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The Bill of Rights: implications for South African schools ten years into democracy

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Law reports prior to 1993 indicate that, *de jure*, school powers were not unlimited. The failure of schools to follow established procedures would result in occasional legal challenges and judgements against such schools. The imposition of the Bill of Rights in 1996, with its shift from parliamentary sovereignty to a constitutional democracy, made it crucial for South Africans to comprehend and accept this fundamental change, whose implications are currently playing themselves out in a variety of situations, including schools. Despite ten years of democracy there appears to be considerable lack of understanding of the Bill of Rights in the context of South African schools. The Bill's application, conflicts among various rights, and differences between the constitution and majority views remain problematic issues.

Die Handves van Menseregte: implikasies vir Suid-Afrikaanse skole na tien jaar van demokrasie

Regsverslae voor 1993 dui daarop dat skoolbevoegdhede, *de jure*, nie onbeperk was nie. Skole wat in gebreke gebly het om te voldoen aan die neergelegde prosedures het hulself dikwels in die regsgedinge en hofuitsprake bevind en uitsprake is dikwels teen sulke skole gelewer. Die toepassing van die Handves van Menseregte, met 'n oorgang vanaf parlementêre soewereiniteit na konstitusionele demokrasie in 1996, het dit noodsaaklik gemaak vir Suid-Afrikaners om hierdie fundamentele verandering te begryp en te aanvaar aangesien die implikasies hiervan hulself in 'n verskeidenheid situasies, insluitende die skoolomgewing, openbaar. Ten spyte van tien jaar van demokrasie blyk daar steeds 'n gebrek aan begrip te wees rakende die Handves van Menseregte in die konteks van Suid-Afrikaanse skole. Die toepassing van die Handves van Menseregte, teenstrydige regsansprake en die konflik tussen die Grondwet en die meerderheids siening is steeds sake wat probleme meebring.

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Prior to the introduction of the Bill of Rights in South Africa in 1994, the notion of learners having “rights” was not a major issue. School principals exercised great power and, with their teachers, were almost beyond question, at least *de facto* if not *de jure*. The concept of due process was largely ignored, and conformity was unquestioned. Schools extended their tentacles of power way beyond their gates, and often demanded unquestioning and unthinking obedience within them.

The above description probably fits many schools previously reserved for children of the white community. Prior to the 1976 Soweto uprising, the description was possibly also true of many black, coloured and Indian schools.

In the post-1976 period many black schools were disrupted by serious challenges to authority. It took strict principals to maintain order, discipline and a measure of academic success. De Villiers (1990), in her biographical account of teaching in Soweto in 1985, reflects on the fact that discipline applied by teachers was often harsh in the extreme, without respect for the dignity of young people. For many black schools, the years from 1976 to 1993 could be described as years of turbulence, rebellion and cruelty.

A careful examination of law reports prior to 1993 indicates that, *de jure*, school powers were not unlimited. The failure of schools to follow established procedures resulted in occasional legal challenges, and in judgements against such schools. Specifically, the failure of schools to observe the principle of *audi alteram partem*, meaning “let the other side be heard” (Hiemstra & Gonin 1981: 163), resulted in schools and education authorities losing cases in the courts. Examples include *Netto v Clarkson* 1974 (2) SA 66 (N), *Naidoo v Director of Indian Education* 1982 (4) SA 267 (N), and *Minister of Education and Training and Others v Ndlovu* 1993 (1) SA 89 (A).

1. Statement of the problem

The introduction of the Bill of Rights thus poses distinct challenges for the South African school community of today. In addressing several meetings of school principals and members of governing bodies, the main author of this study discovered that only 3% of these more than 200 decision-makers had actually read the Bill of Rights. This

itself raises serious questions as to how the rights contained in the Bill can be promoted by a school (as required by the Constitution). In dealing with the Constitution and the Bill of Rights two questions arise. To whom do the Constitution and Bill of Rights apply? Does the Bill of Rights apply to everyone? In the case of the South African school community, the two questions can be phrased as follows:

- Do the South African Constitution and Bill of Rights apply to South African schools?
- Do the South African Constitution and Bill of Rights apply to everyone who is a member of a school community?

2. Methodology

The methodology used to answer the above questions was to critically examine the Bill of Rights and the legal literature, placing these within the context of South African schools.

The purpose of the research was not to provide a comprehensive analysis of all aspects of the Bill of Rights but to examine aspects crucial to an understanding of it. This led to a focus on Sections 8 (Application) and 39 (Interpretation) and then to an examination of what Bickel (Stone 1986:174) referred to as the “counter-majoritarian dilemma”, or the dilemma of a constitution being able to override the will of the majority.

