CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 4/00

CHRISTIAN EDUCATION SOUTH AFRICA Appellant

versus

MINISTER OF EDUCATION Respondent

Heard on : 4 May 2000

Decided on : 18 August 2000

JUDGMENT

SACHS J:

Introduction

[1] The central question in this matter is: when Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?

[2] The issue was triggered by the passage of the South African Schools Act (the Schools Act) in

1996,[1] section 10 of which provides:

> "**Prohibition of corporal punishment**
>
> (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."

The appellant, a voluntary association, is an umbrella body of 196 independent Christian schools in South Africa with a total of approximately 14 500 pupils. Its parent body was originally established in the USA "to promote evangelical Christian education" and the appellant has been operating in South Africa since 1983. It says that its member schools maintain an active Christian ethos and seek to provide to their learners an environment that is in keeping with their Christian faith. They aver that corporal correction — the term they use for corporal punishment — is an integral part of this ethos and that the blanket prohibition of its use in its schools invades their individual, parental and community rights freely to practise their religion.

[3] When the Schools Act was being debated in Parliament, the appellant made submissions to the effect that the prohibition of corporal punishment violated its rights to freedom of religion and cultural life, as guaranteed in the then applicable interim Constitution, but it failed to secure an exemption from the prohibition for its schools. After the Schools Act was adopted, the appellant sought direct access to this Court[2] for an order challenging its constitutionality. This application was refused on procedural

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1 Act 84 of 1996

2 In terms of section 167(6)(a) of the Constitution and section 16 of the Constitutional Court Complementary Act, 13 of 1995, read with rule 17 of the Constitutional Court Rules.

grounds.[3] The appellant then applied to the South-Eastern Cape Local Division of the High Court for an order declaring section 10 of the Schools Act unconstitutional and invalid in that it interferes with the right to freedom of religion and to cultural life to the extent that it prohibits corporal punishment in those independent schools. In the alternative the appellant sought to have section 10 declared unconstitutional and invalid to the extent that it prohibits corporal punishment in independent schools where parents have consented to its application. The appellant eventually abandoned its first claim and relied solely on the alternative claim.

[4] The appellant cited the following verses in the Bible as requiring its community members to use "corporal correction":

> "*Proverbs 22:6*
> Train up a child in the way it should go and when he is old he will not depart from it.
>
> *Proverbs 22:15*
> Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him.
>
> *Proverbs 19:18*
> Chasten thy son while there is hope and let not thy soul spare for his crying.
>
> *Proverbs 23:13 and 14*
> Do not withhold discipline from a child, if you punish with a rod he will not die. Punish him with a rod and save his soul from death."

In support of its contention that parents have a divinely imposed responsibility for the training and

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3 *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC).

upbringing of their children, the appellant cites *Deuteronomy* 6:4 to 7:

> "Hear, O-Israel! The Lord is our God, the Lord is one!
> And you shall love the Lord your God with all your heart and with all your soul and with all your might.
> And these words which I am commanding you today, shall be on your heart;
> and you shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up."

It contends that corporal punishment is a vital aspect of Christian religion and that it is applied in the light of its biblical context using biblical guidelines which impose a responsibility on parents for the training of their children.

[5] It has further claimed that according to the Christian faith, parents continue to comply with their biblical responsibility by delegating their authority to punish their children to the teachers. By signing a document entitled "Consent to Corporal Punishment", they indicate that they understand corporal punishment to be inseparable from their understanding of their Christian faith and an expression of their religion. They further acknowledge that if they do not wish a child of theirs to be subjected to corporal punishment they are at liberty to remove such child from the school; otherwise they authorise the school to apply corporal correction. The correctional procedure to be followed includes giving the parents themselves the option to apply corporal punishment should they so wish. Should such option not be exercised, the correction is to be applied in the form of five strokes given by the principal, or a person

delegated by him, with a cane, ruler, strap or paddle.[4]

[6] While not doubting the sincerity of the appellant's beliefs, Liebenberg J in the High Court found that the scriptures relied on provided "guidelines" to parents on the use of the rod, but did not sanction the delegation of that authority to teachers. He held that the authority to delegate to teachers was derived from the common law and the approach adopted by the appellant was merely "to clothe rules of the common law in religious attire". He held that in the circumstances it had not been established that administering corporal punishment at schools formed part of religious belief. The judge, however, decided that as it was a test case he should consider the other arguments raised by the appellants. He assumed for the purposes of those arguments that administering corporal punishment at schools concerned a serious religious belief. He concluded that section 10 of the Schools Act did not constitute a substantial burden on religious freedom. He also held that corporal punishment in schools infringed the children's right to dignity and security of the person and was accordingly not protected by section

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[4] The prescribed procedure is set out in the appellant's affidavit as follows:

"(a) Know the offence. Investigate and get the facts. The child must deserve the punishment. Know without a doubt that it was intentional not careless.

(b) Get a witness. Men give hidings to boys, ladies to girls and the witness should be the same sex as the child.

(c) Discuss the offence. The child must know exactly what they did and why they are being punished. Give them the benefit of any doubt.

(d) Get an admission. The child should admit to doing wrong. If you know the offence and the child will not admit it, he [sic] is dishonest and this compounds the offence.

(e) Identify the biblical principle that has been violated. Identify a principle fromscripture that has been violated by the child's behaviour.

(f) Position the child, have them lean forward with feet spread apart. Put their hands on the desk. You want them to be stationery [sic]. You don't want to hurt the child. Discipline is one thing, damage is another.

(g) Review the offence, discuss the seriousness of the offence and the objective in building character.

(h) Love the child, smile and tell them that you love them.

