

Part 6

Research Education: Developing Globally Competent Researchers for International and Interdisciplinary Research

JOHAN BECKMANN & JUSTUS PRINSLOO

DEVELOPING EDUCATIONISTS AS GLOBALLY COMPETENT EDUCATION LAW RESEARCHERS FOR INTERNATIONAL INTERDISCIPLINARY RESEARCH: A SOUTH AFRICAN PERSPECTIVE

Introduction

Education law: An unknown quantity?

The hybrid field of scholarly inquiry to which we will refer as education law for convenience sake is by no means universally known as an academic discipline and as a separate field of law. It enjoys noteworthy recognition as a discrete field of academic enquiry in the law in a limited number of countries including the United States of America, Canada, Australia, New Zealand, England, South Africa and some European countries. This recognition does not imply that it is taught and researched at all higher education institutions in these countries. It also does not imply that all educators and jurists are equipped with the knowledge and skills needed they need to have to apply the law correctly in the field of education. This hesitant recognition of this field of enquiry is clear from the literature and is also suggested by the fact that it carries different designations such as education and the law, education law, school law and even education policy and law.

Some hybrid fields of study can develop into fully-recognised separate areas of study. Both the principles of law (in particular the common law) as well as those of education are rooted in the origins of all human sciences. Even a cursory glance at the principles underpinning education shows a remarkable resemblance to the principles of the common law. For example, both disciplines emphasise the best interests of the child as a learner and the dignity of all human beings including children. When legal principles are applied in the field of education, they do not become educational principles but remain legal principles and constitute the body of knowledge and law that is known as education law. In a particular field of knowledge hybrid separate fields of study can and do develop. In law maritime law, military law and medical jurisprudence are examples of hybrids that have developed into fully-fledged separate fields of law. Similarly the area covered by “education law” has developed into a separate law discipline. It goes without saying that an educationist doing education law research should be cognizant of the above.

The status of education law in South Africa

The study of human endeavour where education and the law have to function in a relationship with each other is not universally acknowledged as a law discipline. In 2007 Mawdsley and Visser, two eminent jurists from the United States of America and South Africa respectively, published the findings of their investigation into the development of education law as a discrete law discipline in South Africa.

In their article Mawdsley and Visser (2007, p. 155) state that, for any field of activity to be recognised as a (hybrid) discipline or a partial discipline of established and recognised fields of enquiry, certain criteria need to be met. They list some of the criteria and apply them to education law in South Africa and conclude that, insofar as the criteria that they quote can be applied in South Africa, “a critical mass” has probably developed in South Africa. However, they also believe that education law is still in its infancy in South Africa compared with among others the United States of America and Europe (Mawdsley & Visser, 2007, p. 161).

Education law is a relatively young field of study not only in South Africa (Stone, 1981). This lack of appreciation also obtains in the rest of the world.

The very nature of education law implies a peculiar and sometimes uneasy or even hostile relationship between education and the law, including relationships between educationists and jurists. This relationship is often likened to a marriage of convenience but perhaps one should rather look to the metaphor of a dance to understand the relationship between education and the law better. A dance implies a constant change of position and a degree of tension and we believe that the implied tensions between educators and jurists and between education law and other law disciplines to which we allude are not necessarily detrimental to the further development of education law.

Definition

We suggest that, in our consideration of education law, it should be understood as the particular collection of legal rules that regulate all activities and relationships in education. These legal rules as applied in education are derived from various sources such as legislation, common law and case law.

Why is education law research necessary?

The law forms a framework within which all actions and relationships in education have to reside in order for them to be legal. This framework is constructed from legal principles and determines what may (is allowed) or may not be done (is not allowed) in education, what can or cannot be done (prohibited) and what must be done (is peremptory) and what must not be done (is prohibited). Staying within the framework ensures immunity from the law and affords protection of rights and freedoms and facilitates harmonious interaction in a specific setting. Dworkin (1986) argues that the role of the law is to act both as a sword and shield and this resonates with the nature of education law.

