THE DEVELOPMENT OF EDUCATION LAW AS A SEPARATE FIELD OF LAW: THE EXPERIENCE OF THE UNITED STATES WITH SOME OBSERVATIONS ON SOUTH AFRICA

1 *Introduction*

The purpose of this contribution is to discuss and rationalise the development of a separate legal field called "education law" in the United States. The main object is to provide the basis for fruitful comparison with South Africa, where this discipline is currently making steady progress. It is useful and even necessary to gain more insight into the dynamics involved in the process in the United States in order to benefit South African legal thinking and development.

Whether a collection of judicial decisions, legislative statutes or administrative regulations with a common theme warrants the creation of a new field of

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law depends on several factors. The field of education law in the United States owes much of its development to elements of existing fields of law, such as contracts, torts and property, but with the notable difference that legal concepts distilled from existing fields of law have been reconstituted and applied to new sets of problems. That education law has emerged as such a prominent field in the United States reflects in large part its ready-made Petri dish for growth and development, namely the thousands of schools and school districts in the fifty states providing education to millions of students whose attendance at these schools is required under the states' compulsory attendance laws (the analogy with South Africa and its estimated 28 000 public schools is obvious).

Over the past fifty years, education law has thus become a well-established separate field of law in the United States. Many law schools offer a course on education law and the course is a requirement in all school administrator preparation programs in the fifty states. So well-developed has the area of education law become that some law schools and most graduate schools now also offer separate specialty education law courses in education law and sports law. Many law firms employ a considerable number of attorneys and dedicate a substantial amount of resources to purchase resources devoted to the explication and analysis of education law, solely for the purpose either of representing school districts and school district employees or parties such as parents and students making claims against schools. As reflected by the 1 500-2 000 reported state and federal cases involving education each year, litigating legal issues concerning education has become a major industry in the United States. Such a number though does not reflect the unknown number of lawsuits threatened but never filed or lawsuits filed but resolved prior to trial, all of which consume the time of school personnel and the resources of educational institutions.

Although education law in the United States has been glamorised as the development of rights, especially the rights of students, the field of education law more properly involves the ongoing definition of the responsibilities of, and limitations upon, the states and the school boards in managing school districts. Under the Tenth Amendment of the United States Constitution, control over education is an implied power residing with state legislatures. This focus of authority at the state level has meant that administrative units within each state, referred to as school districts — each of which is managed by an elected school board — are responsible for implementing education goals and directives set forth at the state level through statutes and regulations.

In terms of South African thinking the recognition of a new field of law usually occurs for the purposes of teaching, study and practical convenience. Most lawyers know that even the time-honoured and basic division of law into "public law" and "private law" is not absolute and is of limited practical use (see generally Hahlo and Kahn *The South African Legal System and its Background* (1973) ch IV "Jurisprudence: the main divisions of law" 108-141). However, it is quite natural and commonplace to categorise law into as many different disciplines or "modules" (for the purposes of university training) with descriptive titles as may be expedient. In the process legal rules and principles are grouped together to the extent that they apply to a defined field of human endeavour. Such categorisation is also a powerful instrument in bringing order and system to a mass of legal rules and concepts (see, by way of analogy, the observations on the recognition of the "law of damages" as a

distinct field as discussed in Visser and Potgieter *Law of Damages* (2003) 1-5). In addition to obvious practical advantages such as facilitating teaching and research, the identification of a new legal discipline may also focus the necessary legislative and public attention on a certain group of legal rules in order to expedite further legal development.

Although there have always been legal rules and principles — mainly contained in statutory law — that have been classified as "education law", the advent of the new constitutional dispensation in South Africa with its recognition of fundamental rights to and in education, has provided a unique stimulus for the recognition of education law as a truly separate and more developed legal discipline. This field obviously does not merely consist of the mass of legislation regulating education but represents a complete sub-system of law, however vague or soft its boundaries may be in certain areas, aimed at, *inter alia,* recognising and protecting rights and defining corresponding duties concerning the provision of education, and providing solutions to other legal disputes in an educational context. Further observations on the background to all this will be provided in paragraph 5 below.