(i) Pray with the child and have the child pray first and ask for forgiveness then [sic] you pray for the child and for his/her growth.

(j) Men should hug boys and ladies should hug the girls. Reaffirm your relationship with that child. When the child leaves they need to know that the slate is clean."

31 of the Constitution. He therefore dismissed the application.[5]

[7] The appellant applied for and was granted leave to appeal to this Court on the grounds that the blanket prohibition in section 10 of the Schools Act infringes the following provisions of the Constitution:

> "**14. Privacy**
> Everyone has the right to privacy . . . ."
>
> "**15. Freedom of religion, belief and opinion**
> (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion."
>
> "**29. Education**
> . . . .
> (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions . . . ."
>
> "**30. Language and culture**
> 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."
>
> "**31. Cultural, religious and linguistic communities**
> (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

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5 *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE); 1999 (9) BCLR 951 (SE).

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."

[8] The respondent is the Minister of Education. He contends that it is the infliction of corporal punishment, not its prohibition, which infringes constitutional rights. More particularly, he contends that the claim of the appellant to be entitled to a special exemption to administer corporal punishment is inconsistent with the following provisions in the Bill of Rights:

"**9. Equality**

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

"**10. Human dignity**

Everyone has inherent dignity and the right to have their dignity respected and protected."

"**12. Freedom and security of the person**

(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."

"**28. Children**

(1) Every child has the right —

. . . .

> (d) to be protected from maltreatment, neglect, abuse or degradation"

He furthermore places reliance on section 31(2) which states that section 31(1) rights "may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[9] In an affidavit submitted on behalf of the respondent, the Director-General of the Department of Education contends that corporal punishment in schools is contrary to the Bill of Rights. He points out that, in 1996, Parliament adopted the National Education Policy Act[6] which, its preamble declared, was:

> ". . . 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".

Section 3(4)(n) of that Act provides that the Minister of Education shall determine national policy for the:

> "control and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution".

[10] The affidavit states that the Schools Act passed later that year provided a single framework for public and independent schools and learners, based upon the rights, freedoms and responsibilities

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6 Act 27 of 1996.

inherent in the Constitution, including the dignity and equality of all persons.[7] During the drafting process of the Schools Act, the respondent received support for the abolition of corporal punishment at schools from all the national student representative bodies, and the two largest national teacher unions. Although not accepted, the appellant's submissions on the Bill were indeed taken note of and seriously considered when Parliament consulted with interested parties during 1995 and 1996.

[11] The affidavit avers further that the advent of the new Constitution requires persons and groups to desist from practices which, according to their beliefs and traditions, may previously have been regarded as generally acceptable. In the past, public institutions had inflicted physical assaults upon citizens and other forms of abuse of their physical, emotional and psychological integrity. State policy and public practice had formerly permitted corporal punishment to be administered to children in schools, and also to juvenile and other offenders in prisons and other correctional institutions. In the light of the new constitutional order, state policy is now different.

[12] According to the affidavit, corporal punishment is inherently violent, and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered. South Africans have suffered, and continue to suffer, a surfeit of violence. The state has an obligation to ensure that the learner's constitutional rights are protected. It has an interest in ensuring that education in all schools is conducted in accordance with the spirit, content and values of the Constitution. The affidavit avers that corporal punishment is incompatible with human dignity. Such punishment is degrading, unacceptable and in violation of both the teacher's and the learner's human

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[7] See the preamble to the Schools Act.

dignity. Even though it is significant that parents at the appellant's schools do not object to corporal punishment, this factor cannot override the general concerns of the state and the Department of Education.

[13] Finally, the respondent states that the trend in democratic countries is to ban corporal punishment in schools. South Africa's international obligations[8] under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[9] and the United Nations Convention on the Rights of the Child,[10] require the abolition of corporal punishment in schools, since it involves subjecting children to violence and degrading punishment.[11] Inasmuch as the outlawing of corporal

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8 The Constitution affirms that international law is an important interpretive tool. See section 39(1)(b) of the Constitution which provides:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
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> . . .
>
> (b) must consider international law".

Section 233 of the Constitution provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

9 South Africa ratified this Convention on 10 December 1998.

10 South Africa ratified this Convention on 16 June 1995.

11 Article 37 of the United Nations Convention on the Rights of the Child provides that:

> "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. "

Article 19 provides that:

> "1. State 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 care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Article 28(2) requires that:

punishment may limit other rights, such limitation is a reasonable and justifiable one in an open and democratic society based on human dignity, equality and freedom.

[14] The respondent indicates that he does not doubt the sincerity of the beliefs of the parents, nor does he dispute their right to practise their religion in association with each other. Furthermore he does not challenge the right of these parents to administer corporal punishment at home, even if he does not necessarily approve of it. He asserts, however, that such conduct is not appropriate in schools or the education system.

[15] It is clear from the above that a multiplicity of intersecting constitutional values and interests are involved in the present matter — some overlapping, some competing. The parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children. The child, who is at the centre of the enquiry, is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such freedom. Yet the same child is also an individual person who may find himself[12] "at the other end of the stick", and as such be entitled to the protections of sections 10, 12 and 28. Then, the broad

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> "State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in its preamble recognises "the inherent dignity of the human person" and refers to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no-one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

12 I use the masculine gender. Appellant said that corporal correction at its senior schools was limited to boys, even though there was no biblical injunction requiring this, because it was well known that girls were better disciplined than boys.

community has an interest in reducing violence wherever possible and protecting children from harm. The overlap and tension between the different clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated. On the one hand, the dignity of the parents may be negatively affected when the state tells them how to bring up and discipline their children and limits the manner in which they may express their religious beliefs. The child who has grown up in the particular faith may regard the punishment, although hurtful, as designed to strengthen his character. On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding deliberately inflicted on him in an institutional setting. Indeed, it would be unusual if the child did not have ambivalent emotions. It is in this complex factual and psychological setting that the matter must be decided.

