v. 2, n. 39, 2022

International Journal of Human Sciences Research

EDUCATIONAL LAW - INTRODUCTION TO EPISTEMOLOGICAL APPROACH

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Abstract: When it alludes to the Brazilian educational legislation, it refers to laws that generally form the cultural planning of the country. With the word education there is an analogous conjuncture. Now the word education refers to the processes of school education, inside and outside the educational establishments, sometimes it has a concept restricted to school education that is done solely in teaching organizations. Therefore, to speak, in other times, in education legislation and education legislation. Finally, it is necessary to clarify the following heuristic problem: Education legislation can be considered the normative body configuring educational law; Or only set of rules regarding education, extracted from other branches, without epistemic concatenation?
Keywords: Education; Right; Interdisciplinarity.

INTRODUCTION

In the light of the teaching of the Lavra de Conte, apud Duarte (1984, p. 15), educational law consists of the "set of norms, principles, laws and regulations dealing with the relations of students, teachers, administrators, experts and technicians, while involved, mediate or immediately in the teaching-learning process".

In the same step, pursuant to Motta (1997), three ways to print the "Educational Law" construct:

a) the set of regulatory rules of relationships between the parties involved in the teaching-learning process;
b) the faculty attributed to every human being and which constitutes the prerogative of learning, teaching and improving; and
c) The branch of legal science specialized in the educational area.

In the first sense, the plethora of norms ranging from federal, state and municipal laws to opinions of the National Education Council, Executive Power decrees, ministerial ordinances, statutes and regiments of schools, which constitute the traditional discipline of teaching legislation, which It is an integral but restricted part of educational law, since it includes: the doctrinal unity, the systematization of principles, the methodology that structures a full legal body.

Therefore, there should be no confusion legislation of education with educational law: while this is limited to the study of the set of norms on education, it has a much more comprehensive field.

Educational law has a very comprehensive field and, as Melo Filho (1982-1983, p.54) states, "can be understood as a set of systematized legal techniques, rules and instruments that aim to discipline human behavior related to education."

As autonomous discipline, educational law is very recent, says Motta (1997). The same author understands that educational law is the natural result, firstly, of the evolution of education in contemporary time and, secondly, of the development of legal sciences, since, remembering Nader (1996, p.02), "a Legal tree, each day, becomes denser, with the emergence of new branches that, in permanent adequacy to social transformations, specialize in sub-riras ".

Thus, in which law requires a broad discipline that allows a systemic approach of its entirety, it also includes a large number of disciplines, each focused on each of the branches that compose it.

Before dividing into branches, law includes a larger division of its trunk into two strains: public law and private law, which are subdivided into disciplines. Educational law is the discipline that constitutes the newest branch of law, collimating both legal and pedagogical scopes.

Motta (1997, p.53), which

> Having as a father the right and as a hand in education and for being the youngest of both, he was fortunate to be able to drink in the purest and recent sources of theory, research and the scientific method, of these two sciences and also philosophy, from History and sociology.

For a better understanding of the third conception defended earlier, the teachings of Melo Filho (1982-1983, p. 54) loom:

> Instead of questioning the legislative and scientific autonomies of educational law, it should be noted that, for the simple reason that there is no legal journey regardless of the totality of the legal system, the autonomy of any branch of law is always and only Didactics, investigating the legal effects resulting from the incidence of a certain number of legal norms, aiming to discover the logical concatenation that gathers them in an organic group and unites this group to the entire legal system.

Reale (1994) also corroborates this statement, whose thinking in relation to the various legal disciplines says it is necessary to study them in their unit set, as none of them have meaning alone, regardless of the others. In this regard, Dio (1982, p. 34) Synthesizes the subject:

> Those who make a retrospective will be talked about the multiplier tendency of the law sectors, as if, from an initial unit, they detached, as a result of a centrifugal force, fragments that will revolve around the orbit. And the analogy proceeds because, if, on the one hand, the disconnection of the central nucleus represents the moment of autonomy, the 'rotating around' means the moment of dependence. In this sense, each branch of law that is erected in a new discipline shows peculiar principles, but does not lose the characteristics that bind it to the broadest study of which it originated.

