



A legal and philosophical perspective on the *in loco parentis* position of teachers

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Abstract

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The in loco parentis position of the teacher implies that he/she is regarded as acting in the place of the parent. This principle is embedded in South African common law and in many respects confirmed by statutory law. In the South African legal context, it implies that the teacher is obliged to take care of the physical and mental safety of the pupil and has the right to maintain discipline. It is a legal instrument for bringing about order in the educative duties of teachers. A more philosophical line of reasoning, centring on sphere sovereignty, reveals why jurists tend to compare the duties of teachers with those of parents, but do not equate them with each other or regard these duties as synonymous.

1. Introductory remarks

The principle of *in loco parentis* is well embedded in the legal history of education (Lombard, 1993:7). In South Africa, in particular, it has had a strong influence on the formal education process (Oosthuizen, 1989:104; Prinsloo & Beckmann, 1987:281; Oosthuizen, 1994:44).

After having gone through different phases of development, the approach to the *in loco parentis* position of the teacher presently adopted in the USA was referenced in the 1995 US Supreme Court decision of *Vernon School District v. Acton*. The outcome maintained that the relationship between pupil and parent was “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 legal as well as the philosophical bases of the doctrine of *in loco parentis* will be investigated in order to discern to what extent they relate to each other.

2. Two fundamental aspects

In considering the fundamental aspects of the relationship mentioned above, certain Reformational philosophical insights were utilized, especially those insights pertaining to anthropology and societal theory. No specific philosophical system was followed, however. Philosophical perspectives such as the following have been applied: the leading and founding functions of societal spheres, primary and secondary functions of functionaries (parent and teacher), sphere sovereignty and universality, stewardship, and the resultant approach to education.

Two fundamental notions come to mind when an analysis of the *in loco parentis* principle is undertaken: “education” on the one hand, and the notion of “a teacher being in the place or stead of the parent” on the other.

2.1 “Education”

Van Rensburg, Landman and Bodenstein’s (1994:366) definition of education was found to be helpful in this respect. According to them, education in its pedagogic (i.e. child-directed) form is the conscious and purposeful intervention by an adult (i.c. the teacher or parent) in the life of a non-adult (educand) to bring the latter to a state of adulthood characterized by independence and maturity. Various authors have analysed this definition, in the process revealing the following essential features of education (cf. Van Rensburg *et al.*, 1994:366; Van der Walt, 1983:23; Van Loggerenberg & Jooste, 1980:45):

- Education is characterized by a strong agogic relationship or bond between the two participants: the educator and the educand.
- Attaining “adulthood characterized by independence and maturity” through the process of education entails the development of the educand in his/her totality. This process includes the development of aspects of being human such as the spiritual, intellectual, the norm and value system of the educand, as well his/her ability to fulfil his/her calling in life, including taking up a career (Van Rensburg *et al.*, 1994:366).
- A variety of societal spheres such as family, church and school, is instrumental in guiding the educand to adulthood. The interaction among these societal relationships or spheres is determined by the fact of sphere sovereignty, as

will be outlined in 2.2 and 2.3 below. Sphere sovereignty has serious implications for the *in loco parentis* principle, as will be indicated.

What has been outlined above, is education in the sense of the German word *Erziehung*, i.e. as the all-embracing and complete guidance and assistance of the educand to full adulthood (see Henz, 1975:23ff.). This means that parents as well as teachers are educators. In the same line of thought, ministers of the church as well as traffic officers are educators in the course of their dealings with children and others who need guidance. Education occurs within a variety of interacting societal spheres. The spheres of family and school are examples of such interacting societal spheres or relationships: parent and teacher each fulfils his or her respective role as educator of one and the same child.

However – and this is important for understanding the *in loco parentis* position of teachers – education is not the *primary* task of either parents, teachers, ministers of the church or traffic officers. The primary task of each of these educators is determined by the primary task of the societal relationship in which the person functions. Education in the parental home is therefore qualified by the primary task of loving care for the children as family members (the ethical aspect of reality), whereas education at school is qualified or characterized by logical-analytical activity (the analytical aspect of reality). The difference between the respective leading functions (primary tasks) of the parental home (i.e. loving care) and of the school (i.e. analytical processes) results in a concomitant difference between the competence area and authority sphere of parents on the one hand, and of teachers on the other, regardless of the fact that they find themselves involved with one and the same child (Van der Molen, 1979:176). Both have an educative task, differently qualified. (It is important to note that philosophers of education sometimes make a rigid distinction between the primary tasks of respectively the parent and the teacher mainly for theoretical reasons. One is seldom aware of such a rigid differentiation in tasks in real life.)

