



# The legal nature of schools, codes of conduct and disciplinary proceedings in schools

Rolien Roos  
Faculty of Law  
Potchefstroom University for CHE  
POTCHEFSTROOM  
E-mail: drtmcr@puknet.puk.ac.za

## Abstract

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*All stakeholders in education should appreciate the legal nature of schools, legal provisions for the management of schools and discipline in schools as well as codes of conduct. Furthermore, these stakeholders should be able to properly implement the various legal prescriptions that apply to all of these aspects. The role of the state and schools in society is addressed from a reformatory perspective. The same is done with respect to the true meaning and purpose of discipline in schools. The legal provisions with regards to each of these aspects are critically measured against these principles.*

## Opsomming

Die regsraad van skole, gedragskodes en dissiplinêre verrigtinge in skole

*Alle belanghebbendes in die onderwysopset behoort die regsraad van skole, die regsreëls met betrekking tot skoolbestuur, en die handhawing van dissipline in skole en gedragskodes te verstaan. Hierdie voorwaarde is nodig ten einde die regsreëls van toepassing op hierdie aspekte behoorlik te kan implementeer. Die rol van die staat en skole in die gemeenskap word ondersoek vanuit 'n reformatoriese oogpunt. Dieselfde word gedoen ten aansien van die ware doel en betekenis van dissipline in skole. Die regsvoorskrifte van toepassing op elk van hierdie aspekte word krities gemeet aan die gestelde beginsels.*

## 1. Introduction

The adoption of a supreme Constitution (SA, 1996) as well as the South African Schools Act (SA, 1996) by the legislature, has brought about an entirely new educational dispensation in South Africa. One critical aspect of this new dispensation is the new approach to, and laws applicable to discipline in schools. To fully appreciate the legal framework dealing with discipline in schools one should be aware of the legal nature of a school, of legal provisions regarding the management of schools and discipline in schools, as well as of the legal nature of a code of conduct and disciplinary action taken in terms of such a code.

This contribution will examine each of these aspects by discussing the relevant legislation and the application thereof by the courts. The discussion of each aspect will include a critical analysis of the legal *status quo* from a reformational point of view. *Reformational* in this sense refers in the first place to a Christian view (in accordance with God's will) and in the second place the approach of not being hesitant to be constructively critical of the current position. A Christian view can be described as opposed to a secular view, the latter being indicative of an approach where God's will is set aside or ignored (Van Dyk, 1997:5). It is the role and duty of Christians to present Christian views, principles and approaches, also with respect to the state and schools. Christians should utilise the strengths and possibilities offered by a secular system, while at the same time not hesitating to criticise its inadequacies (May, 1988:14).

## 2. Points of departure

The principal points of departure that should be addressed prior to any discussion of positive law, include the true purpose of education and discipline, and the role of schools and the state in society. Throughout this contribution, positive law will be evaluated against the following principal points of departure.

### 2.1 The true purpose of education and discipline

For Christians, the true purpose of schooling and education is guidance toward discipleship, which entails that learners are led and guided to do what humans were created for – to glorify God. This means hearing the Word of God and doing what He requires. Doing God's will manifests in human stewardship of creation and healing the brokenness of the world due to sin (Van Dyk, 1997:39; 2000:65).

A Christian teacher should always bear in mind that his or her role is that of loving servanthood and that teaching, in Christian vernacular, could be described as “equipping ministry” (Van Dyk, 2000:49-50). Teachers have to equip learners by attending to their needs and gifts, assisting them in understanding and recognising their calling and purpose as Christians and developing “their desire and ability to function as knowledgeable and competent disciples of the Lord” (Van Dyk, 2000:50). An educator is simultaneously a craftsman and guide for learners (Van Dyk, 2000:78). All components of teaching activity must point to the kingdom of God (Van Dyk 2000:53).

A Christian view therefore implies that the school as instructional structure should educate, inform and lead a learner to acceptance of his or her true calling and towards true discipleship, as discussed elsewhere in this volume (cf. the article titled “n Beginselgrondslag vir gesag, vryheid, orde en dissipline in die onderwysopset van die vroeë-21ste eeu”).

While the law deals mainly with corrective discipline, in the sense of *ex post facto* reaction to a situation, a Christian approach to the concept is proactive. According to a Biblically-based perspective, discipline is a positive phenomenon denoting guidance. A disciple (or learner) must be led to follow the right way. Punishment in the sense of rebuke, control and reprimand, as an aspect of love, may be required if necessary (May, 1988:9). It should be borne in mind that “[j]ustice that is based on love will be tempered with mercy and forgiveness” (May, 1988:10).