According to Mello (1995), the branch of law is considered to be one that has a systematized set of principles and norms that differentiate it from other branches of law and give it their own identity. This is the case of educational law, which is still treated by many as mere legislation of education, education legislation, educational legislation (MOTTA, 1997).

Referring to educational law, Boaventura (1996) states that, as a new discipline, it cannot be seen and studied only within the limits of the legislation. On the contrary, it must be treated in the light of the guidelines that undermine education and the principles that inform the entire legal system.

The author points out that in relationships of education, "legislation would be only a soulless body" (Boaventura, 1996, p. 46).

Educational law is part of positive law, as it understands a set of laws (written and approved by political power) that regulate the education sector.

However, it is also the science that conceptualizes the principles and studies, systematizes and elucidates the norms that regulate the relations of the educational area and which form an orderly system of precepts based on the criteria of universality, equity and justice. Pursuant to Motta (1997), educational law is mainly formed by a set of devices (which provides for concepts and principles), prescriptive (which prescribes how the conduct of public authorities and individuals should be oriented as it should be oriented to be oriented to be oriented. and legal, providing them with coherent directives for teaching-learning relations) and imperative (which imposes limits on freedom, prohibitions, duties and obligations), and therefore irrefutable, as an authentic new branch of law.

From the point of view of positive law, it is not denying the existence of Brazilian educational law, since there is a whole specific normative ordering of the educational area, of which the Law of Guidelines and Bases of National Education (LDB) is a species

Code, supported by connected laws and complementary norms, all posed in a special section of the Federal Constitution, where their basic principles are found. Thus, it can be said that Brazilian educational law is organized in a totality of written legal norms that regulate the forms of institution, organization, maintenance and development of teaching, as well as human conduct directly related to educational processes both within family , as in government organizations and institutions maintained by free enterprise.

In the clarification of Martins (2002), educational law is still an academic orphan, that is, who is developing reflection in the postgraduate degree in law connecting reflection to the legal and the militants other, that of education, stimulate education law education for educational theory.

As for the perspectives, the author points out:

> We believe that in the 21st century, we will reach a model of systematization of educational norms to another time to see a stage of law of education in which social movements in favor of the right to education are under the aegis of doctrine and jurisprudence in education (Martins, 2002, p.24). Today, educational law, from any angle or methodology that is chosen to analyze it, has evolved in such a way that it has established itself as an autonomous branch of law, since it concludes that it fulfills all the requirements, already mentioned above, to leave to be treated only as teaching legislation (MOTTA, 1997).

METHODOLOGY, PROBLEM AND HYPOTHESIS

The current understanding of education legislation, within the law of guidelines and bases considered as the Magna Education Law, is that of school education, but not restricted to the conception of instruction, focused only on the transmission of knowledge in educational establishments. In LDB, education is conceived as a process of comprehensive training, including citizenship formation and work as an educational principle, therefore not restricted to educational institutions.

Here, lies the possibility of contemplating educational legislation as the legislation that collects all legal acts and facts dealing with education.

Already in its conceptual, etymological and historical roots the words legislation and education did not have univocal meaning, that is, they brought in their historical formation the character of polysemia. In Rome, legislation could both mean the set of specific laws of a matter or business and the law in its most comprehensive sense.

Today, the situation has not changed much: when it refers to legislation both in the narrow and wide sense, by extension. Thus, the expression educational legislation proves to be a set of legal norms on educational matter.

When it speaks Brazilian educational legislation, it refers to laws that generally form the cultural planning of the country. With the word education, there is a similar situation. However, the word education refers to the processes of school education, inside and outside the educational establishments, sometimes it has a concept restricted to school education that occurs solely in educational establishments.

Thus, the following should be understood: Education legislation can be considered as the body or set of laws related to education, whether strictly focused on teaching or issues to educational subjects, such as the profession of teacher, the democratization of teaching or school tuition.