Sections 15 and 31 of the Constitution

[16] The appellant's basic argument was that its rights of religious freedom as guaranteed by sections 15 and 31 had been infringed, and that those rights should be viewed cumulatively.[13] It contended that the corporal correction applied in its schools with the authorisation of the parent was not inconsistent with any provision of the Bill of Rights. Accordingly, the qualification contained in section 31(2) did not apply. It went on to argue that once it succeeded in establishing that the Schools Act substantially impacted upon its sincerely held religious beliefs, the failure of the Schools Act to provide an

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13 After argument in this matter was concluded, the Supreme Court of Appeal delivered judgment in the case of *Prince v The President of the Law Society of the Cape of Good Hope and Others* SCA 220/98, 25 May 2000, as yet unreported. The issues in that case were not canvassed in the present one, and this judgment will not comment upon them.

appropriate exemption could only pass constitutional muster if it were justified by a compelling state interest.

[17] The respondent contended, however, that the governing provision was section 31 and not section 15. The corporal punishment was delivered in the context of community activity in a school and accordingly it could only attract constitutional protection if in terms of section 31(2) it was not inconsistent with any other provision of the Bill of Rights; since corporal punishment at school violates the right to equality and the right to dignity, it forfeits any claim to constitutional regard. Alternatively, if corporal punishment in the appellant's schools did not violate the Bill of Rights, its prohibition by the Schools Act was reasonable and justifiable in an open and democratic society.

[18] I will start with section 15 which deals with freedom of religion, belief and opinion. The meaning of a similar provision in the interim Constitution was considered by Chaskalson P in *S v Lawrence; S v Negal; S v Solberg*[14] where he made the following observation[15]:

> "In the [*R v Big M Drug Mart Ltd*] case Dickson CJC said:
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> > 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.'

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14 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

15 Although the Court was divided on other questions, there was no dissent from these remarks. It should be borne in mind that the interim Constitution did not have a provision similar to section 31.

> I cannot offer a better definition than this of the main attributes of freedom of religion. But, as Dickson CJC went on to say, freedom of religion means more than this. In particular he stressed that freedom implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This is what the Lord's Day Act did; it compelled believers and non-believers to observe the Christian Sabbath."[16]

[19] This broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs. Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial. This aspect is underlined by article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) which states:

> "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, *either individually or in community with others* and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." (emphasis added)

[20] The interim Constitution, like the ICCPR, did not distinguish between personal and communal

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16 Above n 14 at para 92.

religious observances and practices. The final Constitution, however, makes specific provision in section 31 for the practice of religion in community with others. For this reason, much of the argument in this Court and in the High Court was directed at the interpretation and application of this section.

[21] The respondent contended that the relief sought by the appellant in the present proceedings, confined as it was to a declaration that section 10 of the Schools Act was unconstitutional "to the extent that it is applicable to learners at . . . independent schools . . . whose parents or guardian have given consent to such corporal punishment . . .", depended upon section 31 of the Constitution, and should be dismissed because it failed to meet the requirement for the exercise of section 31 rights set by section 31(2). This, the respondent contended, flowed from the fact that the administration of corporal punishment to scholars infringed their right to dignity under section 10 of the Constitution, their rights as children under section 28(1)(d) of the Constitution "to be protected from maltreatment, neglect, abuse or degradation" and their right under section 12 of the Constitution to freedom and security of the person, which includes the right "to be free from all forms of violence from either public or private sources". The respondent also contended that if corporal punishment is not prohibited by the Constitution, section 10 of the Schools Act, insofar as it may constitute a limitation of other fundamental rights, is a limitation that "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[17]

[22] The presence of section 31 in the Bill of Rights may be understood as a product of the two-stage negotiation process resulting in the adoption of the final Constitution, in which one of the concerns

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[17] See section 36 of the Constitution.

was how community rights could be protected in a non-racial parliamentary democracy based on universal suffrage, majority rule and individual rights. Constitutional Principle (CP) XI[18] declared that the diversity of language and culture should be acknowledged and protected and conditions for their promotion encouraged. CP XII stated that collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations should be recognised and protected.[19]

[23] The Constitution complies with these Principles in a number of different ways. Thus, language rights and rights of belief are first spelt out fully as individual rights in sections 15 and 30, even though they have a community dimension and are frequently exercised in a community setting. Section 31, in

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18 The interim Constitution contained 34 Constitutional Principles in schedule 4. A new constitutional text passed by the Constitutional Assembly in terms of chapter 5 of the interim Constitution had to comply with these Constitutional Principles. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 2 and paras 15 - 19 and 26 - 30.

