Fundamentals of Educational Planning

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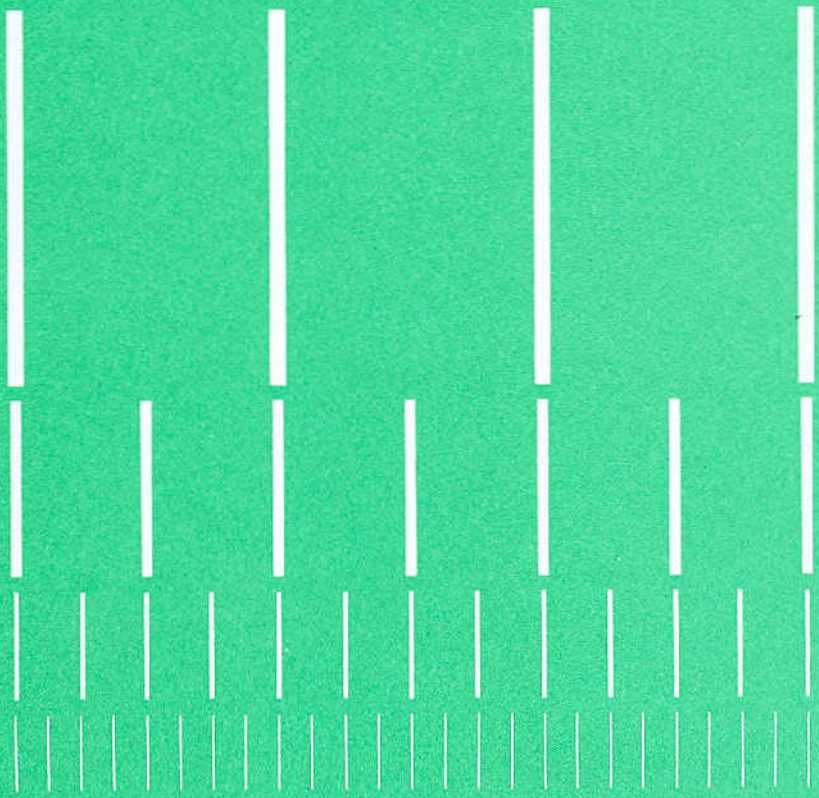
Law and educational planning

Ian Birch



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Fundamentals of educational planning

The booklets in this series are written primarily for two types of clientele: those engaged in educational planning and administration, in developing as well as developed countries; and others, less specialized, such as senior government officials and policy-makers who seek a more general understanding of educational planning and of how it is related to overall national development. They are intended to be of use either for private study or in formal training programmes.

Since this series was launched in 1967 practices and concepts of educational planning have undergone substantial change. Many of the assumptions which underlay earlier attempts to rationalize the process of educational development have been criticized or abandoned. Even if rigid mandatory centralized planning has now clearly proven to be inappropriate, this does not mean that all forms of planning have been dispensed with. On the contrary, the need for collecting data, evaluating the efficiency of existing programmes, undertaking a wide range of studies, exploring the future and fostering broad debate on these bases to guide educational policy and decision making has become even more acute than before.

The scope of educational planning has been broadened. In addition to the formal system of education, it is now applied to all other important educational efforts in non-formal settings. Attention to the growth and expansion of educational systems is being complemented and sometimes even replaced by a growing concern for the quality of the entire educational process and for the control of its results. Finally, planners and administrators have become more and more aware of the importance of implementation

strategies and of the role of different regulatory mechanisms in this respect: the choice of financing methods, the examination and certification procedures or various other regulation and incentive structures. The concern of planners is twofold: to reach a better understanding of the validity of education in its own empirically observed specific dimensions and to help in defining appropriate strategies for change.

The purpose of these booklets includes monitoring the evolution and change in educational policies and their effect upon educational planning requirements; highlighting current issues of educational planning and analyzing them in the context of their historical and societal setting; and disseminating methodologies of planning which can be applied in the context of both the developed and the developing countries.

In order to help the Institute identify the real up-to-date issues in educational planning and policy-making in different parts of the world, an Editorial Board has been appointed, composed of two general editors and associate editors from different regions, all professionals of high repute in their own field. At the first meeting of this new Editorial Board in January 1990, its members identified key topics to be covered in the coming issues under the following headings:

1. Education and development
2. Equity considerations
3. Quality of education
4. Structure, administration and management of education
5. Curriculum
6. Cost and financing of education
7. Planning techniques and approaches
8. Information systems, monitoring and evaluation

Each heading is covered by one or two associate editors.

The series has been carefully planned but no attempt has been made to avoid differences or even contradictions in the views expressed by the authors. The Institute itself does not wish to impose any official doctrine. Thus, while the views are the responsibility of the authors and may not always be shared by

UNESCO or the IIEP, they warrant attention in the international forum of ideas. Indeed, one of the purposes of this series is to reflect a diversity of experience and opinions by giving different authors from a wide range of backgrounds and disciplines the opportunity of expressing their views on changing theories and practices in educational planning.

The present booklet is concerned with law and educational planning. Educational planners and administrators are generally well aware of the importance of law and other legal instruments in ensuring the implementation of their educational policies, plans and programmes. The importance of an appropriate legal framework should not be underestimated at a time when state control is diminishing in the direct administration and operation of schools, and when this responsibility is being increasingly delegated to other territorial or non governmental entities.

The law, however, is not only an instrument to be used by educational authorities, it also represents a constraint in as far as its main function is to protect the rights of those concerned by the educational process – above all, the children. Educational planners and administrators, therefore, should know more about educational law – its nature, source, compass and functions. The present booklet provides an excellent introduction to the subject. No one but Professor Ian Birch (of the University of Western Australia) could have presented the topic in a better way with examples from developed and developing countries.

The law is not culture-free, however, and quite naturally the present booklet is influenced by the Anglo-Saxon legal tradition. Given the importance of the subject for educational planners and administrators, the Editorial Board of the series is considering complementing this issue with another booklet which would reflect the French or Latin legal tradition.

The Institute would like to thank T. Neville Postlethwaite (Professor at the University of Hamburg, Germany), special editor of this issue, for the very active role he played in its preparation.

Jacques Hallak
Director, IIEP

Composition of the Editorial Board

Preface

Educational planners and administrators must refer to the law and educational law of their country in their daily work. Not only must they refer to the existing law to ensure that their proposals and actions are legal but they often become involved in the drafting of new educational law.

Lawmakers often have difficulty in providing a framework for good education. They can sometimes create a situation in which planners and administrators find themselves wrestling more with the implications of the law in education rather than concerning themselves with the education of children.

However, it is clear that there must be some way of regulating such matters as:

- requirements of parents or children with regard to schooling;
- the conduct of schools, principals, and teachers;
- the curriculum;
- both discipline and protection for those participating in education, especially children;
- the rights of minorities;
- special provisions for people living in difficult contexts;
- religious, moral, and ethical freedom and protection;
- the financing of schools;

and, and, and ...!

What is important is to have a legal framework which is not onerous and enables systems of education to operate in the best

interests of all parties. Such a framework can best be developed by lawyers and educationists together. In the meantime, educational planners and administrators have the task of exercising their talents in a legal context which may be more or less favourable to their endeavour.

The Editorial Board of the Fundamentals of Educational Planning – a series run by the International Institute for Educational Planning (IIEP) – decided that an issue on 'Law and educational planning' was long overdue. It invited Professor Ian Birch of the University of Western Australia to write this booklet. Professor Birch has a great deal of experience in educational planning and educational administration – particularly in Asian countries. He teaches courses at his University on educational planning including courses on the law and educational planning.

In this booklet the author provides educational planners and administrators (at various levels of operation) with a framework of the law which impinges on their work and includes relevant international examples. It deals with the nature and sources of school law, various legal fields with which planners and administrators should be concerned, examples of the substance of school law, the influence of international decisions on schooling and it also presents selected case studies from various countries in the world.

Above all, the author seeks to stimulate educational planners and administrators to think about the reasons for school law and the views of the many interested parties as well as their freedom and protection.

We are extremely grateful to Professor Birch for writing this booklet and are convinced that it will provide much 'food for thought' for planners and administrators of education throughout the world.

T. Neville Postlethwaite
Co-general editor of the series

Contents

Introduction

'Law and educational planning' is a booklet which should provide educational planners at various levels of operation with a framework of the law which impinges on their work. The framework includes reference to the nature of school law, the sources of such law, various legal fields with which the planners should be concerned, the substance of actual school law, the influence of international decisions on schooling and case studies of the interaction of law and education. Within each framework, networks of the relationships of interested parties are explored and conclusions are drawn as to an appropriate law-education connection in the future interest of education.

To invite educational planners to consider the implications of law for planning in the provision of schooling has its parallel in the burden being placed on teachers and pupils in almost all education systems to broaden and extend the curriculum by adding subject upon subject to that curriculum, as if it were elastic to the point of never breaking. Planners and policy-makers in all systems and all levels have much to do merely to meet the requirements of those systems in the provision of school services. Yet it can be argued, particularly with the internationalization of education, that educational planners, sooner or later, may regret their failure to take account of the law, not only at cost to themselves but also to the systems they represent.

It is not proposed in this booklet to cower planners into some kind of legal submission but rather to be positive in the sense of suggesting that they along with their colleague-planners in other spheres should address the issue of legal aspects of educational planning. This will enable them to establish both the scope and

limitations of their spheres of influence. It will make them alert to and aware of the problems that they or their successors may face.

The north-south, developed-underdeveloped notions are very relevant in any discussion of law and educational planning. Law is not made in a vacuum but carries with it the baggage of the culture, the society, the history, the religion and the economics of its context. Countries in the north/developed classification may be highly litigious (the USA and Canada are two noted examples) and resort to the law of the land quite frequently. Countries in the south-underdeveloped category may have many reasons for treating the law as of little use. It may seem to have little application in a domain where the Confucian ethic is practiced, for example. It may appear to be totally irrelevant in a situation where too few schools and too few teachers make any law about compulsory education incapable of implementation.

But the fact of the matter is that in these respective contexts the demand for law and its observance is gathering momentum. Take, for example, Taiwan where the dominant ethic is Confucian. Child abuse in that country rose to such proportions that an ineffectual law on child welfare was revamped to provide a welfare system more effective in the protection of children. Much was going on in such a decision including changing social and ethical values, and the elevation of law to displace the hegemony of a well-tried and trusted ethic.

Straddling more southern continents one may take countries such as Brazil, Viet Nam and Zimbabwe to point to the fact that making law does not necessarily mean it can or will be implemented. Taking gender equality in Zimbabwe as one example, it has been reported by the Bernard van Leer Foundation (1992) that the law declaring women and men equal – which was the intention of the 1980 Legal Age of Majority Act – was simply not being implemented. This is now being put right to some extent by a Women's Action Group which has been active in empowering women in understanding their rights. This group has also been engaged in convincing the government of its obligation to ensure that the equality provided for by law was being honoured.

