

A History of Educational Law in South Africa: An Introductory Treatment

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Abstract

Educational Law has come a long way in South Africa since the early 1970's. The early 1980's saw the dawning of Educational Law. During those years Educational Law was presented as a theme in support of certain applicable subjects at a few isolated tertiary institutions in South Africa. The 1980's witnessed the growth of Educational Law from a subject within the framework of Comparative Education to a well-recognised subject in graduate degrees for Educational Management and Administration. The 1980's also witnessed the publication of the first book on Educational Law : *The Law of Education for the Teacher* by Van Wyk. In the 1990's Educational Law exploded in South Africa when the first national and international conferences in Educational Law were held. These were followed by the establishment of the South African Association for Educational Law and Policy (SAELPA) and the Inter-university Centre for Educational Law and Educational Policy (CELP).

Introduction

In 1972 Potgieter found that Educational Law was not a well-known theme among the South African school principals. In his research for *Die problem van ver gelyking en evaluering in die pedagogiek*, he drafted a list of 25 topics and his respondents (school principals) had to arrange them in order of importance and applicability in regard to their daily task fulfilment. After the responses had been processed and analysed, it became apparent that education law was the least important theme, as it ended up number 25 on the list.

Among the reasons for this surprisingly low ranking given at that time to a field which has since leapt to prominence are the following:

- The absence of a bill with justiciable fundamental rights in the South African Constitution at the time.
- The fact that at that time educators had no access to fundamental labour rights but were employed in terms of service relationships. These left them in a rather weak position vis-à-vis their employers who were in a superior position, having decision-making power in all matters concerning educators' conditions and terms of service. This subordinate position of educators as employees was compounded by the fact that labour relations were governed largely by Administrative Law focusing on the legality of decisions and of

actions. The legality of decisions is harder to challenge than the notion of unfair practices which was introduced in the *Education Labour Relations Act, 1993* (Act 146 of 1993).

In terms of the principle of vicarious liability, educators were to a large extent sheltered from the possible consequences of negligence. The Government was its own insurer, and employers and claimants often settled claims against teachers out of court.

The above ideas should not be seen to be suggesting that there was no body of law identifiable as 'Educational Law'. They do suggest that such knowledge was not systematised and that educators and other role-players were largely ignorant of it.

The Pioneering Years

There are several significant milestones in the development of educational law in South Africa. The 1977 the Master's dissertation of J.G. van Wyk (Van Wyk, 1977) under the supervision of H.J.S. Stone could be regarded as the beginning of the study of Educational Law in South Africa. It was written in the field of Comparative Education and it concentrated on 'certain juridical-pedagogical aspects of the South African education system namely employment and dismissal of teachers in the Transvaal and Cape Education Departments' (Van Wyk, 1977: 1). Although other dissertations had dealt with aspects of the law that could be included in the corpus of Educational Law knowledge, they were written first and foremost as contributions to the corpus of legal knowledge and their application to the management and administration of schools and other educational institutions was at best of secondary importance.

Subsequently, a book on professional orientation for the teaching profession by De Witt in 1979 contained two chapters focusing on aspects of Educational Law. One dealt with teacher liability for the safety of pupils and the other with an analysis of the professional conduct of teachers. In 1980 Van Wyk in his doctoral thesis in Comparative Education, focused on aspects of the law pertaining to education, with special reference to the training of teachers in South Africa and a number of other countries (Van Wyk, 1980: iii). One of the major recommendations emanating from his thesis was that student teachers 'should systematically study all juridical regulations and that this aspect of teachers' training be called Juridical Pedagogics' (Van Wyk, 1980:4). It was suggested *inter alia* that Educational Law should be regarded as a separate discipline.

His suggestion was soon acted on by the University of South Africa (UNISA) which included Educational Law as a theme in certain modules of training for the Bachelor's Degree in Education (B.Ed.), which is a postgraduate degree offered by most Faculties of Education in South Africa. This set the trend to be followed by other South African universities half way through the 1980's when Educational Law was included as a theme in the B.Ed. for Educational Administration and Management course at the Universities of Pretoria and Potchefstroom.

