

The Evolution Of The South African - American Viewpoints On The *In Loco Parentis* Position Of The Teacher

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Abstract

The aim of this article is to compare and to analyse the respective views of South Africa and the United States of America on the *in loco parentis* position of the teacher. Apart from the fact that the South African Constitution has had a strong influence on the teacher's position of authority, the South African teacher's *in loco parentis* position has virtually remained unchanged. On the other hand, the *in loco parentis* position of the American teacher has almost completed a full cycle. During the 18th century the American teacher's role was marked by a position of autocratic authority. The 1970's and 1980's witnessed a strong decline in the authoritarian role of the American teacher up to a point where he had very little authority. However, at present, the position in America is reverting back to a position of more authority for the teacher.

The South African - American Viewpoints On *In Loco Parentis*

The *in loco parentis* doctrine is well embedded in the universal history of education (Lombard, 1993: 7). In South Africa, in particular according to Oosthuizen (Bondesio *et al.* 1989: 104) and Prinsloo and Beckmann (1987: 281), it has had a strong influence on the formal education process. However, the South African perception regarding the *in loco parentis* position of the teacher has in certain instances pendulated from one position to various other positions.

Until the late 1960's some of the 'central philosophies' defining the position of the teacher in the United States of America were based on the *in loco parentis* doctrine (Morrill & Mount, 1986: 34). However, the 1969 United States Supreme Court case, *Tinker v. Des Moines Independent School District* is to be seen as a landmark in the gradual phasing out of the doctrine. In the 1985 case, *New Jersey v. T.L.O.*, this trend was confirmed when the judge said that 'school authorities are state officials, not stand-ins for parents' (Rossow & Stefkovich, 1995: 5). However, in 1995 the U.S. Supreme Court in *Vernonia School District v. Acton* reverted back to the traditional viewpoint on the *in loco parentis* position of the teacher. It was held that the

relationship between pupil and parent is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults' (Rossow & Parkinson, 1995: 1).

In this article the evolution of the *in loco parentis* position of the South African teacher will be analysed and compared with that of the teacher in the United States of America. In the final instance the outcome of the modern day differences in viewpoints will be considered and discussion of the present position of South African educational development will be undertaken.

Conceptualisation

The literal translation of the Latin concept of *in loco parentis* is 'in the place (in lieu, instead) of a parent' (Hiemstra & Gonin, 1986: 210). Black (1983: 403) describes it as 'in the place of the parent; instead of the parent; charged factitiously, with a parent's rights, duties, and responsibilities'. It is important to note that although the concept of *in loco parentis* implies that the teacher is 'in the place' (Black, 1983: 403) of the parent it does not mean that he replaces the parent. According to Black (1983: 403), the teacher stands in the place of the parent in a 'factitious' way. The relationship between the teacher and the pupil can, therefore, be described as 'artificial rather than genuine' (McLeod & Hanks, 1982: 397).

It could, therefore, be concluded that the teacher within the societal sphere of the school holds the independent role and function of an educator similar to, but not identical to that of the parent.

The American Perspective

The American and British viewpoints on the teacher's right to discipline is based on authority delegated to the teacher by the parent: 'a teacher who in this respect represents the parent and is the delegate of the parental authority' may inflict moderate punishment (South African Law Reports, 1948: 861). It was decided in 1891 in New Zealand that this authority is not delegated but that it rather stems from the relationship between the teacher and the pupil (South African Law Reports, 1948: 861). The South African viewpoint is similar to the latter.