To pass to specific educational legislation in the case of Vietnam, that country has passed laws requiring compulsory school attendance. It has been found to be impossible to implement and

enforce that law, the will to do so being severely impeded by economic constraints. As these are surmounted, there is little doubt that the compulsory school law will be pursued and expanded.

In Latin America the making of school law is often seen to be symbolic rather than actual. The lawmakers do pass compulsory attendance laws but they are not implemented or enforced. Schooling is not made more widely available and the intention of the lawmakers appears to be only one of lawmaking for political purposes not for implementation.

What conclusions may be drawn from citing such examples? One is that the commonplace observation that the making of laws about schooling may be severely inhibited by the lawmakers themselves. They may not or cannot proceed to implement these laws. Another is that the best intentioned lawmakers are bound by social, cultural and economic factors which may well inhibit the implementation of the laws made. These examples, too, also indicate the gulf between countries in their dealing with the law. In some countries lawmakers are addressing basic issues such as school attendance. In other more litigious-conscious countries, the dealings in law have to do with a range of matters from employment contracts to educational malpractice. What cannot be ignored, however, is that law pertaining to schooling is to be found in the north and south and that such law is more likely to burgeon than to diminish.

While the north-south distinction is important in approaching this analysis of law it should be noted that some developed countries also have their own north-south categories. An Aboriginal female person in Australia may be treated differently to a white male person, although the same education law will apply to each. The right to sue in negligence is available in law to rich and poor alike but the latter may well not be able to afford it. Awareness of the law may be available to everyone but actual knowledge of it is very unevenly dispersed.

The purpose of this introduction has been to indicate some of the difficulties in attempting a booklet on law and educational planning. The philosophical and sociological issues raised merit serious discussion some of which will be taken up in the substance of the booklet. One clear conclusion to be drawn at this point is the danger inherent in thinking that there are discrete systems of law

such as 'Western' or 'Islamic' law without acknowledging the variations in practice within systems. Generic differences such as north-south, developed-developing necessarily import different considerations of the law. Educational planners have in common the need to discern the legal context in which they operate.

I. The nature of school law

Implications for planners

School law has implications for educational planners which are best approached by identifying the network of relationships which makes up its base. Planners need to understand :

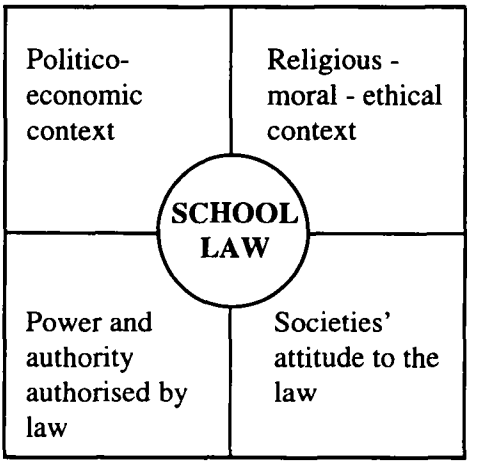
1. the discrete nature of school law and the fact that law is a discipline with its own methodology and discourse;
2. the political context which has a significant bearing on the reason for and composition of law;
3. the ethical – religious and moral – dimension of school law;
4. the force of law and the rights-duties nexus; and
5. the societal context into which school law is introduced.

The first point is inherent to school law as law. The remainder provide the context in which school law operates as *Figure 1* suggests.

Jurisdictional limitations

It is a premise to the study of law in general and school law in particular that lawmaking is jurisdictionally discrete. The authority and scope of any law is limited in its authority to the country in which it has effect. This premise serves to remind planners of the importance of knowing the law of their own country and of realizing that the law made in one country will not apply in another.

Figure 1. The context of school law



It is not the purpose behind this booklet to undertake a study of comparative school law, although examples will be given of the way school law operates in some instances. Rather the task is to alert educational planners to the school law operating in their countries and, in this chapter, to propose a framework within which that law may be analyzed. That framework will not be exhaustive but will comprise reference to the politico-economic context of school law, school law and its religious/moral/ethical climate, the authority of law and its coercive or permissive dimension, and the attitudes of the citizens of a country to the law.

Before proceeding to that framework, mention should be made of the fact that school law (as all law) has its own form of discourse and practice. This tends to remove it from the public domain and give it a distinctive, if not aloof, character. Legal practitioners will often suggest that the substance and practice of law is only to be understood by those initiated into its mysteries. In the study of school law in developed countries in particular, the barriers between law and education have been lowered, if not broken, to the extent that interdisciplinary studies have been made possible. Nevertheless, planners should remain aware of the pitfalls implicit in cross-disciplinary approaches. They should not treat

lightly the difficulties associated with understanding and interpreting a specialized field of knowledge such as law.

The basic discourse of law may be different from ordinary speech because the law has incorporated certain meanings into its language and given that language a special authority. In many common-law countries with English antecedents, Acts Interpretation Acts exist which give special definition to words such as 'a', 'he', 'may', 'shall', 'year', etc. In addition, many acts of the Parliament of such countries contain definitional sections which will determine and limit the meanings of words used.

This is but one example of the fact that educational planners need to approach the law-making aspect of their task with considerable caution. It is necessary for them to recognize that laws are part of a legal *system* with its own discourse, thought forces, authoritative hierarchy, and particular processes and practices. Nevertheless, if it is accepted that the modern educational planner ignores the legal aspect of the profession only at some peril, bridges have to be built between law and education, which will benefit both professions. If the legal domain is not influenced by educationalists in this way, school law will less likely advance the policies and programmes of educationalists.

The political context

In suggesting a network within which educational planners can begin to understand their school law, a first proposition is that the political context of school law is to be given due consideration. It is often mistakenly forgotten that laws are made in a political context. Take, for example, the question of compulsory schooling which is now required by but is not necessarily enforced in most countries. Each reader might inquire into the political context for the making of such a law. Was it a question which was fundamentally economic? Was education seen to be a means for enhancing a country's economy and compulsory attendance as a means of achieving that? Was it more rooted in a social context where the poor were unable to obtain schooling and governments acted to remedy the situation by providing such children with that possibility? Was there a more directly political motive such that the provision of schooling was the means by which the prevailing

ideology, for example, could be best promoted? Or was it the pressure of belonging to an international community where the signing of an agreement or convention carried with it obligations in relation to the education of children?

These are but some suggestions why such a law may have been made. Of course, the original intent may well fade over time and the law becomes a fixed part of any society's rules about schooling. But this general example is raised to alert educational planners to the political context in which school law is and will be varied. No better example for such awareness is that of planners in former socialist countries of Eastern Europe who, with their new independence, are seeking to design school law which reflects the new ideological position.

The recognition of the political context of school lawmaking has one particular advantage for educational planners interested in learning from other countries. It is possible to use educational law as a map of the development of education and educational systems in a country. Take, as one example, the following very brief review of education law in the Philippines (see Box 1).

The examination of education law can provide educational planners with a political and historical context which should better enable them to pursue their task.

There are dangers inherent in such an approach. One is that the law is said to reify education. That is, it portrays a set of facts about education which may or may not be truly representative of the reality. Matters already raised such as the extent to which there has been implementation of the law, not to mention issues of quality, have to be considered. Nevertheless, with such warnings in mind, knowledge of one's own law will alert the planner to inconsistencies in laws which are in existence and the need for change. To take one example from Australia: the national government put in place programmes in primary education in which minority children were to be taught in their own language. One state had laws making it unlawful to teach other than in English, which put it at variance with the national government. While no prosecutions resulted, the state concerned recognized the need to change its law of some sixty years to ensure that the change in educational thinking was properly accommodated in the law.

Box 1. Brief review of education law in the Philippines

An educational decree of the King of Spain in 1863 established three levels of education in the country (schools were operating prior to this decree). A system of free public education was provided for by law in the Educational Act of 1901; the Educational Act of 1940 made provision for universal primary education and, in the Elementary Education Act of 1953 passed after independence, further laws were passed for the revision of education to advance universal primary education. Free secondary education was guaranteed in 1988[1]

1. (This Philippines' example is simplistically presented. The analysis of any one country's law could be mapped in considerably greater detail and provide a more thorough history of events were this approach to be developed).

Economic considerations are critical in discussing the political context of school lawmaking. In other booklets in this series such matters have been addressed. It would hardly seem necessary to alert educational planners to the fact that educational reform may have been driven by economic factors. The pursuit of such reform comes no more cheaply because it has been incorporated in law.

A quite critical issue for educational planners is the extent to which school law is intended to be implemented or is merely symbolic. Is there a real opportunity on economic grounds for laws to be implemented? Such law, even if symbolic, is however of importance in indicating the policy-direction of the country's education system.

The ethical context

Of all the domains of conflict which the educational planner will face in interpreting and administering education law, none appears to have caused more universal concern than the ethical domain. (Ethics is interpreted broadly in this case to embrace religion and morals). The extent of the ethical context will vary considerably with some countries having a dominant religious faith and ideology such as Islamic or Christian. Other countries may be quite secular in their outlook and may or may not permit religious freedom. In the former, the dominant religious ideology pervades the culture to the extent that it is almost inseparable from it. Educational planners, if not the system employing them, may face considerable difficulty in attempting to provide educational services widely regarded as important in the national or international interest. The catch-cry 'education for all' is difficult to implement in a country whose religious law may run counter to such a notion. And what of family planning? How are the statistics on gender equity in education to be turned around internationally to signal equity between sexes? Should they be? The run of questions is considerable as educational planners are made well aware.

The world experience of the influence of ethical issues on education is varied. What is common to many, and can be noted in the examples that follow, is the way in which the law intervenes. In some countries, such as Indonesia, whose constitution declares no religion to be supreme but in which less than 10 per cent of the population is not Muslim, a system of courts has been established. Within this system there is a religious judiciary whose mandate it is to interpret Islamic Law (Subekti, 1982). In Pakistan, on the other hand, constitutional amendment will ensure that the Koran and the Sunnah are supreme as the law of the land. In other jurisdictions, religious issues are decided in the context of the law in its general application. In the USA, for example, the 'wall built between Church and State' was reinforced by the Supreme Court (Everson v. Board of Education, 1947) , which has generally maintained a distinction in school education between the public interest and the religious interest. Such decisions have not always been decisive in practice and have caused considerable consterna-

tion to educational planners faced with electorates not in agreement with the Supreme Court.

In many developed and developing countries there is legal recognition of the pluralism of society such that, along with any mainstream provision for schools, there is usually a legal permission for other types of schools to exist. In Thailand, the Pondok (Islamic religious schools) are permitted, as are schools within the precincts of the Wat with its Buddhist orientation. Countries of the European Community tend to allow private schools or systems of schools, often with a religious base, to exist alongside a mainstream government system of education. Such private systems are not merely legally tolerated but are actively supported by the state. In terms of the curriculum, legal provisions pertain which affect the teaching which is permitted in such schools. Explicitly or implicitly such schools tend to adopt the mainstream curriculum requirements in addition to offering areas of study of particular interest to them. Not only are there legal penalties for failing to meet the legal requirements for the curriculum to be taught but also other pressures, such as a public examination system for entering tertiary education, play a decisive role in restricting the freedom of curriculum choice in the private sector.

