

**MEMORANDUM
LCP4809
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QUESTION 1

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QUESTION 2

With reference to one relevant case, comment critically on the content of the right to basic education (section 29(1) of the Constitution) as a fundamental right entrenched in the Bill of Rights. [20]

INSTRUCTIONS: A STUDENT MUST BE AWARDED 10 MARKS FOR HIS OR HER EXPLANATION OF THE CONTENT OF THE RIGHT TO BASIC EDUCATION AND HIS OR HER CRITICAL ANALYSIS THEREOF.

Content of the right

The right to basic education imposes a duty on the state to provide such education in order for the right to be enjoyed and fulfilled. It is an unqualified right requiring the priority attention of the state, also in respect of budgetary allocations. The right requires the state to provide sufficient schools, educators and support and other incidental services in order to ensure reasonable access to basic education for everybody. The state is also obliged to provide the education in an official language of one's choice where reasonably practicable.

The right refers to basic education, which means education up to a level of functional literacy, in other words, reading, writing, arithmetic, and an elementary knowledge or awareness of economics, culture and politics. That is an education probably equivalent to primary education, which in South Africa equals education to the end of the seventh grade. It refers in other terms to education of a standard that would enable a person to enjoy the rights and fulfill the duties identified with citizenship. In the South African context, "adequate" education could also refer to a standard of education that empowers people to rise above the poverty cycle and compete effectively in the labour market, enables people to understand and enjoy their newly acquired democratic values, rights and freedoms, encourages people to participate in and protect the fledgling democratic system, and enhances their dignity and feeling of self-worth as human beings.

Criticisms of the right

Compulsory education is still not part of the right, although the South African Schools Act provides that learners are compelled to attend school from the age of seven years until the age of 15 years, or the ninth grade, whichever comes first. Unlike the international norm, section 29 also does not guarantee a right to free education. No general freedom of choice is recognised, but the right to choose between public and private education is provided for.

Section 29 does not contain an express right to equal access to educational institutions, but it is assumed that the right is implicitly covered by the equality rights guaranteed in section 9. For example, the school-fee system, which enables individual schools to augment their allocated state funds for the improvement of their facilities and capabilities, is contentious, as it tends to exacerbate the differences between schools in the traditionally white, more affluent, areas and those in the poorer black townships. It has even been argued that the school fee system impedes access to education for those learners who refrain from enrolling or attending because their parents cannot or can ill afford to pay the prescribed fees, and is thus an unconstitutional infringement on their right to basic education. Another contention worthy of consideration is that the school fee system creates differentiation on the basis of the wealth or poverty of a community, which is still inextricably linked to race, and thus amounts to indirect (unintentional) unfair discrimination in terms of section 9(3).

The relevant case applicable is:

INSTRUCTIONS: IF STUDENTS MENTION ANY OTHER CASE LAW PLEASE ASK ME IF

THE CASE IS RELEVANT OR NOT. A STUDENT MUST BE AWARDED 10 MARKS (2 MARKS FOR A BRIEF EXPOSITION OF THE FACTS AND 8 MARKS FOR AN EXPLANATION OF THE JUDGMENT) FOR HIS OR HER EXPLANATION OF THE RELEVANT CASE.

Governing Body of the Juma Masjid Primary School and Others v Essay NNO and Others (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae) [2011] ZACC 13; 2011 (8) BCLR 761 (CC)

Facts:

The Juma Masjid Primary School was established in 1957 as a government-aided Islamic school and offered education to learners from Grades 1 to 9. In 1997, the defendants (the Juma Masjid Trust) allowed the Department of Education for KwaZulu-Natal to "enlist the school as a public school with an Islamic religious ethos on its private property in terms of section 14(1) of the South African Schools Act 84 of 1996" (at para 11). This was subject to the proviso that a written agreement be concluded between themselves and the MEC for Education for KwaZulu-Natal also in terms of section 14(1) of the Schools Act. The Trust made numerous attempts to conclude the agreement with the MEC, but no such agreement ever transpired. As a result of the impasse, the Trust successfully obtained an eviction order against the school governing body and the state respondents in the High Court.