## 2.2 The role of schools and the state in society

It should be questioned whether schools (as institutions) should be regarded as entities separate from the family, the church and the state or whether they should be regarded as an extension of any of these.

Historically schools existed as a continuation of the family unit, as didactic functions could no longer be fulfilled by family members (Stone, 1981:22, 27, 31). Van Dyk supports the principle that schools should be regarded as sovereign entities in their own sphere, distinct and separate from home and family, as the role of parents (in the family) and educators (in schools) do and should differ. The authority of each, in their respective sphere, should be respected. The traditional *in-loco-parentis* approach may lead to the misconception that parents delegate their authority over their

children to teachers, who in effect then perform their duties in subordination to parents (Van Dyk 2000:48-49). Schools as institutions have evolved from the confines of the family unit into a broader structure with a function separate from that of the family. The influence of the family unit or parents in school affairs, as will be discussed later, can and should on the other hand not be denied or dismissed.

Since the period of the *Aufklärung* states worldwide have controlled schools. The line of thought that parents and church have no control over schools and that schools are in nature a state institution enjoys philosophical support (Stone, 1981:23-24). It is a worldwide phenomenon that the state controls the educational structure and also determines the philosophy, supply and practice of education (May, 1988:5). The question that arises is whether schools should be regarded as separate entities, separate and independent societal structures, or whether they should be regarded as integral parts of for instance the cultural, aesthetical or juridical life of a community.

Stone (1981:25) points out that the institution of the school is a result of social development and organisation, similar to the institutions of church and state. The rationale for the development of schools is cultural in nature, as pointed out by Dooyeweerd. Any abolition of the differentiation between the spheres in which different societal structures operate, for instance where the state or church takes complete control over a school, amounts to a reversal of historical-cultural development (Stone, 1981:26).

The school as institution should, therefore, be regarded as functioning in its own sphere, separate from that of family, church or state. Although strong links between these different structures cannot be denied and should be encouraged, it should be borne in mind that the ultimate functions of these structures differ and that this differentiation should be respected (Stone, 1981:32-33; Taljaard, 1976:247). The school is primarily a place of tuition – and this is the function that directs its structure. Tuition is not only provided to ensure general formative development, but may be focused on a particular aspect of culture, such as commerce, natural science or agriculture (Stone, 1981:30).

Stone, in support of Dooyeweerd, accepts that a particular function typifies each societal modality and that modal variety forms part of reality. Each modality is not unrelated to or unaffected by the functions and relations associated with other societal structures – for example the domain of the state is juridical, but at the same time the

state performs secondary functions and its juridical actions are determined by a number of other aspects. In the same tenor, schools are also “bound up with a natural milieu, with culture and history, with society, with the legal system, the economic dispensation, moral views, attitudes to life and the world, and religion” (Stone, 1981:27). A school cannot be classified by either the aesthetic or the ethical (Stone, 1981:27), but it should be regarded as an instructional institute which is further qualified by education (Stone, 1981:29).

In the same vein Fowler states that distinctions between modalities should be honoured but that it cannot be supposed that “the principle of sphere sovereignty means that the societal structures must be hermetically sealed off from each other”. These structures all function in human society, implying interaction of functions (Fowler, 1988:37).

Should it be accepted that schools be regarded as separate entities qualified by the function of education, the question arises what the role of the state in the school system should be. It is accepted, as stated above, that no societal structure or community can operate in total isolation, but to which extent will the state’s influence in the educational sphere be acceptable?

Fowler summarises the Christian view on the essence and role of the state as follows: the state is established by God, it is God’s servant and its authority is defined and limited by God. The state can therefore only perform the functions God has appointed it for and cannot contribute more to society than envisaged by God. The state’s primary function is to ensure justice and dispense justice as servant of God, by punishing injuries humans inflict on others, with the qualification that this should be done for the good of mankind (Fowler, 1988:2-4). The central role of the state is concerned with public justice, not combating immorality or upholding faith (Fowler, 1988:8). Its duty to uphold public justice may result in getting involved with questions of morality and faith (for example when dealing with censorship or juridical disputes between churches), but the state’s action should then be determined by public justice, not faith or morals (Fowler, 1988:8-9). It can therefore be stated that the state’s primary function is not education, but that its duty to uphold public justice may result in getting involved in educational matters. Should this happen, the state’s duty will be to dispense public justice for the good of its citizens.

The state's duty to uphold public justice implies a constraint on interference in internal matters of distinct spheres, for example the family or church (Fowler, 1988:9). If it is accepted that schools function in the distinct educational sphere, state interference in internal affairs will be limited and should only be allowed if demands of public justice would justify such an interference.