2 *Rationale for education law in the United States*

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.

Determining whether a critical mass of education law legal material exists, is mainly quantitative in nature, which essentially means the numbers of judicial decisions, legislative statutes, and/or interpretative regulations. Any effort, however, to assign a specific number to these judicial, legislative and administrative materials for the purpose of determining criticality, misses the key point that a new field of law must satisfy all four factors.

A critical mass depends on more than an isolated case, statute or regulation, even in such situations as when a law decision emanates from the nation's highest court. A decision from the supreme court will thus not, in itself, be dispositive of the need for a new field of law unless that decision has generated new litigation, legislation or regulations. Discussed below are two supreme court decisions, *Bob Jones University v United States* (461 US 574 (1983)) and *Brown v Board of Education of Topeka* (347 US 483 (1954)), the first of which would not have supported the creation of a new field of education law while the second one, viewed in retrospect, did become the starting point for education law in the United States.

In *Bob Jones University* the supreme court upheld an Internal Revenue Service regulation revoking the tax-exempt status of a private, religious university with racially discriminatory religion-based marriage and dating policies. Revocation of tax exemption status would have a serious, perhaps even fatal, impact on any university in the United States because donors to the university would no longer be able to deduct their contributions against their personal

income tax liability. In *Bob Jones University* the supreme court was faced with a conflict between an revenue regulation removing government-conferred tax exemption, and thus tacit government approval of the private university's racially discriminatory practice, and the university's marriage and dating policy grounded in sincerely held religious beliefs. In upholding the revenue regulation, the court created for the first time a new legal concept, ''fundamental public policy'', that could be invoked in a case like *Bob Jones University* to eradicate discrimination. The notion that this new concept could subordinate previously protected constitutional beliefs to government social policy represented an extraordinary new exercise of judicial power. The *Bob Jones University* case had the potential to open the door to government eradication of all kinds of discrimination at all levels of private education. However, other than generating considerable discussion among legal scholars, the supreme court's decision passed quietly into the night, having no further significant impact on the development of substantive law. In the end, despite the initial potential for the generation of new judicial, legislative and administrative law, *Bob Jones University* serves as an example of a law case that, even though emanating from the highest court, failed to reach that potential.

Even though *Bob Jones University* is rather an anomaly in the sense that it is one of the rare education-related supreme court decisions that has not created its own critical mass of legal materials, the court's decision nonetheless is a case study reflecting that criticality will depend on more than the source of a decision. In contrast to *Bob Jones University*, the prominent case of *Brown v Board of Education of Topeka* has spawned a vast galaxy of judicial and legislative progeny.

3 *Development of a critical mass: lessons from* Brown v Board of Education

New fields of law tend to develop incrementally as judicial opinions and legislative enactments gradually form a critical mass of law defining a specific field. In the United States, the supreme court's decision in *Brown* accelerated this process. Five areas of change regarding education law have developed in the fifty years since the *Brown* decision:

First, *Brown* represented the first in what was to become a flood of federal court interventions into the operation of school districts that up to that point in time had largely been the responsibility of states under the Tenth Amendment. *Brown* and its progeny of desegregation cases represented the most expansive and intensive exercise of equity power in the history of the federal courts that in many cases actually supplanted the authority of school boards and state legislatures to operate public schools. Although the direct impact of *Brown* can still be seen in the number of school districts still under federal oversight, the past fifty years have also witnessed an explosion of litigation involving student and employee constitutional rights that have impacted the operation of schools. *Brown* has inserted federal courts into educational decision-making that goes far beyond the isolated pre-*Brown* cases where federal courts limited their intrusions into state and school board operation of schools into balancing the rights of parents to make educational decisions with the rights of states and school boards to control education.

