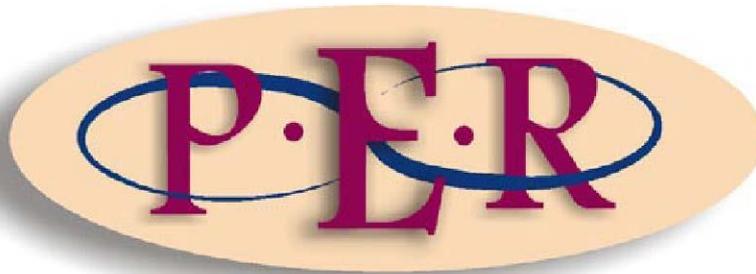


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AND THE LAW IN SOUTH AFRICA SOME PERSONAL OBSERVATIONS
FROM TWO VANTAGE POINTS**

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**A DANCE OR A MARRIAGE? THE RELATIONSHIP BETWEEN EDUCATION
AND THE LAW IN SOUTH AFRICA***
SOME PERSONAL OBSERVATIONS FROM TWO VANTAGE POINTS**

J Beckmann***

1 Introduction

In an article in *TSAR* 2007 Mawdsley and Visser,¹ two eminent jurists from the United States of America (USA) and South Africa respectively explore the development of education law as a discrete field of inquiry in the law. They conclude that, insofar as the criteria they mention can be applied in South Africa, a critical mass of knowledge about the field has probably developed. They propose that education law can be recognised as a discrete field of study, even though it is still in its infancy in South Africa compared with the situation in the USA and Europe, for instance.

Two or more fields of inquiry may be applicable to the work done in a specific area. Normally a relationship between the fields of enquiry develops and it can vary in nature from harmonious cooperation to tension and intense conflict. One could describe such a relationship as a dance with some moments of nearness and some moments of tension.

In some instances hybrid fields of study develop from the two or more of fields of inquiry which are applied in a specific profession or research focus. Such hybrids can develop and be accepted as full and independent fields of inquiry in a particular area of study. Examples of such hybrids are maritime law, military law and medical law.

** My comments are derived from my involvement with the South African Education Law and Policy Association (SAELPA) and the Interuniversity Centre for Education Law and Policy (CELP). I was the first chairperson of SAELPA and the first Director of CELP and remained a member of their executives for approximately fifteen years. I do not claim to have studied the relationship between the law and education in depth and in its entirety for that would be a presumptuous claim for someone of my training and academic background. However, I have observed aspects of the relationship from two specific vantage points and it is these observations I want to share with relevant role players. To my mind, a closer relationship between education and law practitioners is essential for the improvement of the education system.

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¹ Mawdsley and Visser 2007 *TSAR* 153.

"Education Law", as described by Mawdsley and Visser, aspires to the recognition of its status as a discipline of law. It would be wrong to argue that the study of human activity in the area where education and the law necessarily have to function in conjunction with each other is universally recognised as an area of law study. This fact is apparent from the literature and the various ways in which this field is described, such as education and the law, education law, school law and even education policy and law.

In this contribution, and based on his personal involvement in developments in this regard in South Africa from 1981 onwards, the author presents personal and other observations on the relationship between education and the law within the context of education. The metaphor of a dance is used to portray the relationship. To a certain extent the author revisits the article of Mawdsley and Visser and proposes further thoughts for consideration in this regard, also with regard to an exploration of relevant literature.

2 The beginning of the dance

As recently as in the 1980s people started exploring the area where education and the law as academic fields of enquiry in South Africa appear to overlap. 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. Some of the criteria are set out in an article by Mawdsley and Visser.²

In this paper, I want to share observations from specific vantage points on the developing relationship between education and the law, including relationships between educationists and jurists. This relationship is often likened to a marriage of convenience, but it seems to me that it oscillates between a courtship dance and a marriage. A dance implies a constant change of position and a degree of tension. It was only after I had read the paper on which this contribution is based at a conference³ that Prof TK Daniel of Ohio State University in the USA pointed out to

² Mawdsley and Visser 2007 *TSAR* 153.