In 1981 Professor van Wyk published the first comprehensive book on Educational Law in Afrikaans. The English translation: *The Law of Education for the Teacher* was published in 1983. It focused on aspects of the law that pertain directly to the rights and duties of teachers.

In a Doctor of Education thesis (1985) J.L. Beckmann synthesised the rights and duties of teachers, children and parents in three separate chapters. This work was later included in books by Landman & Beckmann (1987) and Prinsloo & Beckmann (1987). The latter attempted to

systematise the legal principles and rules applying to children, educators and parents in regard to education. It included an analysis of the legal provisions regarding the education system at the national level as well as chapters on discipline and punishment in schools and professional registration of teachers.

After having completed a research project on the national standing of Educational Law as a component of teachers' training in South Africa, Prof. Van Wyk published his findings in 1987. Represented in the study population were South African Universities, Technikons and Colleges of Education. Some of the major findings included:

- the fact that Educational Law did not manifest as a separate subject in any of the teachers' training programmes at any of the tertiary institutions. However, it manifested as a significant theme in managerial courses for B.Ed. students at South African Universities.
- Further he found that where Educational Law was offered, it was not presented in a systematic way. As far as the utilisation of sources on Educational Law was concerned, it was found that secondary sources were mostly utilised and that original juridical sources received very little attention. The syllabi concentrated mainly on issues relating to the education system and educational management (Van Wyk, 1987: 52).

From the middle of the decade on the 'ownership' of Educational Law as a theme moved from the field of Comparative Education to the field of Educational Management and Administration. Oosthuizen (1986 & 1987) completed the first Master's and Doctor's degrees in the field of Educational Administration and Management dealing specifically with Educational Law issues. In the latter it was proposed that Education Law should be regarded as an independent field of study and not as a theme or a supplement to any other subject.

Van der Westhuizen and Oosthuizen (1989: 743) furthered this argument by positing that Educational Law should not be reduced to a field of study within the juridical modality. They argued that it should be viewed as being an autonomous societal phenomenon within creation. After they had analysed Educational Law according to characteristics present in reality, they came to the conclusion that the nature of Educational Law is to be found in security, which is facilitated by authority.

The Promotion of Educational Law

National and International Conferences

Several conferences have been supported by Potchefstroom University at the Graduate School of Education. In 1990 held the first national symposium on Educational Law. This was followed by two further symposia at Potchefstroom in 1993 and 1994. In 1995 the Graduate School of Education held the first international Educational Law Conference. Overseas speakers participating in the conference travelled from the United States of America (5), Australia (3), Canada (1) and Nigeria (1).

The South African Association for Educational Law and Policy (SAELPA)

The South African Association for Educational Law and Policy (SAELPA) was established on 17 October 1995 with the support and co-operation of the Belgian (Flemish), Dutch and European

Associations for Educational Law and Policy under the leadership of Proff. Jan de Groof (Ghent University) and Piet Akkermans (Erasmus University, Rotterdam). SAELPA's first elected chairperson was Prof. Johan Beckmann of the University of Pretoria. Prof. Elmene Bray of UNISA was elected as Vice-chair and Dr. Jan Heystek of Pretoria as Secretary.

The main goals of SAELPA are to promote, develop and study Educational Law and Policy and to make effective contributions towards enhancing freedom, equity and quality in education and training in South Africa. SAELPA also aims to promote understanding of these fields of knowledge in all interested parties. The first management of SAELPA signed a declaration of intent with the abovementioned associations saying, *inter alia*, that it would host an annual international conference with them and promote the exchange of information and university staff.

The first conference under this declaration was held at Rustenburg in 1996 and dealt with the theme 'Human Rights in Education: From the Constitutional Drawing Board to the Chalkboard'. This was followed 1997 by a conference dealing with the issue of power sharing in education. The third conference is planned for September 1998 and will provide opportunities for debating the issue of the promotion of human rights through education and will attempt to highlight some opportunities and constraints in South Africa today.

