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Exclusion and Education in South Africa: An Education Law Perspective of Emerging Alternative Understandings of Exclusion

Abstract

The new democratic dispensation in South Africa (1994) was accompanied by law and policy aimed at preventing unfair exclusion from educational opportunities and promoting equal access to educational opportunities. However, feelings of unfair exclusion remain and new understandings of exclusion are emerging.

This paper examines the new policy and law introduced after 1994 some emerging understandings of exclusion. The paper points out that the “new” exclusion is difficult to conceptualize and address. Addressing the challenges posed by them might be more difficult than was the case with exclusion under apartheid rule.

Keywords: exclusion, inclusion, understandings, images of exclusion, language, race, not being there, unlocking

Introduction

This paper is about education law, policy and practice issues concerning access to, and exclusion from educational opportunities and emerging feelings of exclusion.

A brief history of legislation and policy aiming to include everyone and prevent exclusion

The closing paragraphs of the (“Interim”) Constitution of the Republic of South Africa, Act 200 of 1993 (Republic of South Africa, 1993) provide an absorbing description of the nature of South African society before democracy, its challenges and opportunities:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The “untold suffering and injustice of the past” included unfair discrimination regarding, or exclusion from education.

An impressive suite of laws and policies accompanied the new dispensation but some challenges were unanticipated or under-estimated (Beckmann & Prinsloo, 2007, p. 1). Paragraph 6 of Chapter 3 of the White Paper 1 on Education and Training (Department of Education, 1995) (hereafter White Paper 1) contained a warning:

When all South Africans won equal citizenship, their past was not erased. The complex legacies, good as well as bad, live on in the present.

White Paper 1 was the first comprehensive policy on education and training for *all* South Africans. It is still in force along with other policy documents such as White Paper Six on Special Needs Education (Department of Education, 2001).

Paragraph 1 of Chapter 3 of White Paper 1 emphasises “The challenge the government faces... to create a system that will fulfil the vision to ‘open the doors of learning and culture to all’”.

Paragraph 7 of Chapter 3 of White Paper 1 points out that, before 1994, the distribution of education and training provision in the country followed a pattern of “contrasts and paradoxes”. There was a well-developed and well-resourced (white) system of education but, at the same time, “... Millions of South African children and youth [were] learning in school conditions which resemble those in the most impoverished states...”. The majority were excluded from meaningful educational opportunities.

Chapter 4 of White Paper 1 lists some of the values and principles that “should drive national policy” (paragraph 1). All citizens irrespective of race, class or gender should have “the opportunity to develop their capacities and potential, and make their full contribution to this society” (paragraph 2). There is a need for “redress of educational inequalities” among the sections of the population who have “suffered particular disadvantages, or are especially vulnerable...” (paragraph 7).

Section 1 of the Constitution of the Republic of South Africa of 1996 (Republic of South Africa, 1996) (hereafter the Constitution) articulates the founding values of the Republic as one, sovereign, democratic state founded on amongst other things the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. The realisation of these values could counter possible feelings of exclusion.

Section 9 (the equality clause) provides that neither the state nor any person may unfairly discriminate against any one on one or more grounds including race and language (Subsections 3-4). Subsection 2 provides for (affirmative action) measures in respect of persons or categories of persons disadvantaged by (past) unfair discrimination.

In terms of Section 29 (1) (a) everyone has the right to a basic education. The Constitution is silent on the precise meaning of “a basic education” but it can be taken that Subsection (1), by necessary implication, makes provision for equal access to educational opportunities. An analysis of Section 3 of the South African Schools Act (Republic of South Africa, 1996a) (hereafter SASA), which deals with compulsory school attendance, suggests that basic education could be viewed as education from Grades 1 to 9.

Section 1 of SASA defines a school as an institution “which enrolls learners in one or more grades from grade R (Reception year) to grade twelve”. Early Childhood Education is a notable omission from the definition of compulsory school attendance in Section 3 and this exclusion could prevent learners from making proper use of educational opportunities (Beckmann & Phatudi, 2013).

The Constitution also does not provide that basic education should be completely free. Section 39 (1) of SASA makes provision for the levying of compulsory school fees by the Governing Bodies of certain schools. Schools have been divided into five funding quintiles corresponding with their relative levels of

poverty and quintiles 4-5 schools (the richer ones) may levy compulsory school fees but there is provision for exemption.

Subsection (2) gives everyone the right to “receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable”. This right is, by necessary implication, also valid at universities that are not independent universities.