Judgment (with particular reference to the right to basic education):

The Court began its judgment by firstly considering the importance of the right to education (s 29(1) of the Constitution). The court felt that it was imperative "for the purpose of the judgment, to understand the nature of the right to "a basic education" under section 29(1)(a)" (at para 37). According to the court, the right to basic education is "immediately realisable" as it contains no internal limitations requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures" (at para 37). The only limitation to which the right to basic education is subjected is in terms of section 36(1) of the Constitution, that is, in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (at para 37). The right to basic education is therefore distinct from the right to further education provided for in section 29(1)(b) of the Constitution (the right to further education contains the internal limitation of "progressively available and accessible") (at para 37).

In addition to the right to basic education, section 3(1) of the Schools Act makes school attendance compulsory for learners from the age of seven to fifteen years or until the learner reaches the ninth grade, whichever occurs first. Section 3(3) of the Schools Act obliges the MEC to ensure that there are adequate places in schools so that every child who resides in his or her province is able to attend school as required by section 3(1) of the Schools Act (at para 38). In the court's opinion, "the fact that school attendance is statutorily compulsory for certain age groups of learners, read together with the entrenched right to basic education in the Constitution indicates the importance of the right to basic education for the transformation of our society" (at para 38).

Furthermore, section 12 of the Schools Act places a duty on the MEC to provide public schools for the education of learners (see paras 39 and 45). The court noted that the right to education is also recognised in both regional and international law (see paras 40-41).

The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was

entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.

The importance of the right to a basic education is also foreshadowed by the fact that any failure by a parent to cause a child to attend school renders that parent guilty of an offence and liable, on conviction, to a fine or imprisonment for a period not exceeding six months. Furthermore, [a]ny other person who, without just cause, prevents a *learner* who is subject to compulsory attendance from attending *school* is also guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months (paras 42-44).

On the basis of the above, the court found that the MEC had a positive obligation in terms of section 7(2) of the Constitution to "respect, protect, promote and fulfil the rights in the Bill of Rights". With specific reference to the case at hand, the MEC must "respect, protect, promote and fulfil" the learner's right to basic education. The positive obligation on the MEC is derived from section 8(1) of the Constitution which provides that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state" (at para 45). The court noted that the MEC had on numerous occasions failed to discharge the obligations she had pledged to the Trust with regard to the tenancy. Mere acknowledgement of her awareness of the state's constitutional obligations towards the learners did not suffice in this instance; she should have taken proper steps to make alternative arrangements for the learners, say, by submitting a detailed plan (in the court *a quo*) of how she was going to provide alternative education to the affected learners (at paras 47 and 48). If she had done so, the need for eviction would probably not have materialised (at para 47). The court, in agreement with the High Court, stated the following:

It is unacceptable for the State to fail to put up relevant information and more importantly to take steps to comply with its constitutional obligations where a dispute pertains to the relevant State department's performance of its constitutional mandate. Much time and effort has been wasted due to, it seems, the [MEC's] failure to deal decisively with the issue of the continued occupation by the school of the property on terms mutually acceptable If the parties could not agree on mutually acceptable terms, then the [Department] should have taken steps a long time ago to make alternative arrangements, but to at least deal with the issue. If that was done in accordance with the provisions of the Act with proper regard to the department's constitutional mandate, then the need for the present application would probably never have arisen (*Ahmed Asruff Essay N.O. and Eight Others v The MEC for Education KwaZulu-Natal and Four Others*, Case no. 10230/2008, KwaZulu-Natal High Court, Pietermaritzburg, 16 September 2009, unreported at para 28).