Among the fruits of the work of SAELPA are:

- Two invited seminars with government role-players and other stakeholders, one in 1996 on the *South African Schools Bill* of 1996 and one in 1997 on the *Higher Education Bill* of 1997.
- The publication twice a year of a newsletter (also available in electronic format).
- The publication of two reports / conference proceedings:
Education under the new Constitution in South Africa (De Groof & Bray, 1996) and *Human Rights in South African Education. From the Constitutional Drawing Board to the Chalkboard* (De Groof & Malherbe, 1997).
- A further report *Power Sharing in Education* (De Groof, Malherbe, Bray & Mothata) is due for publication in 1998.
- One of SAELPA's Executive Committee members, Prof. Johan Potgieter, published a paper on 'The right to education and the protection of minorities in South Africa: A preliminary perspective' in De Groof & Fiers (1996).
- Several comments on Government publications such as draft bills, white papers and green papers.

It is significant that SAELPA includes the words 'Education Policy' in its name, indicating recognition of a movement towards the integration of two previously separated fields of study. The management of SAELPA also reflects the fact that it draws from two fields in the fact that lawyers and educationists are both well-represented in its management structures.

The Inter-university Centre for Education Law and Education Policy (CELP)

Soon after SAELPA had been established, the Inter-University Centre For Education Law And Education Policy (CELP) was founded by the signing of the founding agreement by the founding

members (the University of Pretoria and the University of South Africa) on 6 February 1997. CELP is similar to ICOR (Inter-university Centre for Education Law) in Antwerp, Belgium and OREP (Office of Research on Educational Policy) at McGill University in Montreal, Canada and was based to a large extent on them. Prof. Johan Beckmann of the University of Pretoria was elected as the first (interim) Director of CELP. Proff. Elmene Bray and Johan Potgieter of UNISA were elected as Deputy-directors. Other South African Universities (as well as universities from other countries) are at present joining CELP, among them the Universities of Potchefstroom, Oklahoma, the Orange Free State and the Rand Afrikaans University.

The main vision and mission of CELP (CELP, 1998) is to become a national asset. Its mission is to promote the knowledge, development and application of Education Law and Education Policy in South Africa so that freedom, equity and quality in education can ensue. It also aims at contributing meaningfully towards capacity building and transformation education.

The main fields of activity of CELP include research, policy analysis and commentary, seminars and workshops, publications and capacity building. Understandably, many of CELP's activities are in a piloting or initial phase but CELP has already succeeded with the completion of the following:

- It published a guide for school governing body members (based on the South African Schools Act of 1996 in conjunction with the national Department of Education
- It published a number of documents under contract for the South African Foundation for Education and Training (SAFET), e.g. a constitution for school governing bodies, a guideline for codes of conduct for learners, a service contract for non-educator staff at schools. The following will also be published soon in collaboration with SAFET: an information book (handbook) for school governors, a code of conduct for governing bodies and a guide to meeting procedures for governing bodies
- It conducted a number of workshops and training seminars
- It rendered technical assistance in the creation of the Education Management Association of South Africa (EMASA) and the Education Management Development Institute (a national Department of Education initiative)
- It commenced work on the development of a comprehensive South African Education Law Handbook including a workbook for students and a resource book
- It has begun the development of a series of monographs among others on discipline in schools and human rights on education, drafted short and full-scale formal and informal courses on Education Law or aspects of Education Law
- It co-operated with the University of Pretoria in offering, for the first time in South Africa, an Educational Law course as part of the Bachelor of Law (LL.B.) curriculum
- It started developing a register of South African case law on education and to classify such cases

Recent Trends

Although all the loose ends of Educational Law were co-ordinated by the establishment of SAELPA and CELP, note should also be taken of some of the other recent developments.

Education and Training

Joubert (1998:15) has recently conducted a survey on the teaching of Educational Law at the various tertiary institutions of South Africa. In the random sample were 45 South African universities, technikons and colleges of education. The survey indicated that a total percentage of 40% of the selected institutions offer Educational Law as a subject. A mere 28% of the respondents from colleges of education indicated that Educational Law forms a part of their curricula. All the respondents from technikons and 40% of the respondents from universities indicated that Education Law is presented to their students. It is noticeable that no English language university is currently offering any formal Educational Law training.