³ Of the South African Education Law Association (SAELA), held at Glenburn Lodge near Krugersdorp in Gauteng.

me that the metaphor of a dance had already been used to depict the relationships between various disciplines. A draft article he made available to me after the conference⁴ does not seem to provide conclusive proof that the metaphor of a dance had been used before. However, the notion of a marriage is evident in the draft article.

3 Content of this paper

I propose to trace the beginning of the dance in South Africa, as well as its progress and development. I will examine local and international evidence relevant to the relationship between education and the law and conclude by offering a personal opinion on the current state of the relationship in South Africa. I will also make some suggestions for future practice and research.

For the sake of convenience, I will refer to the so-called marriage of convenience between education and law as "Education Law". I will use related nomenclature when I refer to the common ground between education and the law. This does not rule out concerns about the status of "Education Law".

4 The beginning

Unlike in the USA and parts of Europe, education law is a relatively young discipline in South Africa. In 1981, Stone⁵ wrote that the value of education law was appreciated only in limited circles. It appears to me that the appreciation has not grown appreciatively since then. Education law seems to be alive and well in some (mostly former Afrikaans) universities and specifically in faculties of education, while it is struggling to find a firm foothold in faculties of law. It is not prominent in faculties of law and education at South Africa's traditionally English-medium universities.

Before SAELPA and CELP were formed in 1996 and 1997 respectively, there was a fairly lively debate about whether or not education law in South Africa could be

⁴ Daniel "Principal's Role".

⁵ Stone *Commonality and Diversity*.

identified as a field of law *eo nomine*. Prinsloo and Beckmann,⁶ Van der Westhuizen and Oosthuizen,⁷ Oosthuizen and Beckmann⁸ and Van Wyk⁹ were among those who contributed to the debate and it seems that Oosthuizen and Beckmann's conclusion¹⁰ in 1998 summarised the position fairly accurately:

In South Africa, Educational Law¹¹ has made significant progress since Van Wyk's pioneering efforts. A group of educators and lawyers are devoting much time to its purposeful development. ... It is hoped that initiatives such as SAELPA and CELP ...will be able to accelerate the development ...

Thus, there was no agreement in South Africa that education law existed as a discipline by that name.¹² The fact that these two entities, namely CELP and SAELPA, were formed and carried the element "education law" in their names signalled the start of concerted efforts to advance the development of such a discipline of the law.

In a seminal article, Mawdsley and Visser suggested that:¹³

Determining whether a new field of law needs to be recognised depends on the convergence of at least four factors: (a) a critical mass of existing legal material that has a common core; (b) a reasonable prospect that the rate of production of material in this common core is sustainable; (c) a recognition that failure to place the common core within its separate field could result in the conveying of fragmented, disjointed, and/or inaccurate information; and (d) "consumer" interest in, and demand for, a unified and separate source of information about the field.

They also contended that Education Law leads to "outputs that can be applied in the operation of schools".¹⁴

Mawdsley and Visser¹⁵ elaborated on the outputs to which they referred and proposed that:

⁶ Prinsloo and Beckmann *Education and the rights and duties of parents, teachers and children – an introductory orientation*.

⁷ Van der Westhuizen and Oosthuizen 1989 *SAJE* 743.

⁸ Oosthuizen and Beckmann 1998 *Australia & New Zealand Journal of Law & Education* 61.

⁹ Van Wyk *Onderwysreg*.

¹⁰ Oosthuizen and Beckmann 1998 *Australia & New Zealand Journal of Law & Education* 71.

¹¹ In South Africa it is not common to refer to "educational" law. Most writers prefer "education law". The journal is published in Australia.

¹² I refer to authors who wrote about the question as to whether a separate field of law by the name of "education law" existed. Many people have written on education law issues since the inception of CELP and SAELPA, and I acknowledge their contributions.

¹³ Mawdsley and Visser 2007 *TSAR* 155.

¹⁴ Mawdsley and Visser 2007 *TSAR* 158.

¹⁵ Mawdsley and Visser 2007 *TSAR* 158.

