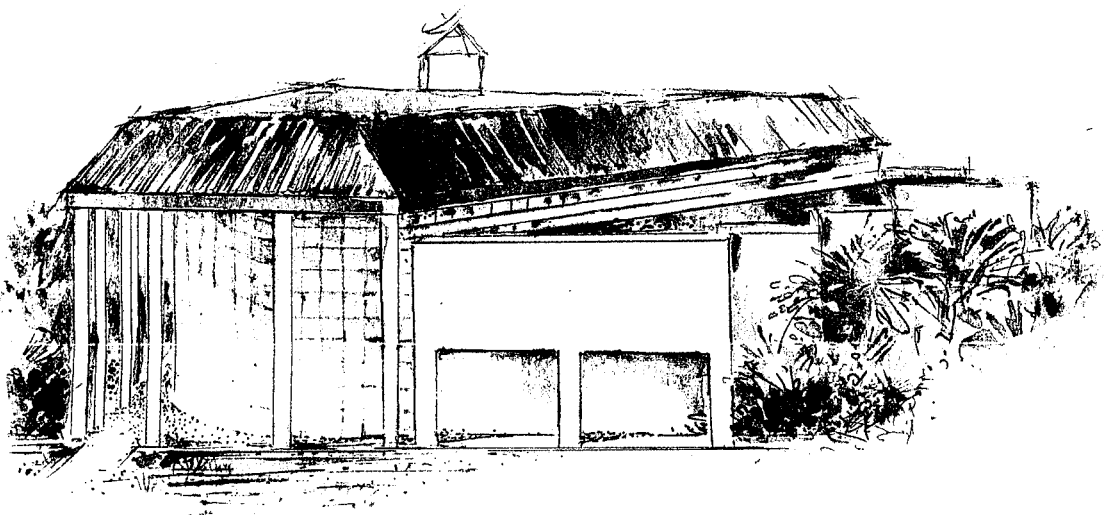


# **AN INTERNATIONAL PERSPECTIVE ON THE MANIFESTATION OF LEARNER RIGHTS**

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## **An international perspective on the manifestation of learner rights**

### **ABSTRACT**

The educator-learner relationship prioritizes specific rights and duties, the neglect of which would result in unfortunate irregularities. Section 9 of the SA Constitution implies that unequals (such as learners and educators) should be treated unequally. South African case law maintains not only the mutual responsibilities and obligations of educators and learners, but has also established the court's reluctance to interfere with educators' fair and reasonable discretionary power concerning discipline, as they have both the duty of care and the right to maintain order at school. While the test of the reasonable person is applied when determining negligent behaviour, note must be taken of the higher degree of care expected from educators. However, an educator's ostensible wrongful act can be regarded as lawful on various grounds of justification. Although the best interest of learners is of paramount importance in the administration of justice, learners share in the education responsibility, as is evident in the contributory fault principle.

Using the comparative law method, a synopsis is given of South Africa, England and Wales, Canada, and Japan, in order to gain perspective in developing education-judicial guidelines to ensure accountable, responsive and open educator-learner relationships in South Africa.

## **1 INTRODUCTION**

The South African educator-learner relationship is, by its own complicated nature, a cause for concern given the fact that all the parties involved are endowed with individual rights and freedoms. Very often the focus falls emphatically on the latter only, neglecting to prioritize the duties which everyone should be obligated to fulfil. This can lead to unfortunate irregularities which do not benefit society.

It is imperative that the educator be well-informed regarding the learner's fundamental rights and his own duties and obligations, so as to ensure an accountable, responsive and open educator-learner relationship.

To simplify matters, the male reference will be used in this paper. The female reference is *mutatis mutandis* included.