Based on this, from the new general order of national education, arising from Law 9.3 94/96, one can somehow consider the use

of expressions educational legislation and teaching legislation. When the expression educational legislation or education legislation is referred to is referring to the legislation that deals with school education, at the levels of education (basic and higher).

It is certain that educational legislation can therefore be taken as a body or set of laws related to education.

It is a complex of laws whose recipient is the working man or the consumer man.

This is the sense of legislation as legislation. The legislation is, above all, in so -called organic or ordained regulations, issued by the magistrates in the face of popular grant. Educational legislation, as it seems to suggest, is a discipline of immediate interest in law or more precisely on educational law.

However, interdisciplinary look will say that it is central to pedagogy when in the study of school organization. Therefore, for the purpose of forming the heuristic problem, the following heuristic question: Educational law provides epistemic and methodological questions, or does not supplant the range of norms, doctrines and jurisprudence emanating from other legal branches? For Severino (1996), after the problem is placed to state its hypotheses: the thesis itself, or general hypothesis consists of the central thesis that the research is intended to demonstrate.

In this step, it is necessary to obtain that educational legislation can be understood as the sum of regular and historically instituted rules about education. All educational, legal and infralegal rules, laws and regulations, with legal instruction, related to the educational sector, in contemporary and in the past, are of interest to educational legislation.

Thus, it is observed that educational legislation can have a broad sense, that is, it may mean laws of education, which sprout from national constitutions, such as the Federal Constitution, considered the largest law of the legal system of the Republic, to the laws passed by National Congress and sanctioned by the President of the Republic.

It may also cover presidential decrees, ministerial and interministerial ordinances, resolutions and opinions of the ministerial organs or the superior administration of Brazilian education. The methodology used observed scientific precepts, harmonizing them with the observation of reality and the experience rescued during the elaboration of this work, resulting in the theoretical and bibliographic review.

The bibliographic review means the lifting of the bibliography regarding the subject on the agenda. Bibliographic research has two operational purposes in this perquirition:

> I - The first is mandatory, it is the revision of the literature, that is, all reading that aims to substantiate the research as a whole.
> II - The second is documentary or bibliographic research itself. It occurs when observation data is bibliographic or documentary in the strict sense and is equivalent to field and laboratory work in other research (RAUEN, 1999).

ROOTS OF EDUCATIONAL LAW

As Motta (1997, p.55) points out, "Educational Law is not a classic right, not even a historical right (in the sense of an old), but rather a civilized right", that is, that only came to be defined and applied by the latest civilized peoples, especially those of contemporary age. Initially, it was more customary and consumed, that is, not written and was limited to general principles.

From antiquity to the time of the French Revolution, references expressed to aspects of educational law did not appear in the Constitutions.

In 1971, in the preamble of the French Constitution, the so-called "public aid"

was foresaw the attribution of the state to educate abandoned minors. In the body of this letter, according to Tacito (1988), also contained the creation and organization of public instruction, aiming to offer free "indispensable teaching" so that it would become common to all citizens.

In the Brazilian Constitution of 1824, in items 32 and 33 of art. 179, it was determined that "primary instruction is free for all citizens" and the creation of "colleges and universities, where the elements of the sciences, beautiful arts and arts" (Brazil, 1824 apud MOTTA, 1997, will be taught, which will be taught. , p.55).

According to Martins (2002), the legal rules related to education contained in the 1824 Constitution are early rules of the right to education and the rules of educational principle. In the case of the Constitution of 1824, the text, from the most rigorous constitutional point of view, is consistent by disciplinary in the legal order the gratuity of primary instruction and include the creation of colleges and universities in the cast of civil and political rights.

Educational law even begins to take shape in 1917 in the Mexican Constitution, having its general principles and norms included in the broader constitutional provisions. Two years after the Russian Revolution of 1917, a new constitution arises in which guiding principles of education in Russia arises.

In the same act, in Germany, with the constitution of Weimar, in its articles 142 to 150, are inserted among constitutional norms, the gratuity of primary and professional education, the facultative of religious education and the freedom of action of free initiative in the countryside of teaching. The Brazilian Constitution of 1934 suffered a noticeable influence of Weimar's letter.