Education law being of a hybrid nature means that both its mother disciplines namely the law and education have to be explored to contribute the knowledge (with its concomitant skills, attitudes and values) needed for the field to assert itself as an independent discipline. Being able to unearth and integrate knowledge from two discrete fields requires a unique set of skills in a single researcher or a committed joint effort by two or more researchers. Because education law as a relatively new

field of academic interest, a great deal of basic and applied research will have to be done to develop its knowledge and skills bases.

Education law requires concerted and sustained research efforts by both jurists and educationists to develop the base for its scientific recognition. This becomes evident from a number of considerations among others that there is no comprehensive textbook on education law that covers the entire field. There are a number of publications which cover aspects of the field but there is no coherent overview of the field. Researchers' work is compounded by a lack of publication opportunities demonstrated among others by the fact that there is no scholarly journal dedicated to education law in South Africa. Researchers therefore have to publish overseas or in journals that do not specialise in education law. Occasionally South African law and education journals have published special editions on aspects of education law, for example, *Perspectives in Education* (2004), *De Jure* (2013), *Journal for Juridical Science and Southern African Public Law* (2013). The South African Education Law Association (SAELA, formerly known as the South African Education Law and Policy Association, SAELPA) has published some conference volumes after some of its annual, international conferences (for example Beckmann, 2006) and the Inter-university Centre for Education Law and Policy (CELP) has published a number of handbooks on areas of education law such as learner discipline in schools and public school governance (CELP, 2015).

Why is education law research challenging?

It is possible that educationists may think that they are the only people qualified to do research on educational matters while jurists might think that they have sole ownership of the right to do research on aspects of the law. In the above paragraphs it was suggested that the relationship between education and the law as embodied in the academic field of education law is challenging and is characterised by tensions. The fact that the relationship between educators and lawyers is not always harmonious and smooth also permeates and impedes the field of education law research. Access to participants or respondents is compromised by the proven lack of knowledge of education law of education officials and managers which results in their being hesitant to make available information which might point to incompetence on their part.

The competence to do quality research involving the harnessing research methods and approaches in two discrete disciplines is not easy to acquire. Although the value of knowledge of education law seems to be recognised by the majority of role players in education, authentic cooperation between educationists and jurists in most of research projects in education is still to materialise. In sum, educators might want to do research on aspects of the law but do not necessarily have the skills for such work while lawyers might also want to focus on aspects of education management in particular but may lack sufficient and suitable knowledge and skills.

Most of the research done in the field of education law tends to be skewed being carried out either by educationists with little applicable knowledge of, and skills in law or by lawyers with insufficient knowledge of, and skills in education. At the moment there is little cooperation between jurists and educators in education law research and the methodology employed tends to belong exclusively in the field of human sciences (namely education) or law.

Educationists are almost invariably forced into using “traditional” human sciences research methods based on a qualitative approach to research. The need for qualitative research by educators on legal and policy issues in education need not be argued. Doing multi-discipline education law research will allow researchers to acquire a variety of skills, knowledge sets, attitudes and values which will equip them better for research in this area. It also appears that the research which focuses on positive law (in particular the rights and duties of different role players) tends to avoid engaging with the social and political implications of aspects of education and the law such as access to education and the curriculum (which does not seem to match the demands of the technological and knowledge era) (Beckmann, 2015, p. 13).

The need for globally competent education law researchers

Getting a grasp of education law in South Africa is not easy. In addition, Section 39 (1) of the Constitution of the Republic of South Africa of 1996 (Republic of South Africa, 1996) provides that:

When interpreting the Bill of Rights, a court, tribunal or forum:

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

This section suggests that more than a grasp of South African education law is imperative for local education law researchers. The constitution suggests that any educationist who does research on education law has to be able to integrate relevant international law into his/her knowledge of education law and must also be able to consider the possible influence of foreign law when analysing and interpreting aspects of education and the law. However, this does not mean that all international law such as conventions and charters apply to South Africa automatically. Section 231 of the constitution (Republic of South Africa, 1996) provides among others as follows:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces...

Ideally an education law researcher should be conversant with international (and some foreign) law as well as with the contents of international instruments such as conventions and charters but should also know which of them apply in South Africa. This will protect them against incorrect interpretations of the law and increase the quality and trustworthiness of their research.