## **2 POINT OF DEPARTURE**

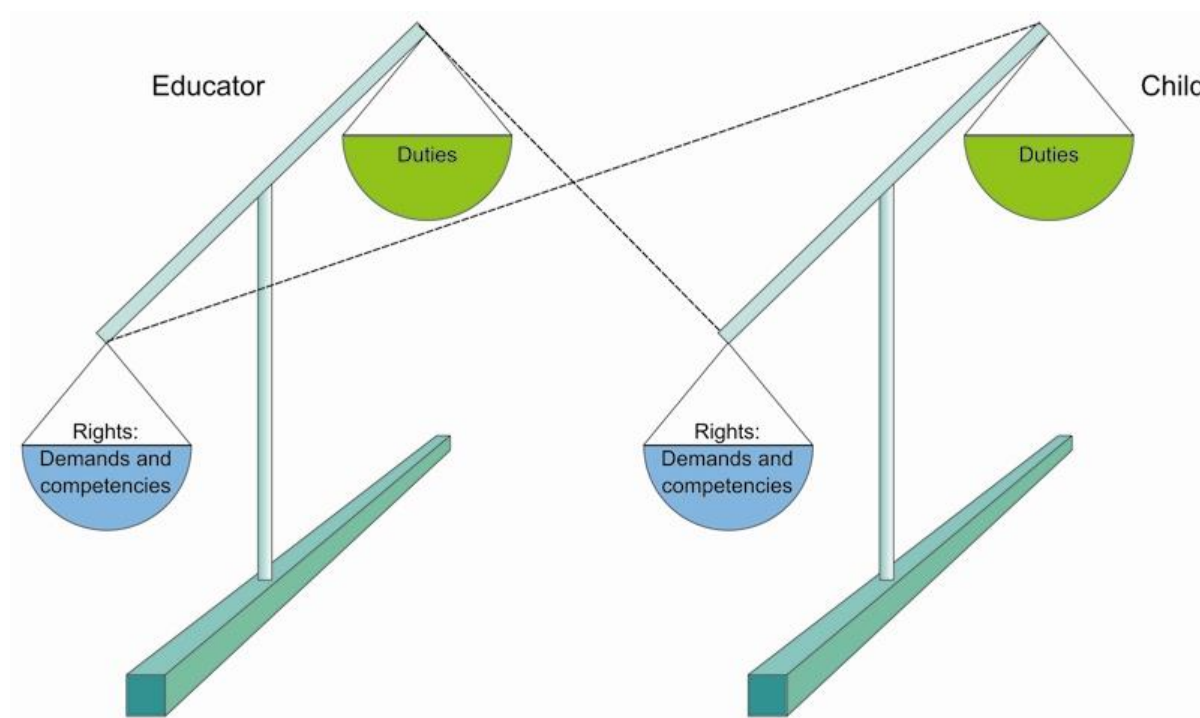
According to Van Wyk (1987:11), Oosthuizen and Bondesio (1988:10), and Bray (1988:5) education comprises a complex network of human relationships, consisting mainly of principals, educators, the parent community and learners. These relationships are structured legally by determining each participant's status (Beckmann & Prinsloo, 1995:4). Without this, education (which is based on structure and order) would degenerate into chaos.

Educators and parents stand in a legal relationship to one another on account of both parties' position of authority concerning the formal teaching and general education of the child (Van Wyk, 1987:65). Children and their parents stand in legal relationship to one another (Van der Vyver & Joubert, 1991:443), and a general as well as a specialized legal relationship exists between educator and learner. This entails that the learner must not be regarded as an inferior partner in education (Van Wyk, 1987:74). Oosthuizen and Bondesio (1988:11) point out that the learner is an inextricable part of the education partnership, and Van Wyk (1987:74) reasons that the learner is one of the most important partners in it.

While Van Wyk (1987:80) points out the difference between general and legal relationships (for example between school and parent community) and individual relationships (for example between educator and learner), Bray (1988:26-29) highlights the fact that numerous rights and duties actually evolve from these general and individual

relationships, as the right of one person sometimes actually imposes a particular duty on another person. Schematically this is presented below in Figure 1.1.

**Figure 1.1: The relationship between rights and duties of educators and learners**



(Bondesio, 1995:42)

The Republic of South Africa Constitution Act 108 of 1996 (hereafter called the SA Constitution) is the supreme law of the country: all other laws and all conduct must be in accordance with the SA Constitution. While section 1 points out the values of “*human dignity, the advancement of human rights and freedoms, democratic government to ensure accountability, responsiveness and openness*”, section 3(2) reminds all citizens that they are “*equally subject to the duties and responsibilities of citizenship*”.

The impact the SA Constitution has on education in South Africa is seen by Bray (1996:151) as being understood only when the role of the State as provider for education is explained. In terms of section 29 of the SA Constitution all persons are guaranteed the right to basic education. The State furthermore determines education structures as well as the powers and functions of the education authorities.