The intervening parties stated that no alternative arrangements had been made for the continued education of the learners. By not providing a public school and failing to ensure that there are enough school places available in the affected areas, as required under section 3(3) of the Act, and simply informing the High Court that there are no other schools in which to absorb all the learners, the MEC failed to discharge her constitutional obligation, to respect, protect, promote and fulfil the learners' right to a basic education.

The conduct of the MEC on the facts of this case thus fell below the standard required by the Constitution and the relevant statutory provisions (at paras 51–52).

The court then moved to consider the constitutional duty of the Trustees to respect the learners' right to a basic education. The court found (once again on the basis of s 8 of the Constitution) that there was no primary positive obligation on the Trust to provide basic education to the learners (at para 57). The court, however, noted that

in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) at para 78, it was held that "socio-economic rights (like the right to basic education) may be negatively protected from improper invasion" (at para 58). The fact that the Trust –

- allowed the Department to "enlist the school as a public school on its property in accordance with sections 56 and 57 of the Schools Act;
- performed the public function of managing, conducting and transacting all affairs of the Madressas (located on the property of the Trust and may be defined as 'a place of religious learning for followers of the Islamic faith' (see footnote 10 of the judgment)) in the most advantageous manner, including the payment of the costs of various items which the SGB and the Department ought to have provided;
- made contributions towards expenses associated with the running of the public school;
- acted consistently within its duties: to erect, maintain, control and manage the school in terms of the Deed of Trust; and
- conceded that it had a duty not to impair the learner's right to a basic education",

meant that the Trust had a negative constitutional obligation not to impair the learners' right to basic education (at para 60). The court, however, found that the Trust, as the owner of the property, had acted reasonably in seeking an order for eviction because its attempts to engage the MEC to alleviate the position of learners affected by the proposed eviction had failed (at para 61).

In the opinion of the court, the High Court had failed to consider the impact of the eviction order on the learners and their interests (at para 68). In other words, the High Court gave precedence to the right to property (of the Trust) over the learners' right to a basic education. As a result, the court had "failed to accord sufficient weight to the entrenched rights of the learners and to the paramount importance of their best interests" (at para 71). The order of the High Court was thus set aside.

QUESTION 3

- (a) List five (5) functions or responsibilities of the principal of a public school. (5)

INSTRUCTIONS: A STUDENT MAY LIST ANY FIVE (5) OF THE FOLLOWING FUNCTIONS:

According to section 16A of the South African Schools Act 84 of 1996,

- (1)(a) The principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 23 (1) (b) and 24 (1) (j).

- (b) The principal must prepare and submit to the Head of Department an annual report in respect of-

- (i) the academic performance of that school in relation to minimum outcomes and standards and procedures for assessment determined by the Minister in terms of section 6A; and
- (ii) the effective use of available resources.

- (c) (i) The principal of a public school identified by the Head of Department in terms of section 58B must annually, at the beginning of the year, prepare a plan setting out how academic performance at the school will be improved.

- (ii) The academic performance improvement plan must be-

- (aa) presented to the Head of Department on a date determined by him or her; and
- (bb) tabled at a governing body meeting

- (iii) The Head of Department may approve the academic performance improvement plan or return it to the principal with such recommendations as may be necessary in the circumstances.

- (iv) If the Head of Department approves the academic performance improvement plan the principal must, by 30 June, report to the Head of Department and the governing body on progress made in implementing that plan.

- (v) The Head of Department may extend the date contemplated subparagraph (iv) on good cause shown.

