The Unconstitutionality of Religiously Motivated Corporal Punishment in Independent Schools in South Africa

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1. Introduction

The aim with this contribution is for it to serve as a discussion of the South African Constitutional Court decision of Christian Education South Africa v. Minister of Education regarding the unconstitutionality of religiously motivated corporal punishment in independent schools.[1]
The focus will first rest on the facts of the decision, after which the judgment will be addressed and commented upon.

2. Facts

The central question that the Constitutional Court had to consider turned on the constitutionality of section 10 of the South African Schools Act (the Schools Act) of 1996 that provides that:

> '(1) No person may administer corporal punishment at a school to a learner.
> (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.'[2]

The section in effect amounts to a *blanket prohibition* on corporal punishment in *all* schools in South Africa. The prohibition therefore has consequences not only public schools, but also for independent schools.
Christian Education South Africa (CESA), a voluntary association of 196 independent schools that sought to 'promote evangelical Christian education', complained that section 10 of the Schools Act was unconstitutional as it prevented its member schools from applying corporal punishment in accordance with the Christian ethos the schools hoped to maintain.[3]

CESA subsequently sought direct access to the Constitutional Court (the Court) for an order challenging the applicability of section 10 of the Schools Act to its schools in terms of the Constitution of 1996.[4] The application was refused on procedural grounds after which the association approached the South-Eastern Cape Local Division

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[1] *Christian Education South Africa v. Minister of Education*, 2000 (4) S.A. 757 (CC), 2000 (10) B.C.L.R. 1051 (CC).
[2] South African Schools Act, no. 84 of 1996. S. 10 of the Schools Act is to be viewed in light of s. 3(4)(n) of the National Education Policy Act, no. 27 of 1996, that aims to 'facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights'. Cf. *Christian Education South Africa v. Minister of Education*, *ibid.*, para. 9; Bray, E. (1996), 'Education in transition: the impact of the draft South African Schools Bill of 1996', in: De Groof, J. and Bray, E. (eds), *Education under the new Constitution in South Africa*, Acco, Leuven/Amersfoort, pp. 35-53; Visser, Hans (1997), 'Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools', in: De Groof, J. and Malherbe, E.F.J. (eds), *Human rights in South African education: from the constitutional drawing board to the chalkboard*, Acco, Leuven/Amersfoort, pp. 133-144, regarding the Act as such.
[3] *Christian Education South Africa v. Minister of Education*, *l.c.*, paras 1-2. The association then also made submissions to Parliament during debates on the Schools Act in this regard, but failed to secure an exemption for its member schools, cf. para. 3.
[4] *Christian Education South Africa v. Minister of Education*, 1999 (2) S.A. 83 (CC), 1998 (12) B.C.L.R. 1449 (CC).

of the High Court.[5] The High Court held that it could not be said that administering corporal punishment formed part of religious belief, thereby denying the plaintiff any relief.[6] CESA (hereinafter the appellant) then appealed to the Court against the decision of the High Court, which appeal was considered by the Court.

The appellant contended before the Court that section 10 of the Schools Act infringed the right to privacy;[7] the right to freedom of religion, belief and opinion;[8] the right to establish and maintain independent educational institutions;[9] the right to participate in cultural life;[10] and the right to practice one's religion in community with others.[11] The crux of the appeal though rested on the alleged infringement of the right to freedom of religion and the right to practise one's religion in community with others.[12] The appellant contended that parents comply with their Biblical injunction to apply corporal punishment by delegating the responsibility to educators.[13] The appellant argued in this regard that corporal punishment was consistent with the Constitution and that the lack of an exemption constituted a severe infringement of its sincerely held religious beliefs.[14] It further contended that the state had to show a 'compelling state interest' before its rights could be limited in the way as was done.[15]

