Review Essay

An analysis of *Equal educational opportunities: Comparative perspectives in education law*

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Abstract

The focus of this collection (comprised of two main sections, seventeen chapters and a synthesis) is the commemoration of 50 years since the passing of judgment on Brown v. Board of Education in the United States in the landmark court decision against segregation in education. This conference on which this book is based took place in South Africa. Its publication also coincided with the 10-year anniversary of South Africa’s change to democratic education after the abolition of apartheid, which promoted separate education.

The collection has two sections that mark these two occasions in terms of reflection, recollections and thematic chapters all linked to the manifestation of equal education. While the first part reflects on equal educational opportunities and non-discrimination as opposed to the experience of separate education, the second part considers thematic issues on equal educational opportunities and non-discrimination in relation to issues of education financing, values, discipline, language and accountability. The collection ends with a synthesis by Jonathan Jansen.

In this review essay we analyse the following book by Charles J. Russo, Johan Beckmann and Jonathan D. Jansen (Eds.): *Equal educational opportunities: Comparative perspectives in education law – Brown v. Board of Education at 50 and Democratic South Africa at 10* (Van Schaik Publishers, Pretoria, pp. 289, ISBN 0-627-02625-7). The foreword of this collection is written by the Secretary General of the South African National Commission for UNESCO, Stranger Kgamphe. In it he highlights the importance of UNESCO’s global monitoring report and the achievement of Education for All (EFA) in relation to the experiences of the two countries. He notes that ‘sound legislation is a key component in ensuring that EFA objectives are met’ (p. vii). The argument he presents also emphasises the need for constant evaluation and monitoring of education systems in every country. He notes that quality education needs to be matched
with educational access, despite the problems facing the sector, such as inadequate funding and poor human resources. While education can be conducted in the same way as businesses are, he cautions that education cannot be rated in the same way as other economic goods, since education per se involves people’s values. Clearly his argument seems to foreground a defence of managerialism and performativity in education.

Justice Albie Sachs opens the reflections, recollections and perspectives with a chapter that relates to how the judicial system has managed to grapple with educational change in South Africa since 1994. At the centre of his reflections is the contextual environment within which educational law transformation had to take place in South Africa. His presentation emphasises that cases brought before the judicial system for review received special treatment in terms of addressing the individual circumstances of the cases, while at the same time trying to make the law apply equally to all. In this reflection one is reminded of the apartheid pass laws and how resistance to these grew until the period of transformation. Notably, educational law inevitably passes through the different stages similar to the stages of human existence in the process of change. One of the major points of focus in this presentation is the way that the Constitutional Court of South Africa endeavours to address issues of substantive justice as a means of making equality effective in the process of change.

Boyce Wanda considers the role of religion and language in building a nation, although these factors ironically work towards dividing a nation. His chapter entitled ‘Religion in public schools: some observations on the South African national policy on religion and education’ goes to the heart of the potential dangers to democratic life that religion and language can cause in a nation. Nevertheless, he notes the importance of the role of language and religion in constitutional reform in the new South Africa. The policy of religion education duly recognises the plurality of religion within a democratic nation, over and against the promotion of a single religion. The symbiosis of separation and interaction become crucial in the constitutional framework. Hence the policy on religion education is intended to promote the constitutional values of equal citizenship, human rights, equality, freedom from discrimination, and freedom of conscience, religion, thought, belief and opinion (p. 23). Similarly a public education system is mandated to protect these values as a way of better preparing the future citizens in line with acquired required democratic political imperatives. The policy also aims at achieving diversity and unity in society. Some of the key features of the policy, according to Wanda, include the idea that the policy is educational and inclusive, while preserving the traditions of the country. The humanistic face of these values is intended to bring about a balanced personality in children. This would also address ignorance, stereotypes, caricatures and denigration of others. As such, sectarian and confessional aspects of religion are not in keeping with the constitutional values of the country. Nevertheless schools can allow their premises to be used by particular religious groups in times that do not conflict with the general public’s interests. In his conclusion the author separates religion education and religious instruction; the latter is meant to provide for a specific spiritual outcome.
In general the article promotes an ethical, moral and civic approach to the teaching of religion education. To our mind the view of religion education propounded here could possibly contribute towards enhancing diversity in the country, because what is promoted is not a single religion and its values, but rather an understanding of different religions. This could in turn create opportunities for sharing both commonalities and differences.

