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Statutes and Case Law as Sources for Discourse Analysis When Researching South African Education Reform through a Complexity Theory Lens

Abstract

This paper explicates how statutes and case law (court cases) can be used as sources for discourse analysis when researching South African education reform through a complexity theory lens. Firstly, the law-making process is built on discourses at different levels. Secondly, discourses are manifested in case law because in order to resolve disputes arguments are presented on which the court is then required to rule. Discourse analysis explores how meaning, identities, activities and relationships are negotiated and constructed and these sources of discourse are useful when the focus is on the study of actions and interactions within the education system.

Keywords: discourse analysis, complexity theory, education reform, law as discourse, case law as discourse

Introduction

Discourse analysis explores the meaning participants and actors make in social interactions and settings (Lee & Adler, 2006, p. 42). Fairclough (2005, p. 925) describes a discourse as a certain way of representing physical, social, psychological aspects of the world. For example, political discourses may be liberal, conservative, social-democratic, and so forth. Thus, the relationships between social groups in a society are manifested in different ways through these discourses (Fairclough, 2005, p. 925). Hajer (2005, p. 300) defines discourse as an "ensemble of ideas, concepts, and categories through which meaning is given to social and physical phenomena, and which is produced and reproduced through an identifiable set of practices". Hajer (2005, p. 300), however, points out that discourse is not the same as discussion, but that it denotes "a set of concepts that structure the contributions of participants to a discussion". According to Cohen, Manion and Morrison (2011, p. 574), 'discourse' is used in research to reveal the meanings that are given to texts. In turn, these meanings create and shape knowledge and behaviour by among other, the exercise of power through texts and conversations.

The underlying philosophy of discourse analysis is that "knowledge and meaning is produced through interaction with multiple discourses" (Starks & Trinidad, 2007, p. 1372). Discourse analysis therefore explores how meaning, identities, activities and relationships are negotiated and constructed (Starks & Trinidad, 2007, p. 1374) and "reveals how power operates and is legitimated or challenged in and through discourses" (Cohen, Manion & Morrison, 2011, p. 574). In discourse analysis, "the analyst is also attuned to how context constrains and enables" (Vincent, 2017).

Statutes (acts) as discourse

The law presupposes a society and a need for some structure of authority or government that will make rules for the whole society (Kleyn & Viljoen, 2010, p. 1) in order to regulate the behaviour of its subjects, hence the rulers who lay down the legal rules. Justification for these rules and authority can be found in the idea of a social contract into which people have entered (Kleyn & Viljoen, 2010, p. 1). This social contract is an agreement between the ruler(s) and the people. According to Kleyn and Viljoen (2010, p. 1), "each person gives up his or her unlimited freedom in order to make peaceful co-existence possible". Thus, it is self-imposed and binding (Rosenfield, 1995, p. 1170) because people submit themselves to the authority of the state. It being an agreement, the notion of a social contract is binding to both the people and the state. The laws (rules) are interpreted and applied by institutions or organs of state and if necessary, enforced by employers of the state, for example the police. This means that some form of sanction will follow upon non-compliance with a law (Kleyn & Viljoen, 2010, p. 2). However, as indicated by Kleyn and Viljoen (2010, p. 3), "law should be more than just a series of decrees and rules enforced by a brutal display of state power". Any legal system is grounded in a value system which is important to society and acts as a unifying force.

Notwithstanding the above, it is argued by Rosenfield (1995, p. 1170) that "even if all legal actors could influence democratic law making, the resultant laws are unlikely to be in equal interests of all those affected". Despite being democratically enacted, laws may be oppressive and their enforcement may disadvantage disfavoured legislative minorities. Drawing on Habermas, Rosenfield (1995, p. 1173) explains that "the appeal of a particular paradigm of law … depends on its ability to reconcile legal and factual equality while bridging the gap that splits system and lifeworld in a way that secures and constrains systems and that concurrently supplements the output of the lifeworld".

A current example of law as discourse can be found in the process of promulgating the draft Basic Education Laws Amendment Bill (2017) as law. Mqeke (2008, p. 201) explains that a bill reaches Parliament through two distinct routes, through recommendation of the South African Law Commission or through the Ministerial route – the so-called task team approach. The Law Commission works through project committees who are persons deemed experts in the relevant sphere of law under consideration and are often university professors and other academics recognised as experts in the field (Mqeke, 2008, p. 201). However, the majority of statutes originate through the Ministerial route (Mqeke, 2008, p. 201) as is the case with the draft Basic Education Laws Amendment Bill (RSA, 2017).

The law-making process, from initiation to the eventual acceptance of a law, is built on discourses at different levels and a number of elements can be identified. Firstly, legislation (statutes or acts) initiated by the government. By introducing a bill, the government not only signals its intention to create a new statute or to amend existing legislation, but also signals stance on particular issues – its ideological ambitions (Doherty, 2007, p. 195). In other words, the government interprets the context as it sees it and proposes a response – the context aspect of complexity theory. Secondly, the law-making process allows for public comment and the Constitution of the Republic of South Africa envisages that there should be on-going

interaction between citizens and their elected representatives in Parliament who are the legislators (February, 2006, p. 135). In the South African education landscape, this not only allows role players and stakeholders such as teacher unions, governing body associations and other non-governmental organisations to give input, but also individual schools and individual members of the public. In addition, not only have the internal procedural workings of parliament built into it a number of occasions in which public input can be made (February, 2006, p. 135), Parliament also has a constitutional duty to facilitate public involvement in the legislative process. These two elements relate to the interaction, feedback and connectivity elements of complexity theory.