- (2) The principal must-

- (a) in undertaking the professional management of a public school as contemplated in section 16 (3), carry out duties which include, but are not limited to-

- (i) the implementation of all the educational programmes and curriculum activities;
- (ii) the management of all educators and support staff;
- (iii) the management of the use of learning support material and other equipment;
- (iv) the performance of functions delegated to him or her by the Head of Department in terms of this Act;

- (v) the safekeeping of all school records; and
 - (vi) the implementation of policy and legislation;
- (b) attend and participate in all meetings of the governing body;
 - (c) provide the governing body with a report about the professional management relating to the public school;
 - (d) assist the governing body in handling disciplinary matters pertaining to learners;
 - (e) assist the Head of Department in handling disciplinary matters pertaining to educators and support staff employed by the Head of Department;
 - (f) inform the governing body about policy and legislation;
 - (g) provide accurate data to the Head of Department when requested to do so; and
 - (h) assist the governing body with the management of the school's funds, which assistance must include-
 - (i) the provision of information relating to any conditions imposed or directions issued by the Minister, the Member of the Executive Council or the Head of Department in respect of all financial matters of the school contemplated in Chapter 4; and (ii) the giving of advice to the governing body on the financial implications of decisions relating to the financial matters of the school;
 - (i) take all reasonable steps to prevent any financial maladministration or mismanagement by any staff member or by the governing body of the school;
 - (j) be a member of a finance committee or delegation of the governing body in order to manage any matter that has financial implications for the school; and
 - (k) report any maladministration or mismanagement of financial matters to the governing body of the school and to the Head of Department.
- (3) The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with-
- (a) instructions of the Head of Department;
 - (b) legislation or policy;
 - (c) an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or
 - (d) a provision of the Employment of Educators Act, 1998 (Act 76 of 1998), and the Personnel Administration Measures determined in terms thereof.

(b) Define the term “co-operative government”.

(5)

Co-operative governance envisages co-operation, co-ordination and support[✓] among the spheres of government (i.e. national, provincial and local[✓]) to promote and maintain effective government. It binds together the spheres of government and forces them to work together[✓] in interrelated and interdependent relationships[✓], showing mutual respect for each other's distinctive character[✓].

N.B IF A STUDENT MENTIONS THE CONSTITUTION HERE, THEIR ANSWER SHOULD BE MARKED AS FOLLOWS:

Section 40(1) [✓] of the Constitution provides that:

- (1) In the Republic, government is constituted as national, provincial and local[✓] spheres of government which are distinctive, interdependent and interrelated.[✓]

- (c) **Discuss the constitutional requirements for just administrative action, and the basic elements of procedural fairness (found in common law and statute and protected by the 1996 Constitution) which the school has to comply with when a learner is faced with disciplinary proceedings. In your answer you must also distinguish between substantive and procedural fairness.** (20)

Section 33[✓] of the Constitution makes provision for the right to just administrative action. It provides that:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. [✓]
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. [✓]
- (3) National legislation must be enacted to give effect to these rights, and must-
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration. [✓]

According to section 8(2) of the Constitution, a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. [✓] This means that the Bill of Rights is applicable to public persons and bodies, including public schools. [✓] The Promotion of Administrative Justice Act 3 of 2000 also confirms this in its definition of administrative action which means any decision taken, or any failure to take a decision, by-

- (a) an organ of state when exercising a power in terms of the Constitution or a provincial constitution; or
- (b) exercising a power or performing a public function in terms of any legislation; or

a natural and juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person. [✓] A public school is an "organ of state" in the sense that it is a functionary/institution exercising public power or performing a public function in terms of any legislation (section 239(b)(ii)). [✓]

It is therefore clear that the governing body of a public school is bound by section 33 of the Constitution and therefore has to adhere to the rules of administrative justice when implementing learner disciplinary action. [✓]

Procedural fairness requires that the administrative organ or official follow correct and fair procedures and complies with procedural requirements. [✓] Procedural fairness is concerned with fair and proper procedures and is protected by Section 33 of the Constitution. Procedural fairness and the rules of natural justice are similar in scope and content. These rules are embodied into main principles, namely *audi alteram partem* (to hear the other side), and *nemo iudex in sua causa* (no one may be a judge in his own case). [✓]

Substantive fairness on the other hand deals with the questions of whether the reasons for the decision are fair[✓] (section 33(2) of the Constitution) i.e. the reasonableness (or justifiableness) of the decision taken. This usually means that a discretionary power must be exercised correctly and the decision taken must be appropriate and suitable – not arbitrarily taken. In essence, the effect of the decision must not be unreasonable on the person disciplined or punished.