Jan de Groof and Graciene Lauwers explore the issue of increasing access to education throughout European society. These authors stress that the right to education does not in any way indicate the state’s obligation to provide education for any specific stage of development, except indicating that education should be accessible to all. Even though many improvements have come about in education, the authors note that the principle of equal education has judicial implications and that it is connected with human rights issues in line with the particular conditions that each state sets. The essential features of EFA include: availability, accessibility (in all its aspects: economic, physical, non-discrimination), acceptability and adaptability. These aspects are in keeping with conventions that have been brought to bear in various pieces of legislation. They also note that the South African legislation is in tune with international standards of legislation on education, while also being in line with philosophy of a nation and the spirit of the policy goals that a nation adopts. The authors also try to come to terms with disparities that exist within the provisions of EFA in European countries. The disparities concern people with disabilities, minority groups and other vulnerable groups. The chapter also takes a look at how private schools are managed in terms of educational law. In their conclusion they stress the fact that legislation on EFA does not imply that everyone will remain in school, since some may drop out because of lack of support. But this is also where the chapter seems undeveloped with respect to transformative change. What should be done at school level to ensure greater participation and throughput could have been addressed – a situation which is definitely relevant to South African education.

Kishore Singh’s investigation of UNESCO’s normative action on non-discrimination and equal educational opportunities affirms UNESCO’s role of ensuring normative action in a bid to secure equal education. He sums up this mandate as part of UNESCO’s constitution and tries to bring out the principles of non-discrimination and equality as they are linked to state obligations. In this regard, he stresses four points that are intended to promote equality of educational opportunity, including compulsory primary education, availability and accessibility of secondary education. Tertiary education is generally accessible, depending on capability. He also describes the equality principle through the different stages of transformation by the use of appropriate methods both for the training of the youth and their teachers. The 1960 UNESCO Convention against discrimination in education is analysed. He notes that racism has been one of the major grounds for promulgating laws against discrimination. The moral obligation is placed on governments to ensure non-discrimination and equality of educational opportunities, and respect for human rights. In order to ensure that member states adhere to these
provisions, the author regards the reporting system as essential. This system works both for monitoring educational provision as well as the implementation of government programmes, which need to be in tune with the vision and concept of education that nations espouse. While coordination is important within the United Nations Systems, he recalls the role of meetings such as the World Conference against Racism, Racial Discrimination and Xenophobia and related intolerance that took place in Durban in 2001. Such meetings are crucial for the network to stamp out racism in education and ensure equal educational access and remove new forms of discrimination.

Charles Willie takes a summative approach in the chapter: ‘Brown v. Board of Education: A Restoration of Equity in Public Education’. He argues that the judgment in the Brown case harmed no one but helped everyone concerned. In remembrance of this case, the author recalls that Brown marked a fulfilment of a theory of complementarity where no group reigns superior over another. He notes that ‘diversity, integration and inclusion are the means and methods of developing a public education system that is fair’ (p. 79). He also notes that some of the serious errors of the past were committed because of exclusion of other groups in the decision-making processes of constituting the law. This is because of the limited perspective that a framing group can have if it happens that it comes from a similar background that is different from the experiences of other people who also share a nation. The majority-minority dichotomy is exemplified through a number of cases. The author highlights two causes that led to serious problems of interpretation of law in the Brown case. The first is the idea that local authorities could interpret the law according to their prevailing circumstances. The second is the idea that schools could be left to their own devices to manage desegregation. The author nevertheless notes that the Brown case increased the number of graduates from high school and the increase in ratio output with regard to the same. At the end, the author draws three lessons from the proceedings, which he sums up as the three Ss in community building which brought black and white communities to serve each other. He notes: ‘I have learned that there is community in schools only if aggregation of people have learned how to serve others, to sacrifice for them and to suffer with them’.