These outputs presuppose at least two sets of consumers: one set that studies and assimilates case, common and statutory law and distils from them principles and requirements applicable to education. A second set of consumers operationalises those principles and requirements within schools. The first group of consumers would normally be identified as law-trained persons skilled in interpreting the standard areas of law and extracting legal principles from new case law and statutes applicable to education, while the second group of consumers (skilled in pedagogy) must apply those principles to the management of schools. Although the functions of these two groups of consumers tend to suggest a sequential relationship, namely that educational practitioners look to lawyers for guidance (principles and requirements), the increased legal awareness in the United States [and South Africa]¹⁶ of non-law-trained education practitioners through coursework and continuing education tends to make the relationship more of a tandem partnership.

These two sets of "consumers" (the law-trained ones and the educational practitioners) have interacted in the activities of both SAELPA and CELP. I am firmly rooted in the work of the second set of consumers and believe that the boundaries between the two sets should never become totally obscured although synergy between them is highly desirable. The synergy should also, in my opinion, be a natural one, as both disciplines aim at realising the principles of justice and fairness, which principles are prerequisites for education to play its required role in society. The dance of these two disciplines should be a harmonious one. This is often not the case.

After considering the South African situation, Mawdsley and Visser were of the opinion that, when the South African developments are evaluated against the four criteria listed earlier, it may be concluded that a "critical mass" has probably developed. It could also be concluded that the other requirements for the recognition of "Education Law" as a distinct legal discipline had been met or were being met.¹⁷ They added:

For reasons of legal theory and practical expediency, it thus makes perfect sense to acknowledge 'education law' in South Africa – although it may in some respects still be in its infancy when compared with, for example, the position in the United States and Western Europe.¹⁸

¹⁶ Author's insertion.

¹⁷ Mawdsley and Visser 2007 *TSAR* 161.

¹⁸ Mawdsley and Visser 2007 *TSAR* 161.

This conclusion by eminent jurists from two continents may have seemed to finally resolve the debate about education and law in South Africa. However, it seems to me that, while acknowledging that the law plays a positive regulatory role in education and that it helps to ensure fairness and justice in education, one should not view the relationship between education and the law as unproblematic.

5 A view from Europe

Wielemans, an eminent Belgian comparative educationist and a former member of the editorial board of the *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* (TORB) (*Journal for Education Law and Education Policy*) in Belgium wrote a thought-provoking contribution to the *Festschrift* commemorating the work of Prof Raf Verstegen.¹⁹ Verstegen was a pre-eminent exponent of education law in Europe during his career in the Faculty of Law at the Catholic University of Leuven, and also distinguished himself as the Dean of the Faculty for a time.

In his contribution Wielemans²⁰ discussed the interaction between educators and jurists, as well as between education and the law. He made the following points that are relevant to a discussion of the development of education law in South Africa:²¹

- (a) His interaction with jurists on the editorial board of the TORB was an enriching experience for him, but in his opinion, the unique editorial mixture of law and education did not always automatically lead to cooperation.
- (b) Discussions were sometimes dominated by inspiring confrontations.
- (c) The marriage of convenience between education and law was often plagued by tiffs and there was seldom any fiery love between the two.
- (d) Although educationists can often build on solid juridical foundations, the law sometimes constrains education renewal.

¹⁹ Geens *et al Ad Amicissimum*.

²⁰ Wielemans "Onderwijsrecht" 378.

²¹ Translation of Wielemans's ideas by the author.

- (e) In centralist countries with detailed education regulations, it is hard for educational diversity to flourish. Jurists tend to guard "normality" and condemn "deviations".
- (f) Jurists and educationists tend to agree on "the big picture", such as fundamental human rights, more specifically, the rights of the child. The law expects education to induct children into the existing social order. In this regard, the law and education cooperate happily. However, the understanding between the law and education diminishes when critical questions are raised about the assumptions of the social order, for instance, about what role the education system should play in the national economy.
- (g) The commitment to and enthusiasm for the regulation of education lead to the diminishing of educational responsibility in society. The more a school is viewed as a business and education as an industry, the more they will need to be regulated in terms of the notion of new managerialism. The more education displays the characteristics of an educational community (family), the less it will have to be regulated.
- (h) The roles of educators, adults and young children are "reduced" respectively to those of teachers and learners while they are essentially adults educating humans becoming adults. As educators and learners seek to break away from these roles in the process of education and growing up, education law is called on to create rules to counter and control the conflict so that the process and system can still be controlled. Thus, the law is administered as a kind of medicine for an ailing system.