The following can be seen as basic elements of due process as prescribed in section 33 of the Constitution, PAJA and the South African Schools Act:

(i) hearing and notice; ✓

A learner/student must be given written notice of the time, date and place of the hearing. ✓ The learner/student must also be afforded the opportunity to state or present his/her side of the case, "if the hearing is to lead to the exercise of a discretion, which could affect the student's/learner's rights, privileges and freedoms" ✓ (Squelch, J. 2006. The right to administrative justice: the implications for school governing bodies in *A critical chronicle of the South African Education Law and Policy Association (SAELPA) 1996-2005*, edited by J Beckmann. Pretoria: SAELPA: 367).

(ii) impartial tribunal; ✓

The decision in a dispute/an administrative proceeding must be made by an impartial tribunal. In education law, the principal and the school governing body are recognised as impartial bodies, "provided they do not have any personal stake in a hearing or its outcome, and do not act with malice or prejudice" ✓ (Squelch, J. 2006. The right to administrative justice: the implications for school governing bodies in *A critical chronicle of the South African Education Law and Policy Association (SAELPA) 1996-2005*, edited by J Beckmann. Pretoria: SAELPA: 367).

(iii) right to information; ✓

Section 32 of the Constitution makes provision for the right to access to information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights. ✓

(iv) right to representation; ✓

"A party to a hearing is usually entitled to legal representation where such assistance is necessary to ensure a fair hearing. Thus, although legal representation is not necessary, or permitted, for all administrative proceedings, it is accepted that a person who is party to a complex case or situation, which has serious consequences, does not have a chance to put his or her case unless he or she has assistance" ✓ (Squelch, J. 2006. The right to administrative justice: the implications for school governing bodies in *A critical chronicle of the South African Education Law and Policy Association (SAELPA) 1996-2005*, edited by J Beckmann. Pretoria: SAELPA: 368).

(v) reasons for the decision; and ✓

Section 33(2) of the Constitution provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. ✓

(vi) right to appeal ✓

The law allows learners/students who have been affected by the decision of an administrative body to appeal against such decision. ✓ For example, section 9(4) of the Schools Act makes provision for a learner or the parent of a learner who has been expelled from public school to appeal against the decision of the Head of Department to the Member of the Executive Council.

QUESTION 4

Solomon, a Grade 12 learner, has been a problematic learner for Mrs Pekeur (the principal of Blu Hills High) since Grade 8. He has been suspended five times for serious misconduct. Solomon is recently suspected of using drugs (specifically dagga and 'tik'). Mrs Pekeur is tired of Solomon's behaviour and decides to punish him by hitting him ten times with a stick or cane.

- (a) Discuss the rules found in the South African Schools Act 84 of 1996 regulating random drug testing at schools. In your answer, you must discuss the obligations of the school principal or his or her delegate and the Minister of Basic Education when learners are tested for drug use. (18)

According to section 8A of the South African Schools Act 84 of 1996:

- (8) The principal or his or her delegate may at random administer a urine or other non-invasive test to any group of learners that is on fair and reasonable grounds suspected of using illegal drugs, after taking into account all relevant factors contemplated in subsection (3).