In the second part of this collection, the first section by Rassie Malherbe evaluates the constitutional framework within which equal education opportunity is pursued in South Africa. In the second section Charles Russo and Brian Perkins provide an American perspective of the same. Russo addresses educational equality against the background of South Africa’s racial and discriminatory past of inequality, largely promoted by apartheid. He draws a comparative analysis of sections 9 and 29 of the Constitution and argues that educational provisions have to be read in line with the context of the Constitution as a whole. He notes that the central theme that runs through most parts of the Constitution is the idea of the equality of human beings, the source of all human dignity. By connecting the equality condition of section 9 to the provision of education
in section 29, the author intends to draw our attention to the intention behind creating an equal education system in line with the Constitution. He nevertheless notes that such provisions do not address the question of free education nor universal education for specific age groups. In any case, he highlights the idea that the application of sections 9 and 29 has to operate in tandem with each other. A cross-comparison of the South African and the American constitutional provisions on education indicate that the American system is intended, on the one hand, to provide standard education that opens up equal opportunities for its members. On the other hand, the South African provisions are more geared towards raising individuals above the poverty line, thereby enabling people to enjoy their rights and their newly found democratic life. The author notes that limitations on basic education have to be weighed against limitation in clause 36 of the Constitution, despite the fact that such limitations should not be allowed on the grounds of lack of resources, except when they jeopardise the role of the institution to provide equal education.

The right to further education is held in contention because of the meanings drawn from the clause on further education. Nevertheless, equal access is affirmed in relation to this section of education. But this clause also recognises that the state may not have the capacity to provide for each individual’s further education, despite ensuring equal access in principle. Another contention that the author picks up is the question of education in one’s mother language. This right is not confined to the existing facilities at the institutions in question, except the preferred language by students. Hence, there is no specific indication of how to deal with issues of mother tongue instruction in the tertiary group. The only condition is that such a practice should be reasonably practicable. Hence single-medium institutions are considered in the light of these limitations. The Constitution also gives people the right to establish independent institutions, provided that others are not excluded on the basis of gender, culture, language, religion and disability. Finally, the author examines the principle of equality in relation to themes of affirmative action for both the admission of learners and educators. Nevertheless, the South African system is reckoned to have a long way to go before most of these ideals are achieved.

In the following chapter, Russo and Perkins review how the Brown v. Board of Education decision has transformed educational reform in the United States. According to these authors, the court noted the importance of public education, in particular the role of the state, and that any segregation would affect African-Americans psychologically. He notes that the Supreme Court directive also helped the drive for equal education for students with disabilities by recognising that a child could not be denied access to a public school nor be subjected to a change in educational status. Because of the special regulation put in place, educational agencies receiving assistance for disabled children were mandated to identify, locate and evaluate children with disability. Nevertheless the author bemoans the fact that in many schools the relevant practices have not changed much.
In section II of the second part William Thro explores issues surrounding financing and funding of education in order to achieve equity. He also examines how successful the mechanisms have been. On the one hand, this section compares the South African case with the American case. This chapter introduces the background of inequitable funding mechanisms in South Africa as emanating from the apartheid period, which was fundamentally discriminatory. Despite the fact that one is apt to see disparity as a thing of the past, 10 years on does not show much difference in terms of the economic disparities between the rich and the poor. The drives in the White Paper on Education and Training to remove the difference have been hampered by a number of problems. These include the differential provincial human capacities at managerial level as well as at particular school level. Moreover, this chapter also examines equity funding within and between provinces as well as within and between schools, over and above funding for the learners who are involved in the different schools as a way of minimising inequity in funding as spelt out in the norms and standards of funding for schools. In many ways, the differentials in the quintiles depend on whether a particular school is previously advantaged or disadvantaged. The previously disadvantaged schools receive preferential treatment in term of receiving more resources than other schools. But because public schooling cannot wholly be funded from the public coffers, the issue of school fees represents one of the thorny issues in South Africa’s education system. Despite the strides that government has made in these areas, disparities continue to exist between the provinces.

Moreover, Thro argues that courts have the ability to invalidate state or federal constitutions, thereby undermining the democratic process that is intended to be achieved in the process. Thro also discusses the case of decentralisation as best manifested in the education system. According to him, the constitutional value of decentralisation limits the national government in a number of ways. For instance, the national government cannot simply impose national standards of financing; the government affects the process of formulating policy regarding funding as well as the fact that the state cannot simply declare a system as non-functional. This, according to Thro, creates a constitutional paradox and also acts as a threat to the stability of the society.