The foundation for the *in loco parentis* doctrine in America can be found in the works of two English scholars, Sir William Blackstone and Chancellor James Kent. In 1807 Blackstone (Blackstone, 1807: 451) wrote that 'the power of parents over their children is derived from the former consideration, their duty: this authority being given them partly to enable the parent as a recompense for his care and trouble in the faithful discharge of it' (p. 459). Two decades later, Kent's *Commentaries on American Law* provided an application of Blackstone's notion for use in describing the legal relationship between teacher and pupil. While Blackstone spoke of the delegation of a portion of the power of the parent to the teacher, Kent's concept was that the power of the parent was 'transferred' in its entirety for use by teachers (Hayner, 1986: 102). Thus, early concepts of *in loco parentis* emphasised the 'authority' or 'power to discipline' aspect of the doctrine.

The South African Perspective

In South Africa the practical implications of the concept could (and still can be) divided in two main branches:

- the teacher's duty of care;
- the teacher's right to maintain discipline.

Duty of care

One of the main pillars of the South African approach is the teacher's duty of care. According to Botha (Oosthuizen, 1994: 74) South African common law principles determine that a parent has the duty 'to protect his child against danger' by taking adequate care as well as precautionary measures to ensure the child's safety. Authorities agree on the point that a teacher also has a duty to protect the pupil against dangers.

As early as 1925, the South African Appeal Court in *Transvaal Provincial Administration v. Coley* (South African Law Reports, 1925) set the standard of care applicable to the teacher's duty of care role as being that of a prudent father. Judge of Appeal De Villiers said :

The care which is exacted by our law is that which the *diligens paterfamilias* [lit.: the prudent, diligent, careful, circumspect head of a family (Hiemstra & Gonin, 1986: 186)] would have taken in the circumstances. It is not the care which the man takes in his own affairs, nor that which the ordinary or average man would take. It is higher than that. The law sets up a standard to which everybody has to conform, that degree of care which would be observed by a careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty. [The author's own insertion] (pp. 27-28).

This viewpoint was confirmed in the supreme court case of *Rusere v. The Jesuit Fathers* (South African Law Reports, 1970). Judge Beck in that case said:

The duty of care owed to children by school authorities has been said to take such care of them as a careful father would take of his children. This means no more than that schoolmasters, like parents, must observe towards their charges the standard of care that a reasonably prudent man would observe in those particular circumstances.

In the supreme court case: *Broom and another v. The Administrator, Natal* (South African Law Reports, 1966) Judge Harcourt referred to English law as being the root for connecting the teacher's duty of care to his *in loco parentis* position:

These and other English cases establish that in that system of law the test which has become firmly established to determine whether or not conduct is negligent is that the foresight and care required of a person *in loco parentis*, such as a schoolmaster supervising and controlling children is that of a reasonably careful parent in relation to his own children (518).

The Right to Maintain Discipline

Under the influence of British law the teacher's *in loco parentis* position was seen as an office delegated to them by the parents of the pupil. In the 1917 case of *Rex v Liebenberg* Judge Ward referred to the *in loco parentis* authority of the teacher, and said that:

the common law permits a parent to administer moderate chastisement to his child and, when the child is sent to school, he is presumed to delegate this power to the schoolmaster.

Another factor which even in modern times has a strong bearing on the South African parent's influence in the formal education of his/her child is the philosophy on the family as a primary societal spheres. Although a variety of societal spheres such as the family, the church and the school are normally instrumental in the education of the educant, the family is regarded as the primary societal sphere of society. The primary educational acts are to take place within the family. The school as a societal sphere is derived from the family as a primary societal sphere and is therefore typified as secondary societal sphere. According to this approach the teacher's authority is an extension (delegated) of parental authority.

The 1920's showed a slight movement away from the dominant role of parents with regards to the *in loco parentis* position of the teacher as the emphasis shifted towards the teacher-pupil relationship as a basis for teacher authority. In *Rex v Schoombee* (1924) the judge said that:

the relationship of a teacher and pupils justifies the infliction of moderate and reasonable corporal punishment where necessary for purposes of correction and discipline.