Second, *Brown* precipitated a series of federal and state anti-discrimination laws that swept within their protection a wide range of areas that went far

beyond the original concern about race. In its movement toward what some would refer to as the federalising of American education, congress has used the power of the purse to tie the obligation to protect equal educational opportunities to the receiving of federal funds. Judicial enforcement of these laws has subjected school teachers, administrators and board members to new concerns about interpretations of state and federal laws, mandates for meaningful and effective compliance under those laws, exposure to compensatory liability, and the vagaries of governmental immunity. The past half-century of American history since *Brown* has demonstrated that a critical mass of education law materials goes far beyond case law to include legislative statutes and their interpretive administrative regulations.

Third, *Brown* was the direct and immediate cause for the formation in 1954 of the Education Law Association (ELA) in Topeka, Kansas, the city and school district that had been the subject of the *Brown* litigation. In the intervening 50 years, ELA, with its large membership of lawyers, higher education professors of education law, and school practitioners, has become a major producer of publications covering virtually every issue facing schools. ELA was not alone: other membership education organisations and advocacy groups began generating newsletters, journals, monographs, and books to inform education practitioners of relevant new court decisions and statutes that impacted their schools. The result has been an incredible proliferation of materials providing advice, suggestions, guidelines and recommendations for the effective and legal operation of schools, some of which is conflicting.

Fourth, *Brown* precipitated the creation of education law courses in school administrator programs that by the mid-1970s would become a requirement for licensure in every state. With the required education law courses came a new kind of textbook, one that not only contained discussions about the law, but included edited copies of judicial decisions. School administrators were now not only subjected to commentary about the law, but were expected to be able to read and understand how courts explicated and interpreted the law.

Fifth, an education constituency more knowledgeable about the law of education demanded attorneys who not only could apply existing fields of law to education but who could keep them abreast of the rapidly expanding numbers of state and federal court decisions, statutes and regulations. The demand for attorneys knowledgeable in education law reflected not only the need for clear and accurate statements about the law, but also the need for attorneys who understood how that law would apply to the operation of schools. Increased litigation involving schools and school employees prompted professional educator organisations to offer liability insurance to their members and resulted in these organisations employing in-house attorneys and in school boards engaging attorneys on retainer arrangements.

4 *The need for a new field of law: the importance of consumer demand*

While all of the changes discussed above cannot be attributed solely to *Brown*, they do reflect the multiple forces set in motion when courts and legislatures act to effect changes in schools. More importantly, though, they indicate that the creation of a new field of education law involves more than just looking upon case law and statutory enactments as inputs. These cases and statutes contain

principles and requirements that must be translated into outputs that can be applied in the operation of schools.

These outputs presuppose at least two kinds of consumers: one set to assimilate the case and statutory law and distil from them principles and requirements, and a second set to operationalise those principles and requirements within schools. The first group of consumers normally would be identified as law-trained persons (attorneys) skilled in interpreting the standard areas of law (eg, contracts, torts, property) 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 legal advice (principles and requirements), the increased legal awareness in the United States by non-law-trained education practitioners through course work and continuing education makes the relationship more of a tandem partnership.

In essence, then, the strongest justification for a new field of education law occurs when those responsible for implementing the law generated through new judicial decisions, legislative enactments and regulatory policies (education practitioners) have ready access to materials explaining changes in the law. The claim is not that teachers and administrators will become attorneys, but that educational practitioners must have confidence in their ability on a daily basis to understand and interpret court decisions and statutes. The more sophisticated education practitioners become in their understanding of the law, the greater the ease with which they can engage in conversations with attorneys and the higher will be their expectation that attorneys accurately translate the language of courts and legislatures into the language of educational implementation.

