Advancing student research in education law

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Abstract

On the one hand, the popularity of education law for postgraduate studies is calling for a reflection on a sound research approach that would complement both the boundaries of the law as substantive discipline and how people experience or view the law. On the other hand, such research requires knowledge of both the law and education. Two types of hands-on experiences have encouraged this article in an attempt to address the general lack of precise research methodologies and theoretical frameworks in order to advance student research in education law. Having (1) provided a fundamental background to law; (2) considered the aim of research and what it entails within law; (3) looked at legal versus other research; and (4) presented a brief historical perspective on South African legal research, an integrative multidisciplinary research approach is proposed in order to side-step being bogged down by conventional approaches that do not necessarily promote successful research outcomes. School level catch-22s need solid education law research!

Keywords: black-letter-law approach, disciplinarity, integrative, interdisciplinary, law-in-context approach, legal research, multidisciplinary

INTRODUCTION

It is common knowledge that the field of education law has become popular to students who want to complete postgraduate studies in education. Conducting research would then imply a legal reflection on relevant aspects of the Constitution of South Africa (RSA 1996), with specific reference to guaranteeing fundamental rights. Moreover, even if only in passing, a legal analysis of education specific legislation could be called for as these Acts were promulgated to regulate the complex relationships between education role-players. Due to the prominence placed on taking cognisance of international law when interpreting the Bill of Rights (RSA 1996, section 39(1)(a)), student researchers should moreover portray the ability to interpret fundamental rights by analysing international law.

However, when studying law as it would be applicable to education, mere knowledge of and slight reference to such legislation does not satisfy the requirements

of empirical legal research. Cognisance must also be taken, for example, of the law of delict, public law and administrative law as they would apply. Then again, mere knowledge of the law *per se* is equally insufficient when students aim at addressing legal issues pertaining to education effectively.

Consequently, student researchers who are interested in the law as it would be applicable to education need to realise that knowledge of both disciplines is essential. The use of an integrative multidisciplinary research method is thus advocated when conducting research on education law.

PROBLEM STATEMENT

Based on two experiences, we are concerned about the general lack of precise research methodologies and theoretical frameworks that would enhance the essence of postgraduate education law students' documents:

1. Acting as study leaders/promoters to master's/PhD students has made us aware that these students' instinctive reaction is to merely mention Acts and legal documents without becoming analytically involved in the research.
2. Acting as examiners of master's/PhD students' dissertations/theses has made us aware of a similar lack of clarity concerning sound education law research.

We intend to address our concern by suggesting a way forward to support student research in education law. Since the importance of academic writing that addresses research-related issues is accentuated by Wolhuter (2011, 610) for its global applicability, we will also indicate the importance of international law.

A FUNDAMENTAL BACKGROUND TO THE LAW

In any country, the law entails the entire body of unstructured rules of conduct created by the government and enforced by the judicial authority (Shrestha 2008, 1). It regulates human interactions; resolves disputes arising from such interactions (Kunz, Schmedemann and Downs 2004, 438); and governs individual and group behaviour within that country's borders (Portman 2009, 4). Because of the South African government's important role in making (legislative authority), implementing (executive authority) and enforcing (judicial authority) law, it is imperative that student researchers understand how particular sources of law relate to the legal and political institutions that create law. Moreover, they need to realise that the law (a system of *revealed* truth; Kunz et al 2004, 438) is a complex, ever-changing, learned professional discourse (Pryal 2011, xv), and that relevant materials to a legal problem may exist in any one or even all three tiers of government (Marshall 2010–2011).

Optimists in the field of law assume that humans shape legal education, which shapes the law and which, in turn, shapes the world. Pessimists, in contrast, contend that the law is outlined by political and economic forces due to the fact that the law remains to be a system of social ordering, a cultural phenomenon, an intellectual

enterprise, functioning as the subject of study at law schools (Arthurs 1983, 629). Whether they are optimists or pessimists, however, legal researchers are at *idem* that the law does not always function in a predicable way (Portman 2009, 5). Students are obliged to take note of both historical and recent materials when examining the law (Marshall 2010–2011), remembering that today's law is a combination of old and new enactments and decisions (Cohen and Olson 2007, 5). This is especially needed when studying the South African uncodified legal system, which is a mixture of English common law and civilian Roman-Dutch legal principles (Devenish 1998, 46; 2005, 46–47).