In some cases the lawmakers have been able to allow for ethical considerations in the preparation of education law. One example is that of Israel. Goldstein (1992) notes how semantic the law in that country has become. The 1949 Compulsory Education Law in Israel allows parents to fulfil the duty of having their children meet the compulsory attendance requirement when they attend a non-recognized private school, provided it is entered on a list drawn up by the Minister of Education and Culture. In this instance the law has provided an education-religious situation which avoids conflict between the immediate interests.

Whilst the religious hegemony of a country (or educational versus religious court actions) may attract considerable interest in any discussion of the ethical context of school law, the matter has much wider significance when issues of justice are considered. Compulsory education is, of itself, a major ethical issue. In many countries children 'belong' to the family and not to the state. Compulsory attendance requirements cut right across this notion with attendance requirements separating children from their

families. Further, instruction proceeds in an environment in which the parents exercise little or no control. The ethical issue of family separation is not merely one of the rights of parents or children: it may go to the very survival of the family in situations where the family is the economic unit in which children play a significant role either as workers or carers of siblings.

In considering the school environment, ethical issues which should concern educational planners include the content of the curriculum and the treatment of the child. For example, should the curriculum in fact invade the very culture of a society? Should a foreign language be imposed as the teaching medium? What of particular curriculum content? Is sex education the proper prerogative of the school or the parents? Should any subject be taught which challenges strongly-held family or societal views?

Where the range of ethical problems is addressed by the law, educational planners in such countries have the task of determining the extent to which such law can be implemented – a most difficult task ethically and practically. In countries where the law has yet to address such issues, a no less enviable task awaits the planners to ensure equity in the laws to be made.

The force of law

Rights and duties, individual or collective, are a focal point in any legal system. 'Who has the right to do what to whom and in what circumstance?' is a dominant question for educational planners who also have to operate within the rights-duties relationships imposed by law. This matter will be taken up in detail in Chapter V. It is raised here since it is a central part of the overall legal framework within which planners have to operate.

Schooling is very much about relationships between people viz. children, teachers, parents and administrators to name four key groupings. But designing law which will promote relationships and reconcile differences is no easy task. What tends to happen in many instances is that power and control are legalized in the form of rights and duties. These terms can become very slippery, as the literature in the field of jurisprudence or the philosophy of law demonstrates. This is sometimes resolved by stating in a law who is owed a right and who has a duty. In many western countries

influenced by English law, 'shall' and 'may' indicate who has a duty and who a right. The meaning of these words is put beyond doubt as lawmakers place a legal interpretation on them, which requires the term 'shall' to be treated as mandatory and 'may' permissive. If that is done, planners can approach the law with more certainty.

On the other hand, such definitional support enables the planners to identify the critical aspects of the legally constructed system within which they work. They are able to determine responsibilities to whom from a rights-duties perspective. One exercise which planners may wish to pursue is to take the basic school law applying in a country or jurisdiction and analyze it against any agreed statement of what schooling should be about. If one assumes, for example, that the focal point of a school system is the child and the child's education, the task is to identify how and to what degree the other stakeholders in education are required to serve the interests of the child and his or her education. In Australia, the basic school law almost never entitles the child to rights in schooling but tends to put rights mostly in the hands of the administrators, somewhat less in the hands of the educators and allows a few to parents. In such a case, the law makes the child, parent and educator subservient to the administrators. If, of course, planners interpret schooling as being about the maintenance and management of a system this law may be regarded as sound law. But it should be a matter of concern to educational planners, especially those in a position to initiate system changes, to establish the extent to which existing law is supportive of educational theory.

To complete this example from Australia, where parents are required (*shall cause*) their children to attend school and children are required to attend, it seems unacceptable that the Minister for Education may *(permissive)* establish schools. In other words, parents and children can be prosecuted for non-attendance but no action can be taken by them to ensure that schooling is provided.

The previous discussion almost inevitably leads to a consideration of the question of law and justice or law and equity. Where the rule of law operates it may run counter to other rights which people believe they have. These rights may be natural rights, or in religiously dominated countries God-given rights, or simply rights which have emerged in communities over a period of time. (It

should be remembered that whilst education has existed in almost all countries for centuries, governmentally legislated schooling is a comparatively recent innovation in many countries.) The extent to which rights appear to come under threat from school law will depend to a great extent on the enforcement of this law by educational and policy administrators. Mention has been made of countries which have adopted compulsory attendance laws, for example, but where there is no intention to enforce the law because in many areas it is unenforceable for various reasons. To avoid such an illogical conclusion, some countries such as Malaysia and the Philippines have not imposed compulsory attendance laws. Interestingly enough, in countries such as Singapore and the Republic of Korea, although there is no compulsory law for attendance at grades seven to nine, there is almost 100 per cent attendance. This is a sobering thought for those who consider that the making of laws will achieve outcomes not otherwise attainable. In the end though, personally held rights will most likely have to give way to legally enforceable rights. This is a situation in which planners may well become involved especially as they represent the interests *(rights?)* of the state as against those of the individual.

In indicating that law and justice are not synonymous, there are usually remedies that participants in education may pursue when laws are improperly or wrongly enforced – again an operation in which planners may well be involved. These remedies are discussed more fully in Chapter V. In shaping a framework for educational planners in the context of the nature of school law, it is important that planners are made aware that they may feel the full weight of law when they act outside of it or fail to execute it properly. In this limited sense it may be open to parents, teachers and students harmed by administrators' decisions to pursue justice for themselves.

The obedient society

The final framework consideration educational planners need to apprise themselves of is the extent to which they are operating in an obedient society. Is the society likely to respond positively to the educational laws which exist. In suggesting that societies may not be 'law-abiding', it is not being said that they are deliberately

defying the law, although that is a possible reaction. What is being suggested is that factors such as knowledge of, or better, ignorance of the law, or social factors mitigate against the law being obeyed.

'Ignorance of the law is no excuse' is a maxim well known in countries in the tradition of English common law. Yet, in many of those countries, studies have indicated that participants in education, including educational planners, are largely ignorant of education law. In some instances, that ignorance is self-defeating as stakeholders have not pursued the law in their own best interest; in others it has brought planners into the legal arena, where their actions have been unwittingly in contravention of the law. This maxim and its effect are important to educational planners who may be in a particularly vulnerable position if their planning goes awry.

Of particular concern in countries with minority peoples, particularly those with their own language, rules and system of justice, is the degree to which educational law passed by the majority can be implemented. It may well be advisable in such circumstances for planners to attempt gradually to introduce new law and, hence, new practices rather than to rely on the prosecution of the lawbreakers to effect educational change.

Can the making of new law lead to changes in human behaviour and attitudes with regard to schooling? A critical variable in attempting to answer that question is whether the people for whom such laws are made are prepared to be obedient or acquiescent. This variable should be of considerable interest to educational planners especially those concerned with change. Some will say a change of law can result in a change of behaviour; others will generally resist such a position. The issue is not easily disposed of and those planning changes may well use the law strategically to support change, if they are aware of the target populations' attitude to the law.

Turning to social factors affecting people's acquiescence to the law, one may cite the example of Japan where those who have a right to sue teachers who have been negligent in their duties rarely do so. Parents are concerned not to infringe the status of teachers and are aware of the hurt a legal action might bring to the student and the family injured (Aoki, 1990). Social networks are quite important in determining the operation of effective schooling and the laws governing it. An example of this is taken from Vietnam,

where a teacher, on being sent to teach to a minority people not his own, spent his first two years working in the village before attempting to set up a school, so as to be accepted and to learn about the mores of that people. Whether all school administrations would tolerate such a practice is a moot point. Nevertheless that educator planned well and ensured a thorough knowledge of the social fabric of the society before implementing his plan for schooling. In this he was successful, so much so that twenty-five years later the people were still pleading with him not to leave the village.

Another way in which social factors might be dysfunctional in enforcing planned change in education is in the participation of the persons involved. In some Western countries such as New Zealand, for example, considerable planning effort has been devoted to decentralizing educational management in schools. Some studies of this planned change have addressed the behaviour of participants in the system. These reveal, for example, that teachers do not necessarily welcome such change for professional self-interest rather than for ideological reasons. Further, and of quite critical importance, is the fact that parents who have been provided with the opportunity for active involvement in school management have often not accepted it. So in countries which for a century have kept parents out of school management – often with laws to that effect – the legal change to invite participation has not always had the desired result. There are instances where the effect has been to enable groups of parents with particular interest to press for changes favourable to them, an unintended outcome of the decentralization policy. Such examples are a reminder that educational planners' use of law needs to be tempered with a thorough analysis of the society in which that law is to be introduced. In this way its likely success and effect can be assessed. Further, appropriate decisions should be made about the changes to be introduced and the law supporting those changes.

Conclusion

The conclusion to be drawn is that educational planners do need to be apprised of the legal context in which they work including the actual school law in use, and the limitations to its use,

the discourse of law the better to understand education law, the socio-politico-economic context in which school law operates, the conflicts which may result as imposed school law meets the ideologies, beliefs and practices held by participants in education, the power-authority, rights-duties issues associated with implementing school law and the nature of the society which is subject to school law. Some of these will be expanded upon in the chapters which follow.

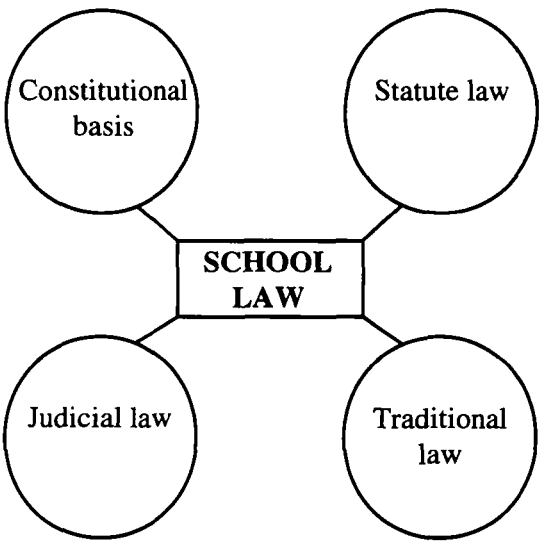
Review questions and issues

1. What was the political context which gave rise to universal primary education in your country?
2. What are the present socio-politico-economic forces driving the provision of education today in your context?
3. From the school law available in your jurisdiction, map the development of educational services. Does your map equate with the actual provision of educational services?
4. Is there a dominant ethical dimension to the planning of education in your country? How is it manifested in your school law? Is there provision for alternate value systems? Should these be allowed for by law?
5. Identify the rights and duties of the principal participants in schooling in your context and indicate how your planning may be affected by these.