3. Application: does the Bill of Rights apply to South African schools?

In answering the question above, Sections 8(1) and 239 of the South African Constitution (RSA 1996a) are critical. Section 8(1) states:

The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and *all organs of state* [italics added, KA, JvS & LP].

The reference to “all law” is of special significance in respect of schools, where school rules are to be regarded as subordinate legislation.¹

1 Van Wyk 1987: 146; Alston 1998: 48-56; Oosthuizen 2003: 35; paragraph 1.3 of the *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners* (RSA 1998).

Subordinate legislation is referred to by Du Plessis (2000: 205) as delegated legislation. Who are “all [other] organs of state”? Section 239 of the Constitution (RSA 1996a) provides a definition as follows:

239 Definition

In the Constitution, unless the context indicates otherwise ‘organ of state’ means

- a) any department of state or administration in the national, provincial or local sphere of government;
- b) and any other functionary or institution
 - i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - ii) exercising a public power or performing a public function in terms of any legislation

but does not include a court or judicial officer.

It is clear from the above definition that the public school is an organ of state in terms of section 239(a)(ii) since it exercises a public function in terms of the South African Schools Act (RSA 1996b). It is, therefore, bound by the Bill of Rights in terms of section 8(1).

As to whether independent or private schools are covered by the above definition, the position is not as clear as in the case of public schools. One view is that they are regulated by statute in terms of Chapter 5 of the South African Schools Act (RSA,1996b) but are not “organs of state”. In terms of section 8(2) of the Constitution (RSA 1996a):

[A] provision of the Bill of Rights binds a natural or a juristic person [the owner of an independent school, KA, JvS & LP] if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

To the extent that the Bill of Rights (section 29(1)) is applicable to everyone, those attending or teaching at independent schools do not forfeit their constitutional rights.

The power of the Constitution, and of the Constitutional Court to enforce the Constitution in matters affecting organs of state is clearly illustrated in *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (CC) where the Constitutional Court stated:

The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore bound by the Bill of Rights.

De Lille had challenged her suspension from the National Assembly on the grounds that her right to freedom of expression (section 16) had been violated by the decision. It is reasonable to conclude that if the rules of the National Assembly can be subjected to constitutional scrutiny, as in the *De Lille* case, in terms of sections 16, 33 (just administrative action) and 34 (access to the courts) of the Constitution (RSA 1996a), schools, as organs of state, cannot expect any lesser scrutiny of their rules if and when such rules give rise to legal disputes and the individuals affected choose to pursue the legal options open to them. Woolman (2002a: 10-62A-63), Cheadle & Davis (1997a: 44-45) and De Waal *et al* (1999: 38-39) elaborate, pointing out that the Final Constitution (1996) provides that those who exercise “public power” or engage in a public function in terms of legislation or a constitutional provision, are bound by the Constitution.

Woolman (2002a: 10-62A-63) states further:

These institutions and individuals neither need to be an ‘intrinsic part’ of what we have commonly or historically considered to be the ‘government’ nor need they be subject to the effective control of the elected legislature or executive bodies [...] if the state has created the conditions of the exercise of some power or function, then the institutions so provided and the individuals so empowered are going to have to answer for their actions in the same manner as those institutions and officials to whom we have no trouble ascribing the appellation ‘government’.

Bray (1996: 150) adds a further dimension to the applicability of the Bill of Rights to schools, referring to the need for all stakeholders in education to be familiar with their basic rights, with how these rights function and with the circumstances under which they can be limited:

Educators are vital functionaries in the education system [...] they are individuals whose individual rights have to be promoted [...] they are [also] the most important and influential protectors of human rights in the education [...] community (Bray 1996: 157).

This line of reasoning is supported by Majola (1990: 36), who describes constitutional law as a field of law which affects both the state and the individual twenty-four hours a day, every day of the year. By extension, there is no time when the school can be exempt from the provisions and impact of the constitution.

4. Do the Constitution and Bill of Rights apply to everyone?

Having considered the application of the Constitution and Bill of Rights to both public and private schools, a second question remains. Do the Constitution and, specifically, the Bill of Rights, apply to everyone, regardless of age? This is a key question for the education community. It is clear that certain rights do not apply to everyone. For example, section 28, dealing with children's rights, does not apply to those aged 18 and above. Equally, voting rights, for instance, are not applicable to those under 18.