Common law safeguards the private domain of individual independence (Van Wyk, Dugard, De Villiers and Davis 1996, 1) and as such it is section 8(2) of the Constitution that extends the domain of fundamental rights beyond the law to conducting private relationships, with section 8(3) aimed at ensuring that courts start by investigating common law where a precise tenet thereof covers a relationship contained in the Bill of Rights (Devenish 2005, 46). With reference to education specifically, the common law principles of fairness and reasonableness apply constantly in unique ways (Joubert and Prinsloo 2009, 21), with *in loco parentis* and *the rules of natural justice* being arguably the most prominent.

THE AIM OF RESEARCH WITHIN THE FIELD OF LAW

We are of the opinion that research concerning legal issues, such as matters crying for attention in education law, must be conducted with an explicit purpose in mind and according to a sound theoretical framework. For example, research might be required for a legal memorandum that analyses the relevant legal principles and apply them to a particular factual circumstance. Then research and legal analysis become integral to each other and need simultaneous development. Moreover, a detailed legal outline will support student researchers in analysing the legal issues presented.

McMillan and Schumacher (2001, 500) point out the necessity of legal research in order to study, categorise, interpret and synthesise data aimed at providing a deeper understanding of legal concepts/past events to resolve legal disputes efficiently (Portman 2009, 4).

Whether of an academic or a practical nature, research concerning legal issues aims at either recommending solutions to existing problems or resolving already solved problems in enhanced ways. Researching the law is thus done with a definite purpose in mind (Kiser 2008, 1). With regard to the law in education as societal institution (Woerman 2012, 111), we concur with De Wet and Wolhuter (2007, 317) that solutions must be found for the education problems typical to South Africa. Therefore, noting what legal research entails merits further discussion.

WHAT DOES RESEARCH WITHIN LAW ENTAIL?

Du Plessis (2007, 43) describes legal research as a fundamental skill unique to the legal profession, providing ample opportunities to develop refined skills concerning how/where to find the law; how to identify important facts; and how to effectively apply the law to any set of facts.

Such skills are essential as research within law involves investigations directed at discovering and studying particular facts, problems or topics (Morris, Sales and Shuman 2010, 3; Ramanath 2001, 745). Only thereafter can relevant legal principles be identified and critically applied (Jacobstein and Mersky 2002, 1) to solve problems (Kunz and Schmedemann 1989, 6).

It is evident that legal research entails a systematic and analytical rather than a mechanical process. Systematic research involves methodical investigations involving the interpretation and explanation of the law and is described by Russo (1996, 34) as a form of historical-legal research that is neither qualitative nor quantitative.

Legal research is not a linear process (Marshall 2010–2011), as it calls for an exact course of action. Kleyn and Viljoen (2002, 331), Gotschall (2010, 3) as well as Marshall (2010–2011) opine that six steps need to be taken during legal research. Steps 1, 2 and 4 are regarded as significant for students conducting education law research:

Step 1: The researcher needs to classify (constitutional, statutory, administrative and international law and case law), define and understand the legal problem and the facts upon which the problem is based in order to invent an initial precise statement of all relevant concerns to guide the research (Surrency 1996, 9). This initial analysis entails gathering and analysing facts in order to identify the main issues; to determine and coordinate legal concerns logically; and to prioritise work (Gotschall 2010, 163). During this step, researchers must make informed judgments concerning the similarity of facts/issues with circumstances in the identified problem. Analogical reasoning is important in order to determine whether a factual situation falls within the ambit of a rule and is thus governed by the precedent system of courts (Chynoweth 2006, 33).

Marshall (2010–2011) underscores the importance of analogising by indicating that *on point* authority does not exist for many legally-based problems. Analogising calls on researchers to build arguments based on a deductive reasoning process – rules of legal discourse (Chynoweth 2006, 33) – which analogises that a rule of law applied to one set of facts should logically be applied to another set of facts. It is, thus, rarely sufficient to look at authorities who deal with facts too closely resembling those that have been presented.

However, inductive reasoning is also needed when a particular factual situation does not appear to be addressed directly by a legal rule, thus necessitating intervention to *fill the gap* (Mouton 2009, 81). Legal research often employs an inductive analysis

in order for categories/patterns to emerge from the data collected rather than being imposed on the data (McMillan and Schumacher 2001, 462).

