

WHAT LAW CAN – AND CANNOT – DO IN EDUCATION REFORM^{*}

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RESUMO

Explora quatro aspectos importantes da política educacional que afetam muitos países e delinea a importância e os limites da legislação e da jurisprudência concernentes a tais assuntos.

Entende haver diferenças significativas quanto à realização acadêmica e à distribuição de fundos para a educação tanto entre os países quanto dentro de cada um deles e cita outros problemas, como a dificuldade de implementar políticas que assegurem a qualidade da educação, com bons profissionais, e preservem os direitos dos grupos minoritários.

Analisa ainda os procedimentos adotados por alguns governos para diminuir tais diferenças e enfatiza que os exemplos citados servem para ilustrar vários importantes aspectos sobre o papel dos juizes e legisladores na modelagem da política educacional, uma vez que a educação bem ou mal modelará nosso recurso natural mais precioso – as crianças.

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1 THE ACHIEVEMENT GAP

There is a gap in measured academic achievement among nations, as documented in the PISA, TIMS, and other studies, and this can have serious implications for the development of “human capital” and thus of economic progress and competitiveness in those nations which lag behind. The gap which I am concerned about today, however, is that which exists **within** each country, commonly correlated with social class and often with ethnicity.

The lagging academic **achievement** of pupils in certain groups, or in certain geographical regions, is also commonly reflected in significant differences in academic **attainment** – that is, how far pupils go in their schooling. The implications for economic opportunities and for participation as citizens are obvious. To take an example that is occurring, as it were, under our eyes as we meet, the anarchic rage fueling the so-called “French *intifada*” is clearly related to the frustrations of young men of immigrant origin whose participation in French society is severely limited by their lack of success in French schools.

Legislation has a role in addressing this issue. For example, legislators can set expectations for the outcomes of schooling, and prescribe procedures for assessment of whether individual schools are meeting these expectations. Such assessment should take into account the “value added” by a school each year in relation to the starting-point of its pupils, recognizing that some pupils come to school less prepared to learn and are thus more difficult to bring to the required level.

England provided an early example of such country-wide assessments, under Margaret Thatcher, and more recently the United States has engaged in the difficult process of implementing “No Child Left Behind”, a mandate by Congress requiring each state to set specific goals for academic achievement and hold all public schools accountable for meeting these goals.

Such programs of systematic assessment are helpful in documenting the achievement gap, but they do not function automatically to reduce it. For that, unfortunately, the policy tools available to government are of only moderate effectiveness. One common measure is to provide additional funding to

schools or regions where academic achievement is low, as has occurred in France, the Netherlands, and many other countries.

In designing programs to provide supplemental resources on the basis of low academic outcomes, it is difficult not to “reward failure”, providing extra support to schools that have demonstrated an inability to use resources effectively. As we will see below, the relationship between resources and achievement is by no means straightforward, and simply increasing expenditure in failing schools does not lead automatically to success.

Another way of seeking to reduce the achievement gap is to use data obtained from external assessments to identify and somehow penalize teachers whose results are especially unsatisfactory, and reward others who, under the same circumstances and with similar pupils, produce relatively good results. Unfortunately, teacher unions tend to resist such sanctions and rewards, and there is also the danger that sanctions will make good teachers unwilling to work with difficult-to-educate pupils from whom it will be especially challenging to produce the desired achievement.

Government may also seek to use the power of publicity to shame the staff of low-achieving schools into producing better results; the so-called “league tables” in England and Wales were intended to have this effect. A danger of this strategy is that it will exacerbate the flight of well-informed parents from under-achieving schools and thus further widen the gap among schools. In addition, bad publicity may simply crush teacher morale and effort rather than stimulate them.

In short, the policy instruments available to legislators and to government in response to the achievement gap may have unanticipated negative consequences. This is not to say that they should be abandoned; only that they should be used with care and flexibly in response to the actual effects. What is needed is a legal and policy framework which makes expectations clear, provides real and attention-getting consequences, then leaves school staff free to find effective solutions in their concrete circumstances.

2 THE RESOURCES GAP

Like the achievement gap, the resources gap exists not only among

nations but also within nations. Article 212 of the Brazilian Constitution has unusually explicit language requiring that no less than a set percentage of tax revenues of all levels of government be applied to “the maintenance and development of education”, with priority given to “the needs of compulsory education”. This requirement is admirable, though it does not prevent substantial inequality among and within states in Brazil, as in other countries including the United States, dependent upon local resources.

There are, of course, countries like France and the Netherlands, in which funding and regulation of schools is centralized; the Dutch have, arguably, found one of the most successful formulas for balancing equitable funding with protections for school distinctiveness. In federal states, like Brazil, Russia, and the United States, achieving that balance is more difficult, and – apart from the political difficulties – there are issues with encouraging local initiative and effort.