Education law cannot be independent of education and it must serve the psychological and physical wellbeing of the youth. This will serve the mutual understanding of jurists and educators well in their forced marriage.

I will now discuss the origins of SAELPA²² and CELP against the backdrop of the possibility raised by Wielemans that the sometimes problematic relationship between education and the law, and the likelihood of the dance of the disciplines (sometimes a war dance at arm's length and sometimes a freer and closer dance) will continue in the foreseeable future.

6 SAELPA

During 1995 a group of Dutch and Belgian scholars from the European Education Law Association (ELA), the Belgian Education Law Association, the Dutch Education Law Association, the Interuniversitair Centrum voor Onderwijsrecht (Inter-university Centre for Education Law and Policy) (ICOR) in Antwerp, and the editorial boards of the education law journals published in those two countries visited South Africa. Their espoused aim was to be involved in the promotion of democracy in education after 1994. They sought contact with South Africans working in "the field".

The delegation included eminent jurists like Prof Jan de Groof (University of Antwerp and Government Commissioner for the Flemish Universities), Prof Piet Akkermans,²³ famous Latinist, jurist and Rector Magnificus of Erasmus University in Rotterdam, Prof Andries Postma of Groningen, Deputy Speaker of the Dutch Parliament, as well as Prof Johan Heene, an educationist from Gent. A result of their meetings with South African academics was that a meeting of interested parties in education law was convened with a view among other things to possible South African-European cooperation in this regard. The meeting took place in Pretoria on 17 October 1995 and issues relating to education law were discussed. Each of the guests from abroad read a paper. At the end of the meeting, a steering committee (with myself as convener) was formed to prepare the way for the formal establishment of SAELPA. We experienced the enthusiastic support and cooperation of the delegates and were promised more support. This agreement was formalised through the drafting of a memorandum of agreement which was signed by the steering committee and the

²² The "P" was later dropped from the acronym when the organisation was re-formed as the South African Education Law Association (SAELA).

²³ He sadly passed away in 2003 while serving as the Rector of the College of Europe in Bruges.

Dutch / Flemish delegation. Dr Jan Heystek²⁴ agreed to be the secretary of this steering committee.

The steering group comprised people such as Prof Sarie Berkhout, Prof Elmene Bray, Prof Johan Potgieter, Prof Hans Visser, Prof Rassie Malherbe, Prof Izak Oosthuizen and Prof Anita van der Bank, as well as Dr Jan Heystek, Dr Lourens Kriel, Dr William Ndlala and Adv Justus Prinsloo. The steering committee co-opted members such as Mrs Rika Joubert, Mr John Pampallis, Mr Arnold Maimadi, Mr Steward Mothatha and Mr Yusuf Sayed. This was a capable group of English- and Afrikaans-speaking educators and jurists with a good racial spread. The nature of the activities and relationships within the committee was characterised by selfless dedication and commitment and cordial, yet robust and rigorous interaction between jurists, educationists and school principals.

At the end of 1995 Prof Johan Potgieter, a private law specialist at the University of South Africa (UNISA), and I were invited to attend the ELA conference in Bremen, Germany, and to visit the ICOR at the University of Antwerp. We met many jurists and educationists from various European countries and gained insight into the functioning of ELA and ICOR.

We returned from Europe and the steering committee organised the first SAELPA conference in Rustenburg, North West. Mr Justice Kriegler, who was a member of the Constitutional Court at the time, was the keynote speaker. During this conference SAELPA was formally established. Its constitution, which was drafted by the late Prof Hans Visser, was adopted and an executive committee was formally elected. I accepted the role of chairperson, on the condition that the chairpersonship would be rotated every two years.

Although some donations helped considerably, SAELPA had to be self-sufficient from the outset. Prof De Groof found a publisher in Belgium and the volume of the papers presented at the 1996 conference was printed in Belgium, as were the next four conference volumes. In recognition of his help he was made an honorary member of

²⁴ He is now a research professor in education at North-West University.

