

BOOK REVIEWS

The Constitution in the Classroom: Law and Education in South Africa 1994–2008
by Stu Woolman and Brahm Fleisch (Pretoria: Pretoria University Law
Press, 2009) Price R210.00 (soft cover).

Only the uninformed will be surprised to learn that the provision of (or failure to provide) education is of great political importance in every state which claims to be democratic. Any modern society in which the provision of education is not prioritized by government is well on the way to comprehensive moral collapse as well as social disintegration.

Why is it so important that children be educated? Children have an interest in achieving whatever competence is required to be able to function successfully in the world. They should acquire the skills and knowledge that will allow them to acquire lawful occupation in adult life, to enter into commercial transactions without being exploited, to engage effectively with public officials, to be good parents and to participate in democratic politics. Crucial to all of this, of course, is the acquisition of literacy and numeracy. The state has a duty to ensure that children receive an education consistent with the attainment of these competences.

Education to enable such capacities is clearly in the interests of learners, but it is also in the interests of society more broadly that children be educated in a way that will enable them as adults to fulfill the obligations of democratic citizenship, to participate in public affairs and make informed decisions about whom to vote for, and to be economically productive. The demands of social justice will not be met unless everyone receives an education up to at least sixteen years' old.

Manifestly, in a society dedicated to the pursuit of social justice, intensive research efforts should be devoted to questions surrounding the historical, legal and political aspects of education provision. In *The Constitution in the Classroom* Stu Woolman, a constitutional law expert, and Brahm Fleisch, an educationalist, have collaborated to address six of the most pressing issues facing educationalists and lawyers concerned with education: the legislative and regulatory creation, albeit unintended, of markets for education in which parents are able to choose schools for their children; the constitutionality of single-medium schools; the constitutionality of independent schools that promote a comprehensive vision of the good; the right to an 'adequate' basic education and what this entails; school governing bodies as sites of democratic participation and the creation of social capital and, finally, the constitutionality of school fees.

The stated aim of this study is to assess the economic and political history that has culminated in the present legal and regulatory position and to

describe and comment on the current position. Woolman and Fleisch not only provide useful historical background, but are also attentive to empirical evidence concerning what moves individuals to act as they do in the context of education, and the way in which the relevant social and political institutions operate. The authors closely scrutinize the constitutional and statutory provisions that bear on their topics and engage critically and adeptly with relevant case law. Yet this is not simply a descriptive work. It has normative import since although on certain political issues the authors prefer not to commit themselves prescriptively, they enter debates concerning the law and politics of education that have considerable normative significance.

In chapter 3, the authors enquire whether South Africa's legal regime guarantees existing single-medium Afrikaans-speaking public institutions the right to retain their language policies. They show that there is some constitutional justification for single-medium public schools, although the legal entitlement to such schools is weak: rights relating to language and culture do not give school governing bodies a free hand to determine admissions policies at public schools. If communities wish to guarantee linguistic and cultural integrity, their best course of action is to create independent schools. But if they do so, they cannot look to the state for financial support.

The Constitution, the authors show in Chapter 4, permits the establishment of privately funded independent schools. The right of independent schools to discriminate will, however, be limited, since such schools will be subject to the Promotion of Equality and Prevention of Unfair Discrimination Act. Independent schools are entitled to exclude pupils who fail to conform to the curriculum requirements that require pupils to belong to a certain language, cultural or religious group, or at least to accept the norms of that group. They may not, however, exclude a pupil on the grounds of race.

Chapter 5, one of the most interesting chapters in the book, asks whether the state is meeting its obligations under the constitutional right to an adequate basic education. The answer, according to the authors, is an emphatic no: the majority of children are not provided with literacy and numeracy skills that will equip them for a social existence in this country. Having identified this deficiency, the authors ask themselves and their readers what should be done. Courts, they suggest, have a role to play: they must define the right to basic education and determine whether conditions requisite to meeting the obligations under the right exist. The authors advocate for courts an 'experimental constitutionalist' approach, which has as its objectives: '(1) social norms and institutional arrangements made more flexible and open to revision; and (2) the revision of those norms and institutions in the light of the "best-practices" revealed by well-designed studies of various policy initiatives' (at 116). Constitutional norms should be created firstly, through "shared constitutional interpretation" — those with a stake in education share with the courts and the government the task of interpreting the Constitution as it relates to educational issues, so that differing readings are not foreclosed but can provide alternative possibilities

— and, secondly, through ‘participatory bubbles’, which denote spaces for the participation of all stakeholders in the resolution of educational difficulties. The authors do an excellent job of specifying the content of the right to basic education.

In Chapter 6 the authors argue that the empowerment of school governing bodies by education law represents a commitment on behalf of government to a benign form of representative and participatory democratic governance and to the production of new stores of social capital (ie decision-making which includes parents and learners ‘increase[s] the kinds of face-to-face relationships that create . . . trust, loyalty, friendship, kinship and commitment’ (at 187)). The autonomy of school governing boards is to be welcomed, the authors suggest, provided that, as the courts have insisted, they do not block the admission of learners from historically disadvantaged communities.

The section on school fees in the concluding chapter of the book has as its target the argument that to guarantee the provision of a basic education to all learners the school fees system in public schools should be eliminated. The authors contend that there is no compelling constitutional argument for the elimination of the current fee system and that its elimination will in any case not ensure equal access to an adequate education: ‘the real solutions lie elsewhere: with the elimination of school uniforms, the creation of publicly underwritten transport, the adoption of a universal feeding scheme and the improvement of teaching within our schools’ (at 239).

This book will be indispensable for those concerned with ‘law and education’ reflecting insightfully as it does on the six issues which form its focus. Particularly interesting for constitutional lawyers will be the ideas of ‘experimental constitutionalism’, ‘a court-initiated invitation to the state to draw on all the resources available to it — most especially the various participants in the system — to come up with solutions to the wide variety of problems our learners currently confront’ (at 163), and ‘shared constitutional interpretation’. What flaws there are — in one chapter a paragraph is repeated almost verbatim, though with footnotes (at 116, 150–3) and there are a few typos (‘exorcised’ (at 182) when the authors mean ‘exercised’ is an unfortunate misspelling) — do not seriously detract from what is an informative and engaging study.

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