During the latter half of the 1940s the teacher's position of authority was strongly emphasised. In the 1948 case of *Rex v Muller* Judge Horwitz pertinently rejected the (at that time) prevailing American and English approach that the teacher represents the parent and that he acts as a delegate of parental authority. He held that the teacher does not only have authority delegated to him by the parent, but that he also has original authority which stems from his office. He also added that a court of law will not interfere with the discretion of the teacher in exercising his authority (unless it is clear that the teacher acted *mala fide*).

But the court's (over)emphasis on teacher authority might have reached its peak in 1947 in *Rex v Le Maitre and Avenant* when criminal charges of assault instituted against a housemaster

and 2 policemen were unsuccessful. Over a period of 2 years severe damage was done to hostel property by unidentified inhabitants of the hospital. The housemaster was unable to identify the guilty ones as a result of which the hostel commission recommended that group punishment should be meted out. After warning the inhabitants of the hostel again, without any success, the housemaster inflicted group punishment on the hostel boarders. He went even further when he delegated his authority to the 2 policemen (one of whom was a member of the hostel commission) who caned five and six boys respectively. All of this (group punishment -which implies that one or more innocent pupils were punished as well as the fact that non-teachers were allowed to inflict punishment on school boys) was condoned by the court as being part and parcel of teacher authority!

Once again the root for this approach might be found in the (extension of the) philosophy on societal spheres. In line with this philosophy, one of the characteristics of any societal sphere is that it holds sovereignty within its own circle. For example, the parent has the sovereign authority to educate his child along the lines of his own convictions (as long as he keeps within the juridical framework). The teacher has a similar role to play in the circle and autonomy of the school as an independent societal sphere. Within the juridical parameters he has a wide spectrum of independent discretion (and authority) to educate the educant to maturity.

The early 1950's witnessed a moderate decline of the teacher's power to exercise authority almost at will, when, for the first time statutory measures regarding corporal punishment were drawn. According to the Administrator's Notice (Transvaal) of 1953, corporal punishment may be administered by the principal of the school or by another teacher in the presence of the principal.

This was to be the pattern and trend for similar statutory measures which were introduced in the 1970's and 1980's.

The 1990's might be regarded as the decade where the primary focus was on the rights of the individual. This thrust for the rights of the student as an individual must be seen as a direct result of the introduction of a Bill of Fundamental Rights as a part of the South African Constitution. Sections on equality, human dignity, privacy, children and education of the Transitional Constitution of South Africa of 1993, were to have an irreversible effect on the *in loco parentis* position of the teacher. These, and other applicable sections also formed an integral part of the final Constitution of the Republic of South Africa of 1996. Some of the sections with a direct bearing on the teacher's position of authority are (RSA: 1996(a)):

'Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected'.

'Freedom and security of the person

12.(1) Everyone has the right to freedom and security of person which includes the right-

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way’.

‘Privacy

14. Everyone has the right to privacy ... ’

In a Constitutional Court hearing in 1995, (*State v Williams*), the constitutionality of corporal punishment was addressed. The court held that since corporal punishment was ‘cruel’, ‘degrading’, ‘inhuman’ and undignifying, it was not constitutional.

Little wonder that section 10 of the South African Schools Act of 1996 determined that:

‘10 (1) No person may administer corporal punishment at a school to a learner.
(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault’ (RSA: 1996(b)).

Even though the teacher's right to exercise authority by inflicting corporal punishment was abandoned, it does not mean the teacher's overall right to maintain authority came to a stand still:

- In terms of section 8 of the South African School's Act (RSA: 1996(b)) a code of conduct for learners is to be adopted by a public school. This code of conduct ‘must be aimed at establishing a disciplined and purposeful school environment’ and nothing in the Act exempts a learner from the obligation to comply with such a code of conduct.
- In terms of section 9 of the South African School's Act (RSA: 1996(b)) a learner may be expelled from school as a correctional measure for a period not longer than one week.