Because of the difference between the competence areas and authority spheres of parents and teachers, a teacher as educator can never “take the place” of the parent as primary educator of a child. No teacher can in principle be entrusted with the parental task of *education as qualified by the loving care of the family*. The educative task of the school as a societal sphere, and thus of the teacher, is typically qualified by the school’s primary task of teaching-learning, i.e. by *analytical processes*.

In view of this point of departure, the following misconceptions can be avoided:

- The idea that the school has been derived from the family. Although a group of parents might have been instrumental in erecting a school, a school is an

independent societal relationship in its own right, with its own unique ontic structure, task and aims.

- The idea that teachers derive their authority from the parental home. Being the office bearers of an independent societal relationship or sphere, teachers possess independent authority in their own right.
- The notion that parents can delegate their educative task to teachers. Such an action on their part would lead to the abrogation of the parental home as a societal relationship.
- The notion that teachers can, in their own right and within the context of the school, educate the child to full maturity. Within the context of sphere sovereignty, the task of teachers is restricted to educative teaching.
- The notion that the child's status remains unchanged as he/she commutes between parental home and school. Within the family a child assumes the status of pupil/ learner when entering the educative atmosphere of the school (cf. Vogelaar, 1991; Vogelaar & Bregman, 1984; Bregman & Kole, 1987; Van Driel & Kole, 1987; Samson, 1981; Fowler *et al.*, 1990; Fowler, 1987; Griessel, s.a.:18; Stone, 1981:29; Du Plooy *et al.*, 1985:189-190, and especially Taljaard, 1976:243 ff. for a more comprehensive explanation. Landman *et al.*, 1971:128 ff. tend not to draw such rigid distinctions between the educative tasks of home/ parent and school / teacher).

In conclusion, then, the *in loco parentis* principle should be applied in such a manner that the fundamental difference between the respective educative tasks of parents and teachers is not violated or negated.

2.2 *In loco parentis* as a legal principle applicable in education

Literally translated, *in loco parentis* means "in the place (in lieu, instead) of a parent" (Hiemstra & Gonin, 1986:210). According to Black (1983:403) it means "in the place of the parent; instead of the parent; charged factitiously, with a parent's rights, duties, and responsibilities".

The *in loco parentis* principle reveals the following essential *legal* elements (Oosthuizen, 1989:104; Prinsloo & Beckmann, 1987:281; Oosthuizen, 1994: 44; Hosten *et al.*, 1983:476):

- These legal elements suggests the presence of office bearers. This view refers to the persons who *legally* hold the office of *in loco parentis* and who can,

depending on circumstances, be teachers or housemasters, entrusted with temporary custody of the child by the child's parents .

- *In loco parentis* refers to the interaction between two societal spheres, e.g. those of the school and the family: the family is regarded as the primary societal sphere since education commences within the context of the family. The school is regarded as a secondary societal sphere since the child (educand) is entrusted to it by the primary societal sphere of the family. The school, and therefore also the teachers, operate within well-defined juridical parameters, which provide them with a great deal of independent discretion in the education (as qualified by teaching/instruction) of the child within the context of the school as a societal relationship.

2.3 Societal or sphere sovereignty

The reciprocal relationship between parent and teacher is based on a partnership of common interest in the education of the educand. As far back as 1874, under the presidency of T.F. Burgers of the Zuid-Afrikaansche Republiek, this partnership obtained a *judicial* basis on South African soil through the promulgation of the Education Act (no. 4 of 1874 – popularly known as “the Burgers Act”). This Act determined that school matters be decided by a “School Commission” which should consist of six members who were parents of pupils from the particular community (Barnard, 1979:49 ff.)

Although the partnership between parent and teacher(s) is mainly driven by the common goal of *education*, it should be borne in mind that in this respect we are dealing with two separate societal relationships: the school and the family, and thus with education in its respective meaning of parental education and education by teachers.

The status of *in loco parentis* as a *legal principle* can not be contested. As a *legal* or *juridical* instrument, the *in loco parentis* principle has been devised (positivized) by jurists to serve the important function of regulating the legal relationships between the parental home (parents) and the school (teachers). As such, it pertains to the function of ordering and regulating the life of people within the borders of the state. The common law principle of *in loco parentis* is an expression of this responsibility of the community and the state. The *in loco parentis* principle can therefore, in a sense, be regarded as founded and grounded in the fundamental task of the state, viz. the duty to order, rule and regulate civil life in its territorium. It is a consequence of efforts on the part of the state, of legislators and jurists to give verbal expression to an ontic feature of statal existence, viz. that of order and regularity (Van Zyl & Van der Vyver, 1982:275). This is the true foundation of the *in loco parentis* concept as a *legal instrument*.