Although age-based discrimination may, in terms of section 9(5), sometimes be fair, on the question of limiting children's rights Woolman (2002b: 10-7) suggests that the courts will not deny children *prima facie* entitlement to the basic rights of dignity, life, privacy, security of the person, fair trial, expression, or the freedom from servitude and forced labour.

Whether the Constitutional Court might consider being under the age of 18 a reason justifying the limitation of a particular right must, for now, remain speculation. Schools cannot assume that, simply because they are under age, children may be treated as though the Bill of Rights does not apply to them.

5. Interpretation of the Bill of Rights

There are, at times, difficulties in distinguishing between the terms "application" and "interpretation" in the constitutional context. Rautenbach (1995: 18) describes the words as almost synonymous but distinguishes "application" as referring to the way the Constitution is applied in specific circumstances, a view with which Beatty (1992: 408) concurs.

What then is meant by "interpretation"? De Waal *et al* (1999: 122) describe constitutional interpretation as "the process of determining the meaning of a constitutional provision". Kentridge & Spitz (2002: 11-36) suggest that in certifying the 1996 Constitution, the Constitutional Court certified that every provision met the required principles. The inference can be drawn that in interpreting the Constitution one cannot give a clause a meaning which conflicts with the principles applied in the certification process.

Section 39 of the Constitution (RSA, 1996a) deals specifically with the interpretation of the Bill of Rights, as follows:

Section 39 (1) When interpreting the Bill of Rights, a court, tribunal or forum —

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) must consider international law; and
- c) may consider foreign law.

Section 39 is not for the courts alone. Section 39(1) refers to “a court, tribunal or forum” and section 39(2) refers to “every court, tribunal or forum” as being required to promote the spirit, purport and objects of the Bill of Rights.

Kentridge & Spitz (2002: 11-41), as well as Rautenbach (1995: 18), suggest that, far from being the exclusive domain of the courts, this clause points to interpretation and application of the Bill of Rights at every level. This seems directly applicable to the management of a school, highlighting the need for such managements to be familiar and in line with the content of the most recent rulings on constitutional issues that have any bearing on schools. The judgement in *S v Blom* 1977 (3) SA 513 (A), 514 would seem to be pertinent here, the court having stated (in translation):

In this stage of the development of our law it must be accepted that the cliché that ‘every person is presumed to know the law’ has no basis for existence and that the maxim ‘ignorance of the law is no excuse’ cannot justifiably be applied in the light of the present-day theory of fault in our law. *But the approach can be endorsed to the extent that a person in a modern state who is employed in a specific area can be expected to familiarise himself with the legal prescriptions which are relevant to that specific field* [italics added, KA, JvS & LP].

Taken as a whole, schools may thus be deemed to need to know their constitutional responsibilities and expected to interpret the Bill of Rights in the way described in section 39(1)(a) and (2). The word “tribunal” is not commonly used with reference to schools but in section 13(2) of the *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners* (RSA 1998), issued in terms of section 8(3) of the South African Schools Act 84 of 1996 (RSA 1996b), reference is made to the fact that the Principal must, “arrange a fair hearing by a small disciplinary hearing (tribunal) [...]”. The use of the word “tribunal”

as a synonym for a disciplinary committee points strongly to that committee's being bound by section 39(1)(a) and (2) of the Constitution.

The words "must promote" in section 39(1)(a) add a further dimension with the implication that the school must not only comply with the Bill of Rights but must also actively promote its principles. Schools must therefore promote, in the words of section 39(1)(a), "the values that underlie an open and democratic society based on human dignity, equality and freedom".

The implications of this for schools are enormous. In any discussion of the rights of learners and educators the fundamental values cited above must be taken into account and applied. Enshrined rights are not open to or at the mercy of interpretation at will.

In considering the interpretation of the Bill of Rights, the Constitutional Court and the High Courts must make further reference to section 39(1)(b) and (c), namely that international law must be considered and that foreign law may be considered — and this includes school-related case law applicable to the South African situation.

6. Consideration of international and foreign law

As South Africa is a signatory to an array of international treaties and conventions, including the Universal Declaration of Human Rights (UDHR) and the Convention on the Rights of the Child, the South African courts are bound to consider such ratified agreements in any case where they are or may be relevant. Priso-Essawe (2001: 553) offers the view that the South African Bill of Rights can be considered as a means of incorporation [of international law on human rights or human rights conventions] that may be referred to as "constitutional incorporation" and which makes international conventions directly available to judges. While this does not imply a slavish obedience to every detail of such conventions and treaties, any major deviation would thus need to be justified.