The relevant factors in subsection (3) are as follows:

A urine or other non-invasive test may only be conducted after taking into account all relevant factors including-

- (i) the best interest of the learners in question or of any other learner at the school; ✓
- (ii) the safety and health of the learners in question or of any other learner at the school; ✓
- (iii) reasonable evidence of illegal activity; ✓
- (iv) all relevant evidence received. ✓

When conducting the urine or other non-invasive test, the principal or his or her delegate must do so in a manner that is reasonable and proportional to the suspected illegal activity. ✓

- (9) A learner contemplated in subsection (8) may be subjected to a urine or other non-invasive test for illegal drugs only if-
- (a) the test is conducted by a person of the same gender; ✓
 - (b) it is done in a private area and not in view of another learner; ✓
 - (c) one adult witness, of the same gender as the learner, is present; ✓
 - (d) the sample is clearly and correctly labelled with full particulars ✓ as contemplated in subsection (5), with the necessary changes; and
 - (e) a device ✓ contemplated in subsection (11) is used.

Subsection (5) provides that the urine test or other non-invasive test must be clearly and correctly labelled with full particulars including-

- (i) the name of the learner; ✓
- (ii) the time and date the sample was taken; ✓
- (iii) an incident reference number;
- (iv) the name of the person that conducted the test; ✓
- (v) the name of the witness; and ✓

- (vi) any other details that may be necessary to identify the item and incident; ✓
 - (vii) recorded in the school record book; ✓
 - (viii) handed over to the police immediately to dispose of it in terms of section 31 of the Criminal Procedure Act 51 of 1977. ✓
- (10) The principal or his or her delegate must-
- (a) within one working day, if practicable, inform the parent that a random test or search and seizure was done in respect of his or her child; ✓ and
 - (b) inform the learner and his or her parent of the result of the test immediately after it becomes available. ✓
- (11) The Minister must-
- (a) identify the device with which the test contemplated in subsection (8) is to be done and the procedure to be followed; ✓ and
 - (b) publish the name of this device, and any other relevant information about it, in the *Gazette*. ✓
- (12) A learner may be subjected to disciplinary proceedings if-
- (a) a dangerous object or illegal drug is found in his or her possession; ✓ or
 - (b) his or her sample tested positive for an illegal drug. ✓
- (13) Any disciplinary proceedings in respect of a learner must be conducted in terms of the code of conduct contemplated in section 8. ✓
- (14) No criminal proceedings may be instituted by the school against a learner in respect of whom-
- (a) a search contemplated in subsection (2) was conducted and a dangerous object or illegal drug was found; or ✓
 - (b) a test contemplated in subsection (8) was conducted, which proved to be positive. ✓
- (b) With the aid of one relevant case, discuss whether the decision taken by Mrs Pekeur to hit Solomon is constitutional or not. (12)**

Section 10(1) of the Schools Act ✓ prohibits the use of corporal punishment in all schools ✓. Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault (section 10(2)). ✓ The Constitution indirectly prohibits corporal punishment (which may be defined as: slapping, ousting or shoving, and rough handling) because such an act encroaches on the entrenched rights to dignity (section 10), privacy (section 14) and security of person and not to be treated in a cruel, inhuman and degrading manner (12(1)(e)). ✓

STUDENTS SHOULD HAVE DISCUSSED THE CASE OF *CHRISTIAN EDUCATION V MINISTER OF EDUCATION* 2000 (4) SA 757 (CC) here. A STUDENT MUST BE AWARDED 8 MARKS FOR THEIR DISCUSSION OF THE CASE (2 MARKS FOR A BRIEF EXPOSITION OF THE FACTS AND 6 MARKS FOR AN EXPLANATION OF THE JUDGMENT).

Facts

The issue before the court was whether when Parliament had enacted the South African Schools Act 84 of 1996, wherein it had prohibited corporal punishment in schools, it had violated the rights of parents of children at independent schools who, in line with their religious convictions, had consented to its use. Christian Education averred that corporal correction was an integral part of the active Christian ethos which it sought to provide its learners attending its member schools and that the blanket prohibition of its use in those schools invaded individual, parental and community rights to practise religion freely. Having been unsuccessful in the Court a quo, the appellant was granted leave to appeal to the Constitutional Court on the grounds that the blanket prohibition contained in s 10 of the Act infringed the provisions relating to privacy (section 14); freedom of religion, belief and opinion (section 15); education (section 29); language and culture (section 30); and cultural, religious and linguistic communities (section 31).