II. Source of school law

A basic argument of the previous chapter has been that educational planners need to know the law which affects them as planners. For that to be attained, planners need to be able to identify the sources of school law in their respective countries and the weight which is given to particular sources. This chapter will provide a network of sources leaving it to readers to identify those applying in their countries as *Figure 2* suggests.

Figure 2. The sources of school law



Constitutional basis

The law in every country has a constitutional base. This provides the authority for the exercise of all power with institutions, usually courts, determining its meaning. Some countries will reflect their religious foundations and come under that family of law, Islamic law for example. Other countries have their constitutions tied to the dominant political hegemony – communism, capitalism and the like. Still others have written constitutions which prescribe the power and authority of government. Finally, some countries have constitutions which are not written but which have evolved over a long period and are accepted as the common law of that country.

By way of example consider the following. In Canada, the authority for education is expressly vested in the provinces by that country's constitution. In the USA and Australia, education receives no specific constitutional mention other than in the context of being a residual power, to be treated accordingly. The constitutional provision contains a declaratory-type statement about education in the cases of India and Japan, the expectation being that the appropriate authority will operate within such provisions. In West Germany, Austria and Switzerland only aspects of education receive a mention, whilst in Israel, and England and Wales, there is no written constitution and the parliamentary process is the legitimate authority. The situation is further complicated in countries such as the USA in which the provisions for individual rights have had considerable influence on the provision of education.

Educational planners will need to identify the constitutional law operating in their countries and become aware of its general content. It is not necessarily the case, however, that constitutional sources will mention education and planners will need to look further afield to identify the sources of school law.

Statutory law

One such source will be the written law whether prescribed in an originating document, made by decree or order, or passed by a parliament or other authorized institution of government. This

statutory law will normally provide the framework for the operation of schooling in a country and include such matters as the provision of schooling, the requirement placed on communities, parents and children to participate in schooling, attendance requirements, the curriculum to be adopted, the employment and duties of teachers, and the administrative system within which the whole may operate. The knowledge of this education law will provide planners with the framework law of education.

Schooling policy in all countries will be decided in the context of school law. The extent of that law and the attempt to master it may well be a daunting task for school planners. Nevertheless, that law in its detail will be of considerable importance in planning. Teachers, for example, particularly where they operate within associations or unions, tend to be well-informed on the law affecting their employment. Where there is a proposal to vary teachers' responsibilities, planners may well find themselves involved in debate with persons who know that law particularly well.

A further point of issue, however, is that the administrative law which planners employ must be valid law. It may well be the case that when planning decisions are challenged, the law invoked for that purpose was not law at all but tradition born of practice or expedience. This challenge between tradition and the law will be taken up again later in this chapter.

Judicial law

Disputation about the meaning of written laws, their enforcement or challenges to their validity are normally determined by courts appointed for that purpose. A further area of knowledge to be explored by educational planners is the range of courts in their countries and the particular functions each has. This will then enable them to concentrate on those courts which are most likely to be involved in decision making on educational issues. Such courts tend to have two major tasks. The first task is to determine the meaning and application of the law. Their second function is 'making' law in areas not otherwise provided for. For example, in some countries the law related to the educational negligence or

malpractice has been developed by the courts and is not found in the provisions of statutory law.

The role of the judiciary in determining the meaning of law is well established in a number of jurisdictions. Its task is considerably more onerous in countries where individual rights are also guaranteed at law and the courts have been required to determine how such rights should operate in educational situations. Decisions of the USA Supreme Court have become widely known and discussed, for example, as the Court has decided the meaning of 'freedom of speech' and its application in the school setting. In interpreting written costitutions and laws too, courts are sometimes held to be making law rather than extrapolating on its meaning.

One area of court-made law already mentioned is that of malpractice or duty of care. Australia is one country where educational planners and administrators need to go to the decisions of the High Court of Australia if they are to find the law related to obligations to care for children in the school context. Such law is not found in the constitution of the country nor in the laws passed by governments. A critical factor is the extent to which school planners not only know the source of this particular form of law but are also able to keep abreast of it. Law does change and knowledge of out-of-date school law provisions is of little assistance to the school planner.

The above examples are restrictive in their generality but they serve to alert all educational planners to the distinctive roles in law exercised by the courts. Planners in each jurisdiction will find it of value to investigate this source and its area of competence in order to ensure a complete network of sources for educational law.

Custom law

A quite fascinating area of law with which educational planners have to grapple is what might be called custom law – the law of custom, tradition and myth. There is an abundance of such law not only amongst distant and minority groups in countries such as Thailand and Laos but also in very developed countries with their Aboriginal populations, for example. Its form is different in these contexts but its influence is not.

Custom law is of the essence of the school law. It is the law which makes social institutions viable as such. Formal law is able only to provide the framework for schooling namely buildings, teachers, students, facilities and curriculum. But it is the practice in the classroom which ultimately decides whether schools are effective working organisms. In each jurisdiction, law has evolved as to classroom practices. Contributing to these are factors such as teaching style, discipline forms, infrastructure support and the social context of the children. Educationalists who visit a school in contexts totally different from their own need to understand the underlying system of laws and rules which brings order to the classroom. Such rules may be formal or informal. They have the effect of making possible a teaching environment which laws made by governments reviewed by judiciaries and administered by administrators could not possibly shape. Custom law may even run counter to decided practice but it is in the educational planners' interest carefully to approach any issue of conflict lest in questioning or bringing the custom law into dispute, the legal fabric which makes a school work is destroyed.

Organizational custom law should not be confused with societal custom law which can be equally influential in terms of the success of making schooling effective. In introducing the very notion of schooling, for example, minority peoples' lifestyle in any number of countries has been threatened. In Vietnam, where there is a custom among some minority people that girls aged nine will prepare for marriage, sew their dresses for life and learn other necessary things to do with marriage, the challenge for planners is how to incorporate such customs into the provision of schooling without alienating the society.

The issue is often compounded for planners in the situation in which local tradition is dominant, even antithetical to the policies of the government of the country. This is particularly so where, of necessity, teachers from different clans are employed despite their lack of knowledge of the local language or dialect and, hence, the custom law of the clan. Even more frightful to contemplate is the situation where a foreign language is the medium of instruction, and where the explicit or implicit purpose of schooling has specifically ideological rather than pedagogical overtones. The basic error in educational planning in these contexts is the failure to

recognize the existence of custom law, its power and its influence. There may also be an unwillingness to explore how the policies of the state on the one hand and the practices and beliefs of local communities on the other may be joined. The tendency in such situations is for the formal legal agents to prevail. However, the considerable victories won in the courts by minority groups in Canada, for example, suggest that any capitulation by those having only the backing of custom law should not be made prematurely (Mackay and Sutherland, 1990). The issue of the weight of custom law will be pursued below.

Before leaving this summary of traditional law, it is interesting to note how the adoption of some pedagogical methodologies by planners has custom law acceptance but only limited formal law acknowledgement. Take, for example, multigrade teaching in which children from different year or grade levels are combined in one class. This type of education is one commonly practised in Latin America, Asia and the Pacific. It is the only means by which millions of children will ever receive schooling. It is generally regarded by governments as an economically successful but pedagogically inferior method of teaching. In some countries, of course, particularly Islamic ones, multigrade teaching was in fact the methodology by which the faith was taught. This age-old method has been overtaken by newer ones which have been acknowledged in law as the appropriate methodology with requirements such as lock-step promotion, examinations at the end of each year and the like. It is a strange twist to history, if not logic, that the planners now have to introduce legislation, albeit hesitatingly, to permit the traditional way of schooling to be allowed. Even at that point, however, the law has imposed wedges as in the Philippines where it is not possible to merge children between grades three and four. Whilst advocating that educational planners know and enforce the laws of governments and judges, it is important to remind them of the significant scope and power of custom or traditional law.

Weight of law

For the purposes of establishing the network of law which educational planners must embrace, it has been possible to catego-

rize school law in terms of the laws of governments, the judicial influence, and custom or traditional law. Educational planners need to be aware of and reckon with the weight which may be attached to these three types of law. The question to be answered is: which form of law is likely to prevail?

Assuming an outcome within the confines of the rule of law, it has to be said that custom or traditional law remains the most fragile simply because it does not have the weight to be enforced ever against other law. Even in the Canadian cases mentioned above, it has to be acknowledged that traditional law remained intact only because there was a Bill of Rights guaranteeing personal rights. The minorities in these cases persuaded the courts that those rights were being violated – another reminder to school planners of the folly of not knowing their law.

As between political and judicial lawmaking, any conflict will, in theory, be resolved in favour of government-made law. Judiciaries may well act quite independently of government but the final power to make, amend or repeal laws rests with governments. Should a judicial decision be contrary to government policy, it will generally be the case that governments can take appropriate action to vary legislation and put their policies into effect. The one noted exception to this is in jurisdictions where a written constitution prevails, the amendment of which is so difficult that governments are unable to obtain the majorities needed for that change. In Australia, for example, the Constitution can be changed only by a vote of the states with a majority vote required and a referendum of all eligible voters a majority of whom must also agree. The result is that, of attempts by governments to change the constitution over the past ninety years, few have been successful.

Implications for planners

While the warning must again be sounded that educational planners need to note the idiosyncratic operation of the law in each jurisdiction, the foregoing summary identifies three clear categories of law of concern to the planner. Too simple a reading of the outcomes by planners would be ill-advised. Although the law of government will likely prevail, two questions remain with the planner: the first is 'is the law proposed good for education?' the

second 'what is the most appropriate means of implementing such a law to the benefit of the target population without confrontation?'. The former is one which should remain high on the agenda of the education-law debate; the second may depend on the role of the planner and whether that is seen to be one of the conformist or reformist.

Knowing where school law is to be found is essential for planners wishing to inform themselves of the law. Whilst some knowledge of school law is an advantage, it is so only if the planner can keep up-to-date with changes to the law. This process requires knowing the whereabouts of law and having ready access to it. No general statement can be made as to the holdings in all countries of law in general and school law in particular. Certainly most countries have systems for recording and storing governmental or parliamentary law, and judicial law. Few, if any, have addressed the tabulation of custom law which almost by definition defies such recording. It remains for each planner to be informed of the sources of school law and, if possible, of sources that report on changes in law. These latter are available by way of daily, weekly or monthly digests in many countries.

Along with knowing the sources is the question of accessing them, which again can only be addressed in-country. It is worth noting, however, that technology has been utilized in several countries to provide ready access to current law and decisions, and to changes in law. On the other hand, it is often difficult for planners to access information on the grounds of distance, the method of accessing holdings, professional obstinacy or the bureaucratic system responsible for such records.

The network of school law embraces governmental, judicial and custom law, the interrelationships between them, the sources for accessing such law and some of the inherent patterns in their operation. The *first* implication for educational planners is that they must map for their own jurisdictions the network of sources in operation.

The *second* implication is that educational planners need a solid knowledge base if their planning is to be legally sustainable. It is suggested that knowledge of the sources is as important to the planner as knowledge of the substance of the law, which can be quite vast and subject to change..