Against this background, as well as against the background of the school as an independent societal relationship in its own right (cf. Dooyeweerd, 1986), the teacher has the task – as determined by his/her duty of educative teaching (i.e. of regulating or managing the processes of teaching-learning) – of performing the following duties:

- to discipline pupils;
- to take care of the physical and mental well-being of pupils whilst they are under his or her supervision;
- to organize and manage the parent-teacher partnership in order to enhance the teaching-learning processes of the pupil/learner (Van Katwijk, 1994:80-81). As was previously explained, the aims of teachers and parents converge in the fact that *their efforts are continually focused on the education of one and the same child*. Parents and teachers thus have a shared interest, i.e. the welfare of the child, despite the fact that the child assumes different statuses when involved with the parent or involved with the teacher. Their shared focus on the child, and concern for the well-being of the child, result in an unavoidable *teacher-parent* relationship, which should be cherished and promoted by both teachers and parents. In the school context (i.e. the teaching-learning context) the teacher is expected to maintain and promote this teacher-parent relationship. In the context of the family, the parent is expected to reciprocate.

Although the legal principle of *in loco parentis* implies that the teacher is “in the place” (Black, 1983:403) of the parent, it can never mean that he or she *replaces* the parent. According to Black (1983:403), the teacher stands in the place of the parent in a “factitious” way. The relationship between teacher and pupil can be described as “artificial rather than genuine”.

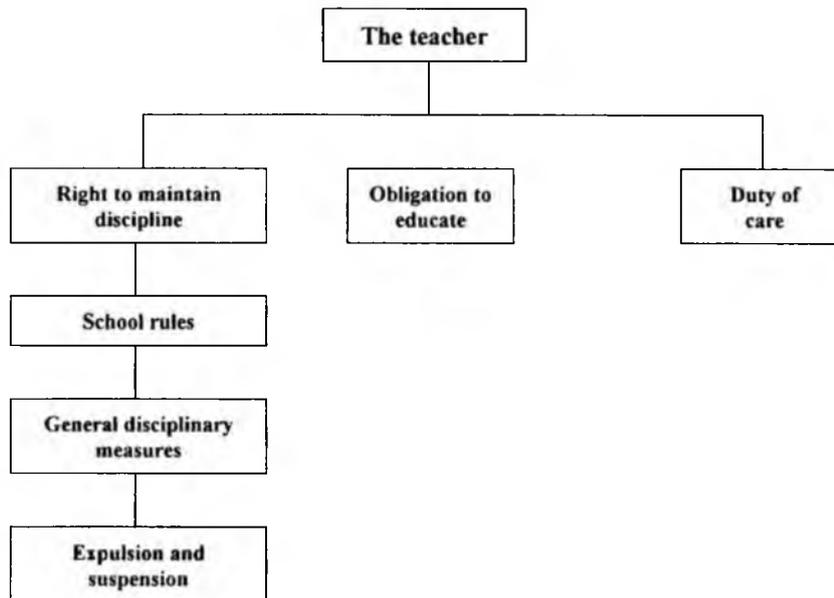
3. Some practical implications of the *in loco parentis* principle as a legal instrument in education

3.1 General remark

Given the fact of the teacher’s unique interest in the educative teaching of the child, his/her *in loco parentis* role implies that he/she has the obligation to manage the teaching-learning processes involving the pupil, that he/she has the right to maintain “school”-authority over the pupil, to discipline him/her at school in the context of the teaching-learning process, and that he/she has a duty of taking care of the pupil with regard to the physical and mental well-being of the latter (see figure 1).

3.2 Duty of care

Figure 1: The *in loco parentis* position of the teacher



One of the main pillars of the South African approach to the duties and functions of teachers is the teacher's duty of care in the sense of protection (not loving care as in the case of the parent) (cf. Figure 1). Not only is this approach in line with section 28(2) of the South African Constitution which determines that the best interests of the child "are of paramount importance in every matter concerning the child" (SA, 1996), but it is also in line with the stipulations of the United Nations' Convention on the Rights of the Child. In terms of article 3(1) of the Convention "the best interests of the child shall be a primary consideration ... in all actions concerning children" (UN, 1989). Apart from this, article 3(2) of the Convention stipulates that "State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being ...". South African common law principles stipulate that a parent has the duty "to protect his/her child against danger" by taking adequate care as well as precautionary measures to ensure the child's safety (Botha, 1994:74). Authorities agree on the point that a teacher also has a duty to protect the pupil against dangers. It is, however, necessary to note that the teacher's obligation does not derive from that of the parent, but should be

seen as an original duty and obligation of the teacher in the unique and autonomous context of the school. The fact that South African law expects of both parent and teacher to take care of the physical and psychological well-being of the child when in their respective presence and care, can amongst others be ascribed to the duty of the state (legislature) to order and regulate life in its territorium to the advantage of each and every citizen – in this case the child. The duty of taking care is expressed in the form of the common law principle of *in loco parentis*.