Globally competent researchers should therefore be abreast of international and foreign law and to its application and power in their own countries.

Training and research in education law: Current state of affairs

Education law training resides largely in the former Afrikaans language universities as well as in the distance education institution of higher education, the

University of South Africa (UNISA). Moreover such training (including in-service training) is offered largely by faculties of education. This already suggests a problem that has to be overcome namely a lack of interest on the part of jurists and faculties of law (in particular in former English medium institutions). A further problem is that some scholars confuse law and policy. Some believe that law and policy are the same thing or even that policy is law. Some even believe fallaciously that law is subservient to policy and that policy can amend law – this amounts to a misapprehension of the roles of law and policy in education (as well as the interaction between them). This misapprehension may subvert the rule of law and mislead researchers.

Currently, research on education law is mostly done by educationists (lecturers attached to universities and postgraduate students) who are almost invariably forced into the strait-jackets created by the “traditional” research in human sciences and education namely the qualitative, quantitative and mixed methods approaches. These methods may be useful in the collection of data on education but have limitations regarding research involving the law that applies to education.

Another serious challenge to educationists who want to do research in the area where education and the law converge is that methodology handbooks are almost without exception written for researchers in the human sciences. In South Africa educationists who desire to learn more about research methodology in law have one standard reference book namely *Legal research, method and publication* (Venter, van der Walt, van der Walt, Pienaar, Olivier & du Plessis, 1990). This book includes sections that deal with types of research that might be useful to educationists doing education law research namely comparative legal research and historico-legal research. However, having studied and taken cognizance of this information does not necessarily mean that an educationist is qualified to, or competent in using methods in law research. As far as could be ascertained, there is only one book on research in the field of education law namely *Research methods for studying legal issues in education* (Mawdsley & Permuth, 2006). The fact that this book is meant for education law researchers in the United States of America limits its value for South African education law researchers to some extent.

A potential educationist education law researcher working at postgraduate level is faced by another obstacle namely that it is difficult to find educationists able to supervise research that is essentially legal in nature. Similarly, there are not many of supervisors in the field of law who can confidently supervise research executed in the field of education.

However, jurists are on occasion invited to be external examiners for students from the field of education who engage in research that includes a legal perspective. The opposite of this is also true. At the moment co-supervision of postgraduate students working on education law issues by jurists and educationists seems to be the exception rather than the rule.

The target group for the development of globally competent educationist education law researchers

If South Africa aspires to produce globally competent researchers for international and interdisciplinary research on education law, clarity has to be obtained on who the target group of such development should be. In this paper we

deal with researchers whose are educationists and who need to become competent in education law research.

Our paper concentrates on researchers primarily qualified in and working in education. Within the field of education postgraduate students at *magister* and doctoral level and staff at universities are likely to form the nucleus of the suggested group of globally competent education law researchers. Other agencies like parastatal research bodies, education authorities and teacher unions could also contribute to the development of a cohort of education law researchers as contemplated but they are not likely to be dominant in such a group.

Development strategy

It should be evident that the current training of educationists as education law researchers is not likely to produce researchers that will comply with the demands of global competence and international inter-disciplinary research. Ideally such a researcher should have an advanced formal qualification in either law or education and a formal qualification at a suitable level in the other. Reaching this ideal is not reasonably feasible in the foreseeable future and we therefore propose that a suitable development strategy should comprise:

1. Establishing training programmes for education law researchers at universities and recruiting suitable candidates in association with interested parties.
2. Equipping education law researchers in training with skills and competencies to understand and interpret relevant law.
3. Involving both educationists and jurists in the training of education law researchers and in developing suitable training programmes. The South African Education Law Association (SAELA) and the Interuniversity Centre for Education Law and Policy (CELP) might be suitable platforms from which to launch initiatives in this regard as both of them comprise jurists and educationists.
4. Including selected themes from education management programmes in education faculties (such as learner discipline and governance), from the training of jurists in law faculties (such as labour law, the interpretation of statutes, constitutional law, the law of delict) and from other relevant disciplines such as political science in a programme aimed at developing researchers that can contribute knowledge and skills to the development of the hybrid discipline known as education law. It is evident that there should be training in research methodology pertaining to both fields.
5. Fostering the ability to identify the legal underpinnings or dimensions of problems in education.
6. Deliberately exposing students to a selection of international education law experts among others through lecturer and student exchanges, conference attendance and postdoctoral fellowships.
7. Emphasising the development of skills to do work in interdisciplinary research teams.
8. Fostering an ability to establish and maintain international academic networks.