Step 2: During this step, researchers need to familiarise themselves with the court structure of the jurisdiction to determine which law applies to the identified issue. It is essential to also identify international legal principles that need to be considered. Researchers must determine the statutory framework under which cases in other jurisdictions have been decided in order to establish whether they may indeed be used as mandatory or persuasive authority (Marshall 2010–2011). The same applies to international treaties and conventions.

Step 4: It is essential that researchers develop an awareness of the different sources of the law. A major challenge is to realise the purpose and scope of legal sources (Marshall 2010–2011); to understand which sources to consult (Cohen and Olson 2007, 2); and how they relate to each other. This step entails searching for authority to support legal arguments (Pryal 2011, 43) and necessitates consulting multiple sources and using different techniques.

Both primary and secondary legal sources need to be consulted (Du Plessis 2007, 19). When researching the law in education, it is equally important to consult non-legal sources in order to support legal sources (Jacobstein and Merskyn 2002, 2). Since primary legal sources may be overwhelming to education students due to their complex wording, Cohen and Olson (2007, 15) suggest that they start with secondary sources.

Since legal research is primarily a search for authority and legal precedent, primary sources remain indispensable. Each source must, moreover, be used with a sense of its place in the hierarchy of authority (Cohen and Olson 2007, 7), and researchers need to develop their own critical thinking thereof (Kawaguchi 2011, 174) instead of merely accepting what is said by secondary sources.

In order to support sound research, and because of the dynamic nature of the law, researchers must learn to appreciate the need to verify every source when developing a legal argument, since the precedential value of cases is frequently affected by subsequent judicial analysis or by actions of legislatures. Rooted in the historical nature of law and its reliance on precedent, legal research requires looking to the past to locate authority that will govern the disposition of the research question (Russo 1996, 35). Amendments to Acts and the manner in which statutes are interpreted and applied by courts must be considered. Researchers must endeavour to update their research carefully in order to accurately assess the significance of any authority. McMillan and Schumacher (2001, 504 and 519) highlight that even student researchers must employ techniques of criticism to assess the authenticity, trustworthiness and accuracy of their sources.

Primary legal authorities are authorised statements of law issued by government bodies. Such sources include constitutions, legislation, international law, case law, regulatory materials and administrative agency regulations and/or decisions and other documents that carry the force of the law.

Kunz and Schmedemann (1989, 7) suggest identifying the leading case governing the issue under research as the most basic step. This is no easy task as: (1) student researchers often fail to identify the main issues/facts correctly; (2) the law changes constantly, leading to diverse court decisions that make it difficult to predict future rulings; (3) conflicting court decisions exist; and (4) binding authority is sometimes absent, requiring of researchers to either apply creative analysis to existing case law or follow the doctrine of *stare decisis*. Studying relevant case law, nevertheless, provides a solid starting point as it can effectively be used to support or provide authority to legal arguments (Pryal 2011, 3) and respect for legal authority (Kunz et al 2004, 4).

Emphasis must, however, be placed on the fact that student researchers need to study primary sources themselves and not rely on secondary sources commenting on them, thereby becoming empowered to integrate legal sources and substantiate legal arguments successfully (Pryal 2011, 43).

Secondary sources refer to materials commenting and annotating primary legal sources (Shrestha 2008, 1). The former include legal encyclopaedias, textbooks, local/foreign law journals, relicts (McMillan and Schumacher 2001, 503), foreign statutes/case law, newspapers, commentaries/opinions and interviews. Conducting personal interviews is a valuable method to obtain all the relevant facts (Surrency 1996, 8), an example of which is found in a recent article (Serfontein and De Waal, 2013). Although secondary sources are only used as persuasive authority, consulting them is important to understand the legal issue (Kunz et al 2004, 5).

LEGAL RESEARCH VERSUS OTHER RESEARCH

Marshall (2010–2011) highlights the challenge of legal research as it differs in many ways from research in other disciplines, with the legal researcher needing to understand the goals of research in a legal context.

Sound attributes of legal research include correctness, credibility and comprehensiveness (Kunz et al 2004, 6). Comprehensiveness is especially required as legal disputes may have far-reaching implications (Russo 1996, 34). Kunz et al (2004, 3) caution that the law does not come wrapped in a tidy labelled package. An investigation into all sources of law, putting them together and sorting them according to relative weight and relevance, and combining them into a cohesive analysis is essential (Surrency 1996, 8).