One of the difficulties in the way of enforcing an equal distribution of funding for schools is that a substantial body of research has found that increased funding for schools is not directly related to improved achievement, providing a new argument to those who do not wish to increase taxes to distribute funds to areas with low ability to raise revenue. On the other hand, it is obvious that the availability of resources can determine what pupils have the opportunity to learn. That is, equalizing resources will not automatically lead to equal outcomes, but inequality of some kinds of resources leads inevitably to unequal results. If a secondary school has no teacher competent to teach chemistry, it is obvious that its pupils will not learn chemistry adequately.

Legislation can – especially in a country without a federal structure – require equal expenditures, adjusted for different categories of pupils who may cost more to educate. But “equal” is a tricky concept in this context: does it mean that the level of expenditure for all schools should be as high as what taxpayers in the wealthiest communities are willing to spend on their schools? Or, in order to make the system fiscally realistic, should the wealthiest communities be forbidden to spend more than the nationwide norm on their schools?

Won't this tend to drive affluent parents to use private schools?

A more practical approach than seeking "equality" may be to seek "adequacy". Courts in a number of the North American states have ruled that state government must supplement the ability of local school districts to tax and spend at a level which ensures that the schooling provided to every child is **adequate**. But who defines adequacy? Is that a minimal standard, or should it be based (as it has been in some cases) on which educators say that they need or want? Isn't this last almost unlimited?

Or, again, should it be based upon what affluent parents consider adequate for their own children? Isn't there a basic unfairness if parents with enough money can purchase a better-resourced education for their children than that which other children are provided by government? The logic of making justice an absolute led Plato to suggest, in *The Republic*, that children be raised and educated from birth by the State, with no parental influence at all; no legislator in a free society would risk such a proposal.

The issue is further complicated by the fact that the definition of an adequate education is constantly changing in response to social and economic developments, as well as the fact that an increasing proportion of parents have themselves received enough schooling to become effective advocates for providing their children even more, and of higher quality. "Education For All", if by that we mean (as we should), schooling of sufficiently high quality, is a constantly-moving target.

3 THE QUALITY OF TEACHERS

The theme of schools of good quality leads inevitably to that of teachers of high quality, whether measured in grasp of the subjects they teach, skills in the classroom and in assessing student work, and in the personal qualities which make them true educators. While research suggests that the link between other sorts of resources and educational outcomes is often ambiguous, the effects of skilled and committed teachers has been demonstrated again and again.

Legislators can – and should – set minimum standards for entry into the teaching profession (as mandated by article 206, paragraph V, of the Brazilian Constitution) and also

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provide incentives for teachers to improve their knowledge and their skills above that minimum. As with the other policy interventions, however, there are difficulties in the way of implementing this effectively.

The most serious of these is that the supply of those seeking to teach who meet high standards of preparation and of character may be insufficient to meet the demand, especially in an educational system expanding rapidly to provide universal primary schooling under appropriate conditions of quality, and to extend the years of schooling through intermediate and secondary education. Under these conditions, there will be a strong tendency to employ the unqualified in order to simply have "a body in every classroom", and this will not only lower the quality of schooling but also create an expanding corps of inadequate teachers who resist efforts to raise educational standards for fear that it will threaten their own positions.

The task of attracting really qualified individuals to a career in the classroom has been made more difficult by what is a very positive development in a broader sense, the growing opportunities available to women in a broad range of occupations. Young women who want to have careers are no longer constrained to become teachers.

In order to attract – and to retain – the sort of individuals who will do an effective job as teachers, we need not only to address the question of salaries but also that of working conditions. The matter of salaries is obvious (though difficult, given that the large number of teachers makes any significant adjustment in their pay a major item in government budgets), but that of working conditions is more subtle but at least as important. Fine teachers who will, out of a sense of commitment to the calling, work for less than they could earn elsewhere will nevertheless quit the classroom if they find that conditions or bureaucratic constraints prevent them from teaching in a manner which satisfies their sense of professionalism.

Unfortunately, some of the measures which governments take to ensure the quality of schooling, and to require schools to meet common standards of content and thus opportunity for pupils to learn what they will need to progress in schooling and in the economy and society, may have negative effects upon teaching conditions. Competent teachers may find themselves entangled in requirements that have been established to limit the harm that can be done by incompetent teachers. School leaders may become more concerned with enforcing rules than with guiding and stimulating instruction.

In addition, the rules put in place by governments, or by judges, to ensure that teachers are treated fairly may function in a way which makes it very difficult to remove the incompetent. These rules may also prevent the formation of a coherent team of teachers who share the same vision of education and can support one another. The sense of having to collaborate with colleagues whose competence they do not respect, or whose approach to teaching they do not share, creates unfavorable working conditions which drive many fine teachers out of the profession.

Similarly, such rules can make it impossible to create schools with a distinctive educational character, able to attract and retain good teachers and also to attract parents who will support the instructional program of the school.

