

OTHER CONTRIBUTIONS

South Africa's Outlaw Educators

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Abstract

Since the 1994 change in the constitutional dispensation in South Africa, the quality of education has remained at a very low level. In consequence, there is an increasing tendency of "middle class flight" from the state schools system. The home and private school sectors have expanded rapidly. Attempts to resolve this have led to the implementation of a rigid regime of overregulation of both state and private schools, without commensurate increase in results. Consequently, desperate children and parents are increasingly moving beyond the purported limits of the law to find education that meets the needs and preferences of children and their parents. There is now a substantial and rising number of unregistered home learners and private schools. The article considers the protection that these outlaw educators may find in human rights law. The argument hinges on what the definition of education is, and who defines it.

Keywords human rights, education law, curriculum, home education, parental care, unschooling

Background

When the constitutional dispensation in South Africa changed in 1994, home education had become almost extinct through overregulation. Estimates at the time suggest that there were at most 50 families left. Private schools were few and far between, likewise heavily over-controlled.

The new constitution recognised great education freedoms, but it was not long before new laws and policies started eroding those freedoms. Some of the highly intrusive legislative and other measures, such as the Policy on the Registration of Learners for Education at Home (1999) were declared unenforceable by the Constitutional Court (Minister of Education vs. Harris, 2001). Nevertheless, almost all provincial education officials continued to rely on unenforceable policies in processes for the registration of home learners and private schools.

The result was that more and more private schools and home educators started to operate without registration. By 2010 a study found that as many as one quarter of private schools in less affluent areas were unregistered (Bernstein, 2010, p.28). Most home educators continued their practice of

non-compliance with the unenforceable registration requirements. By 2011, the national census showed that there were approximately 57,000 home learners in the country, of whom about 80% classified themselves as “Black African.” Of the whole number, about 3000 ($\pm 5\%$) were registered.

By the time of writing, therefore, about 95% of home learners were unregistered. From the perspective of industrial action, that would equate to a 95% effective strike against registration, lasting fifteen years (Van Oostrum, 2013, p.10).

Legal Environment of Home Education

The Constitution

The Constitution is the supreme law of the Republic of South Africa. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled (Constitution of the Republic of South Africa, Article 2) (“the Constitution”).

Various provisions of the Constitution¹ determine that rights may be limited under certain conditions and that the content of rights must be understood in terms of international law. The Bill of Rights also specifies that everyone has the right to education, and that children have a right to parental care.

Where education is concerned, the national and provincial legislatures have

¹ Chapter 2 of the Constitution comprises the Bill of Rights. The state must respect, protect, promote and fulfill the rights contained in it. A provision of the Bill of Rights also binds natural persons if applicable (Constitution, Articles 7-8).

Rights may be limited by law that is reasonable and justifiable in an open and democratic society (Constitution, Article 36).

When interpreting the Bill of Rights, a court must consider international law and may consider foreign law (Constitution, Article 39).

concurrent competence. Neither can overrule the other, unless the national legislature specifically adopts a resolution that a provision of national legislation will overrule provincial legislation (the Constitution, Schedule 4).

International Law

In addition to several other relevant international treaties, South Africa has signed and ratified the United Nations Convention on the Rights of the Child (1989) as well as the African Charter on the Right and Welfare of the Child (1990). Both treaties contain specific provisions on education and on the obligations and rights of parents.

The ratification of these treaties means that, when the Bill of Rights as well as any other legislation is interpreted, the treaties must be considered when determining the meaning of the language used by the lawmaker. Accordingly, an interpretation of a provision of law which is consistent with these treaties must be preferred over an interpretation that is inconsistent. Customary international law (which would include the Universal Declaration of Human Rights (1948)) is considered to be part of South African law (Schäfer, 2011, pp. 71-107).

National and Provincial Law

There is a plethora of laws and regulations dealing with education at national level. In many cases these are inconsistent with one another while in others there are lacunae in the law.

Accordingly, the national government has launched a multi-year project to rationalise the laws on education (Minister of Basic Education, 2012). This process also affects home education, and now

seems certain to be leading to new disagreements between home educators and government (Van Oostrum, 2013, pp.10-13).