SAELPA and was presented with a certificate of commendation for being SAELPA's "godfather"— a title that he was rather taken with.

I stepped down as SAELPA's Chairperson after the first two conferences. I was succeeded by Prof Elmene Bray, who was followed by Prof Joan Squelch, Prof Moss Thulare, Dr Ken Alston, Prof Elda De Waal and Prof JP Rossouw (not necessarily in that order and not necessarily the only chairpersons).²⁵ During the first few years, we built solid and lasting relationships with, among others, education law specialists from Australia, Belgium, Canada, England, Germany, Ireland, New Zealand, Norway, the Netherlands and the USA. We attended conferences organised in these countries and they attended conferences in South Africa. We wrote joint articles and conducted joint research.

It was noticeable that the assemblies of education law practitioners at these conferences were normally dominated by jurists. The Canadian conferences approached a more equal representation of jurists and educationists, while the South African conferences were generally better supported by educationists than by jurists. It is possible that the varying mixes of jurists and educationists at education law conferences could be symptomatic of or a reason for the apparent tension between jurists and educators.

In 2005 the first World Conference of Education Law was held in Amsterdam and other Dutch cities. The conference attracted delegates from Albania, Brazil, China, Finland, France, Greece, Russia, Malaysia, Spain, Poland, Portugal and the Czech Republic, among other countries. The second World Conference was held in Brussels in 2012. Both conferences led to formal peer-reviewed conference proceedings.

7 CELP

Having visited ICOR in Antwerp in 1995, Prof Johan Potgieter and I were convinced that we needed a similar mechanism to promote and speed up the development of education law in South Africa to support the new constitutional dispensation. The late Prof Hans Visser drew up a draft founding document. A steering committee

²⁵ Somewhere along the way, the title was changed from Chairperson to President.

comprising jurists and educationists from UNISA and UP thoroughly analysed and discussed this document, which was modelled on the structure of a foundation. We then discussed the document with both principals at the time (Prof Johan van Zyl of UP and Prof Marinus Wiechers of UNISA). We also consulted with the deans of the faculties of law at the time (Prof Dawid Joubert of UP and Prof Johan Neethling of UNISA), as well as the deans of the faculties of education (Prof Michael Bondesio of UP, who played a special advocacy role in the process, and Prof Lawry McFarlane of UNISA). All of these role players approved the project. UP offered office space and the use of its financial management system. Both UP and UNISA released some funds which could be used to start CELP and help it promote education law research and training.

CELP was formally launched in February 1997. Mr Justice Kriegler was the keynote speaker once again, and he said that South Africa had needed an organisation like CELP for a long time. The principals of the two founding universities signed the founding documents in which the two institutions undertook, among other things, to give CELP all possible assistance. The University of Fort Hare, Stellenbosch University, the University of Johannesburg, the University of the Free State and North-West University joined later.

CELP has two governance structures. A board, which is led by a member of the management of the faculty of education or law of either UP or UNISA on a rotation basis, has oversight and control over CELP, while the executive director and the executive committee handle CELP's day-to-day affairs. Prof Johan Neethling was the first chairperson of the Board and I was the first director, followed by Prof Rika Joubert. Prof Melodie Slabbert is currently the chairperson of CELP.

CELP has engaged in contract research and training for various education departments, as well as other authorities and agencies. It has also published several monographs on aspects of education law. These have been widely used in university education, leadership and management development, as well as in initial teacher training. The organisation started gaining ground when Prof Rika Joubert joined the

staff. She secured training programmes and helped prepare publications that could be used in education law training programmes at various levels.

CELP staged its first high-level international academic conference in 2012, and the papers from this conference were recorded in a special edition of the journal *Southern African Public Law*. The conference focused on the interpretation of the SA Constitution in Education. The conference made an invaluable contribution to the study of the law and education in the context of relevant constitutional provisions and both educationists and jurists presented papers that examined aspects of the conference theme.

8 The contribution of SAELPA and CELP to the development of education law

As noted, the late Prof Hans Visser was the main architect of the original founding documents for SAELPA and CELP. He did the same for the Education Management Association of South Africa (EMASA) and the Centre for Child Law at UP, both of which are still fully operational and whose work complements that of SAELA and CELP. The idea was that SAELPA would focus its attention on an annual members' conference and on a subsequent publication, while CELP would be the research and training engine for education law.