United States of America

Kent's power-oriented concept of *in loco parentis* was seen the first time a US court grappled with the doctrine in 1847. In *Stevens v. Passet*, (Maine Reports, 1874: 275) a pupil sued the school for improper punishment. In rendering its decision, the court noted the relative power of the teacher to discipline:

If the teacher is authorised to inflict corporal punishment for the purpose of securing obedience to his reasonable rules and commands, and thereby to render the school what it is contemplated by the law that it shall be, it follows that he has the right to direct, how and when each pupil shall attend to his appropriate duties, and the manner in which they shall demean themselves, provided, that in all this, nothing unreasonable is demanded. It cannot be contended, that as the teacher

has responsible duties to perform, he is not entitled to the reasonable means by which to perform them.

With the strong position of authority emanating from the doctrine, came a concomitant immunity from liability when exercising this authority. This was not to last.

By 1859, some courts began to recognise that there must be limitations on the authority provided teachers through their *in loco parentis* role. In *Lander v. Seaver* (Vermont Reports, 1859), the Supreme Court of Vermont noted that the teacher has no natural parental concern for a child. Therefore, 'he may not be trusted with all a parent's authority'. Most of the limitations were specified for issues surrounding corporal punishment. The courts for the remainder of the 19th century were not willing to grant immunity from liability to teachers who inflicted corporal punishment out of malice. Thus, the historical seeds for an alternative view of the relative position of teachers and pupils were planted. However, it would take another century before the doctrine would be abandoned for a different standard.

The Rise of Students' Rights and the 'Teacher as Agent'

The 1970s marked the era of students' rights in the US. This time of long hair and 'flower children' could be linked to the first US Supreme Court decision in which the Court noted that 'students do not shed their constitutional rights at the schoolhouse gate'. (U.S., 1969: 503) Rather than teachers being in the position of parents and enjoying a wide scope of authority over students, students had become 'constitutionally enfranchised', at least in the right to free speech. Students became 'constitutional beings' in 1971. In *Goss v. Lopez*, the United States Supreme Court held that students could not be removed from school unless they were provided with a due process hearing (U.S., 1975: 419).

Once again, the Court moved the teachers away from their original position of standing in place of parents to standing as agents of government, expected to refrain from depriving students of their rights. By 1985, the recognition of students' constitutional rights had moved to the right to privacy in their personal effects. In *New Jersey v. T.L.O.*, the US Supreme Court rejected the State of New Jersey's argument that when students came to school they gave up the right to have any privacy and to be free from personal searches. The state argued that teachers stand *in loco parentis*, and, therefore, students could not have a recognised right to privacy. The Court noted that teachers are not parents but agents of government (U.S., 1985: 469):

If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students ... In carrying out searches and other disciplinary functions ... school officials act as representatives of the state, not

merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

Shortly after the T.L.O. decision, courts began to recognise that schools had become dangerous places. Needing to provide school authorities with some of the powers of yesteryear, the doctrine of *in loco parentis* was recalled.

In *Bethel School Dist. No. 403 v. Fraser*, a high school student gave a speech filled with sexual innuendo at an assembly (U.S., 1986a: 478). After being suspended from school as punishment, the student sued in federal court. Both the federal district court and the U.S. Circuit court of appeals found for the student. The courts invoked the 1969 *Tinker* standard. The standard required that a student's right to freedom of expression be upheld unless that expression resulted in a substantial disruption to the school operations. However, the U.S. Supreme Court had different thoughts. It reversed the decision of the lower court. In so doing, it introduced a new standard for the control of student expression. A student will not be protected by freedom of speech when that speech is 'lewd or vulgar'. The Court noted that educators had the duty to teach lessons of civility to students regarding proper speech.

In *Hazelwood v. Kuhlmeier* (U.S., 1986b), the student newspaper was about to print some controversial stories. The principal of the school edited those stories out of the publication. In suing the school district, the student newspaper staff argued that the stories would not have caused substantial disruption on the school operations (*Tinker*) nor was the language lewd or vulgar (*Bethel*). Therefore, freedom of expression should save the stories from being censored. Once again, the Supreme Court took this opportunity to add yet another tool to re-empower authorities to punish student expression. The Court held that student expression could be punished, regardless of content, if the school did not wish to associate itself with the speech and if a reasonable person could conclude that the speech was 'school-sponsored'.