Chapter 2 of the SA Constitution contains a Bill of Rights. Carpenter (1995:261) states that the absolute nature of the rights which are protected in this chapter is qualified by various words, phrases and clauses. While the Bill of Rights confers the full panoply of constitutional rights on the learner as an individual person (Bray, 1992:24), in terms of the SA Constitution it is commonly accepted that all of these fundamental rights are subject to some form of constraint: the range and scope of one person's rights are influenced by the mere existence of another person's rights (Carpenter, 1995:260).

In an article on human rights (Bray, 1992:24) educators are made aware of the fact that a learner's rights are not co-extensive with those of an adult. According to Van der Vyver (1997:296) the equal protection clause, section 9, is an example of a situation where certain limitations are inherent in the very definition of the concept: "*equal protection*" then requires per definition that unequals (such as learners and educators) be treated unequally.

Court decisions throughout the years have established a common law of the school, under which educator and learner have mutual responsibilities and obligations. The mutuality of this relationship (see Figure 1.1) is predicated on society's expectations of the school in advancement of the common good (Alexander & Alexander, 1992:279). The following case is an example of such court decisions.

In ***R v Le Maitre and Avenant*** 1947 4 SA 616 (C) the court found that 17 hostel learners were guilty of wilfully undermining the housemaster's authority: these boys ignored several warnings and continued with their intentional damaging of hostel property. The court emphasized that, for an educator to uphold this authority, it is absolutely necessary to teach learners how to behave themselves.

This would even imply strict measures if the circumstances called for them. The court reiterated its reluctance to interfere with the educator's discretionary power in terms of discipline, unless unreasonably or unfairly executed.

Arising from the aforementioned "*educator's discretionary power in terms of discipline*", the focus falls on the educator being in such a position. The Latin term *in loco parentis* which means "*in the place of the parent*" (Hiemstra & Gonin, 1981:200) has developed in South African common law to imply that the educator stands in for the educational activities at school (Essex, 1987:212-215; Oosthuizen, 1989:104-105; Bray, 1992:18;

Oosthuizen, 1992:56; Oosthuizen, 1994:209). This is regarded as implied delegation of parental authority by parents to educators (Maithufi, 1997:260).

The implications of sections 8(3)(a), 8(3)(b), 36(2), 39(1), 39(2) and 172(1)(a) of the constitutional Bill of Rights give a new dimension to the role of common law in South Africa (Van der Vyver, 1997:268-269): "*Although rules of the common law that regulate the conduct of persons other than organs of State and which violate the SA Constitution would be unconstitutional, a court may 'develop' such law rules so as to bring them into harmony with the constitutional regime for the protection of human rights. It must do so either by giving effect to a constitutionally protected right, or by bringing the common law limitations of a constitutionally protected right in conformity with the limitation provisions of the SA Constitution.*"

This common law role of the educator (*in loco parentis*) has been confirmed by different statutory measures which exist in South African education, and is, *inter alia*, by Essex (1987:212-215), Van Wyk (1987:73), Oosthuizen and Bondesio (1988:67), Oosthuizen (1992:56-57) and Oosthuizen (1994:209). It becomes quite evident that, given the educator's obligation to educate the learner, there are two co-extensive pillars to the *in loco parentis* role which educators play (Maithufi, 1997:260-261): the duty of care (which implies looking after the physical and mental well-being of the learner), and the right to maintain order at school (which implies the educator's right to discipline the learner).

Bray (1992:24) states that the courts will be challenged with not only defining and interpreting the rights and interests of learners so as to protect them against abuse, but also with ensuring that the duty and responsibility of educators to exercise control and discipline over the educational process are not undermined. As van der Westhuizen and Oosthuizen (1989:743) so clearly point out: educators should firstly be expected to keep themselves informed concerning judicial aspects that have bearing on effective school management, and secondly keep themselves informed concerning any judicial liability that has bearing on both intra and extra-mural activities. Clearly it is the educator who carries the considerable responsibility of actually foreseeing learner conduct which would interfere with the orderly education process at school (Bray, 1992:24).