19 In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) the Court considered the argument that the wording of section 31 did not comply with the requirements of CP XII. At paragraph 24 the Court noted that:

> "CP XII does not indicate how the collective rights of self-determination are to be recognised and protected. That was a matter for the [Constitutional Assembly] to decide. Having regard to the CPs as a whole, the '(c)ollective rights of self-determination' mentioned in CP XII are associational individual rights, namely those rights which cannot be fully or properly exercised by individuals otherwise than in association with others of like disposition. The concept 'self-determination' is circumscribed both by what is stated to be the object of self-determination, namely 'forming, joining and maintaining organs of civil society' as well as by CP I which requires the state for which the Constitution has to provide, to be 'one sovereign State'. In this context 'self-determination' does not embody any notion of political independence or separateness. *It clearly relates to what may be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign state*." (emphasis added)

The Court noted at para 25 that this protective framework for civil society was enhanced by institutional structures such as the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality. The Court thus held that the requirements of CP XII had been met.

its turn, goes on to emphasise the protection to be given to members of communities united by a shared language, culture or religion. It is evident that this section closely parallels article 27 of the ICCPR, which reads as follows:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

There are important differences, however, between the two texts. The recipients of the protection offered by section 31 are not referred to as "minorities". Instead, the right refers to those who belong to a cultural, religious or linguistic "community". In addition, the word "ethnic", used in article 27, has been replaced with the term "cultural".[20] The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism. At the same time, following the approach used in article 27, the protection of diversity is not effected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with

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[20] One commentator, Currie, considers that this reflects:

> "a desire to avoid any association of the new constitutional order with the ethnic particularism of the apartheid ideology. Rather than ties of blood, the Constitution values and protects ties of affinity. Rather than recognizing rights of 'minorities', with the accompanying connotations of a divided population, the Constitution prefers to emphasize that it is protecting connectedness . . . . '[C]ultural community' suggests an organic *Gemeinschaft* connected by language and custom, rather than a fragmented and defensive social agglomeration." (footnote omitted)

Currie "Minority Rights: Education, Culture, and Language" in Chaskalson et al (eds) *Constitutional Law of South Africa* Revision Service 5 (Juta, Cape Town 1999) at 35-12.

other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language). The Constitution finally provides for institutional mechanisms to protect community rights by making provision for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[21]

[24] There are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association contained in section 18.[22] Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different".[23] In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society,[24]

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21 Sections 181, 185 and 186.

22 Thus, the possibility of legislation recognising marriages concluded under a system of religious law, or any tradition, is expressly provided for in sections 15(3)(a)(i) and (ii); the right of everyone to establish independent educational institutions is acknowledged in section 29(3); section 30 recognises the right to use a language and to participate in the cultural life of one's choice; and section 211(3) recognises customary law.

23 See *S v Lawrence; S v Negal; S v Solberg* above n 14 at para 147 and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 134.

24 Section 31(1)(b) speaks about "organs of civil society". Currie states that civil society is "generally understood to mean the private and unofficial associations of the citizens of a state." (footnote omitted) (above n 20 at 35-23) The complex position of civil society as an intermediate structure between the citizens and the state has been described by Glendon in the following manner:

> "[W]e need to attend to the 'seedbeds' of civic virtue where succeeding generations learn anew to appreciate the benefits and sacrifices necessary for

indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.

[25] It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity.[25]

[26] It should be observed, further, that special care has been taken in the text expressly to acknowledge the supremacy of the Constitution and the Bill of Rights.[26] Section 31(2) ensures that the

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> a constitutional order. But here we encounter a problem and a paradox. The problem is that the intermediate structures that may be essential to modern representative governments and welfare states are themselves threatened by the expansion of the state and, to some extent, by the expansion of individual rights against the group. The paradox is that these endangered, small, social environments that are somehow necessary to modern . . . states are not necessarily liberal or egalitarian or democratic themselves. Nevertheless, I would suggest that these fragile social environments are in as much need of protection from deliberate or inadvertent destruction as is our natural environment. . . . [We] have concentrated primarily on the individual and the state . . . Neither . . . do we have an adequate vocabulary or conceptual apparatus to deal with the small mediating structures that lie between the two."

Glendon "Comments on Part 4" in Kirchof and Kommers (eds) *Germany and Its Basic Law: Past, Present and Future — A German-American Symposium* (Nomos Verlagsgesellschaft, Baden-Baden) at 286 - 7.

25 For a discussion of some of the issues involved in relation to individual rights in the context of claims for group autonomy see Metcalfe "Illiberal Citizenship? A Critique of Will Kymlicka's Liberal Theory of Minority Rights" (1996) 22 *Queen's Law Journal* 167.

26 Legislation dealing with personal family law under section 15(3)(a) must be consistent with section 15 and the other provisions of the Constitution in terms of section 15(3)(b); independent educational institutions may not discriminate on the basis of race in terms of section 29(3)(a); the exercise of the rights to language and culture in terms of section 30 may not be inconsistent with any provision of the Bill of Rights; and the recognition of rights in terms of customary law is subject to the Constitution in terms of section 39(3).

concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to "privatise" constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned,[27] where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant.

[27] This is clearly an area where interpretation should be prudently undertaken so that appropriate constitutional analysis can be developed over time in the light of the multitude of different situations that will arise. If it is possible to decide the present matter without attempting to give definitive answers on a complex range of questions in a new field, many of which were not fully canvassed in argument, then

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[27] See Tribe *American Constitutional Law* 2nd ed (Foundation Press, New York 1988) at 1155:

> "Any attempt to constitutionalize the relationship of the state to religion must address the fact that much of religious life is inherently associational, interposing the religious community or organization between the state and the individual believer. Especially in the area of religion, courts in this country have been reluctant to interfere with the internal affairs of private groups. . . Such deference to intermediate groups entails potential domination by the group over the individual member, especially the dissident . . . " (footnotes omitted)

See also Ackermann "Women, Religion and Culture: A Feminist Perspective on 'freedom of religion'"(1994) 22:3 *Missionalia* 212 at 225:

> "For women, freedom of religion means freedom from both religious and cultural constraints which impinge negatively on our experience . . .
>
> [A]s women struggle with the ambiguity of our relationship to the idea of 'freedom of religion', while at the same time recognising our legitimate claims for a religious and cultural identity, we need to challenge those aspects of both religion and culture which are oppressive to us and learn to live with the pain of ambiguity creatively."