Comprehensiveness is, however, not the only distinctive characteristic. Legal research also differs from the dominant built environment research specialism as it shows genuine epistemological/methodological differences about the nature of knowledge and the manner in which it is produced. While knowledge is regarded in the sciences in terms of the accumulation of individual segments of knowledge which contribute to a comprehensive explanation of particular phenomena, the law as part of humanities is more concerned with the organic development of knowledge through an on-going process of reiterative enquiry.

Legal researchers aim at providing horizontal knowledge structures (typical to the humanities/social sciences). Providing horizontal knowledge entails a series of strongly bounded approaches developed by adding another approach alongside existing approaches in a more segmented way.

The law addresses multifaceted, rather than discrete, problems and does not attempt to explain the individual components of, for example, education phenomena, but to develop a holistic understanding of their overall complexity (Chynoweth 2006, 36). Brandon (2002) cautions researchers against the dominance of traditional social science methodologies and against emphasising empirical investigations: they should rather develop theoretical perspectives.

The epistemological/methodological differences between legal research and most other research styles also generate cultural differences between them. Cultural differences produce expectations regarding the external appearance of academic research which legal researchers often struggle to satisfy. These expectations may relate to: (1) forms and appearances of research outputs; (2) processes which are undertaken; and (3) more general behaviour characteristics of research within this field (Chynoweth 2006, 36).

In sum, legal research differs from scientific research in that it concerns much broader and long-term topics; is substantial but less frequently published; is more cost effective; and, of significant importance for this article, is normally done by single researchers working more solitarily and thus often lacking visibility which may be interpreted by others as such researcher being less active (Chynoweth 2006, 37).

LEGAL RESEARCH IN SOUTH AFRICA: A BRIEF HISTORICAL PERSPECTIVE

Legal researchers historically followed two broad traditions, namely, the *black-letter-law* and *law-in-context* approaches. Both these traditional approaches are of a primarily interpretive (McMillan and Schumacher 2001, 497) and authority-seeking (Kunz et al 2004, 6) nature, employing a single disciplinary method (Russo 1996, 33).

The *black-letter-law* approach

The *black-letter-law* approach focuses on the law itself as an internal self-sustaining set of principles derived from determined cases and re-assembling specific cases into a consistent framework in the search of order, rationality and theoretical cohesion (McConville and Chui 2007, 1). This approach is followed during doctrinal legal research encompassing either innovative theory building or straightforward descriptions of laws accompanied by incidental interpretative comments. The black-letter-law approach comprises conducting comparative research that entails descriptions combined with comparisons (Van Hoecke 2013, viii) and legal theory (jurisprudence and, occasionally, legal philosophy) research concerning itself with analysing existing legal rules as found in legislation and court cases. Researchers

following this approach, accordingly, aim at answering questions related to: What is the law? This is done in order to enable them to clarify any ambiguities within rules; place them in a logical and coherent structure; and describe their relationship to other rules.

Qualitative research modes of inquiry are broadly divided into the areas of interactive and non-interactive. Legal research, being dominantly *analytical research*, is normally of a non-interactive mode, with the aim to investigate historical concepts/events through an analysis of documents (comparative nature) employing an emergent research design (McMillan and Schumacher 2001, 500). The latter is needed as legal researchers need to formulate flexible research strategies to guide them to re-evaluate their research methodology and consider alternative approaches (Kunz and Schmedemann 1989, 6). Thus, legal research is often criticised as lacking methodology; being based on opinion alone; or not being research at all (Chynoweth 2006, 37).

According to McMillan and Schumacher (2001, 59), analytical research needs methodological procedures to phrase an analytical topic; to locate and critique primary sources; to establish facts; and to form generalisations for casual explanations or principles. Moreover, analytical research calls for using techniques of criticism (assessing the authenticity/trustworthiness of sources) while searching for facts and interpretive explanations.

The *law-in-context* approach

During the 1960s, a new research approach developed, namely, the *law-in-context* approach or socio-legal research, which is especially valuable when investigating the application of the law to education. It starts with identifying existing problems with the potential of being generalised for casual explanations or principles (McMillan and Schumacher 2001, 519), rather than with the law itself, and recognises that the law can either be a contributor to or solution for societal problems (Halliday et al 2008, 190).