In order to arrive at this level of mutual interaction between legal and education practitioners, a separate field of education law, if it does not currently exist, will have to be created. As a sustainable critical mass of education law judicial, legislative and regulatory materials increases, a separate field of education law is essential if advice to education practitioners is to be timely and accurate. In the United States, as the critical mass of education law material has increased exponentially, the role of the school attorney has included not only giving advice to educational practitioners regarding current problems, but also commenting upon or correcting advice available to education practitioners from a multiple number of published sources. These greater demands placed upon attorneys representing schools and school personnel have required a greater investment of their time in accessing and assimilating the law related to schools, which in turn has led to more attorneys devoting their entire practice to education law. The sheer mass of legal material, the vulnerability of schools and school personnel to liability, and the greater understanding by education practitioner consumers of legal matters have demanded a more knowledgeable and focused group of education lawyers. Education law attorneys must not only know the law, but must also know and understand the educational process to which that law is to be applied. In the end, the need for a separate field of education law in the United States has been fuelled by the spiralling increase in the critical mass of legal materials and the demand by

groups of consumers, attorneys and educators alike for knowledge and understanding of the law and its impact on the education process.

5 *A few observations on the South African experience*

Before the adoption of the new constitution providing for fundamental human rights to and in education, the legal rules collectively described as "education law" mainly occupied the attention of education officials and educators. These legal rules were mostly drawn from national and subordinate legislation. However, certain legal principles concerning delictual and contractual liability, and aspects of criminal and administrative law, also entered the picture. Such textbooks as there were, purporting to deal with education law, were written by or with strong inputs from non-lawyers with the main aim of providing legal information to educators and administrators to enable them to deal with elementary legal problems that could be expected in an educational milieu. Whatever the contribution of these publications to the proper functioning of the educational system, they cannot truly be said to be legal textbooks in the usual sense since they would seldom if ever be consulted by professional lawyers. However, one of the main values of these works has been the fact that they have focused attention on the field of "education law" and legal problems encountered in an educational setting (for a list of such books and related publications, see Oosthuisen *et al Aspects of Education Law* (2003) 240-245).

Not long after the implementation of the interim constitution (1993), the newly appointed constitutional court had to resolve some highly publicised educational disputes (see *Ex parte Speaker of National Assembly: In re dispute concerning certain provisions of the National Education Policy Bill* 1996 3 SA 289 (CC) (dealing with the demarcation of national and provincial powers regarding education policy); *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 SA BCLR 537 (CC) (regarding the correct interpretation of the highly politicised provisions in the interim constitution concerning schools based on a common language or culture). Another case, from the high court, attracted huge media interest in South Africa and internationally. This was *Matuka v Laerskool Potgietersrus* (1996 3 SA 223 (T)) concerning a public school admission policy ostensibly based on racial considerations. The rejection of the admission policy set an important precedent for other schools. Another case, which the government lost, namely *Grove Primary School v Minister of Education* (1997 4 SA 982 (C)), ensured considerable interest from lawyers and parents alike in legal aspects of the governing of public schools. These cases (and matters like *Wittman v Deutscher Schulverein* 1998 4 SA 423 (T) concerning freedom of religion in independent schools) can be said to have focused attention on legal disputes in education as never before, have inspired much learned legal writing and have probably been instrumental in shaping new ideas on the existence, functioning and borders of "education law".

Ever since 1995, a reasonable body of reported "education law" judgments has been built up — not to be compared, of course, with the almost thousands of cases reported every year in the United States of America — in addition to the many judgments that have been reported over the years by Juta and Co under the simplistic and practical heading "school and school board" (see further, eg, the following prominent judgments by the constitutional court as our highest court, illustrating the importance attached to disputes concerning