Thirdly, once a bill has become a law, it becomes part of the social contract between the rulers and the people, altering the legal environment. This relates to the emergence aspect and the context aspect of complexity theory. A new law has emerged, and because the new law has altered the legal landscape, the context has changed. This new context influences the framework in which policy makers and policy implementers must operate. It not only represents the ideological ambitions of the government (the rulers), but speaks to the institutional context, components and the identity of the institutional context (Doherty, 2007, p. 195). In addition, one has to keep in mind that the legislative branch of government makes the law (statues) and that this law only provides broad directives. It is the executive branch which needs to add flesh to the law by providing details in the form of regulations (Russo, 2006, p. 9), thereby adding to the discourse.

Fourthly, the connectedness-aspect of complexity theory comes to the fore in the inter-connectedness of statutes themselves. This interconnectedness with other statutes also forms part of the context(s) of the law and contributes to the non-linearity, one of the aspects of complexity theory.

Case law as discourse

Discourses are manifested in case law because, especially in civil proceedings, when an aggrieved party resorts to litigation in order to resolve a dispute with another party, arguments are presented and the court is then required to make a ruling by considering the facts, the law and previous court judgments. Often these rulings require specific actions. Thus, from a complexity theory perspective, we have the interaction aspect, in that by resorting to litigation, disputing parties interact with each other and the law. This interaction implies that they are inter-connected in some form or manner. The feedback and emergence aspects of complexity theory are found in the judgment by the court, the subsequent prescribed actions and judicial precedents. The aspect of context is present in that a court judgment is based on a specific dispute which has taken place within a specific setting which disputing parties interpret differently. Although the courts are primarily concerned with the interpretation and application of law – the feedback aspect of complexity theory – courts also create law (Joubert & Prinsloo, 2008, p. 1) – the emergence aspect of complexity theory. Therefore, a basic understanding of the role and function of private law, civil law procedure and the doctrine of judicial precedents is necessary in order to clarify case law as discourse.

One firstly has to distinguish between positive law and law in the subjective sense. This distinction is explained by Kleyn and Viljoen (2010, p. 108) as follows:

positive law – law in the objective sense – is the whole body of legal rules that applies as a system in South Africa and regulates the relationships on a horizontal level between persons by means of the rules of private law. Because all persons have their own particular interests, the potential for conflict and disputes is good and it is the purpose and task of private law to harmonise the relationship between persons in such a way that society will be orderly and peaceful (Kleyn & Viljoen, 210, p. 107). The law in the subjective sense refers to the way in which private law regulates the relationship between persons (the interaction- and interconnected-aspects of complexity theory) by means of the concept of subjective rights (Kleyn & Viljoen, 2010, p. 108).

Thus, private law concerns the relationship between persons and persons are therefore the subjects of private law who are allowed through private law to have subjective rights and duties with respect to each other and with respect to certain objects (Kleyn & Viljoen, 2010, p. 108). Robinson et al. (2008, p. 6) define a legal subject as a carrier of legal competencies, subjective rights and in the South African law, all persons are legal subjects. The term 'person' does not only imply a human being and the term 'legal subject' must be defined widely enough to include both human beings and juristic persons (Kleyn & Viljoen, 2010, p. 108). There are thus two kinds of legal subjects, namely human beings, referred to as natural persons, and juristic persons who are groups of persons or associations of people such as a company, a university, a church or a school (Joubert & Prinsloo, 2008, p. 7; Robinson et al., 2008, p. 7). Positive law recognises that associations as such, or in itself, are legal subjects which means that a juristic person is an artificial or abstract person (Kleyn & Viljoen, 2010, pp. 108-109). A juristic person participates through its organs (agents) (Kleyn & Viljoen, 2010, p. 109). For example, a school governing body would participate in legal proceedings on behalf of the school (Joubert & Prinsloo, 2008, p. 7).

The law of civil procedure allows for two forms of civil procedures when approaching a court action proceedings and application proceedings (Kleyn & Viljoen, 2010, pp. 117-118). Although different in procedure, both these proceedings allow for the plaintiff/applicant and defendant/respondent to present arguments, albeit in different forms. It is these interactions that are significant to discourse analysis as the ruling of the court also may become a judicial precedent (case law).

Joubert and Prinsloo (2008, p. 21) provide the following examples of how courts create law and why case law is important:

- The courts determine how governing bodies must perform their functions and what the limitations of their powers are.
- Courts have the power to review the administrative actions of the Department of Basic Education.
- Courts interpret statutory and common law principles that are often vague, broad and general.