Public justice will only be acquired if the state realises that it exercises the power to dispense justice as servant of God and that it is required to act for the good of its citizens. As a result of the Christian view of the state's origin, functions and duties, Fowler (1988:10) argues that governments as temporary rulers of the state can only administer justice in accordance with the ideals and concepts held in the community, otherwise the purported administration of justice will be illegitimate. Utilising the state's power of the sword to enforce rules or ideas unacceptable to the community, will not amount to public justice.

As the state's primary duty is to ensure public justice, Fowler (1988:39) is of the opinion that the use of the state's power to endorse either one Christian denomination or the whole Christian church including all denominations, will be an abuse of power as the state will use its coercive powers for confessional purposes, not juridical (its true function). This argument should not be understood as an indemnity allowing the state to do whatever it pleases – the state remains the servant of God bound to His will. The state should ensure that Christians, just like all others, enjoy freedom of their religion and beliefs. The state should not hinder anyone in enjoying or practising his or her faith.

It can be concluded that schools should be regarded as entities operating separately from the family unit, cultural group, church and state. While modal autonomy is the ideal for societal relationships and should be strived for, this does not imply total functional isolation. The function of the school is primarily educational, but the execution of this function is influenced by a number of other aspects of reality, such as the juridical, ethical or religious. The primary role of the state is the dispensation of public justice. State involvement in schools will be justified if the involvement or interference is compelled by the need to ensure public justice.

### **3. The school as an organ of state in the legal sense**

The legal status of a public school has to be determined to ascertain whether schools are indeed recognised as separate structures, as

discussed above. It is particularly important to establish whether a public school will be classified as an organ of state. The following discussion will analyse the legal definition of an organ of state, determine whether a school is an organ of state and what the legal consequences of a such a classification are. The legal position will then be critically evaluated with reference to the principles stated in 2 above.

### 3.1 Legal provisions

While the Department of Education clearly forms part of the state structures, the question whether any given public school is an organ of state is more problematic. To determine whether public schools are by definition organs of state in the technical legal sense, the legal nature of schools should be examined. The discussion that follows will be limited to the legal position of public schools, as this was also the scope of the research project on discipline.

The term “organ of state” is a technical legal term defined in the Constitution (SA, 1996:239). It includes all departments of state or administration in the national, provincial or local sphere of government; or any other functionary or institution that either exercises a power or performs a function in terms of the Constitution or a provincial constitution, or exercises a public power, or performs a public function in terms of any legislation. Courts, although accepted as a branch of state authority, are explicitly excluded from the definition. The definition is used in various statutes as a mechanism to impose duties on certain institutions or to determine liability in other instances.

The Schools Act (SA, 1996:12) provides that the government in each province must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. It further states that every public school is a juristic person, with legal capacity to perform its functions in terms of the Act (SA 1996:15).

Public schools therefore do not form part of the Department of Education, although the influence of the Department is strong, as will be discussed under the next heading. Referring to the definition, a public school may still be an organ of state if it exercises a public power or performs a public function in terms of any legislation.

The only remaining question is therefore whether a public school “exercises a public power or performs a public function”. Public

schools are provided and (at least partially) funded by the state, in terms of the Act (SA, 1996:34(1)). Although some authors unquestioningly accept that governing bodies are functionaries that perform public functions (cf. Squelch, 2000:310), probably based on this premise, the question has not yet been explicitly addressed by courts. The approach of courts in two cases should be briefly examined to determine a likely outcome.

A public function or power is not necessarily performed or exercised if an institution or person acts in terms of legislation – the requirement is that a public interest should be served or protected and the interest served should not be limited to the parties to an agreement (*Dawnlaan Beleggings v Johannesburg Stock Exchange and others*, 1983:364-365). The interest served by a school is the education of learners – certainly not a contractual obligation, but one created by statute. The school's competence to choose whom to provide the service to, is also restricted by legislation – in principle education should be provided to the children of the community (SA 1996:5).

In the well-known *Christian Education*-case (discussed elsewhere in this volume) the Constitutional Court's approach was clearly that education and the creation of uniform standards was a legitimate concern of the state (*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000:780; henceforth referred to as *Christian Education*). It even stated that the independent schools *in casu* function in the public domain to the extent that they prepare learners for life in the broader community and that they should therefore comply with the Constitution and other laws (*Christian Education*, 2000:787). The inference is thus that the provision of education can be regarded as a public interest that is served and that schools providing education will be performing a public function.

