countries' shared commitment to upholding children's rights and dignity in educational settings. The school

¹⁷⁷ Schedule 1 of The England Education Regulation No. 1033 of 2012

¹⁷⁸ Wolhuter and Van Staden 2008 T G 396; SAHRC 2008 <http://tinyurl.com/j7kdlzy>:Burton Merchants, Skollies and Stones 28-30

principal in Namibia can charge a learner for misconduct, and the Permanent Secretary may expel the child from school.

In Zimbabwe, disciplinary hearings may be held in the absence of a learner, which is unfair to learners since they become excluded from their disciplinary hearing. However, they also, in some circumstances, allow the parent to represent the learner during the school disciplinary hearing.

In the United States, school discipline policies are often tied to the juvenile justice system, with a zero-tolerance approach that empowers school principals to impose out-of-school suspensions, which may be followed by due process, including hearings and appeals, to address the learner misconduct. Learners may be suspended for a year. This has caused many dropout learners. While the United Kingdom system and policies allow the school principal to exclude a child from school for five days, sometimes the exclusion can be permanent or temporary.

The South African Schools Act 84 of 1996¹⁷⁹ clearly states the procedures for disciplining learners. South Africa has recently joined the group of nations that have eliminated corporal punishment in schools, acknowledging the significance of establishing a secure and nurturing educational environment for all students. The South African Constitution and the South African Schools Act explicitly forbid the use of physical punishment and instead promote the use of alternative disciplinary methods that are equitable, compassionate, and centred on rehabilitation and restorative justice. This approach prioritises the well-being, dignity, and rights of learners and seeks to create a culture of respect, empathy, and understanding in our schools.¹⁸⁰ South Africa does not take learners to jail as it is done in the USA through the zero-tolerance policy; these systems have their advantages and disadvantages.

The restorative approach is currently used in South Africa as a more effective and humane way to address discipline in schools, promoting a supporting learning environment and reducing dropout rates by focusing on rehabilitation, accountability, and healing rather than punishment.

¹⁷⁹ South African Schools Act 84 of 1996

¹⁸⁰ Section 9(2) of South African Schools Act 84 of 1996

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The concluding chapter synthesises the study's outcomes, shedding light on the crucial findings pertaining to Sections 8,9 and 10 of the South African Schools Act 84 of 1996¹⁸¹ and offering a comprehensive understanding of the research results.

The South African Schools Act 84 of 1996¹⁸² has been benchmarked against the educational policies and practices of neighbouring African countries, specifically Namibia and Zimbabwe, as well as against the discipline management approaches employed in developed nations, notably the United Kingdom and the United States of America, to provide a comparative analysis.

5.2 Contribution of this Study

This paper has provided an in-depth examination of the South African Schools Act, with a particular focus on the context and evolution of Sections 8,9 and 10.

Additionally, the paper has explored the significant influence of the South African Constitution on the protection and promotion of children's rights, highlighting the interplay between the Constitution and the development of these specific sections of the Act.

To enhance the effectiveness of the South African Schools Act 84 of 1996, it is recommended that the Act be amended to include clear protocols and procedures for conducting disciplinary inquiry hearings involving multiple learners, thereby promoting fairness, transparency, and accountability.

These provisions clearly indicate that the best interest of each child must be evaluated on an individual basis. The South African Schools Act 84 of 1996 ought to be revised in order to acknowledge and tackle the distinct needs and circumstances of child learners, distinguishing them from adult learners in educational institutions, with the aim of guaranteeing that the rights and safeguards granted to children are specifically tailored to meet their requirements.

¹⁸¹ Section 8 of South African Schools Act of 1996

¹⁸² Ibid

The Child Justice Act 75 of 2008 is a compulsory legal requirement for the courts to enforce the application of the Child Justice Act to individuals who are classified as children, while the Criminal Procedure Act is applicable to adults,¹⁸³ Individuals who employ minors to participate in the perpetration of unlawful activities may be subject to legal prosecution in relation to this matter.¹⁸⁴