Case law or judicial precedent is previous rulings handed down by various courts in specific cases (Joubert & Prinsloo, 2008, p. 21). This means that lower courts are bound by the decisions of higher courts and that a court is also bound by its previous decisions, unless they are wrong (Kleyn & Viljoen, 2010, p. 59). However, the higher courts are not bound to the decisions of lower courts. There is

therefore a hierarchy of courts which dictates the manner in which the doctrine of judicial precedent is applied (Kleyn & Viljoen, 2010, p. 60).

From a discourse analysis perspective, arguments presented by the actors (applicants and respondents) and the interpretation of these arguments by the courts, provide valuable insight into the meaning the actors make in these interactions and settings. From a paradigm of complexity theory perspective, a number of aspects can be identified. There is, for example, interaction between the candidates for the principal position, the school governing body, the provincial Head of Department, the law and policy relating to the appointment of principals to public schools and the applicable courts. This interaction illustrates the interconnectedness of these actors in the system. The court judgments not only correspond to the feedback aspect of complexity theory, but also speak to the emergence aspect of complexity theory in that the law has been expanded through judicial precedent, directing future actions such as policy design and implementation. Judicial precedent also contains a contextual aspect in that it is only applicable to similar situations. There is thus interconnectivity between actors, the law and past and future actions.

Conclusion

As the underlying philosophy of discourse analysis is that "knowledge and meaning is produced through interaction with multiple discourses" (Starks & Trinidad, 2007, p. 1372), statutes (laws) and case law and policies become important sources of discourse when researching education reform. In addition, these two sources of discourse are particularly compatible when education systems are studied from a complexity theory perspective.

The main attraction for using statutes (laws) and case law in discourse analysis lies in its emic nature as it allows for the subjective meanings placed on situations to be captured (Cohen, Manion & Morrison, 2011, p. 222). Hence, it permits for a 'culture' to be studied or described in terms of their internal elements and their functioning. It allows researchers to engage in an analysis and critique of the different discourses as both 'instruments of power' and 'effects of power' (Cohen, Manion & Morrison, 2011, p. 589). In other words, how does power operate and what are its effects. These sources of discourse are thus useful when the focus is on the study of actions and interactions within the education system.

References

Cohen, L., Manion, L. & Morrison, K. (2011): *Research Methods in Education*. New York: Routledge.

Doherty, R. (2007): Critically framing education policy: Foucault, discourse and governmentality. In: *Counterpoints*, Vol. 292, *Why Foucault?* New Directions in Educational Research (pp. 193-204). JSTOR.

Fairclough, N. (2005): Discourse analysis in organization studies: The case for critical realism. *Organisation Studies*, 26(6), 915-939.

February, J. (2006): More than a law-making production line? Parliament and its oversight role. In: S. Buhlungu, J. Daniel, R. Southhall & J. Luthman (Eds.) *State of the Nation, South Africa, 2005-2006* (pp. 123-142). Pretoria: HSRC Press.

Hajer, M. A. (2005): Coalitions, practices, and meaning in environmental politics: From acid rain to BSE. In: D. Howarth & J. Torfling (Eds.) *Discourse Theory in European Politics: Identity, Policy and Governance* (pp. 297-315). New York: Palgrave Macmillan.

Joubert, R. & Prinsloo, S. (2008): *The law of education in South Africa.* Pretoria: Van Schaik.

Kleyn, D. & Viljoen, F. (2010): *Beginner's Guide for Law Students*, 4th Edition. Claremont: Juta.

Lee, J. & Adler, L. (2006): Qualitative research redux: Researching contemporary legal issues concerning education. In: S. Permuth & R. Mawdsley (Eds.) *Research Methods for Studying Legal Issues in Education* (pp. 25-56). Dayton, Ohio: Education Law Association.

Mqeke, R. B. (2008): Lawmaking in the new South Africa. In: J. Arnscheidt, B. van Rooij & J. M. Otto (Eds.) *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects* (pp. 199-216). Leyden: Leyden University Press.

Republic of South Africa (RSA) (2017): Invitation to comment on the draft Basic Education Laws Amendment Bill. *Government Gazette*, No. 41178. Pretoria: Government Printer.

Robinson, J. A., Horsten, D. A., Human, S. & Coetzee, E. (2008): *Inleiding tot die Suid-Afikaanse Personereg*, Tweede uitgawe. Potchefstroom: Printing Things Pty Ltd.

Rosenfield, M. (1995): Law as discourse: bridging the gap between democracy and rights. *Harvard Law Review*, 108(5), 1163-1189.

Russo, C. J. (2006): Legal research: The "traditional method". In: S. Permuth & R. Mawdsley (Eds.) *Research Methods for Studying Legal Issues in Education* (pp. 5-24). Dayton, Ohio: Education Law Association.

Starks, H. & Trinidad, S. B. (2007): Choose your method: A comparison of phenomenology, discourse analysis, and grounded theory. *Qualitative Health Research*, 17(10), 1372-1380.

Vincent, L. (2017): Introduction to discourse analysis. Presentation to the Faculty of Education at the University of Pretoria, 1 June 2017.

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