On his behalf the minister of education, the respondent, contended that the prohibition of corporal punishment did not infringe any constitutional rights, but that an exemption for the appellant to carry out corporal punishment would infringe the right to equality;[16] the right to human dignity;[17] the right to freedom and security of the person;[18] and the right of every child to be protected from maltreatment, neglect, abuse and degradation.[19] The respondent elaborated that the aim with the Schools Act was to constitute a uniform framework for all schools based on the requirements of the Constitution, irrespective of the fact whether they were public or independent.[20] The granting of an exemption to independent schools would thus frustrate the creation of such a constitutional framework by allowing the unconstitutional practice of corporal punishment in some schools. It was also contended that the prohibition of corporal punishment in schools was in line with trends in others democracies and South Africa's obligations under international instruments.[21] The respondent, however, emphasised that the sincerity of the beliefs held by parents to administer corporal punishment was not questioned, and the practice of corporal punishment at home was also not questioned, although it was not necessarily approved of.[22]

The essence of the dispute before the Court thus turned on the question whether the prohibition of corporal punishment in independent schools was constitutional where such schools advocated the practice based on religious grounds and where parents had delegated their competency in this regard.

3. Judgment

The Court, *per* Sachs J, assumed without deciding that section 10 of the Schools Act constituted an infringement of the right to freedom of religion as guaranteed in section 15(1) and the right to practise one's religion in

5 *Christian Education SA v. Minister of Education*, 1999 (9) S.A. 1092 (S.E.C.L.D.), 1999 (9) B.C.L.R. 951 (S.E.C.L.D.).
6 *Christian Education South Africa v. Minister of Education, l.c.*, para. 6.
7 S. 14: 'Everyone has the right to privacy (...).' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 7.
8 S. 15(1): 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 7
9 S. 29 (3): 'Everyone has the right to establish and maintain, at their own expense, independent educational institutions (...).' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 7.
10 S. 30: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 7.
11 S. 31: '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 7.
12 *Christian Education South Africa v. Minister of Education, l.c.*, para. 16.
13 *Christian Education South Africa v. Minister of Education, l.c.*, para. 5.Various Biblical texts were cited in this regard.
14 *Christian Education South Africa v. Minister of Education, l.c.*, para. 4.
15 *Christian Education South Africa v. Minister of Education, l.c.*, para. 16.
16 S. 9(1): 'Everyone is equal before the law and has the right to equal protection and benefit of the law.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 8.
17 S. 10: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 8.
18 S. 12(1): 'Everyone has the right to freedom and security of the person, which includes the right – (...) (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 8.
19 S. 28(1): 'Every child has the right – (...) to be protected from maltreatment, neglect, abuse or degradation.' Cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 8.
20 *Christian Education South Africa v. Minister of Education, l.c.*, para. 10.
21 *Christian Education South Africa v. Minister of Education, l.c.*, para. 13.
22 *Christian Education South Africa v. Minister of Education, l.c.*, para. 14.

community with others as guaranteed in section 31(1) of the Constitution respectively.[23] This was the case as the Court declared itself to be hesitant in answering too many uncanvassed questions in a new field. The Court then also assumed that corporal punishment as practised by a religious community was not 'inconsistent with any provision of the Bill of Rights' as contemplated by the express reservation to the rights in section 31(1) under section 31(2) of the Constitution.[24]

On the basis of its assumptions the Court then proceeded to examine whether the infringement was justified under the terms of the general limitation provision contained in section 36, that provides as follows:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

The Court did not consider the question whether the infringement was 'in terms of a law of general application', and thus formally acceptable; but immediately considered the question whether the infringement was substantively justifiable, and thus reasonable in a democratic society.[25] The Court then identified the core question that had to be substantively justified, namely whether the *impact* on the religious beliefs in question was constitutional.[26]