such a course should be followed. In the present matter I think that it is possible to do so. For the purposes of this judgment, I shall adopt the approach most favourable to the appellant and assume without deciding that appellant's religious rights under sections 15 and 31(1) are both in issue. I shall also assume, again without deciding, that corporal punishment as practised by the appellant's members is not "inconsistent with any provision of the Bill of Rights" as contemplated by section 31(2). I assume therefore that section 10 of the Schools Act limits the parents' religious rights both under section 31 and section 15. I shall consider, on these assumptions, whether section 10 of the Schools Act constitutes a reasonable and justifiable limitation of the parents' practice rights under section 15 and section 31.[28]

[28] On the basis of these assumptions made for the purposes of argument, I proceed to examine whether, under section 36, the negative impact which the Schools Act has on the practice of corporal correction in the schools of the appellant's religious community, is to be regarded as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. If, even applying the approach most favourable to the appellant, the answer is yes, then it will not be necessary to consider alternative interpretations which would be less supportive of appellant's position.

Justification of the limitation of the right to religious freedom and religious community practice

(a) The test to be applied

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[28] If the limitation of the religious rights protected by sections 15 and 31 proves to be reasonable and justifiable, it is clear that any limitations of the rights to privacy (section 14) and the right to establish independent schools (section 29(3)) would also be justifiable.

[29] I turn now to the question of whether the limitation on the rights of the appellants can be justified in terms of section 36, the limitations clause. The appellant argued that once it succeeded in establishing that the Schools Act substantially impacted upon its sincerely held religious beliefs, the state was required to show a compelling state interest in order to justify its failure to provide an appropriate exemption. This formulation correctly points to the need for a balancing exercise to be done, but establishes a standard that differs from that required by section 36. The proposed formulation imports into our law a rigid "strict scrutiny" test taken from American jurisprudence, a test which I add, has been highly controversial in the United States. The test requires any legislative provision which impacts upon the freedom of religion to be serving a "compelling state interest" A similar test has been adopted in relation to classifications based on race.[29] In the context of freedom of religion, however, the test has been rejected by a majority opinion of the Supreme Court.[30] Furthermore, even those who criticise

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29 See *Tribe* above n 27 at 1451 and 1465.

30 In *Employment Division, Department of Human Resources of Oregon et al v Smith et al* 494 US 872 (1990) Scalia J for the majority stated the court's approach as follows:

> "[I]f prohibiting the exercise of religion . . . is not the object of the tax [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."(at 878)

He explained that this was because:

> "[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy . . . Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference' . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor [sic] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . ." (at 888) (emphasis in the original)

In dissent, O'Connor J expressed the opinion that a balancing exercise should be conducted by the court: once it was shown that a measure in fact had a substantial impact on the exercise of religious freedom, a compelling state interest had to be produced to justify it. This test was to be applied in each case to determine:

> ". . . whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." (at 899)

See Berg *The State and Religion in a Nutshell* (West, Minnesota 1998) at 78 - 115. The case led to

the new approach adopted by the Supreme Court, acknowledge that the strict scrutiny test was honoured as much in the breach as in the observance[31] and some assert that a different approach which would require the appropriate accommodation of religious freedom should be adopted.[32]

[30] Our Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing. Section 36 provides that:

> "(1) The rights in the Bill of Rights may be limited only in terms of a 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—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose."

[31] As the Court noted in *S v Manamela*, what section 36 requires is an overall assessment that

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enormous controversy and fierce academic debate. See for example McConnell "Free Exercise Revisionism and the *Smith* Decision" (1990) 57 *The University of Chicago Law Review* 1109 and Marshall "In Defense of *Smith* and Free Exercise Revisionism" (1991) 58 *The University of Chicago Law Review* 308.

31 Sager noted that:

> "The compelling-state-interest test has been described as strict in theory and fatal in fact. Here, it was strict in theory and notoriously feeble in fact."

Sager "Panel Discussion: Contemporary Challenges Facing the First Amendment's Religion Clauses" (1999) 43 *New York Law School Law Review* 101 at 117. Berg above n 30 at 102 - 7 cites *United States v Lee* 455 US 252 (1982) and *Bob Jones University v United States* 461 US 574 (1983) as examples. See also Tribe above n 27 at 1267.

32 See McConnell above n 30.

will vary from case to case:

> "In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected . . . .
>
> Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."[33]

To sum up: limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose. Though there might be special problems attendant on undertaking the limitations analysis in respect of religious practices, the standard to be applied is the nuanced and contextual one required by section 36 and not the rigid one of strict scrutiny.

[32] One further observation needs to be made, however. In the present matter it is clear that what is in issue is not so much whether a general prohibition on corporal punishment in schools can be justified, but whether the impact of such a prohibition on the religious beliefs and practices of the

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[33] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) at paras 32 and 33.

members of the appellant can be justified under the limitations test of section 36.[34] More precisely, the proportionality exercise has to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption for which the appellant asked, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

[33] Before setting out to apply the above approach to the facts of this case, I feel it necessary to comment generally on difficulties of proportionality analysis in the area of religious rights. The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders.[35] Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness.[36] To the extent that the two orders can be separated, with the religious being sovereign in its domain and the state sovereign in its domain, the need to balance one interest against the other is

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34 A similar point is made by Blackmun J in his dissent in *Employment Division, Department of Human Resources of Oregon, et al v Smith et al* above n 30 at 909 - 10, where he notes that:

> "It is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."