An analysis of the responses identified the following topics as the ones that are presented by the most institutions:

- The 3 sources of South African Educational Law: Legislation (with a special emphasis on the Constitution and other education-specific statutes), common law and case law
- The teacher's duty of care and teacher liability
- Labour relations in education
- The juridical basis for school administration and management
- The professional code of conduct for teachers
- The rights and duties of teachers, learners and parents
- A code of conduct for learners
- Discipline at school
- School policies regarding language, religion and admission to public schools

Apart from the fact that Educational Law is presented in faculties of education at a number of universities, the newest trend is for law faculties (Universities of Pretoria and UNISA) to present it as an elective for LL.B. students. Another one of the latest developments is that, apart from research master's and doctor's degrees in Educational Law, coursework master's degrees can now also be taken at the Potchefstroom University.

Legislative Sources for Educational Law

A number of statutes are important to the field of education law. These include the *Constitution*, the *National Education Policy Act 1996* and *South African Schools Act 1996*. All are recent developments.

I. The Constitution of the Republic of South Africa

The Republic of South Africa Constitution came into operation on 4 January 1996 (SA, 1996(a)). The salient features of the new Constitution as follows:

It provides for a democratic system of government. The Constitution is entrenched and contains a bill of rights (in Chapter 2) which protects everyone's defined rights. In this regard, independent courts test the legality of all action, including laws of parliament. It establishes three levels of government whose authority and obligation to co-operate in terms of the principle of co-

operative government without interfering in one another's affairs is entrenched. The government system is neither a federation nor a union. Provincial governments have exclusive legislative authority regarding the matters listed in Schedule 5 and have concurrent legislative authority with Parliament in connection with the matters mentioned in Schedule 4 of the Constitution including education (except higher education). Concurrent legislative authority on education means that it is possible that both Parliament and a provincial legislator may legislate on the same educational issue such as admission policies to school. This gives rise to the possibility of conflict between them and sections 146-150 of the Constitution make provision for various ways and means of trying to prevent or to deal with possible conflict. From the Constitutional Court case *In re: The National Education Policy Bill No. 83 of 1995* (Rautenbach & Malherbe, 1998:42-45; Foster, 1998:397-399). It is clear that dealing with such conflict of legislation is not going to be easy. (Rautenbach & Malherbe, 1998: 4-5).

The Bill of Rights contains provisions significant to the supply of education and training in South Africa. These include sections 6, 9, 10, 12, 14, 15 and 26.

The right to education

Section 29(1) of the Bill of Rights expressly declares that:

Everyone has the right -

- (a) *to a basic education, including adult basic education; and*
- (b) *to further education, which the state, through reasonable measures, must make progressively available and accessible.*

The right to an education embodied in this provision creates a legal entitlement to which 'everyone', whether child or adult, has a claim. The term basic education is not defined in the Constitution. Obviously it is an educational experience which is a precursor to 'further education'; but as to what precisely constitutes a 'basic education' may be the subject of debate. It clearly is a fluid term whose meaning will depend on the time and place at which and the context in which a definition is called for.

It should also be noted that while everyone may have a right to a basic education they are not all guaranteed equal access to all basic education programmes or all institutions which offer such programmes. From the wording of section 29(1), it would seem that the right of both children and adults to 'basic education' however defined, unlike the right to 'further education', is an immediate, unqualified right which, arguably, is not dependent on the availability of resources. However, it also appears to be equally clear that the right to an education contained in the Bill of Rights is not a right to a 'free' education. Indeed, it has been acknowledged that the 'cost of the provision of basic education programmes for all young people and adults who require them cannot be borne by public funds alone, but must be shared amongst a variety of funding partners' (Foster, 1998). Thus, while the provision of free basic education undoubtedly is an ideal to be strived for, at least until it is attained, the imposition of user fees or other charges on students will not constitute a violation of their protected rights, provided that no one is precluded from enjoying the right because of an inability to pay (or, indeed, the refusal to pay by a person who is capable and responsible, other than the student, but over whom the student has no effective control - such as a parent.