Russo and Perkins also compare how private financing of education has been carried out in the United States, thereby offering it as an example to the emerging South African private education sector. In order to address issues of performativity, the American government opted to fund schools from public coffers that showed that they are committed to educational excellence and greater community involvement, even if such schools were privately owned. Similarly it encouraged withholding of state funding to schools that were lacking in these aspects. Desegregation of schools is considered substantive if it is a result state action. What is crucial in the desegregation of public schools is the implementation of quality education. The Brown case stands as a landmark case championing legal redress in education.

Frank Brown writes on the privatisation of elementary and secondary education in the United States in accordance with the constitutional provision that leaves individual
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states to determine the conditions of their education system, thereby allowing them to exercise choice of educational model. In the programmes that are taken as examples, the author highlights that the choice of parents for their children’s school was based mostly on demographic factors. But the voucher system that was introduced by government for low-income families did not heavily affect the competition that is vital for the private schools. In a way this allowed parents and teachers to run semi-autonomous institutions, thereby enhancing educational competition that is vital for achieving education quality. The author notes that public education does not operate according to true market conditions.

Jan Nieuwenhuis entitles his chapter ‘From equality of opportunity to equality of treatment as a value-based concern in education’. He reckons the debate on values in education has a long history, mainly centring on what values need to be included and how they should be taught. Equality in education has philosophical nuances and political undertones and rhetoric making; these values appear arbitrary, which in turn create difficulties for educational discourse. Concepts of ‘values’ and ‘equality’ have become foundational in human and social sciences today. There is no neutral ground for examining values and equality. The author first clarifies the use of the concepts. He also notes that intra-conceptual clarification is important and has to be followed by the clarification of usage in society. The author defines values as something worth striving for as indicating a preference. Values incorporate emotion and feeling, and they touch on individual spirituality. The act of valuing is therefore an on-going process. The totality of our values has a bearing on our decisions. Imparting a value is a personal decision. Imparting values is also a socially embedded process. Therefore values are culturally bound, although some values may transcend cultural boundaries. Individuals are not enslaved to the values of their group. Therefore the author invites critical thought on them.

He furthermore argues that equity is one basic tenet of contemporary moral and political theories. It is described in economic, social and educational terms. Therefore complete and absolute equality is in fact a self-contradiction. Questions of equality generate further questions on what forms of equality are defensible. Human equality only works in broader terms. Can equality and uniqueness co-exist? Equal treatment then means ethical judgment on equality. Coexistence of equality and uniqueness are manifest in the education system in South Africa. Equality mainly refers to the development of individual talent. Equality as a right is relevant because of the prevalence of social and economic inequality in modern society, which does not appear natural. Equality as a right is located within our sense of justice.

With regard to equality of opportunity, each person is to have equal rights and opportunities to develop his or her own talents. This is a characteristic mark of liberalism. But there is an inherent flaw in the sense that individuals entering association do so, on the assumption that they are equal in all important respects. Therefore as a foundation it is not sufficient to secure equality in the modern state.
Equality of treatment may be understood as promoting mediocrity. Arguments against equality of treatment open possibilities of separate but equal systems of education, which has been the case in the past. There is a need to move towards a value-based equality. Ensuring equality in education involves access, survival, output and outcome. And, these need to be focused on. Access involves equality of opportunity, whereas survival involves positive compensation and discrimination in certain respects. Therefore equal treatment promotes the core values of respect, compassion, equal treatment, fairness, peace, truthfulness and freedom. The author favours equality as equal treatment and not equality as a starting line or a finishing line.

Mawdsley and Russo reflect on religion and American public education. They note that issues of litigation are linked with values of religion in the American education system, but they also note that there is judicial tension in religion litigation. At the centre of religious litigation is the exclusion of religious values. Questions arise as to whether this is in keeping with other public values of license that the American public adheres to. There is the government’s neutral stand and the position of letting parents decide for their children. This case becomes more interesting when one looks at public school values and religious beliefs in the event that the state’s legislative power to include religion in public schools meets opposition from the judicial system. While government can offer assistance to religious schools, the courts are of the opinion that parents are the centres of private choice.