As early as 1925 the South African Appeal Court in *Transvaal Provincial Administration v. Coley* set the standard by comparing the teacher's duty of care with that of a prudent father (Transvaal Law Reports, 1925:27). The care which is exacted from the teacher by South African 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 similar circumstances. It is not the kind of care which someone would take of his own affairs, nor that which the man in the street would take – it actually implies care of a higher dimension.

This viewpoint was confirmed in the supreme court case of *Rusere v. The Jesuit Fathers* (SALR, 1970:537). Judge Beck, who presided, said:

The duty of care owed to children by school authorities has been said to take such care (sic!) 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.

The Judge did not *equate* the care of teachers with that of parents but used parental care *as a foil or standard* against which to explain and measure the profound nature of the care exacted from teachers for children in their temporary custody. The comparison stresses the fact that both parental and teacher care focus on the child as the common object of concern.

In the supreme court case of *Broom and another v. The Administrator, Natal* (SALR, 1966:518), Judge Harcourt referred to English law as the root of the teacher's duty of caring for the pupil in his/her *in loco parentis* position. This case and other cases demonstrate that in the English system of law the acid test to determine whether or not a teacher's conduct is negligent, is to *compare (not equate)* the teacher's conduct with that of a reasonably careful parent in relation to his/her own children.

3.3 The right to maintain discipline

The other consequence of the *in loco parentis* position of the teacher is his/her right to exercise authority (see Figure 1). This right traditionally included the

right to draft school rules, to administer corporal punishment, to take general disciplinary measures and to expel and or suspend a pupil from school.

3.3.1 School rules

One of the means at the disposal of the teacher which enables him/her to maintain discipline at school is the right to draft school rules to regulate pupil behaviour. Traditionally, this right has never been confirmed by legislation. However, the promulgation of the South African Schools Act 1996 (section 8) confirms this aspect of the teacher's *in loco parentis* position (SA, 1996). It stipulates that "a code of conduct for learners ... aimed at establishing a disciplined and purposeful environment" must be adopted (SA, 1996).

3.3.2 Corporal punishment

Sections 10 (human dignity), 11 (freedom and security of the person) and 30 (the rights of a child) of the Interim Constitution of 1993 created the impression that, among other things, no teacher retained the right to administer corporal punishment (SA, 1993). Three years later, the South African Schools Act (SA, 1996) confirmed this impression. Section 10 of the latter unequivocally stipulates that "no person may administer corporal punishment at a school to a learner" (SA, 1996). As a result of this, the traditional common law right of the teacher to administer corporal punishment on the basis of his *in loco parentis* position, has statutorily been altered.

3.3.3 Suspension and expulsion

Suspension is the temporary refusal of admission of a pupil to a school or the hostel of a school, while expulsion amounts to the permanent refusal of admission of a pupil to a school or the hostel of a school (Oosthuizen, 1994:67). This right of the teacher to maintain discipline in the school environment is also confirmed in section 9 of the South African Schools Act which stipulates that suspension or expulsion of a pupil may be considered on grounds of "serious misconduct" (SA, 1996).

It is clear that, within the parameters of these legal restraints, teachers are entitled to discipline their charges, on condition that their administration of disciplinary measures is determined by the teaching context in which teachers and pupils (learners) find themselves at school.

4. Concluding remarks

The *in loco parentis* principle has become firmly entrenched as a principle in South African law. It is essentially founded in the responsibility and calling of the state (and organs of state) to order civil society within its territorium. The

teacher's task of educating the pupil/learner has such momentous dimensions that judges tend to *compare (not equate)* and *measure* their task and duties with those of parents.

The legal position concerning the *in loco parentis* position of teachers seems to culminate in this argument of the *comparability* of the duties of teachers with those of parents. Philosophical reasoning supplies the more profound rationale for the legal position. Such reasoning proves it to be fallacious to derive the existence of the school as a societal sphere or relationship from the parental home, or to derive the teacher's educative task from that of the parent. It is also untenable to equate the educative duties of teachers with those of parents. On the basis of the principle of sphere sovereignty, the structural differences between the family and the school as independent societal spheres have to be respected, and resultantly, their respective focus on the education of one and the same child. The duties of teachers, viz. caring and disciplining, can at most only be *comparable* with those of parents, as the *in loco parentis* principle implies, and not equated with it.

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