The issue of foreign law (in other words, the domestic law of other countries) is more problematic. Foreign case law is a reflection of both the relevant country's law and its circumstances. Thus South African courts are not bound to consider such foreign law, some of which may be inappropriate to South Africa's historical circumstances and aspirations (Kentrledge & Spitz 2002: 11-26).

Chaskalson, in *S v Makwanyane* 1995 (3) SA 391 (CC), 415 provided clarity on the South African Constitutional Court's approach to international law and foreign case law as follows:

Our Constitution [...] prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right. In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

Gutto (1998: 103) follows a similar line of reasoning, arguing that in using foreign jurisprudence, it is important for the "importers" of such jurisprudence to understand and appreciate "the prevailing social and material conditions [and] the dominant tradition or historical and cultural context" of the country from which the judicial decisions are drawn.

In similar vein Kriegler, in a separate concurring judgement in *Bernstein v Bester* 1996 (2) SA 751 (CC), 1996 BCLR 449 (CC), emphasises the care and study required to locate such authorities in their proper context and to ensure that foreign cases referred to are in fact relevant to the case under consideration (Kentridge & Spitz 2002: 11-26).

Priso-Essawe (2001: 562) states that reference to external judicial sources can serve to moor the country to the "emerging consensus of values in the civilised international community" (quoting from *S v Williams* 1995 (7) BCLR 861 (CC)).

South African schools are faced with new situations and are being forced, for the first time, to make decisions on which the constitution impinges. Foreign experience of such matters, especially where cases have ended in the courts can, at the very least, provide useful pointers for consideration and understanding. The specific difficulty facing South African schools whose school rules are challenged is the paucity of relevant South African case law.

There is another question about constitutional interpretation that is often misunderstood, namely the fact that the Constitution can override the will of the majority. The next section will examine the foundations and implications of this dilemma.

7. Constitutional interpretation and the counter-majoritarian dilemma

One of the key aspects of the interpretation of an entrenched constitution is that it is at times seen to be going against the views of the majority.

In a staff workshop an educator posed the following question: “Why can’t parents in a school make a set of rules, sign them to signify their approval, and then demand that every learner in the school abide by those rules?”² In effect, the educator was asking why a school should be bound by the Constitution and all its implications and interpretations, and why parents, who know the school and what they believe is best for it, cannot simply interpret the Constitution as they (the majority) think is best for their school.

Section 2 of the Constitution (RSA 1996a) provides the following answer:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The dilemma proceeds from a view of democracy which considers that the majority can make decisions and enforce them on everyone.

In legal and constitutional terms this issue revolves around the key difference between a parliamentary democracy and a constitutional democracy. In the former the elected representatives of the majority are entitled and expected to make laws to which everyone must conform. Dicey (Limbach 2001: 1) defines parliamentary sovereignty as being when Parliament has

[...] the right to make or unmake any law whatever, and further, that no person or body is recognised [...] as having a right to override or set aside the legislation of Parliament.

Referring to England, Dicey adds, “Parliament can do everything but make a woman into a man, and a man into a woman”.

In a constitutional democracy there is still an elected majority who make laws but that majority is subject to a supreme constitution and

2 Anon, personal interview, Stirling Primary School teacher, 11 November 2002.

cannot make laws which conflict with that supreme, entrenched constitution. There is an appointed but independent judiciary whose task is to ensure that the Constitution is upheld. Neely (1981: 5), with reference to the USA, describes the actions of courts in constitutional matters as being almost entirely outside the control of the legislative branch. If the courts overturn a law, the only recourse open to the law-makers is to change the Constitution to make the overturned law acceptable.

The dilemma of a majority government elected by the people, making laws which can, in extreme cases, be overturned by an unelected but appointed judiciary, is sometimes referred to as “the counter-majoritarian dilemma” — a term first used by Bickel in 1962 (Stone 1986: 174). Such a judicial process is designed specifically to give the judiciary the power to ensure that the law-makers operate within the framework of the constitution and its values and principles (Davis 1994: 103). Hamilton (Limbach 2001: 2) states that no legislative act that is contrary to the Constitution can be valid, a point made strongly as early as 1803 in *Marbury v Madison* (5 US 137). If that were not so, the law-makers, acting by virtue of their powers, would be doing not only what their powers did not authorise them to do, but in fact what their powers actually forbade them to do.

The counter-majoritarian approach has strong critics. Buckingham (2000: 133-9) believes that the courts should defer to the legislature since that body, elected by the majority, represents the essence of democracy. Having moved from a parliamentary sovereignty to a constitutional democracy, it will be crucial for South Africans to comprehend and accept this fundamental shift, whose implications will play themselves out in a variety of situations, including schools.