In the following chapter Nelda Cambron-McCabe and Martha McCarthy argue, on the one hand, that the question of discipline is used to deny learners equal educational opportunities. They make a conceptual distinction between the idea of discipline and punishment, and they propose that the legal structure of discipline in schools needs to promote equal opportunities. They also discuss coping mechanisms that can ensure a positive disciplinary climate in schools which would enhance the culture of teaching and learning. At the heart of proper disciplinary measures in a school is the noticing of founding norms and values for the school, and adherence to the rights and obligations fundamental for every person. While positive school rules are imperative for schools to be effective, the authors argue that it is necessary to have both punishment and corrective discipline for those who break and disrupt school activities. On the other hand, the authors discuss student discipline and equal educational opportunities in the United States. They argue that discipline in schools tends to leave the educational interests of learners unprotected and also affects black learners disproportionately. Learners are also affected negatively through the zero-tolerance approach of courts, which are often biased towards learners who are against the authorities and the teachers. Most of the learners who are affected disproportionately are those students of colour and this often leads to students dropping out of school. They finally argue for preventative action to evade punitive action through intervention programmes that will promote acceptable behaviour and responsibility in schools.

Henk Kroes examines the constitutional provisions on language that would address equal educational opportunities. He notes that language issues in South Africa had been
handled in a way that militates against equal educational opportunity. He shows this through a number of cases. The author examines the multiplicity of school languages in South Africa, and the predominance of the English language. He also examines the issue of language over and above the idea of functional literacy, a condition that is mainly considered in relation to the many learners who have not been through formal education. What is crucial in this chapter is the emphasis the author places on the protection of minority languages, which in itself also protects the identities of the people in these minority languages. This argument comes against the backdrop of the predominance of English and Afrikaans, which are favoured for employment opportunities in the public sector.

The concluding chapter provides an analytical conceptions of issues of accountability regarding equal opportunities. In this case, Beckman and Prinsloo regard accountability against the background of the democratic dispensation in South Africa. They consider the political, legal, symbiotic, selective statistics and policy-based nature of accountability. They argue that it is important to construct an appropriate accountability framework. In the examination of the different frames of accountability, the authors consider accountability in governance and legal framework. They conclude that accountability has constitutional as well as statutory obligations on the state as well as its citizens. But again this accountability needs to resonate with international standards. The idea of accountability can be used to improve on educational opportunities in South Africa through the many players that are involved with educational issues.

III

Jonathan Jansen’s summative chapter brings together a number of important similarities between South Africa and United States of America. He does this as a summation of his experiences of managing change and also as a way of thinking about change in South Africa. Despite the imperatives in many policy shifts and comparisons, he seems to suggest that there is more of a symbiotic intention than delivery of practical consequences. For instance, he observes that when all is done and said, the white minority still remains largely advantaged in today’s South Africa, a point not many would take comfortably. It is interesting to note that Jansen observes, as we would, that most authors are not at ease drawing simple implementation lines between education policy and practice, signalling the obvious lack of progress in achieving good intentions, given the acclaimed quality and equality of opportunity touted in current educational policies.

For us the crucial question remains: how has South African public education since 1994 responded to the notion of equality of opportunity for all? It seems – as vindicated by Jonathan Jansen’s scepticism – that equality of educational opportunity for all primarily involves formal structures such as the state, educational institutions and other educational bodies which have to effect just actions. What I do not read in the collection is any discussion on whether individuals for whom equal educational opportunities ought to be provided are in fact capable of changing their inadequate (if so) situations.
This is because of a different notion of justice, which calls for the consideration of people’s capabilities – what they can do, rather than what we expect should be done to them. In other words, ten years down the line, what capabilities have people actually demonstrated to indicate that they have utilised the equality of educational opportunity for all to enhance justice in society. We would have wanted to read more about how people’s capabilities have contributed to their enhancing justice in education and not just about the possibilities of equalising education for all. For instance, if the schooling system established equal opportunities for all learners to learn, how do these learners actually contribute towards making society more critical and responsive to social justice concerns? That is, what are their capabilities in relation to the equal educational opportunities afforded learners. Would they simply see themselves as being prepared for a global market economy without being concerned about social justice in their country or about ensuring justice for all wherever people might happen to live? So, the point is that there does not seem to be much the collection offers regarding advice or hope for the future, which demands that we also consider people’s capabilities, because it merely reflects on our past. Only when we take people’s capabilities into account can we legitimately speak about justice for all.

REFERENCES