The *third* implication for educational planners is that their work is permeated with legal concerns. Without entering into the debate as to efficacy of such a relationship, its reality cannot remain ignored.

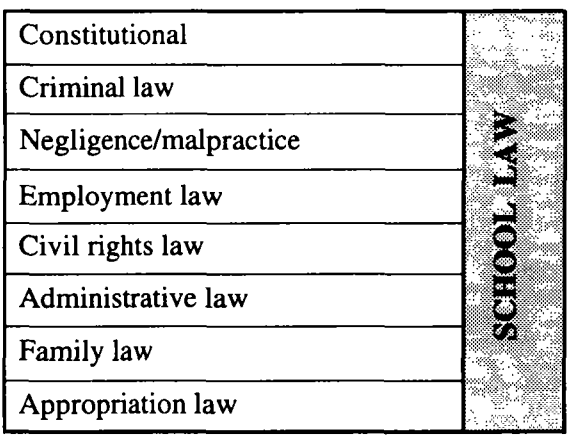
Review questions and issues

1. What is the constitutional base for the provision of education in your country? Does it have planning implications?
2. What are the statutory law provisions for schooling? Do they enhance or restrain educational planning?
3. How have and may your judicial officers affect the administration of education?
4. Identify the ways in which traditional law should be taken into account in your planning of schooling.

III. The compass of school law

The task of educational planners would be so much easier were they able to refer to a concise body of law which contained the substantive school law. However reference needs to be made to a network of law, if school law is to be understood in its entirety. It is necessary, therefore, for planners to consult a range of law which is rarely unified in any country. The range of this network is explored below under the headings of constitutional law, criminal law, law related to wrongs caused by persons to each other, the law of employment, civil rights law, administrative law, family law and appropriation law (see *Figure 3*).

Figure 3. The network of school law



Constitutional law

Reference has already been made in the previous chapter to the role of constitutional law in educational planning. In countries which have written constitutions, these instruments may indicate who has the power to make educational law. This is particularly the case in federal systems of government, where it is necessary to determine whether the national government, or the provincial or local government has that power. In the constitution of Canada, for example, education is reserved for the provinces. This was also the case in the former West Germany but the constitution in that country was amended to give the national government powers with regard to some aspects of education. In other countries the inference was that the power to provide social services, including education, belonged to local government. Yet following a run of judicial decisions in some of these countries, the situation has become clouded with a merging of potential power between governments within a federal system.

But it is not merely the power with respect to education which attracts the attention of educational planners. That power has to be considered together with the funding power. Clearly the two are inseparable if educational planning is to be effective. There has been a tendency in most federal systems of government with written constitutions for the central government to exercise control over the disbursement of educational funds – India being one example. If this is the case, it is not difficult to conclude that educational planners need to have an understanding of constitutional law not only in relation to the allocation of powers in education but also in the extent to which financial support may be given to schooling.

It should also be the concern of planners to determine the extent to which national or state constitutional law make provision for the protection of rights of the participants in schooling. If there is such a national power, state instrumentalities need to take cognizance of it. For such a provision would provide for challenges to school law regardless of state boundaries. Equally, if there are state constitutional provisions related to the protection of rights, of a general or specific nature, the educational planners may be subject to them. The extent to which they are acknowledged or

ignored may, of course, flow from other considerations such as whether such powers have been enforced. Nevertheless, planners do have a responsibility to be aware of the general provisions of constitutional law.

Criminal law

A second aspect of the network is criminal law or its equivalent – essentially law which has to do with unlawful acts of persons to one another across a range of social interactions. To include criminal law within a school law network may, at first sight, appear to be draconian. But a number of schooling activities touch on criminal law, the most obvious being in the area of discipline.

The International Convention on the Rights of the Child asserts at Article 28 that the child has a right to education, which is the primary responsibility of the parents with the support of the state. It goes on "School discipline is to be consistent with the rights of the child and reflect the child's human dignity". There has been a movement particularly in western countries against the use of corporal punishment in schools. Corporal punishment in the shape of hitting, beating or caning a child is an act of assault which is outlawed or, at least, punishable if engaged in under criminal law provisions where they exist. It has become an issue in European and North American countries with interesting results. Within the European community operating under the European Court of Justice, corporal punishment has been banned. The European Court has, in fact, awarded damages against schools in one of its member countries, the United Kingdom, because the retention of such punishment in that country was contrary to the convention on rights agreed to by members joining the European Community (Tryer case, 1978). Not only is this an example of how criminal law impinges on the educational system, it also serves as a reminder that the law can change behaviour and practice.

The United States Supreme Court has ruled that corporal punishment is not a 'cruel and unusual punishment' which the Eighth Amendment to the U.S. Constitution prohibits (Ingraham v. Wright, 1977). Nevertheless, a few states in America do outlaw corporal punishment, while different laws permitting, controlling or restraining its use are found in schools in other states (Levin, 1990).

In the Asian-Pacific region the range is the same, with corporal punishment being widely practiced, India being an example of a country where it has been banned.

The use of corporal punishment will remain a contentious issue; what is important to educational planners, in countries where it is practiced, is for them to know the law and its limits. The administration of such punishment is hedged about with constraints, with the word 'reasonable' commonly found in English-speaking countries' laws. As the reasonableness of the punishment is usually decided by the courts, planners and administrators need to be aware of such decisions and the limits drawn. Being in a position to know what is unreasonable, they should to be able to prescribe practices according to law. This will enable them to avoid having teachers being charged with assault because the type of punishment dealt out has been unreasonable. Where punishment is unreasonable, teachers become liable to the full weight of the criminal law.

Criminal codes or laws are not only about assault and punishment however. They deal with a range of interactions ranging from religious concerns such as violating a place or disturbing people at worship – very much a school activity in systems which comprise only or include some religious schools – and blasphemy to sexual deviancy and libel. Again the conclusion to be drawn is the need for planners and administrators to be apprised of this aspect of law.

Negligence or malpractice (Torts)

A further type of law for the consideration of educational planners is the law of negligence or malpractice (also known as the law of Torts) particularly as it relates to students while at school. This form of law has become particularly applicable in countries where compulsory education has been introduced. The issues which arise from such law are whether a child has a right to be looked after whilst at school and, if so, who is responsible for that care. In addition, there are legal issues such as the degree of proof, what constitutes negligence and how damages are to be assessed. These issues are not merely legal ones, however, because knowing about them may help planners to decide how adequate care is to be taken and how actions in negligence should be approached. Although the field of torts may be of little relevance in some

countries, it is a burgeoning area of school law whose influence may well be felt in times to come.

In many developed countries the right to sue in negligence is well-established and in some countries it is frequently exercised. One would have to take the USA as an example of a litigious-conscious country where a combination of factors has resulted in considerable litigation involving schools. One such factor is that lawyers are paid by results which, where that system operates, makes such litigation much less expensive for the person who considers they are wronged, in that in losing a case they lose little. The range of cases in the USA is considerable. By way of illustration reference is made to cases which have arisen alleging inadequate education. To date these have been unsuccessful. The courts have decided on grounds of public policy that such cases could not be successful given the likely large numbers of claims which might be made. There are also difficulties associated with determining what teaching might be categorized as negligent. Where administrative errors have been attacked, however, at least one case has been successful while others have not (Levin, 1990).

In contrast to the USA, India's law precludes teachers being sued for negligence because they are public servants. "So long as the bona fides of the teacher is not questioned, he or she is normally absolved from the responsibility for any harm done to the child, in the case of the discharge of teaching duties" (Singhal, 1990).

Between these extremes lies a country like Japan where the number of legal actions is small compared with the number of injuries incurred by students. It is possible in Japan for persons to recover the costs for their injuries under a compensation scheme based on a no-fault system. However, the amounts payable fail to meet the costs in most cases. There remains the possibility of suing in the civil courts and, unlike India, public officials may be sued in Japan. That action is only occasionally pursued, lest the school-based relations between teacher and student be severely damaged.

The above discussion has provided a range of considerations with regard to negligence and malpractice issues. There is much more information in jurisdictions where this form of law operates.

Of key importance is the question as to what such legal actions does to the quality of education. Everyone suffers when a student

is injured – the student, the parents, the teacher, the principal, the administration and the relations between any or all of these parties to schooling. Is not another approach dealing with such issues possible? One is the provision of no-fault systems of recompense to injured persons. While there are difficulties associated with such schemes including the financing of them, there are considerable advantages in terms of the quality of the relationships between the various parties. Solutions to this issue will more likely come from concerned educational planners and administrators rather than the legal profession.

Employment law

When asked at a workshop in another country as to what the situation would be in his country were teachers to receive their salary some months after it was due, the writer's first thought was go to the union. That was a quite inappropriate response in the context of the questioner. There was no employment law which could be resorted to for support. Nevertheless, employment law is an important piece in the network of law which educational planners in many countries have to be concerned with. It is also likely that administrators will be forced to take this branch of law more into account in the future.

The employment of children is a matter of concern for educational providers in all countries. There may be international agreements on this subject to which member countries owe some allegiance. But there is also the concern that children are part of the family economic unit. Therefore, they are required to work or care for younger children to enable older persons to work. In countries where laws have been passed and enforced requiring compulsory attendance at school, there are often complementary laws related to children's working conditions. These may range from no work permitted to allowing work provided it does not interfere with the child's schooling. Balancing vested interests, including those of the child, is one of the tasks facing educational planners, especially those responsible for pursuing universal primary education.

The principal focus of concern in employment law for educational planners will be that of the employment of teachers. The extent of that focus may have been determined by the courts. The

rights of teachers to belong in and negotiate as unions or associations has been upheld by the Supreme Court in the USA, for example. The Supreme Court of India has decided that teachers were not workmen (*sic.*) thus denying them access to employment tribunals (Singhal, 1990). In Australia, incidentally, the High Court first decided in the latter vein when the issue first came before it in 1927. Some sixty years later, however, it reversed its decision. Now national labour unions for teachers can be established.

Employment issues associated with teachers are obviously varied and may well differ between those employed in the public and private sectors of education. Matters of concern would necessarily include the qualifications required for teaching, the criteria for employment, the terms of employment, the salary to be paid, the conditions of service, termination of employment, particularly when it is made by the employer for reasons of misconduct or unsatisfactory performance, the right to belong to unions or associations and the right to strike. In addition to such very obvious matters of employment law, there are considerations such as gender equality when determining appointments, arranging transfers or making promotions. There is also the issue of protecting other rights whether they be religious rights, freedoms such as those of speech or academic freedom, or rights associated with physical impairment or sexual harassment.

The range of issues within employment law as it affects teachers is obviously considerable. Educational planners and administrators in those countries in which a considerable number of factors is in evidence will need to be well-versed in employment law. Planners and administrators yet to encounter such an array of employment issues may not have long to develop appropriate strategies to ensure orderly systems of appointment.