It would be remiss not to note that traditionally many persons, and especially black children suffering from disabilities, were excluded from the education system. The issue of special education needs has been relegated to the periphery of educational concerns. 'Most children with special education needs have been denied equal and appropriate educational opportunity' (Foster, 1998). This situation should change dramatically in light of guarantees to everyone of the right to a basic education, to equal protection and benefit of the law and to protection from unfair discrimination on the ground of disability (Foster 1998). These provisions would appear to assure all persons, including those who suffer from disabilities, access to a meaningful basic educational experience in an appropriate setting.

Section 29(2) of the Bill of Rights states that *everyone has the right to receive an education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -*

- (a) *equity;*
- (b) *practicability; and*
- (c) *the need to redress the results of past racially discriminatory laws and practices.*

The official language education right in the Bill of Rights is conferred on 'everyone', not just on citizens of South Africa; extends to all official languages and not merely to what may be described as minority official language(s); and is not restricted to persons who claim one or more of the official languages as their mother tongue: anyone can seek an education in any one or more of the official languages.

In determining entitlement to such education two issues are of importance. Firstly, regard may be had to the available financial, human and physical resources. Secondly, the less tangible but nevertheless critical, considerations of equity and the need for affirmative action to redress past grievances must be addressed. A decision to deny students education in the official language of their choice without due regard having been paid to the factors explicitly and implicitly addressed in this provision would open the decision to a constitutional challenge; but if due regard is paid to the pertinent considerations such a decision would be difficult to challenge.

Finally, it should be noted, that the sanctioning of single language public educational institutions by section 29(2) of the Bill of Rights cannot be read as a licence to engage in unfair discrimination contrary to section 9(3) which prohibits unfair, direct and indirect discrimination on the ground, amongst others, of language. Nor can the section be read as guaranteeing the continued existence of existing single medium public educational institutions. Indeed, it may be argued that, in light of two of the three factors of which account must be taken by the state in meeting everyone's right to official language education (namely, 'equity' and 'the need to redress the results of past racially discriminatory laws and practices'), single medium public educational institutions may only be established as an affirmative action measure. This is subject, of course, to the practicability of maintaining or establishing such institutions (Foster, 1998).

Equity

Section 9 which provides for equality is of particular importance in South Africa. Section 9 provides that the state (or any person) may not unfairly discriminate against anyone on grounds, which include race, colour, ethnicity, religion, culture and language. This can be regarded as one of the cornerstones of the Constitution. In a Supreme Court case - *Matuka and Others v Laerskool Potgietersrus* (1996) - it transpired, *inter alia*, that the admission policy of the primary school in question, provided only for the admission of white learners. Judge Spolstra held that such a provision in the admission policy could be regarded as unconstitutional since it discriminates unfairly on the ground of race contrary to section 9.

Cultural and religious diversity

Section 6 provides for recognition of the cultural and religious diversity of the South African population (which is also reflected in the South African public schools). Section 6 recognises eleven official state languages and stipulates that the state must implement measures to promote the status and the use thereof. Section 31 recognises the cultural, religious and linguistic rights of communities in the sense that each community is allowed to enjoy and practise its culture, religion and language and join associations that will maintain and promote these rights. However, in the matter of The Gauteng Provincial Legislature in re: *Dispute concerning the Constitutionality of certain provisions of the School Education Bill of 1995*, Judge Sachs held that, from a practical point of view, 'the financial and administrative implications of granting to each language or cultural group a claim, as of right, on the State to establish schools, exclusive to themselves, not to speak of the extreme educational fragmentation involved, seem to be insuperable'. (Constitutional Court of South Africa, 1996 [81]).

Section 15 determines that everyone has the right to freedom of conscience, religion, belief and opinion. It also determines that religious observances may take place at state-aided institutions (e.g. public schools) under rules laid down by a competent authority which is the school governing body, in terms of the *South African Schools Act*, 1996.