In terms of the constitutional definition, public schools are therefore classified as organs of state. The next step will be to determine what the most important legal consequences of this classification are.

### 3.2 Legal consequences

The first implication of the school's status as organ of state, is that the *Bill of Rights* contained in the Constitution not only binds the state and all its organs, but also places a positive duty on the state to promote and give effect to its provisions (SA, 1996:7). This entails that organs of state, like schools, have to proactively strive towards the fulfilment of the fundamental rights, including those of learners.



Schools may not infringe the fundamental rights of learners, either by means of inadmissible school rules or action against learners. An example of this is the prohibition of discrimination against pregnant learners or the prohibition of pregnant learners to attend school (SA, 1996:9; SA, 1996:5(1); SA, 1998:3.9). Van Staden (2000:302) is of the opinion that the widespread practice to prohibit pregnant learners to attend school is indicative of the failure to understand the relationship of school rules to the legal system in South Africa.

The *Bill of Rights* does not only apply vertically between learner and state or school, but also horizontally among learners, if the nature of the right allows for horizontal application (SA, 1996:8). Whenever the right of one person infringes the right of another, the various interests at stake will be balanced (Currie & De Waal, 2001:341). There is no single, absolute test as to which right will prevail; each case will be judged individually. Each learner is thus the bearer of rights, but also required to respect the rights of others. In addition, fundamental rights may be lawfully limited if such a limitation complies with the criteria stipulated in section 36 of the Constitution (SA, 1996). Generally, a more drastic limitation of a fundamental right will require a more compelling and convincing justification (*S v Manamela and Other*, 2000:32-33). It is already trite law that human dignity is the core value against which limitations will be measured (Currie & De Waal, 2001:362). Consequently, even permissible limitations must respect the human dignity of a learner.

Fundamental rights and other constitutional provisions are important in the context of learner discipline, but are by no means the only legal rules applicable. Being an organ of state implies that the actions of a school should also comply with other legal requirements. Laws and legal rules on education, schools and discipline may be contained in parliamentary or provincial acts, delegated legislation (regulations or notices issued by the Minister or provincial Member of the Executive Council for Education), or case law. Schools are legally compelled to comply with all legal rules that are constitutional and in accordance with enabling legislation.

Whenever compliance must be established, the most specific, normally hierarchically lowest, legal provision should be examined first (cf. Burns, 2003:79-80, 87-89). This will typically be delegated legislation like regulations or notices. Should the conduct in question not comply with these very specific provisions, it will be unlawful. If no provision regarding the conduct in question is contained in delegated legislation, or the validity of the delegated legislation itself is examined, regard should be given to the enabling provisions,

normally contained in a parliamentary or provincial act dealing with the topic. The next step will be to test the conduct with reference to general legislation applicable to the situation (for example the Promotion of Administrative Justice Act (SA, 2000), to be discussed under 5). The last step in the process will be to establish whether the conduct and other provisions comply with the Constitution. Hierarchically, the reverse applies: the Constitution is the supreme law, with delegated legislation enjoying the “lowest” status. Case law should be considered in each stage, as it may contain directives on the interpretation and application of the notices, regulations, acts or Constitution, or may even contain a formulation of a common-law rule in the absence of a statutory provision.

### 3.3 Principial evaluation

In the *Christian-Education* case the court in effect followed the approach that the state should only be allowed to intervene in school affairs where issues of public justice are at stake. The court acknowledged the fact that the state had a compelling interest in protecting learners from degradation and indignity and thus the limitation of the right to religious freedom could be justified (*Christian Education*, 2000:782). This approach is an excellent example of the approach suggested by Fowler, to wit that the state may be asked to juridically intervene in matters of faith or morality (or, may one add, education) in the interests of public justice (refer to the discussion under 2 above).

The technical legal classification of a school as organ of state does not imply total control by the state. As seen from the definition, even a privately owned company that performs public functions in terms of legislation, will be classified as an organ of state. The main consequences of the status of organ of state are the positive duty on schools regarding fundamental rights and the compulsory compliance with other laws. Although more statutory prescriptions may apply to organs of state than to private entities, the concept of compulsory compliance is common to both. The classification as such does not take the principial argument any further – the extent to which the state may be (and is) involved with and act prescriptively towards schools, especially as far as discipline is concerned, should be examined. The next logical step will be to examine the legal provisions on the management and control of schools and discipline in schools. Only then will it be possible to reach a principial conclusion on the status of schools and the role the state plays in schools.