35 Meyerson notes that religious matters are not truths that can be publically demonstrated. She notes that they are "neither confirmable nor disconfirmable by public evidence" (at 17) and that "[t]he use of common standards of reason cannot help reasonable people to converge on the truth in the area of religion."(at 18) The State must thus justify limitations on specific constitutional rights by providing "a justification for its measure to which all reasonable people would, if asked, accord some degree of force."(at 12) "[T]he state is obliged . . . to justify limitations on constitutional rights from a point of view from which all citizens can reason", not with reference to justifications "whose normative force depends on an intractably disputed point of view" (at 17). See Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (Juta & Co, Cape Town 1997).

36 In *Prince v Massachusetts* 321 US 158 (1944) at 165, Rutledge J noted that:

> "Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life."

avoided. However religion is not always merely a matter of private individual conscience or communal sectarian practice. Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society.[37] Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.[38] Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.

[34] The result is that religious and secular activities are, for purposes of balancing, frequently as

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37 Carmella notes that Glendon observes that:

> "Some communities are 'sectarian' in their understanding. Such 'sects' stand apart from civil society, call people out of society to join them in an intensely private life, and focus their efforts on the small group of adherents. Others, indeed the vast majority, consider themselves 'church' as opposed to 'sect'. 'Churches' deem their role a public one: they are deeply engaged in service to and discourse with the civil society, and cooperate with and learn from the society's institutions. For instance, they educate children, provide social and medical services, operate institutions for a wide variety of purposes, and advocate positions on topics of moral and political importance. Engagement in the culture by 'churches' renders religion a public phenomenon, socially relevant beyond the small communities of adherents .... [S]uch public religion contributes to the larger civil society and polity by encouraging virtue in the citizenry and developing habits and attitudes that nurture self-government." (footnote omitted)

See Carmella "Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion" (1998) 73:5 *Notre Dame Law Review* 1191 at 1195.

38 See the comments in of this Court in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 49 and 52. See also *S v Lawrence; S v Negal; S v Solberg* above n 14 at para 146 - 47; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* above n 23 at paras 107 and 134 - 5.

difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.

[35] The answer cannot be found by seeking to categorise all practices as religious, and hence governed by the factors relied upon by the appellant, or secular, and therefore controlled by the factors advanced by the respondent.[39] They are often simultaneously both. Nor can it always be secured by defining it either as private or else as public, when here, too, it is frequently both. The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not.[40] Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely

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39 See above paras 7 - 13.

40 This was the underlying question to which Scalia J and O'Connor J gave different answers in *Employment Division, Department of Human Resources of Oregon et al v Smith et al* above n 30.

burdensome choices of either being true to their faith or else respectful of the law.[41]

(b) The nature of the rights and the scope of their limitation

[36] There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important.[42] The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation[43] is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

[37] As far as the members of the appellant are concerned, what is at stake is not merely a question

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41 Although it must be noted that the German Constitution is different to ours, an interesting discussion of the issues is to be found in an article by Scholler "The Constitutional Guarantee of Religious Freedom in the Federal Republic of Germany" in Grimm/Hesse/Schuppert/Folke (eds) *Jahrbuch zur Staats - und Verwaltungswissenschaft* 7 (Baden-Baden 1994) 117.

42 See the preamble, section 36(1) and section 39(1)(a).

43 Not all religions are deistic.

of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation. No one in this matter contested that the appellant's members sincerely believe that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children. Furthermore, it has set up independent schools with the specific purpose of enabling parents to have their children educated in what they regard as a true Christian ethos. The impact of section 10 of the Schools Act on their religious and parental practices is, in their view, far from trivial.

[38] Yet, while they may no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs, parents are not being deprived by the Schools Act of their general right and capacity to bring up their children according to their Christian beliefs. The effect of the Schools Act is limited merely to preventing them from empowering the schools to administer corporal punishment.

(c) The purpose, importance and effect of the limitation, and the availability of less restrictive means

[39] The respondent has established that the prohibition of corporal punishment is part and parcel of a national programme to transform the education system to bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development.

[40] The state is 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. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse.[44] The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief declares in article 5(5) that:

> "Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development . . . ."[45]

[41] Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has.[46] The principle is not excluded in cases where the religious rights of the parent are involved. As L'Heureux-Dube J pointed out in the Canadian case of *P v S*:

> "[I]n ruling on a child's best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent throughout his or her right to access affects the child's best interests.

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44 Especially articles 4, 19 and 34. See above n 11.

45 See Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht 1995) at 163.

46 *Minister for Welfare and Population Development v Sara Jane Fitzpatrick*, CCT 08/00, 31 May 2000 as yet unreported at paras 17 and 18.

> I am of the view, finally, that there would be no infringement of the freedom of religion provided for in s. 2(*a*) were the Charter to apply to such orders when they are made in the child's best interests. As the court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion."[47]

In similar vein Rutledge J of the US Supreme Court stated in *Prince v Massachusetts*:

> "And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor [sic] and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction . . .
>
> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities . . . "[48]

[42] The respondent contended that, in line with the above considerations, the state had two powerful interests in the matter. The first was to uphold the principle of equality. It contended that to

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47 108 DLR (4th) 287 at 317.

48 Above n 36 at 166 - 8. It should be pointed out that the actual decision in this case has been criticised, but not the above statements.

affirm the existence of a special exemption in favour of religious practices of certain children only, would be to violate the equality provisions contained in section 9 of the Bill of Rights. More particularly, it would involve treating some children differently from others on grounds of their religion or the type of school they attended. I think this approach misinterprets the equality provisions. It is 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, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. As the Court said in *Prinsloo v Van Der Linde and Another*,[49] the essence of equality lies 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 these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.