9. Developing an appreciation of the fact that the problems concerning education in South Africa are not totally unique and that the information era and modern communication technology have linked all nations and opened up the possibility of international co-operation in virtually all fields of human endeavour including research on possible responses to challenges.

Conclusion

The global village “interconnected by an electronic nervous system” as foreseen by Marshall McLuhan (Livinginternet.com, 2015) has truly arrived and research undertaken in isolation and not taking cognizance of what pertains in other countries limits its potential to contribute significant knowledge towards understanding and possibly solving perennial challenges in education. John Donne’s words (Online-literature.com, 2015) that no “man [researcher] is an island, entire of itself; ...” are truer now than ever before. For the sake of its children, its education system and the wellbeing of the country itself, South Africa has no choice but to endeavour to develop globally competent educationist education law researchers able to participate meaningfully in international interdisciplinary research and remedy the present deficiencies in education law research. Hopefully the development strategy that we suggest will expeditiously contribute to a marked increase in the number of such researchers in South Africa and enhance their impact on society at large.

References

- Beckmann, J. (2013): *Understanding Educational Challenges by Asking Legal and Educational Questions: The Quality of Mathematics Teachers in South Africa*. Draft contribution for a *Festschrift* for Prof J Neethling.
- Beckmann, J. (Ed.) (2006): *Engaging the Law and Education in a Transforming Society: A Critical Chronicle of SAELPA: 1996 – 2005*. Pretoria: SAELPA.
- De Jure* (2013): 46(2).
- Dworkin, R. (1986): *Law’s Empire*. London: Fontana Press.
- Interuniversity Centre for Education Law and Policy (2015): <http://www.celp.co.za/publications/printed-books>. Accessed 3 March 2015.
- Journal for Juridical Science* (2010): Special issue 2010.
- Livinginternet.com. (2015): Marshall McLuhan Foresees the Global Village. http://www.livinginternet.com/i/ii_mcluhan.htm. Accessed 3 March 2015.
- Mawdsley, R. & Permuth, S. (Eds.) (2006): *Research Methods for Studying Legal Issues in Education*. Dayton, Ohio: Education Law Association.
- Mawdsley, R. & Visser, P. (2007): The development of education law as a separate field of law: the experience of the United States with some observations on South Africa. *Journal of South African Law*, (1), 153-161.
- Online-literature.com. (2015): John Donne Meditation XVII. <http://www.online-literature.com/donne/409>. Accessed 3 March 2015.
- Perspectives in Education* (2004): 22(3).

- Republic of South Africa (1996): *Constitution of the Republic of South Africa of 1996*. Pretoria: Government Printer.
- Southern African Public Law* (2010): 27(2).
- Stone, H. (1981): *Gemeenskaplikheid en Diversiteit ('n Profiel van die Vergelykende Opvoedkunde) [The common and the diverse (A Profile of Comparative Education)]*. Johannesburg & New York: McGraw-Hill Book Co.
- Venter, F., van der Walt, C., van der Walt, A., Pienaar, G., Olivier, N. & du Plessis, L. (1990): *Regsnavorsing: Metode en Publikasie [Legal research: Method and Publication]*. Cape Town: Juta.

Prof. Dr. Johan Beckmann¹
University of Pretoria
Research fellow, North West University
South Africa
johan.beckmann21@gmail.com

Justus Prinsloo, Research fellow
North West University
South Africa

¹ As an NRF Incentive Funding grant holder the grant holder acknowledges that opinions, findings and conclusions or recommendations in any publication generated by the National Research Foundation supported research are those of the author and that the NRF accepts no liability whatsoever in this regard.