## 4. Management and control of schools and discipline in schools

### 4.1 Legal provisions

The main role-players in a public school are the governing body, educators (headed by the principal), parents (and community), learners and the state (the national and provincial Departments of Education). The role, functions and duties of each will be briefly examined. Particular attention will be paid to the role of the governing body in the management of schools and discipline in schools.

The governing body of a public school is an entity that is created by and constituted in terms of the provisions of the Schools Act (SA, 1996). Governance of a school vests in its governing body whose functions and duties are limited to those described in the Schools Act (SA, 1996:16(1)). The relationship between school (as juristic person) and governing body, is one of “trust” (SA, 1996:16(2)). In *Schoonbee and Others v MEC for Education, Mpumalanga and Another* (2002:883) the court confirmed that the “overall governance” of a school vests in its governing body and that the role of the governing body is “fiduciary in respect of a school”.

The governing body consists of elected members, the principal (*ex officio*) and co-opted members. Elected members are representatives of the parents of learners at the school, educators at the school, members of staff at the school who are not educators; and learners in the eighth grade or higher at the school (SA, 1996:23).

In terms of the Act, the duties of a governing body include the promotion of the best interests of the school, the provision of quality education for all learners at the school, the adoption of a code of conduct for learners, the support of the principal, educators and other staff of the school in the performance of their professional functions, and administration and control of the school’s property (including buildings and grounds occupied by the school) (SA, 1996:20). The governing body should also do whatever it can to supplement the funding the school receives from the state (SA, 1996:36).

The professional management of a school vests in the principal under the authority (and supervision) of the provincial Departmental Head of Education (SA, 1996:16(3)).

The powers of the provincial Head of Department of Education regarding schools and governing bodies include:

- Temporary closure of a public school under certain circumstances (SA, 1996:16(4)).
- Governance of a new public school until a governing body has been constituted (SA, 1996:16(7)).
- Withdrawal of a function of a governing body, but only after the procedures prescribed in section 22(2) have been followed (SA, 1996:22).
- Appointment of a person or persons to perform the functions of a governing body, if it has been established on reasonable grounds that the governing body fails to perform some or any of its functions. Limitations to the appointment are also prescribed (SA, 1996:25).

A provincial MEC for Education may close a public school, but only after the procedure prescribed in section 33(2) has been followed. This includes notice to the governing body and community. The governing body should be afforded the opportunity to respond and the community's input should be solicited during a public hearing. Unless the MEC and governing body agree otherwise, or the conditions of a trust, bequest or donation provide otherwise, the property of a closed school will devolve to the state (SA, 1996:36(3)).

The state is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school (SA, 1996:60(1)). However, the state's liability is excluded if the damage or loss was caused as a result of an enterprise or business operated under the authority of the school to supplement its income (SA, 1996:60(4)).

It is accepted by the state that discipline is required for the creation of an environment conducive to learning (SA, 1998:1.6). It is the duty of each governing body to adopt a code of conduct that will be the legal instrument regulating the maintenance of discipline in the school. This should only be done after consultation with learners, parents and educators of the school (SA, 1996:8(1)). All learners are compelled to adhere to the provisions of the code (SA, 1996:8(4)).

The governing body is empowered to maintain and enforce school discipline (in accordance with the code). It has been regarded by the courts as a "statutorily protected obligation to maintain proper

discipline at the school” (*Governing Body, Tafelberg School v Head, Western Cape Education Department* 2000 (1) SA 1209 (C), 2000:1217; henceforth referred to as *Governing Body, Tafelberg School*). Should a governing body recommend expulsion of a learner to the Head of Department, but he or she decides differently without affording the governing body the opportunity to be heard on the matter, the latter act will be invalid and set aside (*Governing Body, Tafelberg School*, 2000:1215, 1219). A governing body is also entitled to institute legal proceedings (in its own name or that of the school) if it is required to do so to fulfil its statutory duties (*Despatch High School v Head, Department of Education, Eastern Cape and others* 2003 (1) SA 246 (CkH), 2003:251; henceforth referred to as *Despatch High School*).

The duties of parents, as stipulated in the Schools Act (SA, 1996:1, 40) and Guidelines (SA, 1998:6, 7.2) should be listed in the code. The gist of these duties is that parents should actively participate in school activities, enable their children to participate in school activities and perform optimally in school, oblige their children to honour the school’s code of conduct, accept responsibility for misbehaviour and to pay school fees or request an exemption from this duty. Parents should be informed of disciplinary steps taken against their children, have the right to be present during such proceedings (SA, 1996:8(6)) and have the right to institute legal proceedings if they are of the opinion that their or their child’s rights have been unlawfully infringed (SA, 1998:6(3)).