Martins (2002) states that in the Constitution of 1934 education receives expressive space in the interventionist state. That said, from the point of view of constitutional law, the State would not complain and education as a specific, autonomous constitutional discipline.

According to Motta (1997) Brazilian educational law has, in its historical base, as a basic pillar, the license of D. Sebastião, dated 1564, which set a redize (part of the tithes and rights of El Rei throughout Brazil) for the so -called "missionary enterprises". With these resources, Portugal funded all the teaching that was developed by the Jesuits in Brazil.

In addition to this permit, other Portuguese legal instruments also had provisions that regulated teaching in Brazil, such as Ratio Studium, the Constitution of the Society of Jesus, and the Missions Regiment (1866), but their doctrinal basis comes from Portuguese and French jurisconsults , as well as the Afonsinas, Manueline and Philippines ordinations. The first important work for the systematization of educational law was Alberto Teodoro Didio, called "contribution to the systematization of educational law", since, although the purpose, expressly proclaimed, of the two seminars previously performed on educational law, no one was concerned, in the due extension and depth, with the general and encompassing view of this emerging area of legal studies.

In line with the clarification of Motta (1997), it is credited to it the pioneering spirit in addressing the subject, because in the Specialization Course in Comparative Law of the Faculty of Law of the University of São Paulo presented a monograph in which the expression educational law It is first used: "Educational Law in Brazil and the United States". According to the monograph, his study was

> [...] Only one survey, more exploratory than systematic, in order to plant some seeds than, in the future, can be constituted in the law of education, a matter that may gain autonomy, as occurred, for example, with labor law "(Di Dio, 1982, p.11). 5 evidential elements of the existence of educational law

By defining whether a legal discipline can be considered autonomous, it is necessary to frame it, in the lecture of the Baaventura (1996), according to the following tripetic conditions:

> a) First, when it is large enough with plenty of matter to deserve a proper study;
> b) Secondly, it is necessary to have homogeneous doctrines, dominated by general concepts, common and distinct from others applied to other disciplines; and
> c) Finally, it must have its own methods, that is, special procedures for approaching the themes and problems that constitute the object of their investigations. (Boaventura, 1996, p.41)

As for the extent of matter, it has been flooding since the first law selected by Emperor D. Pedro I on October 15, 1824. Not enough, the fertile legislative action of the federal level, increased considerably from the 1930s, with the creation of the Ministry of Education and the Federal Council of Education, the Federation Units were also required to produce, especially in their secretariats and councils State of Education, vast complementary legislation, which, by its volume, forced several states to provide their respective consolidations of teaching laws (MOTTA, 1997).

Every decade after the Law of Guidelines and Bases of National Education, of December 20, 1961, were accumulated, both in the federal and state and municipal level, laws, decrees-law, decrees, ministerial ordinances, resolutions, opinions Normatives, administrative acts, instructions, regulations, statutes, regiments, etc.

With the amendment of LDB by Law No. 5,692, of August 11, 1971, new collections of current legislation were launched. The Ministry of Education also issued several collections, among which the following were well disclosed and used: 2nd degree education; Laws and opinions, in 1976, and the education of the 1st degree; Legislation and opinions in 1979. During the 1970s, 80s and 90s, other collections on state and national legislation were edited in some states. Another source of educational law lies in magazines given to fire by state education councils, which, along with publicizing the normative acts of each state in the educational area, also publish studies, reports and opinions that enrich the doctrine at all levels of Teaching, especially in elementary and high school.

The second criterion that Boaventura (1996) speaks of homogeneous and peculiar doctrines to education. The doctrine about it is broader than bibliography, as it covers the comments of the greatest Brazilian jurists and constitutionalists about the right to education and other principles that were historically included in the Constitutions, especially from 1934, as achievements of the Brazilian people in the field of education. Educational law has doctrinal principles that differentiate it a lot from other branches of law, but also adopts some general principles, many of them with specific approaches to the area of education, such as:

> a) obligation;
> b) non -retroactivity;
> c) hierarchy;
> d) continuity;
> e) articulated decentralization;
> f) concentration of means;
> g) progressivity in the implementation of laws;

h) Impossibility of claiming ignorance of the law;
i) lack of crime without law that defines it;
j) presumption of innocence of the defendant until proven otherwise; etc.