school education: *Larbi-Odam v Member of the Executive Council, Education* 1998 1 SA 745 (CC) (foreign educators); *Head of Education Department Limpopo Province v Settlers Agricultural High School* 2003 11 BCLR 1212 (CC) (appointment of school principal); *Minister of Education v Harris* 2001 11 BCLR 1157 (CC) (age requirements and the status and legal validity of education policy); *Premier Mpumalanga v Association of State-aided Schools* 1999 2 SA 91 (CC) (bursaries and administrative justice); *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) (prohibition on corporal punishment in public and independent (private) schools); *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) (right to equality in view of state restructuring schemes); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 2 SA 1 (CC) (administrative justice and subsidies to independent or private schools). More recently, two decisions from the supreme court of appeal on education have demonstrated the importance of a correct interpretation of provisions in the constitution and other statutes in the sphere of public schools (see *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 10 BCLR 973 (SCA) (on the important and sensitive issue of language); *LUR vir Onderwys en Kultuur, Vrystaat v Louw en Oosthuizen* 2006 1 SA 192 (SCA) (on delictual claims against the state)). It is important to note the high quality of the legal reasoning in the judgments referred to above as well as the stimulus to further legal thinking, research and writing that they have provided.

In addition to the above, many legislative and policy developments in the sphere of education have given rise to wider interest and highlighted the importance of having sufficiently developed and detailed rules regulating the provision of education. For example, the famous white papers on education policy of the 1990s and wide public consultations preceding the drafting and approval of the South African Schools Act 84 of 1996, initiated debate on legal aspects regarding education on a scale never before experienced in South Africa. The system provided for in the South African Schools Act in terms of which public schools are governed by elected governing bodies has also led to litigation against education authorities on a scale never before witnessed in South Africa. Moreover, there are currently almost 250 national and provincial statutes dealing specifically with education, as well as references to education in many other laws. These laws have to be reviewed on a regular basis.

Since 1994 a number of academic educators and lawyers have taken a professional interest in aspects of education law — culminating in the founding of a national association promoting education law and policy (SAELPA) as well as an inter-university centre undertaking advanced research into aspects of education law and policy (CELP). These developments were accompanied by valuable exchanges and co-operation with education law specialists and bodies in Western Europe, the United States, Canada and Australia. The co-operation with Western Europe has led to publications based on conferences which made high quality materials on education law authored by prominent lawyers more available (see, eg, De Groof and Bray *Education Under the New Constitution in South Africa* (1996) 1-371; De Groof and Malherbe *Human Rights in South African Education* (1997) 1-314). In addition, more and more articles on aspects of education law have appeared in accredited law journals. In a further noteworthy development, the law faculty of the University of Pretoria was the first in South Africa to introduce an elective module on education law specifically

for the LLB degree (in 1998). The involvement of academic lawyers has been important in furthering the idea of a properly developed notion of education law as a separate legal discipline since it is usually only legal academics who would involve themselves with the theoretical and systematic principles of education law as an interdisciplinary field of scientific study.

When the developments and situation in South Africa are evaluated against the four criteria listed earlier, insofar as they can be applied in the local context (see par 2 above), it may be concluded that a "critical mass" has probably developed as described and that the other requirements have been met or are being met for the recognition of "education law" as a distinct legal discipline to be a fact. 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.

6 *Conclusion*

Discussing isolated Unites States supreme court cases with reference to their role in contributing to a critical mass of judicial, legislative and administrative materials is a somewhat artificial process in the post-*Brown* United States, where thousands of such materials now exist at the state and federal levels. However, in other countries where the number of cases from the country's highest court and statutes from legislatures directed solely at schools are still very few in number, the creation of a critical mass of materials and the development of more sophisticated notions on law and education may still be an emerging process. Nevertheless, the quantity of legal materials is not necessarily decisive and the quality and nature of the material must also be seen as highly relevant. Especially important in the emergence of the field of education law, though, is knowledge among education practitioners of their rights and responsibilities under the law. Education law is obviously not just meant for the "consumption" of practising lawyers; in fact, if education law is further to mature into its own separate field, educational practitioners must have an active awareness of, and demand, accurate information about the law and its application to the effective operation of their schools.

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