Only a governing body may suspend a learner found guilty of serious misconduct after a fair hearing, for a maximum of one week (SA, 1996:9(1)(a)). The Guidelines provides that a principal has to decide whether disciplinary steps will be taken against a learner after considering the evidence in the matter. The matter will then be heard by a “small committee” appointed by the governing body (SA, 1998:13.2). This is required whenever suspension or expulsion may follow, but it is submitted that this committee (referred to as the disciplinary committee) should not be limited to impose only these two types of disciplinary sanctions. The Guidelines provides that the governing body has to inform the learner whether he or she was found guilty and that the governing body has to keep proper record of the proceedings (SA, 1998:13.2, 13.4(g), 13.5).

A possible inference may be that the disciplinary committee is a committee of the governing body empowered to finalise disciplinary matters on behalf of the governing body. The argument against this approach is that such delegation is not explicitly authorised. The

inference that such a delegation is implicitly authorised cannot be made (cf. Baxter, 1984:436-441). The governing body may delegate the authority to investigate allegations against a learner to the disciplinary committee (Burns, 2003:164). In practice, this will entail that a disciplinary committee may hear the matter, make findings of fact and recommend that the learner be suspended, but that the responsibility for the decision to suspend still vests in the governing body.

These arguments also apply as far as expulsion of a learner is concerned. A learner may only be expelled by the provincial Departmental Head of Education, after such a recommendation has been made by a governing body (SA, 1996: 9(2)).

Educators enjoy the same rights to discipline a child at school as the parents, but no learner may discipline a fellow learner (SA, 1998:3.7, 7.4). Although serious misconduct should be referred to the principal, mechanisms should be established to alleviate the workload of the principal (SA, 1998:7.5). It is practically impossible for a principal to deal with every disciplinary matter in a school, ranging from minor contraventions of classroom rules to serious misbehaviour endangering others. It is therefore accepted that educators handle less serious contraventions as part of their daily educational task.

Learners must be afforded the opportunity to participate in decision-making within the school and enjoy the right to be heard on matters that affect them (SA, 1998:4.1).

## 4.2 Consequences

Although the state enjoys certain powers in respect of schools, it must be emphasised that the powers may only be exercised subject to the provisions of the Schools Act (SA, 1996) and the Constitution (SA, 1996). Compliance with these requirements may be tested by a court of law and if the state did not act within its powers or in accordance to the prescriptions, the action will be set aside. The conclusion drawn from the case law discussed is that a governing body has the right (possibly even the duty) to litigate, should the state not act in accordance with the statutory provisions or otherwise in contravention of a legal rule. Courts have not hesitated to uphold the rights of governing bodies against the state.

The governing body is responsible for the maintenance of discipline in a school. The main instrument in this process is the drafting and implementation of a code of conduct. In the drafting process, the

governing body has to adhere to all legal requirements for a code stipulated in the Constitution (SA, 1996), Schools Act (SA, 1996) and Guidelines (SA, 1998). A failure to comply with these requirements may render a provision in a code or school rules contained in a code, legally invalid and unenforceable.

The governing body's composition makes provision for parent and community representation. It is accepted that the governing body may, within legal parameters, determine its own policy regarding disciplinary matters in the school. The effect is that parents and the community will, to some extent at least, determine the approach towards discipline in a particular school. In addition, parents and learners must be consulted during the drafting process and their input must be taken into account.

### 4.3 Principial view

Taljaard (1976:246) distinguishes three groups of role-players in schools: those who desire teaching (parents, grandparents, citizens), educators and learners ("pupils"). He is of the opinion that school management should be the responsibility of the first category, i.e. not learners. School communities are diverse and this diversity will and should be accommodated in schools, through management by the first category (Taljaard, 1976:246). Like-minded persons (like Christians) are then able to form school communities where certain common points of departure are accepted and incorporated into the character and activities of the school. "Subject-identical" schools can then organise themselves into territorial units and collaborate (Taljaard, 1976:247). Taljaard (1976:248) seems to realise that this is only an ideal but argues in favour of total separateness of schools and the state (Taljaard, 1976:247).

Total separateness of schools and the state is not recognised in the current legal framework. However, the autonomy of governing bodies is recognised within the parameters discussed. The state's involvement is also limited by the law, thus safeguarding the autonomy of governing bodies. The legislature has limited the powers of the executive educational departments and the actions of these departments may be tested by courts of law. The statutory prescriptions that bind schools and governing bodies were enacted to ensure uniform standards and to give effect to the rights of learners as stated before. It can therefore be argued that state intervention in this sense is based on demands of public justice, as advocated by Fowler (see discussion under 2). The conclusion is therefore that the current dispensation respects the autonomy of the

school and its governing body, subject to limitations which are imposed in the interests of public justice.