It is difficult to exclude a person from educational opportunities at public educational institutions on the basis of language. However, there have been four court cases dealing with allegations that the language policy made by the school governing bodies in terms of Section 6 (2) of SASSA favoured Afrikaans and was used to exclude learners who wanted to receive education in English. It was only in the *Governing Body of Mikro Primary School and Another v Western Cape Minister of Education and Others* (332/05) [2005] ZAWCHC 14; 2005 (3) SA 504 (C) [2005] 2 All SA 37 (C) case that the court found in favour of the school and its language policy. The courts have thus protected learners against exclusion based on language.

Section 9 (3) (a) stipulates that “everyone has the right to establish... independent educational institutions that... do not discriminate on the basis of race...”. Private school fees are high and most parents cannot afford them. A learner’s socio-economic class may lead to exclusion from these educational opportunities.

Section 5 (5) of SASSA provides that the admission policy of a public school is determined by the governing body of the school. Subsection (1) provides that a public school must “admit learners and serve their educational requirements *without unfairly discriminating in any way*”. (Emphasis added)

In terms of Section 6 (2) of SASSA the governing body of a public school may determine the language policy of the school subject. Subsection 3 stipulates clearly that *no form of “racial discrimination* may be practised in implementing [language] policy”. (Emphasis added)

Post-1994 understandings of, and intentions regarding inclusion / exclusion

It seems that the first democratic government viewed inclusion as the unlocking of doors that had been locked before – an echo of the mantra of the Freedom Charter that the “doors of learning and culture shall be opened [to all]” (African National Congress, 1955). This approach involved repealing certain laws and discontinuing certain practices and creating new governance and management structures.

The previously racially-divided education departments were reduced to one with the creation of a *single Department of Education with 9 provincial departments*. (Emphasis added)

Current education law, policy and practice on inclusion / exclusion

The courts have declared that the right to a basic education for all is not subject to conditions and that it is “immediately realisable” (*Governing Body of the Juma Musjid Primary School & others v Essay N.O. and others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (cc) (11 April 2011)).

Matukane and others v Laerskool Potgietersrus (1996) 1 All SA 468 (T) was a landmark case about the refusal of a primary school to admit black pupils (wanting to be taught in English), adducing that they would not respect the (Afrikaans) culture of the school. The court disagreed and ordered that the pupils be admitted to the school. This case ruled out race, tradition or culture as mechanisms for excluding learners.

The state is following a deliberately “pro-poor” approach to school funding to remove certain financial barriers. School fees may not be levied in quintile one to quintile three schools (the poorest ones). In 2015, in terms of the National Norms and Standards for School Funding (NNSF), the state allocated approximately six times more money *per capita* to the “poorest schools” (quintiles 1 to 3) than to the “richest” for expenses excluding educator salaries (Department of Basic Education, 2015).

In higher education the state created a student financial aid which provides bursaries to qualifying students in need of financial aid in terms of the National Student Financial Aid Scheme Act (NSFAS), 56 of 1999 (Republic of South Africa, 1999). On an academic level, the state has introduced a number of redress measures (meant to counter the effect of poor schools on learners’ chances of gaining admission to higher education) such as racial targets or quotas regarding admission to higher education.

The effect of the legislative and policy provisions and practices on inclusion / exclusion

Today between 75% and 80% of South African schools are “dysfunctional” and are not able to impart the necessary skills to students (Wilkinson, 2015).

Statistics South Africa (no date) published a monograph (based on the 1996, 2001 and 2011 National Censuses) titled “A profile of education enrolment, attainment and progression in South Africa”. This monograph enables one to judge the “extent of achieving the goal of universal access to education” (Statistics South Africa, no date, p. 12).

In regard to the *proportion of persons aged 5-24 years attending an educational institution* the monograph reflects an upward trend for all groups, black Africans from 71 to 93.9% and whites, rather surprisingly, from 70.5 to 77.7% (Statistics South Africa, no date, p. 13).

The Net Enrolment Rate (NER) for the Foundation Phase increased by 29 percentage points and that for the Further Education and Training Phase (FET) by 16 percentage phase. Population group-specific NERs show that the NER for the Foundation Phase increased the most for whites followed by black Africans. For the FET phase the NER for black Africans grew the most followed by coloureds (Statistics South Africa, no date, p. 15).