The same author (Bray, 1992:24) warns that court actions which so circumscribe the discretion of educators that they abdicate responsibility towards the learner, which historically and rightfully is theirs, would be a danger to public interest.

### **3 OBJECTIVES OF THE RESEARCH**

The overall objective of this study was to help educators gain insight into the intricate nature of the educator-learner relationship by making them aware of specific educational and juridical aspects. The study aimed at enhancing their confidence and creating greater job satisfaction. All of this should then culminate in *the best interest of the learner in the administration of justice*.

This overall objective was operationalised by:

- determining the legal position of the learner within the school system;
- identifying the legal determinants of the educator-learner relationship;
- examining the degree to which the educator has a duty of care, exposing him to probable liability;
- presenting a comparative law perspective of the educator-parent-learner relationship; and
- developing educational-juridical guidelines in an effort to ensure an accountable, responsive and open educator-learner relationship.

### **4 RESEARCH METHODOLOGY**

#### **4.1 Literature study**

Primary and secondary legal and educational sources were studied to gather information on the educator-learner relationship with regard to the sources of school law, the fundamental rights of learners, legal obligations of the learner, the educator's duty of care, discipline, and legal liability.

DIALOG and ERIC searches were conducted to locate appropriate literature sources.

#### **4.2 Comparative school law perspective**

The comparative law method is defined by Venter *et al.* (1990:213) as a "*unique, systematic and jurisprudential strategy*" which, by virtue of similarities and differences, is used regarding a specific topic within a variety of legal systems to come to a new understanding about this topic. Such a synoptic study was done, with specific reference to South Africa, England and Wales, Canada and Japan.

## 5 FINDINGS

Specific findings have become clear from the research. They are presented in terms of the original research objectives.

### 5.1 Findings based on research objective 1: To determine the legal position of the learner within the South African school system

The following notable findings regarding an educational-judicial perspective of the educator-learner relationship within the South African public school system have been made:

- A learner's age has an impact on both his capacity to act and his capacity to litigate. These limited capacities should be seen as legal protection because of the learner's lack of experience, and not as a legal penalty. The recognition of the learner's lack of experience sounds a warning to educators to safeguard the welfare of their learners.
- As a sub-section of administrative law, school law is affected by both private law and public law in the sense that the former regulates, *inter alia*, the legal relationship between the parent and the learner. The latter contains certain criminal law provisions such as statutory or common law misdemeanours.
- The South African learner is obliged to submit to authority, discipline and punishment. He has the duty to subordinate himself to the school's code of conduct. Moreover, he has the obligation to comply with compulsory schooling and participate in extra-mural activities. The learner thus **shares** in the education responsibility, and the educator is obliged to take action if the learner fails to obey him.
- Both the SA Constitution and the Schools Act provide for the learner's right to procedurally fair administrative action. The latter comprises the *audi alteram partem* and *objectivity* principles. Although the learner also has the right to be part of the governing body of his school, he enjoys protection based on his status as a minor in private law.
- The Schools Act is lacking in the sense that serious misconduct which would justify expulsion has not been defined; the disciplinary proceedings which have to be followed have not been specified; and the provisions of due process have not been laid down. Another deficiency of the Schools Act is that the right of appeal is awarded



the learner or his parent only against the learner's expulsion, and not against his suspension. Contrary to this ignorance regarding the learner's right to appeal against his suspension, the SA Constitution enshrines the fundamental right to just administrative action and stipulates that a child's best interests are of paramount importance.

- The best interests of the learner must enjoy paramount importance in all matters.
- Some discrepancy exists between the age limit in the SA Constitution, which specifies that persons younger than 18 years are regarded as children, and the SA Schools Act, which fails to define the term minor. If the legal parameters of 7-21 years of age are accepted as the definition, then three years of the learner's life as a minor are not protected by the special additional protection afforded children in section 28 (the so-called children's clause) of the SA Constitution. This would imply that the best interests of the learner are not of paramount importance during these three years.
- Regarding his fundamental rights, the age and level of maturity of the learner could lead to the limitation of his independent right to exercise these rights. These aspects are reminiscent of the *Gründrechtsmundigkeit* and *sufficiently mature* principles of Germany and the United States of America. Educators must therefore take note that being vested with fundamental rights does not necessarily imply that the learner has the independent right to exercise them.
- The educator must take cognizance of the fact that *vertical and horizontal application* applies to section 28 of the SA Constitution which protects the rights of children. Both State (public) and private relationships are affected by this duality.