Constitutional interpretation and the counter-majoritarian dilemma affect a number of issues in the school environment, including freedom of religion and expression. For example, a school, with the support of educators and parents, establishes clear school rules, including a rigid dress code (by majority decision). In contrast, the learner, possibly with the support of parents, or a religious or cultural community, chooses to dress differently. In such a case the majority view is confronted by a constitutional right that is clearly contrary to their own view.

Cultural dress is particularly relevant. Following Xhosa initiation rites, initiates are required for some weeks to wear a particular form of dress at all times. A secondary school learner approached his principal with this problem, wearing initiation clothes to school.³ An agreement was reached whereby the learner would wear the required Xhosa dress to and from school but would change into school uniform inside the building and out of uniform at the end of the school day (cf RSA 1996a: sections 12 & 24). During breaks he was permitted to remain indoors. This amicable agreement avoided a serious cultural confrontation and met the needs of both the school and the learner. One of the reasons for wearing the required initiate dress was the learner's fear of victimisation, ridicule or attack if he were seen by other initiates in the "wrong" dress — school uniform. Peer or initiate pressure can be very powerful.

This amicable solution might have been impossible to reach if more than one initiate had been attending the school at the same time. What right would the school have had to insist on such an arrangement if learners had insisted on attending school all day in the required initiate dress? The potential for confrontation would have been enormous. To refuse the initiates permission to attend school in their required initiate dress could have been interpreted as disrespectful towards both Xhosa culture and the specific learner's pride in his cultural heritage. The constitutional right to dignity (section 10) and to freedom of expression (section 16), in terms of both individuality and one's cultural heritage are involved in such a situation. The Constitution (RSA 1996a) provides protection for such learners. Furthermore, given that the initiation practice is a Xhosa boy's entry into manhood, any negative action on the part of a school would be seen as insulting a Xhosa man. The school is faced with a dilemma: it must at the same time be culturally sensitive and maintain the standards expected by the majority of its community.

A similar situation arose in a KwaZulu Natal school, where a grade eight Moslem learner arrived on the first school day dressed in Moslem attire. She was sent home and ordered to conform to the school's dress code. A year-long wrangle between the school and the Education Department followed, involving great legal expense, before the school

3 Terblanche, personal interview, primary school principal, 24 May 2000.

acceded to the departmental order to admit the girl and others like her.⁴ The school dress code was clear but the counter-majoritarian dilemma nevertheless played itself out.

The counter-majoritarian dilemma is a common tension in a constitutional democracy. The position and reasoning of the South African Constitutional Court is clearly illustrated by Chaskalson in *S v Makwanyane* 1995 (3) SA 391 (CC) where the Constitutional Court considered the constitutionality of the death penalty and the question of public opinion. Chaskalson stated:

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament [...] but this would mean a return to parliamentary sovereignty.

In response to the idea of a referendum on capital punishment, Chaskalson concluded:

[I]t is only if there is a willingness to protect the worst of us and the weakest amongst us, that all amongst us can be secure that our own rights will be protected.

Nothing in the school context is ever likely to take on such contentious proportions as *Makwanyane*. What Chaskalson highlights, though, is the most critical principle: that constitutionally protected rights are so fundamental that they cannot and must not be at the mercy of majority views. They are enshrined, and limited only in accordance with constitutional provisions for such limitations. The Constitution (RSA 1996a: section 12) provides such protection for learners and educators alike. A school is not free to apply its own limitations without meeting the justification levels set by section 36 of the Bill of Rights.

This principle is just as applicable to the right to freedom of expression in a school (even if it is opposed by the majority of the school community) as it is to the right to life (even if the majority should want the death penalty to be reinstated). Constitutional rights are enshrined, whether within or outside a school, and may be limited only in accordance with constitutional provisions for such limitations.

4 Anon, personal interview, primary school principal, 22 June 2001.

8. Conclusion

Ten years of constitutional democracy in South Africa has brought with it a vast array of changes. However, in the context of South African schools, understanding of the applicability of the Bill of Rights and its actual application seem to be very slow in taking root. While everyone should be aware of the Bill of Rights, it would seem that education authorities have a greater responsibility to ensure that schools become places where the Bill is not only known and applied, but strongly promoted.

With such an understanding, schools will need to re-examine their codes of conduct, school rules and disciplinary procedures to ensure that they are compatible with the Constitution. If the Bill of Rights is not accessible to an ordinary citizen, or a school-going learner, or if it is not understood and promoted, the constitutional guarantee of fundamental rights will remain merely a piece of paper with little or no meaning in the school context.

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