The point was made that the general limitation provision contemplates 'the use of nuanced and context-sensitive balancing' in order to determine whether an infringement can be justified or not. The Court emphasised, with reference to S. v. Manamela, that the balancing of interests called for a proportionality exercise to be conducted based on the identified factors in section 36(1)(a)-(e) and other relevant factors.[27] The conclusion was reached that such an exercise entails that the greater the infringement of a right, especially an important right, the more important the justification had to be in order to supplant the protection *in casu*. The Court then consequently criticised the argument by the appellant that 'a compelling state interest' had to be shown under the circumstances, as the introduction of such 'rigid' scrutiny derived from the American model was not compatible with the test foreseen under section 36(1), and due to the fact that the 'a compelling state interest' had been rejected by the United States Supreme Court in the context of freedom of religion.[28]

The proportionality exercise that had to be conducted was placed firmly within the parameters of a 'democratic society'.[29] The values, concerns and aspirations of such a society were thus used as a reference point or measure against which the proportionality of the infringement was gauged. The Court noted in this regard that a relationship exists between the secular and religious realms that can cause tension at times. For instance, the Court noted that the underlying problem in a democratic society was the question as to how far a democracy could allow the members of religious communities to disregard laws by reason of their religious beliefs.[30] The point of departure was formulated that automatic exemption could not simply be granted by way of course, as any society needed to cohere by requiring basic legal norms to be adopted as binding by all.[31]

Words, however, amount to very little if they are not put into practice. The Court subsequently proceeded to conduct the required proportionality analysis.[32]

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[23] *Christian Education South Africa v. Minister of Education, l.c.*, para. 28.
[24] Cf. *Christian Education South Africa v. Minister of Education, l.c.*, paras 8, 28.
[25] *Christian Education South Africa v. Minister of Education, l.c.*, para. 29.
[26] *Christian Education South Africa v. Minister of Education, l.c.*, para. 32.
[27] *S. v. Manamela*, 2000 (5) B.C.L.R. 491 (CC), paras 32-33. Cf. *S. v. Makwanyane*, 1995 (6) B.C.L.R. 665 (CC), 1995 3 S.A. 391 (CC), para. 104; *Christian Education South Africa v. Minister of Education, l.c.*, para. 31.
[28] *Christian Education South Africa v. Minister of Education, l.c.*, para. 29.
[29] *Christian Education South Africa v. Minister of Education, l.c.*, para. 35.
[30] *Christian Education South Africa v. Minister of Education, l.c.*, para. 35.
[31] *Christian Education South Africa v. Minister of Education, l.c.*, para. 35.
[32] The Court gave a useful explanation of the pitfalls to be careful of in conducting the proportionality exercise, cf. *Christian Education South Africa v. Minister of Education, l.c.*, para. 33.

The importance of freedom of religion in a democratic society was realised. In other words, an evaluation was made of the nature of the right, as dictated by section 36(1)(a) of the Constitution.[33] The Court noted in particular the link between the right to believe or not to believe and the affirmation of human dignity.[34] The importance of the right to freedom of religion was emphasised *in casu* by the fact that the issue of corporal punishment in a scholastic environment was not simply a matter of 'convenience or comfort' for the appellant, but the product of sincerely held religious beliefs.[35] The *impact* of the prohibition in the concerned schools was thus far from trivial for the appellant.[36]

The importance of the right to freedom of religion was compared with the importance of the purpose pursued by the Schools Act, as provided for under section 36(1)(b) of the Constitution.[37] The aim of the Schools Act was identified as the development of a national programme to transform the education system in order to bring it in line with the requirements of the Constitution, irrespective of the fact whether public or independent schools were at issue.[38] The Court noted that the development of such a programme was crucial and that a 'coherent and principled system of discipline' was an integral part thereof.[39]

However, the respondent's argument that the right to equality would be violated, were an exemption crafted for the appellant was rejected as a misinterpretation of the equality provisions under the Constitution. Stated differently, an exemption could not be withheld on the basis to pursue equality. The Court held that equality meant treating everyone with 'equal concern and respect' and not necessarily in the 'same way'.[40] The making of an exemption to a religious community would thus not offend the right to equality, but would attest of respect for such a community.