From a principial point of view, it is not adequate for governing bodies and educators to strive for “mere” legal compliance in the drafting and implementation of a code of conduct. These role-players must always bear in mind what the true (Christian) meaning of discipline and discipleship is (see discussion under 2 above). The courts also recognise the fact that discipline should be regarded as corrective measure, as opposed to being merely punitive (*Despatch High School*, 2003:252). A code of conduct and school rules will lose their significance as instrument to be utilised in the attainment of true discipleship if these role-players do not fully appreciate their role and indeed duty regarding discipline.

Educators and governing bodies should realise that their authority is a direct consequence of their office, which is a “God-appointed place” (Van Dyk 2000:46-47). Not only the establishment, but also the exercising of authority must be legitimate and in accordance with God’s will.

Seen from the reformational point of view, the involvement of learners in the drafting process of a code is welcomed, as it fosters responsibility as opposed to blind obedience (cf. Van Dyk 2000: 238). Learners also enjoy the opportunity to voice Christian views on discipline during the drafting process. It is in accordance with the Christian view on authority and the role of educators and parents, that learners are not allowed to punish other learners.

## **5. Legal nature of code of conduct and disciplinary proceedings**

A last aspect that merits discussion is the legal nature of a code of conduct and disciplinary proceedings instituted in terms of such a code. Once the legal consequences of the nature of these proceedings have been established, a principial evaluation of the legal classification and consequences will follow.

### **5.1 Legal definition of administrative action**

Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In addition, everyone who has been adversely affected by administrative action has the right to be provided with written reasons for the action. Section 33(3) obliged Parliament to enact



national legislation to give effect to these provisions. This was done by promulgating the Promotion of Administrative Justice Act (SA, 2000).

The question to be answered is whether a code of conduct and disciplinary action taken in terms of a code of conduct amounts to administrative action as defined in section 1 of the Promotion Act (SA, 2000).

Rephrased, an administrative act is a

- decision or failure to take a decision;
- that adversely affects the rights of a person;
- that has a direct, external legal effect;
- by an
  - organ of state exercising a constitutional power;
  - organ of state exercising a public power or performing a public function in terms of empowering legislation or
  - a natural or juristic person who is not an organ of state, when it exercises a public power or performs a public function in terms of an empowering provision.

Each of the elements of the definition requires further analysis before it can be established whether an act amounts to administrative action.

A decision, in terms of the definition, has to be administrative in nature and has to be made in accordance with an empowering provision (SA, 2000:1). The source of the decision-making power is therefore a legal document or instrument, normally legislation. The Constitutional Court has held that an act that entails the implementation of legislation will be administrative in nature, as opposed to an act that amounts to a policy decision (*President of the RSA v SARFU*, 1999:par 141). Whenever a code of conduct is adopted and implemented, the governing body is empowered by the Schools Act (SA, 1996:8(1)) to do so and exercises this power in accordance with provisions in the Guidelines (SA, 1998). The adoption of the code of conduct as well as any action taken in terms of the code will thus be a decision as stipulated.

The decision has to affect the rights of a person adversely. The approach of the Supreme Court of Appeal is that the infringement may also constitute the infringement of a fundamental right,

including the right to administrative justice (*Transnet v Goodman Brothers*, 2001:871). Any infringement or threatened limitation of a person's vested right or fundamental right will therefore conform to this requirement. As the adoption of school rules in a code of conduct and any disciplinary action taken in terms of the code will limit a learner's fundamental rights (in most instances justifiably so) this requirement will be fulfilled.

The decision also has to have direct, external legal consequences. These aspects of the definition originated in German law, where it respectively entails that the decision has to be final (therefore not merely pending or still in the investigation phase) and that it should have more than mere internal application (Currie & Klaaren, 2001: 81). The South African courts are yet to consider the interpretation and application of this requirement. Should the courts follow the approach in German law, the adoption of and actions in terms of a code of conduct will comply with these requirements. The finality requirement should not pose any problem in the context of learner discipline, as school rules will only affect a learner once they have been finally adopted and implemented. Learners will only be able to enforce their right to administrative justice once disciplinary action is a reality and not a possibility. The second requirement will entail that the decision has to affect a person outside the hierarchical structure of the decision-making body (Currie & Klaaren, 2001:82). Although the school system has been democratised and learners are the central figures in the school system, they do not form part of the hierarchical structure of the Department of Education or of school management. The Guidelines clearly states that parents of learners may institute legal action against any educator, learner or person who unlawfully infringes the fundamental rights of the child (SA, 1998:6.3). The right of a learner or parents to litigate against the state has never been questioned in South Africa and is a regular occurrence.