## **5.2 Findings based on research objective 2: To identify the legal determinants of the educator-learner relationship.**

The following are the most important findings regarding the legal determinants of the educator-learner relationship:

- Administrative acts which are performed at school must comply with the general prescriptives of the law, which are legal empowerment, lawfully constituted authority, compliance with circumstantial and procedural prerequisites, reasonableness, fairness and liability equal to that of private persons in the case of action taken without legal authority. The bona fides of the author of an administrative act cannot change an invalid act into a valid act. The court will only interfere in administrative decisions if there is evidence, *inter alia*, of **ultra vires**, **prejudice** or **mala fides**.

- The quasi-judicial competence of an administrative body, such as the governing body of a school, refers to its competency to investigate a possible breach of conduct, hold trials, come to conclusions, make official decisions and exercise its discretion. All of these need to be done in accordance with the adjudicative process.
- **Natural justice** concerns itself with the fact that a person who is affected by an administrative act, such as the learner, is entitled to a fair, unprejudiced hearing. Yet the application of natural justice need not be rigid, since the circumstances of the case, the nature of the investigation and the specific infringement point to its flexibility. By upholding the principles of natural justice, the educator accepts *accountability* for his actions.
- The blameless accountability of the Department of Education in the final instance, for the unlawful act of its staff is worded in vicarious liability. Four aspects need to be present to establish vicarious liability:
  - ◆ an unlawful act;
  - ◆ the unlawful act has to be performed during the execution of the employer's duties;
  - ◆ the unlawful act has to fall within the limits of the employer's competencies; and
  - ◆ the unlawful act has to occur while an employer-employee relationship exists.
- Negligence can exist only if the damage caused was reasonably foreseeable and preventable. The test of the reasonable person is applied in order to determine what the law expects of an educator:
  - ◆ Would a reasonable person have acted in the same way?
  - ◆ Could the damage have been foreseen?
  - ◆ Could the damage have been prevented?
- Based on the *in loco parentis*-position of the South African educator, he exercises both delegated and original authority over the learner at school, and carries great responsibility regarding his legal duty concerning caring supervision and the accompanying right to maintain discipline.

### **5.3 Findings based on research objective 3: To examine the extent of the educator's duty of care.**

The major findings in this regard are:

- The educator's duty of care refers to a specific obligation towards a specific group of learners in his care. South African law expects of the educator to act as prudently as a good father, in other words, like a *diligens paterfamilias* or *bonus paterfamilias*. Although the reasonable person is a person whose conduct must be judged in the light of the limitations imposed on him by human nature, a higher degree of care is required of the educator in his professional relationship with learners.

Given the educator's specific training, his specialised knowledge of the nature of the learner in general, and his awareness of both the physical and psychological welfare of the learner and the dangers which threaten him, the law sometimes expects more from the educator than from the parent. At the same time the reasonable educator guards against being negligent, and stays abreast of those legal provisions which regulate or govern his actions.

- Delictual liability is established by the presence of the following five elements: conduct, fault, damage, and causation, and wrongfulness. However, an ostensibly wrongful act by the educator will be regarded as lawful conduct in the presence of grounds of justification. These grounds are self defence, necessity, statutory authority, disciplinary power which takes note of, *inter alia*, the seriousness of the offence and the age of the learner, provocation and consent, taking into consideration whether a learner has sufficient mental ability to appreciate the consequences of his consent to the risk taken.
- Contributory fault of the learner can be established when the learner is partly to blame for the damage which occurred because of the educator's wrongful and negligent conduct.

#### **5.4 Findings based on research objective 4: To present a comparative school law perspective of the educator-learner relationship.**

The following are the most important findings regarding a comparative school law perspective of the educator-learner relationship:

- School law in South Africa, England and Wales, Canada and Japan is subordinate to the supreme law of each country. Common law and case law are part of the sources of school law in all four countries.
- Japanese education could benefit greatly from regarding the authority of their case law precedents as binding, rather than regarding them as non-binding as is currently the case.