The Court noted though that the pursuit of human dignity was more compelling a reason not to grant an exemption. The fact that a number of African countries and European countries moved towards the abolishment of corporal punishment in schools to advance the dignity of learners was subscribed by the Court.[41]

The Court continued its exercise by observing that section 10 of the Schools Act did not require parents to make an absolute or strenuous choice between obeying the law, and thus the prohibition of corporal punishment, and following their conscience by opting for corporal punishment.[42] This was the case as the common law had not been affected by the Schools Act, parents could thus still administer corporal punishment at home, but were prohibited from delegating their responsibility to educators.[43] It may thus be said that the infringement of the right to freedom of religion was not too severe measured against the requirements of a democratic society, especially as the affected schools could still maintain other aspects of their Christian ethos. In other words, the Court considered the nature and extent of the infringement as required under section 36(1)(c) of the Constitution.[44]

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33 Cf. *Christian Education South Africa v. Minister of Education*, *l.c.*, paras 36-38; Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law* (3rd ed.), Butterworths, Durban, pp. 352-353; Malherbe, Rassie (2002), 'The constitutionality of government policy relating to the conduct of religious observances in public schools', *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law*, pp. 409-410; Van der Schyff, Gerhard (2003), 'The limitation of the right to freedom of religion in South Africa', *Zeitschrift für öffentliches Recht*, 58, pp. 318-320, regarding the factor as such.

34 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 36.

35 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 37.

36 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 37.

37 Cf. Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law*, *o.c.*, pp. 353-354; Malherbe, Rassie (2002), 'The constitutionality of government policy relating to the conduct of religious observances in public schools', *l.c.*, pp. 410-413; Van der Schyff, Gerhard (2003), 'The limitation of the right to freedom of religion in South Africa', *l.c.*, pp. 318-320, regarding the factor as such.

38 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 39.

39 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 29. Cf. Dlamini, Charles (1997), 'The relationship between human rights and education', in: De Groof, J. and Malherbe, E.F.J. (eds), *Human rights in South African education: from the constitutional drawing board to the chalk board*, Acco, Leuven/Amersfoort, pp. 51-52, regarding the discipline of learners.

40 Cf. *Prinsloo v. Van der Linde and Another*, 1997 (3) S.A. 1012 (CC), 1997 (6) B.C.L.R. 759 (CC), paras 32-33; *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 42; *President of the Republic of South Africa and Another v. Hugo*, 1997 (4) S.A. S.A. 1 (CC), 1997 (6) B.C.L.R. 708 (CC), para. 41; *City Council of Pretoria v. Walker*, 1998 (2) S.A. 363 (CC), 1998 (3) B.C.L.R. 257 (CC), paras 81, 130; Swanepoel, Jan (2003), 'The equality jurisprudence developed by South Africa's Constitutional Court since 1994', in: Soeteman, Arend (ed), *Pluralism and law*, Franz Steiner Verlag, Wiesbaden, pp. 186-194; Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law*, *o.c.*, pp. 360-363.

41 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 43.

42 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 51.

43 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 49. The Court noted that a home environment was to be preferred above a school environment for corporal punishment.

44 Cf. Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law*, *o.c.*, pp. 354-355; Malherbe, Rassie, 'The constitutionality of government policy relating to the conduct of religious observances in public schools', *l.c.*, pp. 413-414; Van der Schyff, Gerhard, 'The limitation of the right to freedom of religion in South Africa', *l.c.*, pp. 321-324, regarding the factor as such.

A review of the factors leads one to conclude that a justified relationship of limitation existed between the infringement and the purpose of the infringement. In other words, section 36(1)(d) of the Constitution was satisfied that requires the relationship to be evaluated.[45] The infringement could therefore satisfy its purpose.