Commodification of Education

Flight from state schools

The state school system has had a dismal reputation for decades. The past twenty years have brought little improvement, if any (Dlanga, 2014). Pupils in South Africa's schools remain at the bottom of international assessment rankings (Nkosi, 2012).

Private schools are better but they do not, on average, achieve beyond the international mean. Nevertheless the numbers of private schools and pupils have increased sharply (Masondo, 2013). So has the number of home learners.

Private schools and the provision of prepackaged programmes for home education has become big business. Major investment companies have been buying up schools and providers of packaged homeschooling programmes, organising them into chains of outlets for commodified knowledge, complete with heavily marketed brand names. Some of these chains are now listed on the stock exchange (Maake, 2014).

A secondary effect of the increase in private schools is that the state school system is being drained of good teachers who prefer the better working conditions in private schools. These teachers are sufficiently desperate to accept salaries that are half or less of what they are paid in state schools.

The government now has the problem of preventing the "middle class flight" from the state school system from turning into a stampede. They had been warned as

far back as 1996 that that will destroy the state schools and prevent improvement of education for the poor (Minister of Education, 1996).

Government's Answer to the Flight from State Education

The government's response is to standardise all education, forcing all forms of private (including home) education into the same mould as state education. Policy initiatives have, therefore, focused on imposing uniformity across all forms of education.

Ironically, such standardisation and uniformity seem to promote commodification. One result of this is that private purveyors strongly support state initiatives at standardisation. It means they need not compete in providing more effective education but can focus on dressing up the packages they sell in more attractive but educationally insignificant ways. In the process, the child becomes nothing more than a consumer of the resultant homogeneous soup. Standardisation has so far focused on the following fields:

Curriculum

Since 2002 the Minister of Education has been empowered by an amendment (Sec 6.a) to the South African Schools Act (1996) to prescribe the curriculum of private schools as well as state schools. Legal opinion is that this law is probably unconstitutional and therefore unenforceable, but it has not been tested in court.

Since 2008 there has been progressive pressure on private schools to comply with the state curriculum, or "National Curriculum Statement." The core

document of this policy goes by the name of the Curriculum and Assessment Policy Statement (CAPS). This curriculum is described by the education department as “a single, comprehensive [sic], and concise policy document” (Department of Education, undated).

On inspection it is found to be a detailed teaching programme prescribing the subjects to be taught in schools down to the level of topics scheduled week by week. The number of hours to be allocated to each subject is specified, as well as a recommended number of hours for each topic. Assessment instruments and processes and the requirements for promotion to the next grade are specified in detail, as are the records to be kept by the teacher. The prescribed instructional time ranges from 23 hours per week in Grade R (5-6 year olds) to 27.5 hours per week for Grades 10 to 12. That is compulsory “desk” work and does not include breaks, assemblies, or time allocated for the extensive administrative burden imposed by quality control measures. For these, one would need at least another four hours per week. Neither does it include time for compulsory homework.

Teachers and parents agree that the curriculum is extremely full, and requires even the youngest children to spend many hours per week on homework. Assuming that the time requirement for homework ranges from one hour per day for Grade R to 3 hours per day for Grade 12, the total work load comes to about 32 hours per week for five and six year olds to about 45 hours per week for Grade 12. Many teachers and parents consider this to be excessive.

Quality control

The CAPS curriculum prescribes a large number and variety of assessments and testing to which children must be continually subjected. Detailed records of all these must be kept for the purpose of quality control.

In the state education system, each province is responsible for controlling the quality of education in its schools. Teachers complain bitterly about the administrative burden imposed on them by the need for producing “evidence” that they have worked. It is said that much time and resources needed for education are drained off by the demands of the bureaucracy.

Private schools, on the other hand, must register (at significant cost) with Umalusi, a statutory body that is primarily responsible for moderating the examinations for the National Senior Certificate, the official school leaving qualification. However, Umalusi is now being employed to perform the “quality” control function of private schools on behalf of the provincial education departments, imposing similar, if not more onerous administrative demands on schools, teachers and learners.