Civil rights law

Civil rights law is a very diffuse area of law with some countries, Germany and India for example, having rights built into their national constitutions. In other countries, such as the English common law countries, common law freedoms have been upheld by the courts. But these may be modified by governments through legislation. In still other countries no rights with respect to educa-

tion are provided for. Of interest to all countries, however, are the international treaties, covenants or agreements containing rights. These are subject to broader consideration in Chapter VI below.

Not only is civil rights law very varied in terms of its content, it may also target particular populations. Article 30 of the Indian Constitution, for example, singles out minority groups for protection on the grounds of religion or language. These groups are permitted to establish and administer their own schools and may not be discriminated against in terms of state funding for such schools.

A further complicating factor in any discussion of civil rights is the role of the judiciary in the interpretation of those rights. One may refer to the celebrated decisions of the Supreme Court of the USA in *Plessy v. Ferguson*, 1896, where it ruled that separate but equal facilities for black Americans was permitted under the Constitution and in *Brown v. Board of Education*, 1954, it ruled that separate but equal was not a proper interpretation of the same right. The membership of the Court had, of course, changed but the example still serves to remind just how fickle in an historical/sociological sense judicial interpretation can be.

Even when mandated civil rights have favourable judicial support, there remains the issue of the extent to which citizens are the beneficiaries of such law. There is considerable debate, for example, whether children have rights and, if they do, whether such rights are similar to those of adults. In many countries such a debate would be out of place. But with the signing of covenants such as that on the Rights of the Child, the issue will become more widespread.

Into this confused arena steps the educational planner. Those with no rights provisions to contend with may deem themselves fortunate, unless they believe the school systems should have some concern for the rights of children. At the other extreme are countries such as those in North America where managers need to be made very aware of the obligations they have to respect with regard to rights. They may, of course, treat such provisions with disdain. But such an approach in some social contexts would almost certainly result in litigation which might be very costly to the school administration.

Administrative law

This network of law which impinges on school law also includes the area of law which is closest to the formal activities of planners and administrators, namely administrative law. This branch of law determines the mechanisms by which laws and rules are to be made and provides the means by which the procedures and actions of planners may be challenged.

Administrative law tends to be very technical in its operation, as might be expected. It is also a form of law which, when challenged, will do little more than require administrators and planners to do things the right way. Countries with procedural rights embedded in their law provide a ready avenue for challenging administrative actions. In many countries the administrative aspects of planning are often not open to inspection far less to challenge. Nevertheless, educational planners may be subject to scrutiny for their administrative decisions.

Family law

As the family has been recognized as a unit and the interests of children become the concern of legislators, a branch of the law tied to schooling has evolved under the heading of family law. This law is particularly concerned with the relationships between parents and children, caring for children in situations of family breakdown, providing guardianship where death or another reason deprives children of one or both parents and protecting children from unlawful assault or similar crime in the family context. This is a growing field of law with which educational planners need to become familiar. This is particularly the case when they are called upon to provide schooling for children, such as orphans and refugees, who have come into the care of the state.

Appropriation law

Whilst not part of any body of law, one concern of educational planners is appropriation law. This law determines how much money is available for financing educational interests, what sectors

it is to be committed to and the degree of accountability required of educational systems and institutions. In almost all countries, the education budget will comprise a significant part of the total budget. The money allocated to education will be largely committed to the maintenance of existing systems, including teachers' salaries, maintenance costs and building programmes. The administrators responsible for budgetary matters bear a heavy political and legal responsibility to ensure that appropriation laws are properly put into effect.

The range of law affecting planners is almost endless. In addition to the above, mention should be made of municipal law. This law would include domestic regulations governing health and sanitation requirements, building and safety codes and other welfare matters. By way of conclusion to this survey it is necessary to reiterate the need for planners to go beyond what might be strictly described as school law and to make themselves cognizant of the larger network of law.

Review questions and issues

Using Figure 3 page 39 as your model

1. identify the main areas of general law which impinge on your planning procedures;
2. detail the specific aspects of general law which you find (a) enhance your planning activity and (b) inhibit that activity; and
3. outline the changes in the general law which you would propose to promote efficient educational planning and administration.

IV. The substance of school law

School law provides a framework for educational systems, the authorities within it, their functions, the duties of the participants in schooling and the way in which the law may be enforced against those participants or by them. Planners at whatever level of operation and with whatever responsibility should have a working knowledge of the substantive school law of their country and, more specifically, that applying to their domain of interest. Furthermore, critical to their interests is the extent to which such law is operational or symbolic, since this may well affect the potential for the implementation of any planning innovation. Planning may be effected according to law or despite the law. This leads to moral issues not the subject of this discussion but which the concerned planners may well wish to address.

Whilst there are considerable differences in the substantive provisions of school law across countries, it is possible to construct a network of the functions of school law which reflects what is common to many situations. School law is concerned to:

(a) determine who or what is authoritative in the education system, if that has not been otherwise provided for;
(b) determine the functions which those authorities may exercise;
(c) prescribe the duties incumbent on the various participants in the school system;
(d) designate where the responsibility lies for ensuring that duties are carried out and to what degree of competence; and
(e) decide what rewards and punishments are available to participants in the school system.

Each of these aspects of the law will be examined in turn.

Allocation of authority

The authority to administer school systems is, in all known cases, principally held by a Minister or other named member of the government. While nationally the Minister is the designated educational authority figure, authority is specifically or by delegation apportioned to one or more other officers who exercise subsidiary authority: in most countries it will be a legally appointed director of education. In those countries which have imported business concepts into educational planning, a chief executive officer, or like designation will be used. Such an authority figure is more likely to exercise immediate authority in the education system. Yet in any large system there will be a number of other administrative positions which have had apportioned to them certain, if more limited, authority. So the chain of authority extends to the school where authority figures such as the school board or equivalent, the principal and teacher will be identified.

Along with the determination of the authority figures for education, there will be a chain of organization established in the general school law provisions. Whilst collegial and collaborative organizational forms might be occasionally discovered, most systems have a vertical line of control with the final responsibility belonging to the Minister of Education or like designation. One of the ways in which the earlier mention of administrative law applies in this context is that courts determining such law are concerned that it designate where the authority for any action lies. School law which failed to meet this criterion would fall into the category of being poor law – from an administrative perspective.

School systems other than the government system are authorized to exist by law in many countries. The extent to which such authority is free of government control is very varied in countries which allow a private sector of school education but there always tends to be an overarching form of control by government with varying degrees of freedom being allowed.

The order of authority is clearly a matter of concern to educational planners as knowing who has power to do what is an essential aspect of effective planning. It is also important for them to be aware of the differences between systems and of the ways in which the public and private sectors interact.

Allocation of functions

It is quite common for school law to allocate functions at the higher end of education systems but this diminishes markedly when the classroom situation is reached. While the administrative functions of teachers may be made clear, the pedagogical responsibilities rarely are. In the recent American law legislating for school improvement, the actual teaching functions are not detailed (McNeil, 1987). This may reflect the fact that the teaching function remains one which is too elusive for description in formal, legal terms.

The mandatory versus permissive approach to understanding school law is of particular importance when addressing the functions assigned to the various authorities. Where functions are mandatory there is little opportunity to escape the obligation. Where the authority person is given only the permission to effect or not to effect something, the cause of education may be weakened. Planners need to know whether a function may or may not be exercised. The issue of enforceability depends on such information.

Allocation of duties

School law allocates duties to authority figures as to other participants involved in schooling. The general framework of duties required of the apex authorities such as Ministers and Directors of Education includes the provision of schooling, a curriculum, teaching and the infrastructure necessary for the running of schools. The degree to which these duties are carried out depends very much on the financial provision for schooling.

Other participants in the provision of schooling have their duties prescribed by law. These may include Ministry personnel, members of various kinds of boards, assessors where the provision of schooling is under regular inspection and, of course, principals. The duties of principals have been varied in some countries in recent times where there have been changes in educational administration which have devolved more power to schools and empowered schools to become more the focus of the decision-making process. This has sometimes given parents more duties in the area of school planning and administration but not to the extent of being able to

intrude significantly into the domain of the professional educator. What this has also done is to require principals to take over some of the duties which would previously have belonged to administrators or planners at the system level.

Parents and students are also allocated duties and responsibilities under school law but very much as the clients of a system. Parents are generally required to do everything possible to ensure that they do not hinder their children's attendance at school. They should not prevent attendance at school nor require children to work or care for younger members of the family. Whilst universal primary education remains the goal of nations world wide, many are not yet prepared to make school attendance obligatory, partly because they cannot supply the necessary resources and partly because they cannot afford it.

Children, too, have a range of duties required of them when they do attend school. These are mainly related to their school work, school attendance and general behaviour. The weakness in much school law is that it is not very adaptable, being linked to fixtures such as school buildings rather than the children. But there are methods of delivery coming into use which will require school law to change. These include programmes such as that being pursued in remote areas of Indonesia where schooling is being taken to the children rather than requiring children to come to the school. The use of technology too augurs well for the delivery of education which may require adjustments to present legal requirements.

No attempt has been made in the above to identify actual lists of duties. This could have been done but it would have had limited applicability. It is a matter for planners in their own countries to ascertain what the allocative function of school law is and the duties legally required of participants connected with any specific planning process.

School law enforcement

School law not only identifies the authority figures and prescribes their functions it also provides the means for the enforcement of the law. This applies to the highest authority in the school system, who is normally the one held responsible for the

overall administration and is answerable if a system failure occurs. The law becomes much more prescriptive in its enforcement when it deals with those participants most directly involved in the school process, especially teachers and principals, parents and pupils.

Teachers are liable to a range of enforcement provisions related both to their professional expertise, their professional conduct and their private behaviour. As was mentioned in the previous chapter, teachers have not yet been found to be negligent on the basis of their teaching competence when measured by a student's failure to learn. But this professional expertise has been called into question in some countries, where a pupil has suffered injury as a result of a teacher's negligence. While such cases tend to relate to incidents in class or in the school grounds, it is open for the law to be enforced against teachers for professional negligence.

The other particular area of enforcement is in the situation where teachers breach their employment conditions by not being in attendance when they should be, by not obeying lawful authorities or simply failing to comply with the provision of the given law. In such cases those exercising authority over teachers are given lawful power to penalize such teachers summarily or following a stated process.

One of the most vexed areas of law enforcement against teachers – as far as teachers are concerned – is the process whereby teachers can be professionally punished for events which are related to their private lives. This question is one which, in the jurisdictions in which it is applicable, goes beyond teaching to public or government servants at large. There are crimes which teachers may commit – violence against other persons, for example – which few would defend as being excusable. But there are offences of a lesser nature for which dismissal would appear to be too severe a punishment.

School law enforcement may also be concerned with religious, political or social beliefs and practices. Countries with religious hegemonies tend to be more strict in expecting conformity to the law regarding matters of religion and politics. Many countries require a commitment from teachers that they will teach according to state ideals and abstain from importing their political, religious or social opinions into the classroom. Violations of such law often carry dismissal as the likely consequence.