This approach is of a more epistemological nature entailing an external enquiry into the law as social entity. Legal rules are not merely considered for what they are, but evaluated for their effectiveness in achieving a particular social goal (Cownie 2004, 55). However, the latter does not imply that legislative text may be ignored: a balance must be found between texts and context (Botha 2005, 72; *S v Zuma* 1995).

This approach acknowledges the importance of viewing legal rules within their historical/social context (interdisciplinary) and requires legal researchers to consider and understand the context to which they relate (Chynoweth 2006, 20–30). The contextual nature of this approach is underscored by the purposive approach taking regard of the contextual framework of legislation, including social factors and political policy directions, when interpreting statutes (Botha 2005, 51). When research is done on the impact of laws and courts on, for example educational issues, Smulovitz (2010, 747) cautions that cognisance must be taken of the fact that the

outcomes will be conditional and depend on the interaction between the social conditions (context) under research. The latter assists the researcher to reflect on the reality and to understand the workings of the law in order to evaluate the efficiency of the law in achieving the desired outcomes.

The law-in-context approach aims at probing the underlying philosophical, moral, economic and political assumptions *vis-à-vis* the law and not merely questioning the operation of the law. The value of such an approach lies in assisting the researcher to investigate the application of the law to the sphere of education. The results of the research are presented as academic arguments open to criticism and not as final academic knowledge/explicit facts (Arthurs 1983). Being open to criticism, this kind of legal research continues to be the leading form of academic legal research (Cordon 2003, 7).

AN INTEGRATIVE MULTIDISCIPLINARY RESEARCH APPROACH

Tress, Tress and Fray (2005, 479) plead for a clear understanding of research concepts, since a lack of understanding may hinder creating integrative research projects and make comparing/evaluating outcomes unfeasible. In line herewith, the core concepts *disciplinarity, integrative*, *disciplinary* and *multidisciplinary* are scrutinised.

Disciplinarity: *Disciplinarity* takes place within the boundaries of well-recognised academic disciplines, while appreciating the artificial nature of these boundaries. The research activity is oriented towards one specific goal looking for an answer to a specific question (Tress et al 2005, 488). The mere accumulation of knowledge by researchers has, however, been criticised by philosophers, such as Aristotle, Bacon and Kant, and more recently by Gibbons et al (1994, 354) and Moran (2002, 148).

Integrative: The umbrella concept *integrative* refers to combining various academic disciplines during a research process and is defined based on the degree of disciplinary integration and involvement of non-academics. Integrative concepts are viewed as a continuum rather than as fixed categories (Tress et al 2005, 479).

Education White Paper 3: A Programme for Higher Education Transformation (DoE 1997) underscores integrative disciplinary research approaches as they allow for wider accountable processes to flow from the changing nature of research enterprises, seeing that research results are measured by a broader range of indicators such as national development needs and community development.

Multidisciplinary, interdisciplinary and transdisciplinary research are recognised by Tress et al (2005, 479–481) as concepts associated with integrative research approaches. These concepts are often used interchangeably to describe different degrees of interaction between disciplines and are also often coupled with concepts such as *comprehensive*, *holistic*, *combined*, *complementary*, *integrated* and *problem-oriented* research.

Interdisciplinary: *Interdisciplinary* research entails the use of diverse methods secondary to different disciplines in a single research study, allowing for cross

fertilisation between various academic disciplines. Aspects pertaining to two or more disciplinary perspectives are integrated into one approach, creating a new field of inquiry (Banakar and Travers 2005, 5). The aim of interdisciplinary research is for researches to learn from the various disciplines in order to unite around a common interest (Tylor 2009, 143).

Van Eeden (2011, 255) justifies interdisciplinary research as being a key element aiming at solving societal problems. Interdisciplinary approaches have, moreover, already been encouraged by socio-legal studies, feminist legal studies, critical legal studies and new approaches to international law (McConville and Chui 2007, 5). Cohen, Manion and Morrison (2012, 377) advocate the importation of ideas/methods from spheres outside education when research in this sphere is undertaken. As a result, interdisciplinary inquiry is acknowledged as a developing trend and the way forward for education research. In support, Cohen et al (2012, 381) indicate that the boundaries of new knowledge cannot be limited by individual disciplines.