An End to the 'Teacher-as-Agent' Standard

Given the trend in the erosion of students' rights, suspicion about the vitality of the 'teacher-as-agent' standard is valid. This is especially true when the recent Supreme Court decision regarding drug testing of students is considered. In *Vernonia School District v. Acton*, (U.S., 1995: 115) James Acton, a student in the Washington Grade School of the Vernonia Oregon School District, challenged the school's drug testing programme. He argued that the programme violated his constitutional rights under the Fourth Amendment, to be free of unreasonable searches. The incident that sparked this suit took place during the 1991-92 school year when James was in the seventh grade. James and his parents refused to consent to a drug test which was required for participation in interscholastic sports. James, who wanted to try out for the football team, was then suspended from participating in the athletic programme that season.

The Supreme Court noted that the Fourth Amendment only protects societally recognised expectations of privacy. The expectations must be legitimate. While students may have privacy

rights, they are children who are subjects of the state while in school. While *T.L.O.* held that the relationship between pupil and teacher entails more than delegated power of parents (*in loco parentis*), it 'did not deny, but indeed emphasised, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults'. As students, they are routinely required to submit to various physical examinations and to be vaccinated. Therefore, students within the school environment have less expectations of privacy than members of the population generally.

The suggestion in *T.L.O.* that schools had become dangerous places was followed up by a series of cases which eroded students' rights in areas such as freedom of speech. The majority in *Acton* cited this recent history of re-empowerment when it defined the relationship between teacher and pupil for 1995. It described the relationship as 'tutelary'. After reading this part of the verdict, the best way to understand the relationship is by looking at a continuum. At one end of the continuum the concept of *in loco parentis* provides the highest level of control. At the other end full citizenship provides the most individual freedom and least amount of control by government. In *T.L.O.*, the Court rejected New Jersey's argument that it had an *in loco parentis* relationship with students therefore students had no expectation of privacy. In *Acton*, the *in loco parentis* concept is revived. The tutelary status offers somewhat less authority than the *in loco parentis* role but provides far more control than does the government/free adult model. The attorney for the *Acton* plaintiffs was so taken with this part of the case that he thought the tutelary relationship could be used by school authorities to justify treating pupils any way they wanted. Nevertheless, invoking the tutelary relationship seems an appropriate rationale if an increase in school official empowerment is desired or deemed necessary.

Conclusion

In the United States of America the traditional *in loco parentis* role of the teacher was rejected in favour of the 'agent of the state' concept in cases such as *Tinker* and *T.L.O.* However, considering the *Vernonia* decision, there seems to be a strong reversion back to the *in loco parentis* role of the teacher. In this case the power of the teacher was 'emphasised' as being 'custodial' and 'tutelary' (Rossow & Parkinson, 1995b: 1). A semantic analysis of these two words shows that: 'tutelary which means "invested with the role of a guardian or protector" while custodial is derived from the Latin word 'custos' which means defender, guard, ward (McLeod & Hanks, 1982: 1264; Postma, 1967: 78).

Both these words have the strongest possible connotations of the traditional *in loco parentis* position of the teacher. Their current use might be in reaction to the lack of discipline experienced in many American public schools.

In South Africa there seems at present to be a movement away from the traditional viewpoint concerning the *in loco parentis* position of the teacher. This is mainly due to the (possible) implications of the chapter on Fundamental Rights in the South African Constitution. South Africa should take a page from the American experience and should be careful not to strip

teachers of too much authority which is strongly embedded in the traditional *in loco parentis* role of the teacher.

Keywords

in loco parentis South Africa teacher
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