But this can only be a preliminary conclusion, as section 36(1)(e) of the Constitution still requires satisfaction. Namely, attention must be given to the question whether less restrictive means could be used in achieving the purpose. The rationale behind the requirement is thus to ensure that an infringed right is infringed as little as possible thereby securing as much protection of the right as possible.[46] The Court noted in this regard that an exemption would rob the national educational programme of its symbolic, moral and pedagogical purpose of creating a culture that is not based on violence and that aims to address disciplinary problems in a new way.[47] The purpose was thus too important to be countered by an exemption. The Court also foresaw problems with implementing an exemption for the appellant's schools. This was the case as administering corporal punishment would obviously be conducted at different schools, using different force by different educators.[48] The possibility of excessive punishment would thus have been present, while learners or their parents could only complain about such excess at the cost of alienating their schools and communities.

The Court then concluded that upon having weighed all the relevant factors the scales came down in upholding the applicability of section 10 of the Schools Act to all schools irrespective of their nature, thereby dismissing the appeal.[49]

4. Commentary

A number of negative and positive observations may be made in commenting on the judgment.

Firstly, it was regrettable that the Court only chose to *assume* that the rights guaranteed by section 15(1) and section 31(1) were at issue and that an infringement of the rights concerned had taken place. This is the case as there was a clear factual disturbance of the rights as complained of. The practice of corporal punishment in the appellant's schools was, by all accounts, religiously motivated. The prohibition of such punishment should therefore have been noted as an interference with the rights concerned. Courts should endeavour to interpret the protected conduct and interests of rights as widely as possible, as well as infringements of such protection.[50] This is the case as a declaration of rights can only act as an instrument with which to constitutionalise a particular society when it is not cut off from the debates and disputes that characterise everyday life. Furthermore, it makes little sense to exclude conduct and interests from protection when the inevitable balancing exercise that has to be conducted in order to decide not to extend protection to such conduct and interests could possibly have been used in justifying an interference with the extended protection. The effect would then be to so constitutionalise society in stead of avoiding the application of a declaration of rights.

Secondly, it is furthermore unfortunate that the Court did not engage the question regarding the express reservation in section 31(2) that the rights guaranteed by section 31(1) may only be exercised in a manner that is consistent with the remainder of the Bill of Rights. The reservation cannot be interpreted as meaning that *any conflict* with other provisions in the Bill will mean that such provisions must have preference over the rights in section 31(1). Such an interpretation will effectively render the right to practise one's religion in community with others void whenever the slightest conflict would arise with any other provision. The ramifications of such an interpretation would also be dire for independent schools with a communal religious identity, as every conflict

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45 Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law, o.c.*, pp. 355-356; Malherbe, Rassie, 'The constitutionality of government policy relating to the conduct of religious observances in public schools', *l.c.*, pp. 414-416; Van der Schyff, Gerhard,'The limitation of the right to freedom of religion in South Africa', *l.c.*, pp. 325-327, regarding the factor as such.

46 Cf. Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law, o.c.*, 356-357; Malherbe, Rassie, 'The constitutionality of government policy relating to the conduct of religious observances in public schools', *l.c.*, pp. 416-417; Van der Schyff, Gerhard, 'The limitation of the right to freedom of religion in South Africa', *l.c.*, pp. 328-329, regarding the factor as such.

47 Cf. *S. v. Williams*, 1995 (3) S.A. 632 (CC), 1995 (7) B.C.L.R. 861 (CC), paras 48-49; *S. v. A Juvenile*, 1990 (4) S.A. 151 (Z.S.), 161E-F; *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*, 1991 (3) S.A. 76 (Nm.S.C.), 93H-I, regarding observations about corporal punishment as such in respectively South African, Zimbabwean and Namibian contexts.

48 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 50.

49 *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 52.