During a conference on interdisciplinarity held by Educational Research and Innovation in 1972, research within individual disciplines was criticised for missing the link between science and society. Science was perceived as inflexible and unable to cope with societal demands. Trying to bridge the gulf between humanities and sciences, Chynoweth (2006, 37) underlines the existence of exceptionally sound communication between disciplines as one of the great challenges to achieving genuine interdisciplinary thoroughness.

Multidisciplinary: *Multidisciplinary* research (disciplinary interaction; Tress et al 2005, 485) draws on more than one discipline (Cozzi et al 2008, 291) aimed at creating new integrated knowledge/theory. It emerges when a variety of academic disciplines share a mutual goal with numerous disciplinary objectives, aiming at exchanging knowledge without crossing individual subject boundaries (Tress et al 2005, 488).

In contrast with transdisciplinary (combining unrelated disciplines) and interdisciplinary research, a multidisciplinary approach allows for parallel disciplinary efforts without establishing any real disciplinary integration between them. A variety of disciplines work simultaneously, without building explicit relationships (Jantsch 1970, 413). Since the different disciplines may have dissimilar purposes, they do not influence one another significantly and each discipline is permitted to use its own research methods, theories and instruments without being forced to create a joint theoretical framework (Conrad 2002, 15).

Despite its multidisciplinary nature, this approach does not ignore the valuable historical roots of any of the participating disciplines (Baumgartner et al 2008, 387; Pyne 2010, 72) and each participating discipline's research methods must be integrated as far as possible. Van Eeden (2006, 51) points out the benefit as being that, if such an approach is undertaken prudently, the elementary qualities of each discipline remain the most important point of departure during the research process. A multidisciplinary research approach permits frequent interaction among key

experts, thereby obtaining the active/effective participation essential for successful research outcomes (Queens University 2010).

A multidisciplinary approach allows each participating discipline to add new knowledge in order for a holistic picture to emerge on the research phenomenon (Tress et al 2005, 485). Different issues related to a specific phenomenon can therefore be tackled as diverse skills are integrated and interdisciplinary collaboration is stimulated to comprehend phenomena and to bring them closer to practical application (Cozzi et al 2008, 289). Multidisciplinary research surpasses the boundary of being merely disciplinary (Van Eeden 2011, 254) and only enriching one disciplinary field. It rather leads to holistic, representative and inclusive informative research results with the potential of contributing meaningfully to understanding the identified problem (Van Eeden 2011, 255–259). This leads to the field as a whole benefiting from an improved understanding of each of its component disciplines, and from the greatest possible involvement of each in its collaborative research agendas (Chynoweth 2006, 28).

Based on the above, the authors propose an integrative multidisciplinary approach for students conducting research in education law. The approach will allow them also to consider specific educational modes of inquiry, methods and strategies to complement their findings pertaining to the complexity of societal problems in the education sphere. Using such methods in collaboration with legal analysis, Engel (2009, 85) signifies the manner in which cultural practices can give life/meaning to the law by understanding legality through the eyes of *regular* people. Investigating the application of the law in education, moreover, necessitates studying the law within its broader, social and political context by using methods taken from both disciplines (McConville and Chui 2007, 5).

CONCLUSION

It is time that the world of research is opened to students, inspiring them not to become bogged down by conventional approaches. We therefore propose switching to innovative integrative research approaches in order to enhance single disciplinary research approaches.

A multidisciplinary research approach is recommended as knowledge thus generated has more general application within and across specific disciplines. Such an approach would permit education law student researchers to appreciate the boundaries of the law as a substantive discipline in its own right, while also taking note of societal changes and how people in general experience or view the law.

An integrative multidisciplinary approach could increase the possibilities of sound student research in education law, adding valuable insight into and analysing matters that reflect legal catch-22s at a variety of school levels.

The complex areas of the law are ripe for exploration by researchers who wish to study them by way of a multidisciplinary research approach.

NOTE

1. The Optentia Research Focus Area (www.optentia.co.za) aims at to developing and organising knowledge for the optimal expression of individual, social and institutional potential, with specific interest in the African context. The research programme uses inputs from various disciplines in the social sciences, including those of Educational Sciences, with Elda de Waal working in the field of Education Law.

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