As external assessment by means of international instruments has demonstrated (Nkosi, 2012), the provinces do not succeed in providing quality education. Among private schools it is whispered that the quality control function Umalusi, also, is much about control and little if anything about quality. Many of these schools complain privately that this is just an additional mechanism to harass independent schools which already carry a heavy burden of bureaucratic interference, driving up the cost of private education

without adding anything to the quality of education.

Education Management

The Education Management Information System (EMIS) is an extensive computerised network of databases, analysis programmes and user interfaces intended to make it possible to improve education by better decision making. Various parts of the system have been introduced over the past fifteen years, and there is currently strong pressure to complete the rollout of the system (Education Portfolio Committee Minutes, 2007).

One part of EMIS goes by the name of LURITS (National Learner Unit Record Information and Tracking System). It provides for the collection, administration and reporting of substantial personal information on twelve million learners and their parents and siblings. Its purpose is to enable education authorities to track the whereabouts of each learner and put up red flags if learners drop out of school for more than a week. It also tracks the progress of each child from grade to grade through the system (Pandor, 2008).

Inferences from the single national education system

The CAPS curriculum is a programme for teaching, not a programme for learning. Children who have profiles of development that are not synchronised with a rigid programme of teaching inevitably fail to “keep up,” becoming “learners with special needs.” And the more rigid the programme, the more children will need “special” attention, increasing the workload of teachers.

In a school system where the teacher ratio is 30:1 (Department of Women, Children and People with Disabilities, 2012, p.145), teachers have very limited capacity to assist children with special needs. Accordingly, the system is likely to spawn an even bigger industry of extra classes, remedial assistance, and so forth of the kind that already flourishes in the shadow of a dysfunctional school system. Unfortunately, poor students cannot afford these private services. It is understandable that the fallout from such a rigid system will need to be managed in detail, which clearly requires detailed management information—such as provided by LURITS.

Conversely, it is self-evident that LURITS presupposes graded education—it is not able to deal with learners who are not in grades. That, in turn, requires that “being in a grade” must have much the same meaning for everyone in terms of what the learner has been taught. Accordingly, much of the information contained in LURITS will have little or no value if children follow different curricula, and if the quality of the data is not verified.

It is clear, therefore, that the prescribed education structures form a closed system: CAPS, LURITS and the quality control structures cannot function effectively without one another.

The Bottom Line

The bottom line of the system is claimed to be “quality education.” It is not. The real bottom line is found in the prescribed requirements for progression and promotion from one grade to the next.

According to the promotion requirements, a learner may not be held

back in a grade more often than once in every three year phase. Beyond that, learners must be promoted, irrespective of whether they have mastered any of the prescribed outcomes (Department: Basic Education, 2012).

The practical effect of this is that there is no requirement that any child be educated.

There is an anecdote that illustrates this phenomenon. It is said that one rural school uses a stone as a doorstop. For a lark, the stone was registered on the LURITS system under the name “Peter Stone.” Peter’s class attendance record is immaculate, but his learner profile shows that he gets a mark of “not achieved” in every assessment and test. Apparently, Peter Stone is now in Grade 5.

One must conclude that the CAPS curriculum, the quality control system and the management information system may be effective at prescribing teaching. It fails, however, to result in learning. Indeed, the system is very effective at avoiding accountability for learning.

Proposed Regime for Home Education

From many signs, it has long been possible to forecast the kind of policy, laws and regulations that are contemplated for home education. For example, in 2012, already, the Minister of Basic Education responded to a question in parliament as follows:

The Discussion Document on Home Schooling developed by the Department of Basic Education deals with matters such as the character of Home Education, the current South African Home Education Law and Policy and a review of this law and policy with

the view of providing for Home Education as part of the formal schooling system (Minister of Basic Education, 12).

To this day, homeschoolers have not seen the “discussion document” referred to. The process of policy development is singularly lacking in transparency.

However, a leaked version of a draft of the proposed new regulations for home education supports all the suspicions concerning the details of “providing for Home Education as part of the formal schooling system” (Pestalozzi Trust, 2014).

Home education is to be locked into the system of CAPS, LURITS and quality control by Umalusi.

Outlaw Education

Constitutionally, and technically in terms of the law, the state should prescribe the content of neither private school nor home education. In practice, however, education officials refuse to register private schools or home education if they fail to comply with the prescribed curriculum.