In the school discipline context, it is imperative to acknowledge that the fundamental principle is to prioritise the best interests of all children within the educational institution. There is a necessity to furnish the School Governing Body (SGB) with appropriate guidelines in the context of school discipline to aid them in ascertaining the paramount interests of all children implicated in disciplinary affairs. Guidelines are conspicuously absent from the Schools Act, and the provisions pertaining to the paramount consideration of the child as set forth in the Children Act are ill-suited for application within the realm of school discipline.¹⁸⁵

Sections 8 and 9 of the South African Schools Act conspicuously fail to include a specific mention of the fundamental principle of the 'best interests of the child', which is an essential factor to be taken into account in disciplinary proceedings concerning child learners. Moreover, it is important to note that the interests of other parties involved in these proceedings are only mentioned in section 8(5)(a), which exclusively focuses on their right to due process. However, this provision fails to consider the potential consequences for other stakeholders and the well-being of the child.

The School Act focuses on only one dimension, namely, their due process interest.¹⁸⁶ The "due process" in the School Act pertains to the implementation of equitable procedures. The concept of substantive due process pertains to the adequacy and equity of the rule in question.¹⁸⁷ This clause thus merely guarantees the adherence to a just procedure and the requirement for fairness in the rules; it does not establish an obligation on the School Governing Body (SGB) to safeguard and prioritise the various interests of all learners in the school during disciplinary proceedings.

¹⁸³ Section 63(2) of Child Justice Act 75 of 2008

Section 63(2) of Child Justice Act 75 of 200

8

Section 7 of Children Act 38 of 2005

¹⁸⁶ Section 5(a) of South African Schools Act 84 of 1996

¹⁸⁷¹⁸⁷ Joubert and Prinsloo Law of Education 130

5.3 Recommendations

It is recommended that legislators amend the South African Schools Act 84 of 1996¹⁸⁸ so that it complies with the requirements of a child-centred approach.

The proposed amendment to the South African Schools Act 84 of 1996 must prioritise the best interest of the child, as enshrined in Section 28(2) of the Constitution of the Republic of South Africa, which emphasises the child's right to care, protection, and well-being. Furthermore, the revision should also safeguard the rights of learners who have transgressed, ensuring that rights are respected and protected in institutions of learning and that they are treated with dignity and fairness.

Legislators should establish clear protocols in the Schools Act to address situations where multiple child offenders are involved, providing explicit guidelines for fair and appropriate handling of such cases. The South African Schools Act 84 of 1996¹⁸⁹ should consider different approaches in terms of the age gap of learners when dealing with cases of discipline in schools. The SGB must be provided with proper guidelines when dealing with discipline, and it is recommended that a law professional be included in complex cases involving children at school. The South African Schools Act 84 of 1996¹⁹⁰ should improve the prescription as to what methods and procedures should be utilised to treat learners who are suspended; a program to protect them during suspension is advisable. The South African Schools Act 84 of 1996 should enhance the legislative requirements for pupils to participate in anger management programmes or counselling sessions after they have been suspended from school for an extended period.¹⁹¹ Legislation must have a mechanism to ensure that every learner who is affected by indiscipline is treated with the dignity it deserves.

¹⁸⁸ South African Schools Act 84 of 1996

¹⁸⁹ Ibid

¹⁹⁰ South African Schools Act 84 of 1996

¹⁹¹ Le Roux and Mokhele 2011 Africa Education Review 324-325, Maphosa and Mammen 2011 Anthropologist 191

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- (2) Iain Curries & Johan De Waal, Six Edition the Bill of Rights, Juta and Company Journals
- (3) B Hogget, D Pearl, *The family law and Society cases and material*, fourth edition, Butterworth
- (4) Cosmas Maphosa & Almon Shuba, *Education Disciplinary Capacity after the Banning of Corporal Punishment*, *South Africa Journal of Education* vol.30



Innocent Mthembu (210545577)

School Of Law

Howard College

Dear Mr Innocent Mthembu,

Original application number: 00013829

Project title: An examination of School Act 84 of 1996 in particular relevance to discipline in schools.

Exemption from Ethics Review

In response to your application received on 16 May 2023

granted EXEMPTION FROM ETHICS REVIEW.

, your school has indicated that the protocol has been

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research

Approach and Methods must be reviewed and approved through an amendment/modification prior to its

implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be

submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely

Mr Matthew Blain Kimble

obo Academic Leader Research

School Of Law

UKZN Research

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