The Minister, however, contended that it was the infliction of corporal punishment, not its prohibition, which infringed constitutional rights. He argued that Christian Education's claim to be entitled to special exemption to administer corporal punishment was inconsistent with the provisions relating to equality (s 9), human dignity (s 10), freedom and security of the person (s 12) and children (s 28) in the Constitution and that s 31(1) rights could not, in terms of the provisions of s 31(2), be exercised in a manner inconsistent with any provision of the Bill of Rights. The Minister further contended that the trend in democratic countries was to ban corporal punishment in schools and that South Africa's obligations as signatory to various conventions required the abolition of corporal punishment in schools, since it involved subjecting children to violence and degrading punishment. Inasmuch as the outlawing of corporal punishment limited other rights such limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. While the sincerity of the beliefs of the parents could not be doubted nor their right to practise their religion in association with each other be disputed, and while the right of parents to administer corporal punishment at home was not challenged, such conduct was not appropriate in schools nor in the education system.

Judgment

In the court's opinion what was in issue was not so much whether a general prohibition on corporal punishment in schools could be justified but whether the impact of such a prohibition on the religious beliefs and practices of the members of the appellant could be justified under the limitations test of s 36. The proportionality exercise had to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption prayed for could be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

While the relevant parents could no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs, they were not being deprived by the Act of their general right and capacity to bring up their children according to their Christian beliefs. The effect of the Act was limited merely to preventing them from empowering the schools to administer corporal punishment.

According to the court, the Minister had established that the prohibition of corporal punishment was part and parcel of a national program to transform the education system and bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools was crucial for educational development as was a coherent and principled system of discipline. The State was further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. Furthermore, in every matter concerning a child, the child's best interests were

of paramount importance. This principle was not excluded in cases where the religious rights of the parent were involved.

In the court's view it was true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, did not hold. To grant respect to sincerely held religious views of a community and make an exception from the general law to accommodate them would not be unfair to anyone else who did not hold those views. The essence of equality lay not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue would, in the circumstances, not be inconsistent with the equality provisions of the Bill of Rights.

The court held, further, that the outlawing of physical punishment in the school represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function manifestly intended to promote respect for the dignity and physical and emotional integrity of all children. The schools in question of necessity functioned in the public domain so as to prepare their learners for life in the broader society. It was not unreasonable to expect those schools to make suitable adaptations in respect of non-discriminatory laws impacting on their codes of discipline.

The court held, further, that the parents were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously. What they were prevented from doing was authorising teachers, acting in their name and on school premises, to fulfil what they regarded as their conscientious and biblically-ordained responsibilities for the guidance of their children. Save for this one aspect, the appellant's schools were not prevented from maintaining their specific Christian ethos.

The court held, accordingly, that, when all the factors were weighed together, the scales came down firmly in favour of upholding the generality of the law in the face of Christian Education's claim for a constitutionally compelled exemption. The appeal was dismissed.

Therefore the decision taken by Mrs Pekeur is unconstitutional.

OR

The Constitutional Court gave a final judgment on corporal punishment in schools and in essence the judgment emphasised the following points:

- Corporal punishment is unconstitutional and therefore outlawed in all schools in South Africa.
- The South African Schools Act of 1996 outlaws the administration of corporal punishment in all schools by both school officials (educators) and parents (the Court did not rule on corporal punishment administered at home by a parent).
- Community rights (e.g. the right to practice a communal religion or culture (s31), cannot be exercised in a way that violates other individual rights protected in the Bill of Rights (e.g. the right of a learner to be protected against cruel and inhuman treatment (s12) and the right to human dignity (s10). The Court therefore reiterated the importance of section 31(2) of the Bill of Rights.

[30]