In recent years, an extensive jurisprudence of educational law has been formed in the various instances of the judiciary, including the Federal Supreme Court, where there are numerous judgments, especially on provisional measures issued by the federal executive branch in the last three years, which have been the target of several direct actions of unconstitutionality. These provisional measures had school tuition, default of students and parents of students, pedagogical and administrative punishments, National Council of Education, evaluation of higher education institutions, election of rectors of public universities, etc. (MOTTA, 1997).

Therefore, it is not denying autonomy to educational law, because it is evident that they are verified, and in quantity, homogeneous doctrines, dominated by peculiar general concepts, starting with the very concepts of education and educational law, as well as and: autonomy University, enrollment, authorization and recognition of courses, accreditation of institutions, etc.

FINAL CONSIDERATIONS

In the last place, it is important to emphasize that educational law also fulfills the third criterion, because it has its own methods for approaching the topics and problems that constitute the object of its investigations. Moreover, in relation to the methods for knowledge of the object in educational law, Boaventura (1996) points out:

Doctrines, principles, norms, institutes foreign to other branches of law order and inform the broad and bulky extension of norms, by the proper methods for knowledge of the educational object.

The methodological instrument is the means by which the knowledge of the science of educational law grows. In particular, education as a discipline has a series of methods that are applied to their growth.

It is the function of educational research.

Regarding the procedures consistent with the problems of educational law, the teacher-student relationship standards were developed and establishing personal interrelationships within the school and its relations with the community.

Much has contributed, methodologically, to the development of the education sciences the research results, particularly in the field of human behavior analysis (Boaventura, 1996, p.45). Finally, as the demand, undergraduate and postgraduate courses in the legal area will be adopted the discipline "Educational Law", whose epistemological status will be fully configured.

REFERÊNCIAS

BOAVENTURA, Edivaldo M. Um ensaio de sistematização do direito educacional.**Revista de Informação Legislativa**, Brasília: Senado Federal. v. 33, n. 131, p. 31-57, jul./set. 1996.

DI DIO, Renato Alberto Teodoro. **Contribuição à sistematização do direito educacional.** Taubaté: Universidade deTaubaté. Imprensa Universitária, 1982.

DUARTE, Sérgio Guerra. **Educação brasileira**: legislação e jurisprudência do pré-escolar à pós-graduação. Rio de Janeiro: Antares, 1984.

MARTINS, Vicente. **Direito educacional**. e-BooksBrasil: local, 2002.

MELLO, Celso Antônio bandeira de. **Curso de direito administrativo**. 7 ed. São Paulo: Malheiros, 1995.

MELO FILHO, Álvaro. Direito educacional: aspectos teóricos e práticos. **Revista do Conselho de educação do Ceará**, Fortaleza, n. 1982-1983.

MOTTA, Elias de Oliveira. **Direito educacional e educação no século XXI**. Brasília: UNESCO, 1997.

NADER, Paulo. **Introdução ao estudo do direito**. Rio de Janeiro: Forense, 1996.

RAUEN, Fábio José. **Elementos de iniciação à pesquisa**: inclui orientações para a referenciação de documentos eletrônicos. Rio do Sul: Nova Era, 1999.

REALE, Miguel. **Lições preliminares de direito**. 21 ed. São Paulo: Saraiva, 1994.

REIS, Ana Maria Viegas. **Ensino a distância... megatendência atual**: abolindo preconceitos. São Paulo: Editora Imobiliária, 1996.

RUGIU, Antonio Santoni. **Nostalgia do mestre artesão**. São Paulo: Autores Associados, 1998.

SEVERINO, Antônio Joaquim. **Metodologia do trabalho científico**. São Paulo: Cortez, 1996.

TÁCITO, Caio. Educação, cultura e tecnologia na constituição. In: **A constituição brasileira de 1988**: interpretações. Rio de Janeiro: Forense, 1988.