50 Cf. Alexy, Robert (2002), *A theory of constitutional rights*, Oxford University Press, Oxford, pp. 200-217; Malherbe, Rassie, 'The constitutionality of government policy relating to the conduct of religious observances in public schools', *l.c.*, p. 407; Van der Schyff, Gerhard (2003), 'Limitation and waiver of the right to freedom of religion', *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law*, p. 378.

with their communal religious expression would nullify such expression, thereby rendering their independence practically useless. The reservation should rather be interpreted for it to disallow exercises of the rights so guaranteed that are inconsistent with other provisions in the Bill of Rights *after the general limitation provision has been applied to any such conflict*.[51]

Thirdly, it is a pity that the Court did not address the question of legality. In other words, whether the interference posed by section 10 of the Schools Act was in terms of a 'law of general application'. Legality is an important principle, as only infringements that spring from the law can be used to justify the limitation of fundamental rights, thereby attempting to avoid arbitrary infringements of such rights.[52] By expressly addressing it, rather than simply implying it, the Court would have contributed to building a structured constitutional discourse and jurisprudence.

The references by the Court to the *general* nature of section 10 of the Schools Act must not be confused with the question under legality as to whether an infringement is in terms of a law of *general application*.[53] Generality as used by the Court must be interpreted as a reference to the fact that an exemption was not granted the appellant under a law of general application. Section 10 of the Schools Act would thus still have been a law of general application had an exemption been granted, as it would then still have attempted to regulate a particular category of school, namely public schools and not a particular school as such. This is the case, as an interpretation that attempts to equate notions of generality in the judgment with the requirement of generality as an element of the principle of legality would confine the merits of the judgment to the issue of legality, when that was clearly not the case in the judgment.

Fourthly, the Court must be commended for its considered and mature approach to determining whether the infringement caused by section 10 of the Schools Act was *substantively* justified. In other words, whether the infringement was reasonable in a democratic society.

For example, the Court wisely rejected the argument that a 'compelling state interest' had to be shown before the infringement could have been justified. The creation of different levels of justification in American constitutional law was due to the fact that express limitation provisions were absent and had to be implied in some form or another. The case under the South African Constitution is clearly different. A well-developed general limitation provision is present, as augmented by a number of specific limitation provisions, that sets the scene within which the necessary balancing of interests must take place in order to gauge the justification of infringements. The fact may not be lost from sight though that the American experience must not entirely be discounted. For example, the fact that certain factual situations require a more stringent form of justification may conceivably be used under permitting circumstances as comparative material with which to determine the nature and importance of a particular right and the degree of severity that the importance of a purpose must exhibit in order to limit such a right.[54] In other words, the qualities of foreign jurisprudence must be evaluated against the formal and substantive background created by the Constitution and not simply supplanted thereby.

Fifthly, a number of remarks may be ventured about the concept of a democratic society and its ramifications for independent schools. The question may be put in this regard as to the desired function of independent schools in a democratic society. In other words, what role must independent schools fulfil in such a society?

It can be argued that independent schools contribute to the diversity and pluralism that must be present in any democratic society. One can hardly speak of a democratic society without recognising that different people and groupings will exercise their rights in different ways thereby leading to diversity and pluralism.[55] A democratic society should therefore be sensitive to the needs of different communities, otherwise its guarantees of freedom

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[51] Cf. Van der Schyff, Gerhard, 'The limitation of the right to freedom of religion in South Africa', *l.c.*, pp. 336-337.

[52] Cf. Witteveen, Willem (2000), *De denkbeeldige staat: voorstellingen van democratische vernieuwing*, Amsterdam University Press, Amsterdam, p. 197; Heringa, A.W. (1986), 'Het vereiste "prescribed by law": een zelfstandige waarborg?', in: Heringa, A.W., De Winter, R.E. and Witteveen, W.J. (eds), *Staatkundig jaarboek 1986*, Ars Aequi Libri, Nijmegen, pp. 161-174; Garibaldi, Oscar M. (1976), 'General limitations on human rights: the principle of legality', *Harvard International Law Journal*, 17, pp. 503-557; Van R. Henning, P.J. (2000), 'Legality and the rechtsstaat', *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law*, pp. 222-228, regarding the principle of legality.