At the same time, large numbers of children and their parents are desperate to obtain effective education for them. Many of these are children have become “children with special education needs” simply because they do not fit into the rigid grid of the system.

As mentioned, the result is that 95% of the parents of home learners fail to comply with the requirement that learners be registered for education at home. They can be prosecuted and, if convicted, they could be sentenced to a maximum of six months in jail or a fine.

However, the number of unregistered (and therefore “illegal”) private schools is also increasing. It seems that about one quarter of all private schools may be unregistered. Parents who send school age children to such institutions instead of to registered schools can receive the same punishment as parents of home learners. In addition, the owners and operators of such an illegal private school can also be prosecuted. In this case, the maximum sentence is three months in jail or a fine.

These parents and teachers and the education they provide are, therefore, literally outside the law—“outlaws”—and at risk of prosecution.

Conversely, and just like the merrie men of Sherwood Forest, the outlaw status also frees them of all restrictions, and they are able to respond to the education needs of the children in a manner that is in the best interests of the children. And it shows. Among these parents and teachers one finds an almost unlimited variety of approaches to education. They explore and experiment in interaction with each child to find what works best for the child. Even radical unschooling is growing in popularity and is the topic of many informed discussions in these circles.

Outlaw education and the law

As stated, outlaw educators may be prosecuted and severely punished. If they are convicted. But that may not be so easy. If the state can prove that they have broken the law, the state will also have to prove that they are not justified in breaking the law. There are many aspects to this task, and some of them will be considered below.

Is the law legal?

The Constitution makes neither education nor school attendance compulsory for anyone. It does require the state to “respect, protect, promote and fulfil” the right to education which vests in everyone, not only in children.

The first of the state’s obligations is to “respect” the right. That is a negative right. It means that, unless it is reasonable and justifiable, the state may not intrude or interfere with persons who are exercising their right. Neither may the state hinder or place obstacles in the way of persons exercising their right.

The provisions on compulsory school attendance, on home education, and others of the South African Schools Act (Sec 3, 4 and 51) create two legal fictions: that persons who attend schools receive education and that persons who do not attend schools do not receive education unless the opposite is proven. These fictions may be rebutted, depending on what the definition of “education” is.

If it is shown that the compulsory school attendance provisions fail to respect the right to education, the law itself may be unconstitutional.

The Definition of Education in Law

Neither the SA Constitution nor the South African Schools Act define “education.” However, it is defined in applicable international law. The Universal Declaration of Human Rights (1948) declares in Article 26(2) that education shall, in the first place, be directed to “the full development of the human personality.”

This definition of education is affirmed by the United Nations Convention on the Rights of the Child (1989) as well as the

African Charter on the Rights and Welfare of the Child (1990), both of which have been ratified by South Africa. When considering what education is, anyone who respects the rule of law must certainly work with that definition and consider its implications.

The development of one's personality is, clearly, very much an individual right, unless it is assumed that all individuals have the same personality and that personality is a static phenomenon. The development of one's personality is also a very personal matter, and determines one's self identification. Indeed, it is a private and even intimate matter.

The development of one's personality is, indeed, the essence of personal autonomy and, therefore, everyone must establish for him or herself what the definition of education is.

For that reason, the education that one seeks must be the free choice of the person in whom the right to education is vested. That includes children. If the state places any restrictions on this free choice, the burden is on the state to prove that such restrictions are reasonable and justifiable.

The Child's Right to Parental Care

Article 28(2) of the South African Constitution recognises the child's right to parental care. This is often assumed to mean that the state determines what care a child must receive, and the parents must provide.

That seems to assume for the State an omniscience and omnipotence that is normally associated with divine beings. More likely, it derives from an assumption that all authority vests in and derives from the state, and that there are no other sources of inherent authority.