[43] The second and more persuasive argument is to the effect that the state has an interest in protecting pupils from degradation and indignity. The respondent contended that the trend in Europe and neighbouring African countries was firmly in the direction of abolition of corporal punishment, and that the core value of human dignity in our Bill of Rights did not countenance the use of physical force to achieve scholarly correction. Accordingly, respondent was under an obligation to prohibit such punishment, and to do so without exception and for the benefit of all children. The appellant replied that

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[49] 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 32 - 3. See also *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at paras 81 and 130, and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* above n 23 at para 132.

for believers, including the children involved, the indignity and degradation lay not in the punishment, but in the defiance of the scriptures represented by leaving the misdeeds unpunished; subjectively, for those who shared the religious outlook of the community, no indignity at all was involved. It argued further that internationally there was widespread judicial support for the view that physical punishment only became degrading when it passed a certain degree of severity.[50] Appellant would be bound by limits set by the common law, and these limits would establish the standards to be applied. It did not contend that corporal punishment should be permitted in all schools, but asserted that its use should be allowed within reasonable limits in independent schools where parents, out of their religious convictions, had authorised it. The state interest, accordingly, did not extend to protecting the children in the appellant's schools.

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50 The European Court of Human Rights has stopped short of finding that all cases of physical discipline, including smacking, constitute a violation of the right to freedom from inhuman or degrading punishment. The cases have held that, amongst other factors, the severity and effects of the punishment, as well as age of the child, are relevant. See *Tyrer v United Kingdom* (1978) 2 E.H.R.R 1; *Campbell and Cosans v United Kingdom*. (1982) 4 E.H.R.R. 293;*Costello Roberts v United Kingdom* (1993) 19 E.H.R.R. 112. In*A v United Kingdom* [1998] 2 F.L.R. 959, the court unanimously held that the repeated beating of a nine-year-old boy by his step-father with a garden cane, leaving bruises on his thighs and buttocks for a week, amounted to "torture or inhuman or degrading punishment" contrary to article 3 of the Convention. The court held that the government of the United Kingdom could be liable for failing to take measures to protect the child, in that the Convention imposed an obligation on states to implement laws which provided sufficient protection of children in the form of effective deterrence against what it termed "such serious breaches of personal integrity". The United Kingdom had failed to do this by allowing parents and others *in loco parentis* to invoke the defence before a jury that such punishment was "moderate and justified" in circumstances such as in this case, where the punishment was obviously at a level of severity which fell within the scope of article 3. On the other hand, at least eight European countries have prohibited the corporal punishment of children entirely, namely Austria, Croatia, Cyprus, Denmark, Finland, Latvia, Norway and Sweden and the United Kingdom finally abolished corporal punishment in independent schools in 1998 by section 131 of the School Standards and Framework Act. See Bainham "Corporal Punishment of Children: A Caning for the United Kingdom" (1999) *Cambridge Law Journal* 291 at 293. Bernat notes that in 1992, the Austrian Supreme Court in EvBl 1993/13 used the principle of "non-violent childraising", recently introduced into Austrian law, to hold that this principle forbids not only bodily injury, but also any other form of ill-treatment that does not respect human dignity. This was so even though the child himself might not consider it to constitute "harm". The Court held that the best interests of the child were threatened whenever a parent objectively violated his parental responsibilities. See Bernat "Austria: Legislating for Assisted Reproduction and Interpreting the Ban on Corporal Punishment" (1993-94) 32 *Journal of Family Law* 247 at 252 - 3.

[44] The issue of whether corporal punishment in schools is in itself degrading was touched upon but not decided by this Court in *S v Williams and Others*.[51] Holding that judicially ordered corporal punishment of juveniles was in conflict with the Bill of Rights, Langa J stated that "the issue of corporal punishment [in] schools [was] by no means free of controversy" and that "the practice [had] inevitably come in for strong criticism". In his view, the "culture of authority which legitimate[d] the use of violence [was] inconsistent with the values for which the Constitution stands".[52] Speaking generally, he stated that:

> "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 sanction[ed] it. The activity is planned beforehand, 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."[53]

[45] Similarly, although not called upon to decide the constitutionality of corporal punishment meted out to school children, Dumbutshena CJ in *S v A Juvenile*,[54] nonetheless indicated that he would agree with the dissenting opinion of Mr Klecker in the European Commission of Human Rights decision in *Campbell and Cosans v United Kingdom*:

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51 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at paras 48 and 49.

52 Id at para 52.

53 Id at para 90.

54 1990 (4) SA 151 (ZS) at 161E-F.

> "Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being . . . The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention."[55]

[46] The same sentiment was expressed by Mahomed AJA in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*.[56] The issue here was whether the infliction of corporal punishment in government schools was contrary to article 8 of the Namibian Constitution. He noted that although punishment upon male students at government schools was regulated by a code issued by the Ministry of Education, Culture and Sport, such punishment inflicted as some kind of sentence for acts of indiscipline:

> " . . . remains an invasion on the dignity of the students sought to be punished. It is equally clearly open to abuse. It is often retributive. It is equally alienating. It is also equally degrading to the student sought to be punished, notwithstanding the fact that the head of the school who would ordinarily impose the punishment might be less of a stranger to the student concerned than a prison official who administers strokes upon a juvenile offender pursuant to a sentence imposed by a Court."[57]

The judgment, however, expressly left open the question of what the position might be in cases where a parent had actually delegated his or her powers of chastisement to a schoolmaster. In a concurring

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55 (1980) 3 E.H.R.R. 531 at 556.

56 1991 (3) SA 76 (NmSC).