- South Africa, England and Wales and Canada expect learners' submission to reasonable rules of behaviour at school, while Japanese schools determine behaviour rules arbitrarily.
- South Africa and England and Wales regard the educator as being in loco parentis, Canada prefers the ***parens patriae-doctrine*** and Japan sees the educator in a ***custodial role***. Furthermore, South African legislation promotes the ***best interests of the learner*** and Japanese legislation instructs the educator to carry out his duty in the interest of the learner, but Canadian legislation is wary of the learner's interpretation of these principles. Legislation in England and Wales is preoccupied with the educator's exemplary life to the degree that it implies concern for the learner's best interests.
- In spite of differences in this regard, all four countries stipulate punishment for misdemeanours at school. Corporal punishment is banned in South Africa and England and Wales, while Japan continues this banned measure and Canadian provinces have not found agreement on the matter.
- South Africa and England and Wales hold their education authorities vicariously liable for unlawful acts, but acknowledge the contributory negligence of the learner. Canada and Japan are extremely reluctant to instigate criminal proceedings against educators, and Canada also holds the learner responsible for his own tortuous actions.

## 5.5 RECOMMENDATIONS

The following recommendations are made towards developing educational-judicial guidelines in an effort to ensure an accountable, responsive and open educator-learner relationship in South Africa:

- The legal implications which the SA Constitution and the Schools Act have on education should be made intelligible and accessible to all educators. Questionnaires should be sent out periodically to determine whether the information has been interpreted and implemented correctly.
- Care should be taken that the educator becomes fully conversant with the competencies, subjective rights and legal obligations bestowed on the learner, his parents, himself and the State. This could be done by compiling a set of comprehensible regulations in a Compendium with regards to, inter alia, the legal status of the learner, the prescribed procedures contained in formal law which have to be followed in the education system, the learner's obligations concerning his own education, and the educator's obligation to take action if the learner fails to obey him.

- The educator should be trained regarding exactly what is meant by legal, reasonable and procedurally fair administrative action. This could be done by including School Law as a compulsory subject in the completion of an education degree or diploma, and by introducing School Law as part of current in-service-training qualifications.
- The deficiencies of the Schools Act should be attended to immediately by:
  - ◆ carefully defining serious misconduct;
  - ◆ clearly specifying the disciplinary proceedings which have to be followed;
  - ◆ laying down the provisions of due process;
  - ◆ consistently applying the learner or his parents' right to appeal against all decisions affecting him negatively;
  - ◆ bringing the school-going age limit in line with the indication in the SA Constitution that a minor is regarded as younger than 18 years. This calls for a decision to be made regarding the compulsory school-leaving age.
- The educator should be informed of the scope and content of the duty of care he owes the learner. This could be done effectively in the various provinces.
- Guidelines should be compiled to make educators aware of the general prescriptives of the law with reference to administrative acts. Phrases such as *bona fide behaviour*, *the ultra vires principle*, *diligens paterfamilias*, *the rules of natural justice*, and *vicarious liability* should be expounded in full detail.
- The learner should be made aware of his obligations concerning his own education. Most important would be his duty to comply with compulsory school attendance and reasonable rules of behaviour. He must also be made aware of the fact that his own contributory fault might be taken into consideration concerning damage resulting from wrongful and negligent conduct.
- More should be made of the obligations of the learner which are common on an international level.
- Schools should finally come to realise that the so-called "indemnification form" does not protect them legally from being held liable for damage suffered by a learner.
- Canada's minority language education rights need to be scrutinized closely, since South Africa can gain much from the viewpoint that minority languages should be

protected from extinction. However, attention should be drawn to the fact that the learner should be included in the affording of such rights.

- Corporal punishment has apparently lost its place in an accountable, responsive and open educator-learner relationship. Therefore the learner can only benefit from an international agreement which prohibits this form of punishment at schools.

## **6 CONCLUDING REMARKS**

An accountable, responsive and open educator-learner relationship is vested in the clear demarcation of the individual competencies, subjective rights and legal obligations of the parents, the learner, the educator and the State. It is in this regard that the onus rests with the educator to stay abreast of dramatic changes in the legal environment.

This research identifies itself with W.H. Auden's wise words:

**Unless an individual is free to obtain the fullest education with which his society can provide him, he is being injured by society.**

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