It has already been argued that a school is an organ of state exercising a public power or performing a public function in terms of empowering legislation in 3 above.

The conclusion is therefore that the adoption of school rules in a code of conduct and the institution or enforcement of disciplinary measures against a learner in terms of the code, constitute administrative action as defined in the act. The act makes no distinction between the different types of administrative acts and stipulates the same validity requirements for all administrative action. Further classification is therefore not required.

## 5.2 Legal consequences of administrative nature

The Act is merely a refinement of the constitutional right and supplements the constitutional provisions (Devenish *et al.*, 2001:143; *Metcash Trading v Commissioner SARS and Another*, 2001:1130). The constitutional right and the provisions in the Act cannot be read and interpreted in isolation; it must be applied against the background created by the common law (Devenish *et al.*, 2001:178). It is even said that the constitutional right simultaneously contains and expands the common law (Hoexter & Lyster, 2002:12). The Constitutional Court has confirmed that the common law remains relevant and will contribute to the development of the administrative law (*Pharmaceutical Manufacturers Association of SA: In re Ex parte the President of the Republic of South Africa*, 2002:par 45).

To be valid, administrative action must therefore comply with the requirements set by the Constitution (SA, 1996), the Promotion of Administrative Justice Act (SA, 2000), common law and the empowering legislation – in this context comprising all the parliamentary and provincial acts and delegated legislation dealing with education (cf. Squelch, 2000:309).

The main consequence of being classified as administrative action is that the grounds of review listed in section 6(2) of the Promotion Act (SA, 2000), will be available to a learner who wishes to contest action taken in terms of a code of conduct. It is important to note that non-compliance with the requirements of procedural fairness (as provided for in section 3 of the Promotion Act) will also lead to invalidity of the action taken. The grounds of review will not be discussed, as this will extend this article beyond its scope, but this should not be regarded as a misappreciation of their importance to the lawful maintenance of discipline in schools.

## 5.3 Principal evaluation

Classifying a code of conduct and disciplinary action taken against learners as “administrative” should again be regarded as a technical legal classification only. The legal classification is done in order to allocate rights to learners and duties to the governing body and educators drafting and implementing the code. One of the main obligations imposed, is that a fair procedure should be followed, in accordance with legal requirements laid down in the statutes dealing with education and administrative justice.

This conforms to the view previously aired that educators and the governing body should realise that their authority is afforded to them by God, who also requires that it be exercised according to His will (Van Dyk 2000:46-47). (The will of God regarding discipline is discussed under 4.4 in the contribution entitled “n Beginnelgrondslag vir gesag, vryheid, orde en dissipline in die onderwysopset van die vroeg-21ste eeu”, elsewhere in this volume.) In accordance with this vision of discipline, all persons involved with the maintenance thereof should in addition to compliance to the legal requirements, also comply with the God-willed actions of stewardship and healing (Gal. 5:13-14, Van Dyk, 2000:65).

## 6. Conclusion

A proper appreciation of the legal nature of school rules contained in a code of conduct is essential. The conclusion by Van Staden (2000:302) that an urgent need for educators to be made aware of the law regarding education and the implications of the law is supported. The required awareness should not be limited to educators, but should include all stakeholders in education. This appreciation is required to ensure legal compliance and to create a stable environment, as far as discipline is concerned.

However, legal compliance should not be the ultimate goal of an educator or governing body. The Christian educator or governing body should always be guided by a Biblically founded perspective on discipline, discipleship and the responsibilities of office, as discussed throughout this article and volume.

The roles of the state and school in society differ. This differentiation is respected in South Africa. Although the state enjoys considerable powers in the educational sphere, the autonomy of governing bodies is respected. The courts have not been hesitant to uphold the rights of governing bodies against the state's executive. The legislative prescriptions on education that do apply, should be regarded as a manifestation of the state's primary function to juridically ensure public justice.

The autonomy of governing bodies and the duty of governing bodies to consider input of parents and learners when drafting a code of conduct, should be regarded as a welcome opportunity to Christians to voice their views on discipline and ensure compliance with the will of God. Although it is unlikely and unrealistic to expect that secular schools will adopt all Christian views, Christians may still exert some influence over state education (May, 1988:17).

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**Key concepts:**

administrative action

code of conduct

disciplinary proceedings

school management

**Kernbegrippe:**

administratiewe optrede

dissiplinêre verrigtinge

gedragskode

skoolbestuur