Standards for entering the teaching profession are important, as are standards for the "non-negotiable" content of instruction (though these should always be prudently limited),

and so are rules to protect the interests of teachers as employees. Arbitrary and unjustified actions by school administrators are damaging to the morale of all teachers and undermine the status and attractiveness of the profession. But such interventions by government and by judges should always leave room for distinctive schools and for the exercise of professional judgment by teachers who have demonstrated that they are competent and reliable.

4 THE RIGHTS OF MINORITY GROUPS

Schools are one of the primary fields of action where minority cultural groups seek to vindicate their right to maintain and transmit their distinctive language and culture, and legislation often makes provision for this in the case of groups which are indigenous to the country, such as Basques, Catalans, and other regional groups in Spain. The Brazilian Constitution, in article 210 on school curriculum, makes provision that *Indian communities shall (...) be ensured the use of their native tongues and their own learning methods.*

Immigrant groups, by contrast, may be accommodated through programs of instruction that use their home language in a transitional manner, but this is seldom recognized as a matter of right; the assumption is that, since they chose to come, they are obligated to acculturate themselves to the host society.

Recognition of the importance of the languages used by children at home with their families is an enlightened policy, and there is some evidence (though it is by no means conclusive) that initial school instruction through those languages can facilitate more thorough subsequent mastery of the language of the host society. But, as with the other policy initiatives we have discussed, there are dangers associated with this approach.

Above all, measures to preserve minority languages should not work against equal access to more advanced levels of schooling; such language programs should not become a well-meaning dead end for minority pupils. Sometimes such measures are advocated by minority-group activists who have an interest in maintaining group distinctiveness, and may not reflect the desires of parents, who may be more concerned about future opportunities for their children.

In short, minority languages and cultures deserve respect, including those of immigrants, but policymakers should not be blinded by a romantic belief that they are likely to be maintained indefinitely, except when they have a territorial expression. Thus, in the United States, the Navajo language has better prospects of continued use because it has official status in a large geographical area than do other Native American languages which lack that advantage.

Realistically, a measure of cultural pluralism is best preserved by structural pluralism of the education system, often through alternative schools not operated by government, but sound policy will ensure that this functions within a context of common standards and government oversight, as for example is the case in the Netherlands and Belgium. This is essential to ensure that all children have an equal opportunity to learn those skills and that knowledge which are essential to function in the society, and also to identify and sanction schools that are not providing an adequate quality of instruction. A school which seeks to develop a religious perspective on the subjects in a national curriculum is an important expression of pluralism and the rights of conscience; a school which teaches only religious tenets and texts cheats children who will be living their religious commitments in a complex and demanding society.

It is important, however, that such standards and oversight permit alternative schools to be **equivalent** but not **identical** to the government's own schools. All too often, the framework of accountability squeezes "free" schools into conformity with state schools. But this, like the other topics, deserves a much more thorough discussion than we can give it here. In my book *The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies* (Princeton 2000) I deal with the dangers but also the possibilities of that relationship at some length.

5 CONCLUSION

I have left out many aspects of legislation and jurisprudence which deserve discussion and which I have dealt with elsewhere. To mention a few, these include: the rights of teachers – balancing job security with accountability; the rights of pupils – free speech and its limits; the rights of parents – both voice and choice;

schooling for national unity and citizenship – especially of immigrant children; balancing economic with humanistic goals of education; religion and education, both in public and in alternative schools; home schooling; 'deschooling' – cyberschools and other new developments.

The four examples, even though too briefly, serve to illustrate several important points about the role of legislators and judges in shaping educational policy: those who make and enforce educational policies should be aware of the changing and inter-related nature of education and its institutional expressions; they should recognize that, more than almost any other area of law and policy, education engages fundamental values on which there are divisions in society; they should remember that those who hold minority views about these matters deserve to be heard; thus policymakers should avoid seeking advice exclusively from those with a professional self-interest.

After all, education is everyone's business, because it shapes for good or ill our most precious natural resource, our children, and this engages all of our hopes for the future.

ABSTRACT

The author explores four major issues in education policy that affect many countries and outlines the importance and limits of legislation and jurisprudence addressing such matters

As he understands, there are academic achievement gaps and gaps in the distribution of funding for education both among nations and also within each one, and he mentions other problems, as the difficulty in implementing policies to ensure the quality of schooling, with competent teachers, as well as to preserve the rights of minority groups.

Further on, he analyses measures taken by some governments to lessen such gaps and emphasizes that the discussed examples serve to illustrate several important points about the role of legislators and judges in shaping educational policy, once education itself will shape for good or ill our most precious natural resource – the children.

KEYWORDS – Education Law; 1988 Brazilian Federal Constitution – articles 210 and 206; academic achievement; cultural pluralism; minority group; school; teacher; pupil.

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