[53] E.g. *Christian Education South Africa v. Minister of Education, l.c.*, para. 52.

[54] I.e. an evaluation in light of s. 36(1)(a) and s. 36(1)(c).

[55] Cf. *Christian Education South Africa v. Minister of Education, l.c.*, paras 23-24; ECHR, *Handyside v. United Kingdom* of 12 July 1976, *Publ. Eur. Court H.R.*, Series A, vol. 24, para. 49; Van der Schyff, Gerhard (2004), 'Het concept democratie in het EVRM', in: Adams, Maurice and Popelier, Patricia (eds), *Recht en democratie: de democratische verbeelding in het recht*, Intersentia, Antwerpen, pp. 563-572; Arai-Takahashi, Yutaka (2002), *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Intersentia, Antwerp, pp. 244-249.

amount to little if they may not be exercised. Independent schools thus allow for different focuses to be pursued than the mainstream, or allow for different emphases to be followed on mainstream topics. Independent schools are therefore important in ensuring that the accommodation of difference in society is not simply hollow rhetoric. The Constitution evidences a keen awareness in this regard by guaranteeing the right to found independent schools in section 29(3). However, the cardinal question, as correctly recognised by the Court, is to which extent may independent schools be allowed to pursue their own agendas? The Court is to be supported for articulating the basic notion that a balance must be sought that values *coherence*.[56] This is an important point to grasp, as there can only be true freedom in society where individuals and groupings recognise that they have to sacrifice a measure of their freedom in order to constitute a society that is in turn capable of defending their guaranteed freedom.[57] A so-called wild or unbridled freedom or natural state is so regularised by the introduction of a legal order to promote security and predictability in human inter-action.[58]

However the question is whether the Court drew a desirable line between autonomy and coherence *in casu*?

It is submitted that the Court drew a line consistent with the relevant circumstances. Although independent schools were prohibited from administering corporal punishment it may be argued that the *impact* of the prohibition on societal diversity and pluralism was not so great as to sound alarm bells. This is the case as independent schools could still pursue their Christian ethos, bar corporal punishment. Corporal punishment as a corrective or educative method was also not outlawed as such, thereby allowing faith communities to pursue it within the confines of the common law, but then at home.[59] The only real impact on pursuing corporal punishment as an expression of a particular religious ethos was thus the *forum* considered to be the most desirable for it. In other words, a domestic environment as opposed to a scholastic environment.

Thus, the attainment of societal coherence was not entirely at the expense of pursuing an ethos different from that espoused by the state or other societal actors, this is true not only for the independent schools that could still pursue other aspects of their ethos, or for the parents involved who were allowed to pursue their particular ethos as before.

[56] E.g. *Christian Education South Africa v. Minister of Education*, *l.c.*, para. 35.

[57] Scheltens, D.F. (1980), 'Het prejuridische subjectieve recht als fundamenteel rechtsbeginsel', in: Scholten, G.J., Scheltens, D.F. and Van Eikema Hommes, H.J., *Rechtsbeginselen*, W.E.J. Tjeenk Willink, Zwolle, pp. 24-26.

[58] *Ibid.*

[59] It is important to note that the decision did not revolve about the constitutionality of corporal punishment as such, but simply if it was appropriate in independent schools wishing to retain it on religious grounds. Calls have however been made for corporal punishment to be prohibited totally. A total prohibition of corporal punishment in South Africa would however be extremely difficult to police and would probably be honoured more in its breach than in its observance. Pete, Steve (1998), 'To smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children?', *South African Journal on Human Rights*, 14, pp. 430-460, nonetheless advocates a complete ban and argues that it will help to change public opinion over time although it may meet initial resistance.