The other aspect of law enforcement for consideration is that against parents and pupils. Parents are a little more remote from the school law than their children and, provided they comply with school attendance laws, where they are in force, they have little else to do. Violations of such laws carry penalties which may be enforced but should not lead parents to behave in the way one in Australia did, which was to tie a rope around his recalcitrant son's neck and drag him to school. (The parent was, in fact, convicted of assault.)

Pupils are more likely to have the law enforced against them to their detriment. There are laws operating in some countries which require students who are absent from school to repeat the year, if the absence exceeds a stated number of days. In other countries, such absences may lead to students being classified as truants and, in the worst instances, being removed from their families.

The other main form of law enforced against students is that related to disruptive or aggressive behaviour against the principal or teachers, or other students. Penalties obviously depend on the seriousness of the offence and the provisions of the law. Suspension, if not exclusion, from school is one common outcome. Attendance at a government school or a private school may well invoke different applications of the law. Corporal punishment is a case in point, being a form of law enforcement specifically banned in some countries, banned in government schools only in others and operational in still others.

School law also provides remedies for those wronged by educational planners. Those in authority are usually well-placed to obtain redress for any wrongs caused to them. But it is often difficult for ordinary people wronged by decisions of planners or administrators to take legal action. The mere costs of mounting a case is one immediate consideration.

Parents may effect remedies for themselves or on behalf of their student children in those countries where the law of negligence or malpractice operates. They have little right of law to challenge lawful requirements related to schooling, school attendance, the curriculum and the teachers appointed unless they live in a jurisdiction where individual rights have been violated. One class of parent which has been successful in this regard is that connected

with minority groups which have been afforded specific protection. Such minorities may be identified on the grounds of race or religion. Other classifications such as gender and handicap are also given special attention in law in some countries.

Teachers in countries where they are allowed to be unionized are able to obtain remedies at law with regard to their employment. In those jurisdictions, appropriate machinery is usually prescribed through which they may pursue their objectives. Also in countries where tort law operates teachers may be protected against personal liability for any actions taken against them in negligence, since their employers are made liable for the negligent acts of their employees.

The opportunities for children to obtain remedies for procedural or other wrongs done to them are bound up with their parents through whom they approach the courts. Whilst any discussion of the rights of children may appear somewhat academic given the numbers of children under economic or social oppression not of their or their family's making, note does have to be taken of the concern in the international arena for the rights of children. Some countries such as Canada, have incorporated such rights in legislation resulting in the following provision:

> "Young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular the right to be heard in the course of, and to participate in, the processes that lead to decisions that effect them, and the young person should have guarantee of these rights and freedoms (Mackay and Sutherland, 1990)."

That law needs to be read in the context of the federal decisions made about it which have not given the provision its full effect in all instances. Nevertheless, it stands really and symbolically as a statement about the goals many countries would have for their children.

Review questions and issues

1. Map the authority structure created by law for your school system.
2. Identify the legal sources which allocate the functions and duties of system administrators, school authorities, principals, teachers, parents and students. Do these correspond with their actual roles in the school system?
3. Identify the ways in which the law may be enforced by and against educational planners and administrators in your context.

V. Law and the resolution of conflict

School law belongs to that body of law which addresses the needs of people. Across a range of countries the law has been found inadequate in resolving conflicts in cases of family breakdown, the care for the aged and the infirm, and the treatment of the sick and dying. When a marriage breaks down, for example, legal argument may follow between the parents for guardianship of the children or the possession of property, perhaps to the detriment of the well-being of the children and their schooling. So the question may reasonably be asked whether the law and especially school law provides educational authorities with a mechanism to resolve the conflicts which arise in schooling and among its participants, namely the administrators, teachers, parents and children.

Parent-system conflict

Take as a first example the case of the system administrators who represent government interests on the one hand, and parents and children on the other. There is immediate conflict apparent between the two. The basic issue in this instance is whose interests are to be served. On the one hand the state is concerned to develop national interests for economic, social, political, religious or self-serving ends. Schooling has become accepted as a means whereby such goals may be achieved – the rationale for this and its justification are left for others to debate. To this end schooling has been introduced and in a century and a half it has become widely accepted not only as a state instrument for obtaining national goals but also as a right of the state. The law has been utilized to achieve

this purpose and children have been taken from the care and responsibility of their families and made to attend school. This will happen even more as countries develop the capacity to provide schooling and make it compulsory. Implicit in the concept that schooling is in the national interest is the right to determine what happens in the school by way of teaching, the content of the curriculum and the behaviour of the children – matters which will be pursued below.

On the other hand, parents have different viewpoints about this conscription by the state of their children. These viewpoints range from ready acquiescence of the situation to opposition to the state's domination, which is expressed in the claim that decisions about schooling belong rightly to the parent. In other words, there is confrontation between these two forces with their respective positions on who should be responsible for schooling and to what extent.

School law has been formulated by the authority which is identified with the position that schooling in the state's interest is the preferred position contrary to the claim of parents to individual choice. It is not surprising, therefore, that school law contributes to the adversarial nature of the debate. Of course, not all school law is unilateral in its demand for the state's interest to be served. The law in many countries makes provisions whereby parents may choose alternate schools or even teach their children themselves as is the case in the new law of the Russian Federation. But in these cases controls may be applied by law. This ultimately gives the state the right to determine whether such schooling is adequate in quantity and quality.

This conflict between the state and the parent or child is one in which the law has been instrumental since it is state-made law that has determined the issue and, if the state wants to prosecute under that law, it is in a position to do. There are modifications to which the law has also been applied in those jurisdictions in which individual rights have been preserved or made possible. These instances have tended to be in the litigious-conscious, developed countries. One example is the *Amish case* which was decided in the Supreme Court of the USA in 1972.

In the *Amish case* (Wisconsin v. Yoder, 1972), parents challenged the right of the state to decide the amount of schooling

their children should have. The relevant facts briefly were that parents in the Amish community which followed strict moral and religious precepts and had done so for decades had taken their children out of the government school when the children were 14 and 15 years of age (the age prescribed by law for compulsory schooling was 16). The reasons given were that the curriculum and the presence of the children in school were detrimental to their being able to live in the Amish community with the morals and values held by that community. The parents also argued that alternative non-formal vocational education was being provided.

The Supreme Court held that the right to free exercise of religion and other rights were violated by the state's requirements that the children, in this case, be required to complete the final year of compulsory education. That decision was limited in its application as the Court did not decide that all parents had the right to determine their children's education. Significant factors affecting the Court's decision included the long-standing beliefs of the Amish community, the fact that the children had spent eight years in the state-provided school system and that there was a general conflict of values in terms of freedom of religion which were being violated by a continuation at school *for these particular children.*

What has such a case to say to educational planners? In the first place, where there are opposing views held by the state and parents, the law only decides a particular issue. It does not resolve the educational conflict between the state and the parent. The law may ameliorate the situation in certain circumstances as in the case described above but usually the basic conflict remains. School planners clearly need to be aware of this conflict of interests and of the law related to it. They are only in a position to enforce the law or take it into account when it affects their work. But, taking into account the implications of the previous chapter, they may also attempt to weave into their planning the likely impact of future changes which may make state-parent interests in the education of children more equitable than is presently the case.

Teacher-system conflict

Another area of conflict is that of the teacher, and the state system – the concern here being government teachers and not

private teachers, although the issues may be similar. Teachers may disagree with the content of the curriculum or the way in which they are required to teach it. One example of this is taken from the state of Arkansas in the USA where teachers were required by their state employer to teach the science curriculum following a particular theory of evolution which had its basis in an interpretation of the Christian Bible. In one instance, an education authority terminated the employment of the teacher on the ground that the teacher had supported the Darwinian theory of evolution in her classroom contrary to the requirements of the system. In *Epperson v. Arkansas*, 1968, the Supreme Court held that the authority had violated the teacher's rights in dismissing her. However, this case has not provided teachers in the USA with a broad right to academic freedom in terms of their teaching duties.

The employer-teacher relationship is different where the private sector is involved. While the overriding laws of the land apply, employment is usually on a contractual base with a part of that contract being that teachers will adopt methodologies which are acceptable to the school. It is also likely that during the employment procedure, private school teachers may have had to declare their allegiance to a specific kind of school ethos.

A second area of teacher-system conflict in the government education is that of employment, including concerns such as the salaries to be paid and the terms of employment. The conditions applying in such appointment can and do raise tensions, particularly in countries where distance and difficult situations are the context in which teachers may have their first appointment. Teachers are also in the first line of attack from parents when the services provided for schooling are inadequate and particularly when the burden of supplying facilities falls on the local community. While major initiatives in providing school services, such as Operation Blackboard in India, are applauded for their physical achievements, what is often not assessed is the improvement in the quality of life enjoyed by teachers, when their schools are better resourced.

Teachers in both the public and private sectors share in common one employment issue, namely, their organization into associations or unions. Where the association is professional in orientation, such as a grouping of curriculum people or teachers of the handicapped joining to exchange ideas, the problem is minimal.

Where it does take on sizeable proportions, however, is where the intention is to form a union for bargaining purposes and especially with a view to taking strike action.

The conclusion to be drawn from the teacher-employer (state) conflict is that the law has placed the employer in a clearly favourable position in terms of who teaches, what is taught, how it is taught and to whom it is taught. There are instances of judicial interpretation in countries with civil rights provisions where the courts have supported individual rights. In no case, however, is there any suggestion of the balance being other than in favour of the state. Teachers have banded together, sometimes very successfully, in being able to bring political pressure to bear for change or to use the judiciary to redress grievances: but they always remain the employees. Whilst educational planners clearly need to take cognizance of the teachers' voice in many issues related to schooling, it tends to be for reasons of their political, not legal, power.

Teacher-student conflict

A further field of conflict is that of the teacher on the one hand and the parent or student on the other. Teachers are employed under law as experts in schooling and there are often legally enforceable restrictions on the part which parents may play in schools. This reverses the control exercised by parents who have been the educators of the child in a significant way for the first few years of life. They are displaced by the teacher who, by law, takes over the educating role and may practice it often without any particular regard to the wishes of parents.

The conflict may be increased as the influence of the school permeates that of the home or undermines it. This occurs, for example, in the teaching of values. 'Whose values?' may the parents ask. But it may also arise from the content matter in the curriculum and also in the way it is taught. Take, for example, the medium of instruction. This may be a 'foreign' language in countries like Indonesia or Viet Nam since the national language is a second language to many clans, particularly in isolated communities.

The conflict widens as the influence of the school extends beyond its bounds to challenge the practices of the home, the mores

of the community, the economic life of the family or hamlet, or the very social and political fabric of the local society. It is not, therefore, merely the issue with which this chapter began of state versus individual, it is also state versus clan, state versus minorities and state versus local communities. For the educational planner working from within the state framework, the support of the law is there provided planners act within it. But to restrict the planning base only to its legal requirements may result in contributing to the adversative position which the law tends to create.