57 Id at 93H-I.

judgment Berker CJ noted that although little agreement existed in respect of the desirability or otherwise of corporal punishment in schools, it seemed to him:

> ". . . that once one has arrived at the conclusion that corporal punishment *per se* is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not on principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind — even if very moderately applied and subject to very strict controls, the fact remains that *any* type of corporal punishment results in some impairment of dignity and degrading treatment."[58] (emphasis in original)

[47] The above cases support the argument of the respondent that the trend in southern Africa has been strongly in favour of regarding corporal punishment in schools as in itself violatory of the dignity of the child. At the same time, they do indicate that the issue is subject to controversy, and in particular, that the express delegation of consent by the parents might have a bearing on the extent of the state interest. Section 12 of the Constitution now adds to the rights protected by the interim Constitution the following provisions:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> . . .
>
> (c) to be free from all forms of violence whether from public or private sources
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> . . .
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—

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58 Id at 97C-E.

. . . .

(b) to security in and control over their body . . . ”

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) 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.

[48] The present matter does not oblige us to decide whether corporal correction by parents in the home, if moderately applied, would amount to a form of violence from a private source. Whether or not the common law has to be developed[59] so as further to regulate or even prohibit caning in the home, is not an issue before us. The Schools Act does not purport to reach the home or practices in the home.

[49] We cannot, however, forget that, on the facts as supplied by the appellant, corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment. Section 10 grants protection to school children by prohibiting teachers from administering corporal punishment. Such conduct happens not in the intimate and spontaneous atmosphere of the home, but in the detached and institutional environment of the school. Equally, it is not possible to ignore either our painful past history when the claims of protesting youth

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[59] Under section 8(3) of the Constitution.

were met with force rather than reason, or the extent of traumatic child abuse practised in our society today. These latter factors in no way touch on the sincerity of appellant's beliefs, or on the spiritual integrity with which their activities are pursued. Nor has it been suggested that the corporal punishment applied in the appellant's schools constitutes violence of like dimension. Yet such broad considerations taken from past and present are highly relevant to the degree of legitimate concern that the state may have in an area loaded with social pain. They also indicate the real difficulties the state may have when asked to make exemptions even for the most honourable of persons.

Proportionality analysis

[50] The measure was part and parcel of a legislative scheme designed to establish uniform educational standards for the country. Educational systems of a racist and grossly unequal character and operating according to a multiplicity of norms in a variety of fragmented institutions, had to be integrated into one broad educational dispensation. Parliament wished to make a radical break with an authoritarian past.[60] As part of its pedagogical mission, the Department sought to introduce new

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60 The striking words of Mahomed DP in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262 bear repeating in this context:

> "The contrast between the past which [the Constitution] repudiates and the future to which it seeks to commit the nation is stark and dramatic . . . . The past permitted degrading treatment of persons; s11(2) renders it unconstitutional . . . . Such a jurisprudential past created what the post-amble to the Constitution recognises as a society 'characterised by strife, conflict, untold suffering and injustice'. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting 'future founded on the recognition of human rights . . .'"

At 263 he stated:

> "The post-amble to the Constitution gives expression to the new ethos of the nation by a commitment to 'open a new chapter in the history of our country', by lamenting the transgressions of ''human rights' and 'humanitarian principle' in the past, and articulating a 'need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization'".

principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the legislature prescribed a blanket ban on corporal punishment. In its judgement, which was directly influenced by its constitutional obligations, general prohibition rather than supervised regulation of the practice was required. The ban was part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment.[61] The outlawing of physical punishment in the school accordingly 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. It might in appropriate cases be easier to carve out exemptions from general measures that are purely administrative, regulatory or commercial in character than from those that have principled foundations and are deliberately designed to transform national civic consciousness in a major way.[62] Even a few examples of authorised corporal punishment in an institution functioning in the public sphere would do more than simply inconvenience the state or put it to extra expense. The whole symbolic, moral and pedagogical purpose of the measure would be disturbed, and the state's compliance with its duty to protect people from violence would be undermined. There is a further factor of considerable practical importance. It relates to the difficulty of monitoring the administration of corporal punishment. It will inevitably be administered with different

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61 See *S v Williams* above n 51. The Correctional Services Second Amendment Act, 79 of 1996 abolished corporal punishment as a disciplinary measure in prisons in respect of civil debtors, whilst section 1 of the Abolition of Corporal Punishment Act, 33 of 1997 abolished corporal punishment as part of the penal system.

62 The measure cannot be characterised as an example of "a totalitarian bent" that envisages one's country "as the land of the single, true meaning" and assumes that "the purpose of the schools is to minimize the aggregate costs of parental error. The family, in this vision, becomes a little baby-making factory, whose purpose is to create children for the benefit of the state." Carter "1997-98 Brennan Center Symposium Lecture:'Religious Freedom as if Religion Matters: A Tribute to Justice Brennan'" (1999) 87 *California Law Review* 1059 at 1082.

force at different institutions, or by different teachers, and there is always the possibility that it will be excessive. Children are put in a very vulnerable situation because they (and their parents possibly) can only complain about excessive punishment at the risk of angering the school or the community.

[51] I do not wish to be understood as underestimating in any way the very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question. Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfill what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.

[52] When all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption. The appeal is accordingly dismissed. No order for costs was asked for and none is made.

Order

The appeal is dismissed.

Postscript: The Voice of the Child

[53] There is one further observation to be made. We have not had the assistance of a *curator ad litem* to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the state would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.

Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Yacoob J and Cameron AJ concur in the judgment of Sachs J.

For the appellant: FG Richings SC and DM Achtzehn instructed by Goldberg & De Villiers.

For the respondent: MNS Sithole SC and BJ Pienaar instructed by the State Attorney, Johannesburg.