9 SAELA

Despite a lack of sponsorship, SAELA has managed to hold an annual conference every year since 1996. SAELA has also published quality papers in reputable conference volumes and accredited scholarly journals (which have, on occasions, made available space for the publication of articles based on papers read at SAELA conferences – *De Jure*, *Southern African Public Law* and *the Journal of Juridical Sciences* are cases in point). South African scholars interested in education law have in all instances served as guest editors of these journals. SAELA has regularly hosted a number of visitors from abroad. Since its establishment, SAELA has tried to involve political and bureaucratic role players in its proceedings, and there has been some success in involving Ministers of Education and Heads of Education Departments.

Some of the practices that originated in SAELPA's early years are the following:

- a) publishing the bi-annual electronic journal *Sui generis*;
- b) commenting on draft legislation and policy;
- c) involving more jurists and school-level practitioners.

CELP has engaged in contract research and training for various authorities and agencies. It has also published six monographs on aspects of education law and has regularly updated them. These have been widely used in universities in education leadership and management development and in initial teacher training. In addition, CELP has published an authoritative book on Public Schools Governance as well as a book on International Education Reform and Quality Education.

What is noteworthy and has not been mentioned in this paper so far is that the existence of CELP and SAELA directly and indirectly led to the introduction of LLB modules in education law as well as to master's and honours degrees specialising in education law.

10 The future: Some thoughts for consideration

I believe that the dance of the disciplines will continue. As South Africa is not immune to global trends, a residual degree of tension between education and the law, as well as between education and law scholars, can be anticipated. I believe that education law's two parent disciplines of education and law should both retain and expand their roles, so that education can benefit from their joint efforts.

Possible impediments to the marriage include the possible belief of some jurists that educationists are intruding on their terrain. There is a lack of publication opportunities because law and education journals are not always comfortable with publishing material that displays the hybrid nature of the subject. The development of education law is further impeded by the fact that there are too few universities engaged in the field (about seven of the more than twenty higher education and training institutions in South Africa). Other factors that impede the development of education law are the relative lack of interest on the part of universities' law and

education faculties, the lack of publication opportunities and the apparent ignorance or even denial on the part of educators and education administrators of the necessity of a sound knowledge of the law as it applies to education.²⁶

11 Recommendations

Those involved in the development of education law might well consider issues such as the following:

- a) In the context of Education Law, how can the apparent gap between historically Afrikaans- and English-medium higher education institutions, as well as with the historically disadvantaged institutions, be narrowed or bridged?
- b) How can SAELA and CELP be more involved in designing and carrying out research nationally and internationally?
- c) How can the effectiveness of the printed and electronic output of the work of SAELA and CELP be optimised (including the possibility of a dedicated electronic education law journal)?
- d) How can educationists and jurists develop a deeper sense of partnership and a joint responsibility?

12 Conclusion: An impossible dream within the realms of possibility?

I believe that there are good grounds for arguing the existence of a scholarly field called education law.

I hope that someday the dance of the disciplines could lead to a marriage, not of convenience, but one based on mutual respect. I hope it will also be based on a shared dream, a shared passion and a shared ideal, as well as the agreement of like-minded people in which the partners will pursue the same objective without losing

²⁶ Beckmann and Prinsloo 2006 *TSAR* 483; Beckmann and Prinsloo "Education Litigation".

their respective identities or stopping their unique contributions. Maybe the impediments to the marriage of true minds need not remain forever.

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LIST OF ABBREVIATIONS

CELP	Interuniversity Centre for Education Law and Policy
ELA	European Education Law Association
EMASA	Education Management Association of South Africa
ICOR	Interuniversitair Centrum voor Onderwijsrecht
NRF	National Research Foundation
SAELA	South African Education Law and Policy Association
SAELPA	South African Education Law and Policy Association
SAJE	South African Journal of Education
TORB	Tijdschrift voor Onderwijsrecht en Onderwijsbeleid
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNISA	University of South Africa

UP

University of Pretoria

USA

United States of America