Security of the person and human dignity

Sections 10 and 12 secure the freedom and security of the person and his/her human dignity. Section 12(1) stipulates that everyone has the right not to be treated in a cruel, inhuman way'. Section 10 provides that everyone has the right to have his/her human dignity respected. The South African Constitutional Court, in *State v Williams* (1995) 3 SA 632 (CC) held that corporal punishment administered to juvenile offenders was unconstitutional in the sense that it is to be regarded as 'inhuman' and 'degrading'. Section 10 of the *The South African Schools Act* (SA, 1996(c)) has since outlawed corporal punishment in all public and independent schools and has imposed on offenders in this regard the same penalty as that for the criminal offence of assault.

Right to privacy

In terms of section 14 of the Constitution everyone has the right to privacy, which includes the right 'not to have their person or home searched'. The implications it holds for educational practice could be manifold. For instance: at first glance it seems as though a student (and/or his/her school satchel) may not be searched for illegal drugs (or dangerous weapons). However, section 36 of the Constitution determines that 'The rights in the Bill of Rights may be limited' if such a

limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. To limit the rights in the Bill of Rights (such as the right to freedom), certain relevant factors have to be taken into consideration. Some of these factors include 'the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose'. In the United States of America 'the right to privacy is not absolute; it is relative' (Rossow & Stefkovich, 1995). When considering the provisions stated in sections 14 and 36 they seem to have the application in South Africa that, in a case of reasonable suspicion of possession of eg. drugs and/or dangerous weapons, the search of such a student could be held Constitutional.

Due process

Section 33 of the Constitution stipulates that every person is entitled to lawful and procedurally fair administrative action.

II. National Education Policy Act of 1996 (NEPA)

Apart from the fact that this act sets the scene for a national policy for South African education, it also seeks to provide for (SA, 1996 (b): section 2) *consultations to be undertaken prior to the determination of policy, and the establishment of certain bodies for the purpose of consultation; the publication and implementation of national education policy; and the monitoring and evaluation of education.*

III. South African Schools Act of 1996

The long title of the *South African Schools Act* (SA, 1996(c)) indicates the purpose of this Act as providing for a uniform system for the organisation, governance and funding of schools. This Act reduces the number of school types to two (public and independent schools). It provides for democratic governance of schools by making provision for participation by parents, learners and even non-teaching staff in the running of the affairs of schools through membership of governing bodies. It also develops the notion of partnerships between the government on one hand and parents and educators on the other hand. It refers in particular to partnership funding of schools by imposing schools fees (determined by the governing body) on all parents who are able to pay such fees.

IV. Other Relevant New Laws

Among the laws that were promulgated after South Africa's new government came into power in 1994, a number have a profound influence on education and on educators. These include

- The *Educators' Employment Act* of 1994 and
- The *Labour Relations Act of 1995*. The *Labour Relations Act* provides *inter alia* for the determination of conditions of service which apply solely to employees in the education sector. It establishes the Education Labour Relations Council (ELRC)). Conditions for employees whose employment covers public service are determined by the Public Service Co-ordinating Bargaining Council (PSCBC)). It also defines residual unfair labour practices and prescribes mechanisms for dispute settling.

- Other relevant statutes include the *South African Qualifications Authority Act 1995*, which provides for a South African Qualifications Authority (SAQA) and a National Qualifications Framework which will facilitate an integrated approach to education and training and provide the portability of qualifications across the various modes of training and education.
- The *Higher Education Act* of 1998.
- The *Employment Equity Bill* of 1997 (South Africa, 1997) which provides among others for affirmative action regarding black people, women and disabled people in the public and private sectors.
- The *Basic Conditions of Employment Act* (South Africa, 1997(b)).
- In addition, all nine of the provinces now have their own school Education Acts or Bills.

Conclusion

In South Africa, Educational Law has made significant progress since Van Wyk's pioneering efforts. A group of educators and lawyers are devoting much time to its purposeful development. As implied in the Education Management Development (EMD) Task Team Report (1996) there is a lack of knowledge of aspects of Educational Law in Government circles. It is hoped that initiatives such as SAELPA and CELP (with their respective national and international networks) will be able to help accelerate the development of Educational Law to such an extent that educationists and lawyers will be able to meet the challenges.

Key Words

South Africa; Educational Law; History; Education Policy.

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