This does not agree with the principle of subsidiarity as a construct in human rights law. Carozza (2003, p.38) defines "subsidiarity" as: "...the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself." Indeed, the principle has been adopted as a central constitutional principle of the European Union². He explains the practical implications as follows:

...every community is singular in its identity and dynamics, in the way that it furthers its primary ends—the way, for instance, that a family serves its members' needs for education, material assistance, love, and intimacy. The principle of subsidiarity requires that such expressions of human goods not be supplanted by the state but, instead, be both tolerated and even assisted so as to flourish freely. (Carozza, 2003, p. 45)

In determining the content of the right to parental care, therefore, one must refer to Article 5 of the United Nations Convention on the Rights of the Child (1989), read with Article 3, where States Parties bind themselves to respect the responsibilities, rights and duties of parents to guide and direct the child in the exercise of his or her rights in a manner that is in the best interests of the child. That includes the child's exercise of his or her right to education.

² See, for example, the consideration given to the functioning of the subsidiarity principle at national level in a doctoral thesis on the law on home education in the Netherlands, by Sperling (2010).

The Canadian Supreme Court offers a very practical explanation of why the child needs parental care:

While parents bear responsibilities towards their children, they must bear correlative rights to exercise them, given the fundamental importance of choice and personal autonomy in our society. [T]he privileged role parents exercise in the upbringing of their children...translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself.

[...]

If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold, but in doing so it is limiting the...rights of parents rather than vindicating the constitutional rights of children (*B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995).

Most parents, says the court, are better equipped with knowledge and motivation than anyone else to guide and direct

children in the exercise of their rights. To deny the child the advantage of parental care by second-guessing parents or preempting their decisions is to fundamentally infringe the child's human rights.

Parental Obligations with respect to the Right to Education

The Universal Declaration of Human Rights (1948) declares, in Article 26(3) that "parents have a prior right to choose the kind of education that shall be given to their children." The United Nations Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990) state this slightly differently: they declare that parents have the primary responsibility for the care and upbringing of the child. Clearly, in contemporary human rights law the parental right to choose the education of their children is essential to enable them to fulfill their legal responsibilities and obligations to the children.

The meaning of the "primary" responsibility of parents was considered by the Constitutional Court in the case of *Grootboom (Government of the Republic of South Africa and others vs. Grootboom and others*, 2000. p.12). The court concluded that the primacy of the parental responsibility means that the state has only secondary responsibility—it may only intervene if the parents are unable or unwilling to fulfill their primary responsibility.

This understanding correlates well with an argument based on the principle of subsidiarity. The state is not the supervisor of the parents. The state must provide a safety net for the child's rights when the

parents fail, as parents sometimes do. Evidently, it is generally in the child's best interests that the child be cared for by the parents, who normally know the child and his or her circumstances far better than any organ of state and who maintain a pedagogically essential attachment bond with the child. It is parents who are equipped to guide and direct children in the exercise of their right to education. It is parents who know the personality of the child best and are, therefore, equipped to guide and direct the children in defining their own education.

Conclusions

The state's attempt to control every form of education in South Africa subjects all learners to a dysfunctional and overregulated system—a kind of “death by management.” The system regulates teaching, but cynically indemnifies itself against any expectation that it will ensure learning.

The fallout of the system appears in the form of a dismally low quality of education when measured by international standards. The most visible symptoms may be poor test results, but the most devastating are the increasing number of discouraged early dropouts and children who develop “special learning needs” primarily because they don't fit the system.

The law does provide for the state to require that children (or adults) learn specific abilities in which the state has an interest. The state may, therefore, issue minimum requirements for education.

However, when it does, its actions constitute not a fulfilment of the right to education, but restrictions or limitations on the free exercise of the right to education. That means that the state carries the burden of proof that each such minimum requirement is, indeed, reasonable and justifiable.

The state may simply not abrogate to itself the decisions that belong to the sphere of autonomy of the individual, guided and directed by his or her parents, if a child. Certainly, it is beyond reason to burden five year olds with a thirty hour work week of which every hour must be filled with work prescribed and scheduled by the state without reference to the individual personality of the child and without any meaningful reference to the parents of the individual child. Imposing such a burden on the child's time and resources clearly supplants all opportunity for the free exercise of the right to education. This must constitute an abuse of the rights of children.

The current law and policy on private schools, and the current process for reviewing law and policy on home education, reveals no intention on the part of the state to respect the free exercise of the right to education. Given the lack of transparency in the policy making processes, and the totalitarian assumptions from which those processes seem to stem, it is inevitable that the outlaw educators of South Africa will continue to increase in number.

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