The *National Gross Enrolment Rates (GERs) by census year and educational phase* (Statistics South Africa, no date, p. 20) show that most phases had GERs of more than 90% (which is approaching “universal access for the official age group” (Statistics South Africa, no date, p. 13). The GERs generally showed an upward curve. The Foundation Phase is an exception but has nevertheless grown from 58 to 78%.

The *GERs by population group and educational phase, Census 2011* (Statistics South Africa, no date, p. 20) indicate that, except for the Foundation Phase, the GERs for all population groups appear to be 100 and more, those for black Africans being the highest.

The *National Age-specific Enrolment Rates (ASERs) by population groups*, (Statistics South Africa, no date, p. 23) indicate that, relative to other groups, fewer coloured children (aged 4-6) are enrolled for Early Childhood Development (ECD) and in the Senior and FET Phases (children aged 15-24).

A *time plot for proportions of persons completing the next level by population group* (Statistics South Africa, no date, p. 64) reveals that the proportion of persons completing Grade 12 after Grade 9 moved upwards for all population groups from 1950 to 2010. The proportions of persons completing a bachelor's degree after completing Grade 12 reflected an upward trend for whites and Indians. The trend for coloureds reflected relative stagnation while that for black Africans reflected minimal growth between the 1980s and the 1990s and a downward trend from there up to 2010.

It would appear that black Africans (67%) and coloureds (6%) are relatively under-represented in higher education while whites (18%) and Indian/Asians (6%) may be somewhat over-represented relative to the entire population (Department of Higher Education and Training, 2014, p. 9).

The *percentage distribution of average undergraduate success rates* (Department of Higher Education and Training, 2014, p. 16) shows that the average undergraduate success rate was 80.3 % for contact students, no population group being below 76%, the set medium-term target (Department of Higher Education and Training, 2014, p. 16). There is still a considerable gap between black Africans and Whites and Indians/Asians.

Some emerging understandings / perceptions of exclusion

The above statistics suggest progress in regard to access to educational opportunities. However, feelings of exclusion persist and new understandings thereof are emerging. These understandings appear nebulous and fluid and are perceived as a force comprising *inter alia* attitudes, cultures and styles that still prevent learners (students) from making use of the educational opportunities available to them.

In the past, "White" education was the proverbial "trophy in the glass case" for the disadvantaged who believed that quality education was only available at "white" educational institutions – off-limits to people of colour. The fact that many learners are not able to access education at formerly white institutions today, that they cannot be "there", leaves a perception that they are still excluded from quality education.

Last year an independent school near Pretoria (Curro Roodeplaat) caused a furore when it put students who preferred English medium (mostly black Africans) and those who preferred Afrikaans medium (mostly whites) in separate classes. However, none of the protesting parents of colour complained about the quality of education (Nel, 2015).

The perception is frequently that learners in the approximately 80% dysfunctional schools in South Africa (corresponding with black African and

coloured demographics and poverty indicators) are inevitably doomed to inferior education. The quintile system and fee exemptions have not allayed such fears.

During the last two weeks of February 2016 some university campuses were subject to violent student protests demanding amongst other things that “Afrikaans must fall” (be removed, which appears to be in conflict with Section 6 of the Constitution, the language clause). The students believe that fellow-students who are taught through the medium of Afrikaans by Afrikaans mother tongue speakers are advantaged (Nel, 2016) compared to students who are not taught in their mother tongues by lecturers whose mother tongue is often not English.

The institutional cultures and climates of some higher education institutions are also experienced as exclusionary, hurtful and anger-provoking and reminiscent of an oppressive past. Kruger (2016) refers to demands made by the youth branch of a political party that anything related to Afrikaans at the University of Pretoria be destroyed.

Understandings, demands and realities

Some demands ostensibly made in light of the feelings of exclusion are problematic because they simply cannot be met. An expectation that all learners can be taken “there” where whites were educated in the past is not realisable. There are not enough places at former white institutions and the number of “Afrikaans schools” has been decreasing annually (Klopper in Nel, 2016b). However, the perceptions regarding culture and climate probably deserve the urgent attention of the management structures of the institutions concerned.

Conclusion

The new understandings of exclusion are not properly defined yet and will probably be harder to address than the discrimination of the apartheid era. The feelings of exclusion can probably only be properly addressed by the achievement of demonstrable parity of performance in all educational institutions.

This paper is limited in the sense that I can, because of a lack of research data, only offer personal observations and tentative conclusions. However, a very important, complex and challenging field of research and debate is emerging. A better grasp of these emerging understandings of exclusion might influence the extent to which South Africa will be able to address and overcome her challenges and use her opportunities.

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