Parent-parent conflict

Before leaving situations of conflict involving parents, mention should be made of the situation in a number of countries where there is conflict because of the divisive nature of the law. One such situation is where parents may choose to send their children to government or private schools. It is more, however, the attitude of the parents than the legal provisions which causes the antagonism. The justification for making that claim lies in the fact that in many countries of the proposed Economic Community, for example, public and private sector schools have co-existed for a considerable length of time: in other countries antagonism between the public and private sectors has remained high. The differences are exacerbated when the school, as a sorting agency, begins to enable preference to be gained by one student over the other. This is not always in favour of the non-government school student since in many countries private schools are not preferred over government schools.

Child-system conflict

Without wishing to cast children into the role of being in conflict with their educators in reality – many are happy at school, some not – there is an important notional degree of conflict if one is concerned with the legal provisions for education as opposed to the pedagogical ones. To emphasize the claim made before: if the child is intended to be the focus of the school system are the world's various systems of education underpinned legally in terms of focusing on the education of the child? The evidence adduced

above suggests the contrary. The one turning point may be the advent of the Covenant on the Rights of the Child.

One point is clear and that is that educational theory has not had a strong influence on the framers of the law. Whilst that theory is dynamic and has not been constant, there has been support both from researchers and administrators concentrating on the needs of the child. Some success with lawmakers has been had in some instances, albeit not without a struggle. Laws have been changed, for example, in several countries to accommodate shifts in theory as to the best way to cater for the needs of physically or mentally impaired children. Whereas once such children were thought to be best educated in an isolated environment, present educational practice in many countries is to integrate such children with their peers who do not suffer such impediments. In these instances, change in educational perception has been parallelled by changes to the law.

The final situation of conflict which completes the network of participants with interests and conflict in schooling is that of the population at large. The general public is no innocent bystander to the schooling process, often being involved in it as administrator, parent or teacher. But to retain the public as a unit in this discussion is important. It has an interest in education, which may involve conflict in terms of the decisions of the politicians elected to represent the people, the taxes paid by the public where that is relevant, and the questions and issues of quality in education, which is a matter of public interest.

Conclusion

Parliaments the world over have a say in or actually determine the laws on schooling in the countries which they govern, if they have the constitutional power to do so. Most parliaments have some persons elected or selected as representatives of the people to serve in them. A major task which electors or selectors may have is convincing politicians of the importance of schooling on the legislative agenda. Few would deny its importance on election or selection day. But that fervour is not always carried through to the actual life of politics. When it is, politicians may become the victim's of party politics and surrender their views for those of the

majority; they begin to become the victims of special interest groups, educational or otherwise; they may simply lack the power of opportunity to have anything changed. The result is conflict between groups of politicians and between politicians and their supporters. One attempt to resolve this issue has been to develop the argument that education is apolitical. This matter has been addressed in Chapter II and it is merely necessary to observe that this is not possible. The dilemma for the politicians remains especially when there are educational, administrative bureaucracies at variance with them pedagogically and politically.

"It will be a great day when our schools get the money they need and the armed forces have to raise money from the public to buy their weapons." This less-than-subtle anonymous saying became popular amongst parent groups in Australia in the conflict between the public as taxpayers and the government in a situation where compulsory schooling was, by law, free. To pay taxes and to have to raise money for the maintenance of schools was unacceptable to many. The conflict was seen to be reducible to the simple question of the priorities of governments; it was seen to be easily resolved by making education *the* priority when passing monetary laws. Were the issues so simple?

But the conflict was not only one for government. It was also a matter of how and where taxes were to be spent. For example, in which sector of education taxes were to be spent? – a non-issue for countries concerned essentially with primary education, a major issue amongst those offering education from pre-primary levels to universities for life long education. The taxpayer, however, has some self-interest at heart and, where the population is young, the considerations are different to when it is ageing. When economic growth is high and training for jobs is important different priorities prevail compared with times of recession and redundancy, when retraining or alternative education is the need. Given the static, systemic nature of education, it is difficult to provide for new forms of education and to have them funded, given the tendency for high recurring costs in educational budgets.

Taxpayers too may have been involved in internal conflict on account of laws passed or rules made by planners concerning spending in schools. There may be very practical issues such as the amount designated for capital expenditure as opposed to the

maintenance costs of schooling – buildings versus teachers to put it simply. Other issues are ideological such as that of government aid to religious schools, which is one of importance in some countries. In the USA, for example, the Supreme Court (*Lemon v. Kurtzman,* 1971) has maintained a fairly comprehensive no-state-aid policy which is binding on the American school system and which has led to considerable conflict. In many European countries this issue has long been settled. But sectarian differences can turn this area into one of considerable conflict and make it quite difficult for educational planning and management.

Related to the question of paying for education is that of quality. Questioning the quality of public education has caused educational planners to devise ways of measuring and reporting on quality and, in some instances, they have resorted to legislation to attempt to improve the quality of education by requiring standards to be met. However, the law is not generally able to determine issues related to the quality of life, although through it, governments can mandate for minimum provisions in health, safety and welfare. In the educational field, planners need to consider carefully the use of the law to attempt to achieve quality, since its success is limited at best and may be dysfunctional at worst. It is quite possible, for example, to imagine a situation where passing rates are prescribed by law. In order for teachers to meet the prescription of the law, they may vary their procedures to obtain the required result, without improving the quality of education at all.

Review questions and issues

1. What are the major areas of conflict which educational planners in your country need to address?
2. To what extent does the law in your situation successfully resolve conflict?
3. How should the law be changed the better to reduce conflict or achieve conflict resolution?

VI. The international influence

The Charter of the United Nations makes only two references to education in Articles 13 and 55. And yet one of the imperatives for local planners of education is to respond to the actions taken by their governments in ratifying international agreements which contain an educational component. Prior to 1945 and the war which led to the United Nations' Charter addressing so much the issues of war and peace, education had been a matter of international concern. The Agreement on the Teaching of History, signed under the auspices of the League of Nations in 1939, is one example. But the 1945 charter was adopted in a context in which a number of international organizations, and a number of treaties and agreements would have a considerable effect on education. The organizations included the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization (ILO). Very specific educational organizations such as UNESCO's International Bureau of Education (IBE) and other groupings of nations such as the Organization for Economic Co-operation and Development (OECD) played important roles in the educational developments along with the bi-lateral and other agreements negotiated between countries. In more recent times the evolution of the Common Market countries and movements towards a United Europe have had their educational implications for Member States.

This is not the place to review all the treaties, conventions or agreements in education promoted by the organizations already mentioned. The attention of educational planners is drawn to the fact that each has promulgated decrees related to education and the fact that this discussion refers only to UN and UNESCO instru-

ments should not detract the reader from being made aware of a much wider range of international concern for education.

The Universal Declaration of Human Rights of 1948 (Osmañczyk, 1985) addressed a number of general rights which persons were entitled to, some of which might well be addressed by educational legislators. Cognate with educational interests are punishment (Article 5), no discrimination before the law (Article 7), and the right to access social services (Article 25), to mention a few.

The specific rights to education were addressed in Article 26 which prescribed the right of all to education. It is affirmed that education should be free at least for primary and technical education. Higher education should be accessible on the basis of merit. The Article is also pedagogical in tone with the assertion in 26 (2) "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms". The weight of the Charter appears to be on the side of the individual rather than on the state or the system.

Further educational references extol education's potential for changing human attitudes and behaviour, for developing harmony and in furthering 'the activities of the United Nations'.

The concluding educational right addressed is that of parents. "Parents have a prior right to choose the kind of education that shall be given to their children." A number of individual rights relating to the freedoms of association, thought, religion, expression and assembly, and a range of other freedoms related to social and cultural life in the country of residence are also enumerated.

Analysis of other proposed documents is given in *Appendix I* but has been commented on in this Charter to alert educational planners to matters of concern in terms of educational administration. The first issue is the weight which the Charter has in the law of the country of the reader. International agreements are not lightly entered upon. There are treaties about treaties. That is, there are procedures, checks and balances to which countries signing international conventions and the like have agreed. The question of actual compliance is not the subject of this discussion although it might be a matter of concern for planners. The issue here is that, in principle, a country acquiescing to the charter has implicated itself in the educational ideology inherent in it.

Of next importance is the actual ideology to which a country has subscribed. The wording above suggests a concern for individual rather than collective educational rights. It also suggests a parental dominance in the question of educational choice which would run counter to much educational practice. Is the wording, therefore, merely symbolic to be honoured only in theory and not in practice? And what of the conflicts already mentioned between the position taken in the Charter with that of the interests of the many parties to the provision of schooling? Given that education was a fairly minor concern in the overall provision of the 1948 Charter and that the pressure upon nations to sign was far stronger than the mandate to implement any one Article of the Charter, it is useful to trace the evolution of education in the international agenda, if educational planners are to realize its full importance.

UNESCO with its considerable emphasis on education adopted the Convention against Discrimination in Education in 1960. This Convention asserted that discrimination in education was a violation of the rights enunciated in the UN Declaration on Human Rights. The substance of the convention is contained in its first Article which defines discrimination as including "any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition of birth, has the purpose or effect of nullifying or impairing equality of treatment in education....". This first Article goes on to particularize such discrimination in terms of depriving people of access to education, confining any person to an inferior education, maintaining separate institutions for education except as later allowed for in the convention on the basis of sex, religion and private interests, but only in certain circumstances. Finally, in this Article, the Convention condemns any infliction of indignity on any person through the educational process.

The remaining Articles in the Convention are addressed to issues of promoting equality in education (Article 4) and Article 5 echoes some of the sentiments of the UN Declaration of 1948 in advocating the development of the human personality and respecting the liberty of parents to choose the type of education their children are to have. An addition in this regard is the special reference to the rights to equal education of minority groups and "the teaching of their own language", although that provision is

hedged by reference to 'depending on the educational policy in each state' (Article 5 1(c)(i)).

Whilst in its title a Convention against Discrimination, this instrument contains very positive assertions about the provision of schooling especially in Article 4. In the terms of that Article, signatories to the Convention undertake to develop and apply policies which, given national contexts, "will tend to promote equality of opportunity and of treatment in the matter of education....". This part of the convention implies for Member States that primary education will be free and compulsory, that secondary education will be generally available and that tertiary education will be likewise available 'on the basis of individual capacity'. The Article goes on to address issues related to standards in education, the quality of education, the methodology of teaching persons who have not been able to go to school and the education of teachers, all along the lines of non-discriminatory practice.

Signatories to this Convention, who are intent on its implementation in their states, are committed to an ideology in which rights in education and the methodologies of teaching are weighted in favour of the individual as opposed to the national, system or group interest. They have also committed themselves, in principle, to a hierarchy of education which they will endeavour to provide on the basis of equitable treatment, albeit not as free education beyond the primary school. Any attempt to implement such a convention as this will involve the educational planner in conflict where the sentiments of the convention are at variance with the mores of the society into which they are to be introduced. Even in symbolic terms, proposals such as free education, and education for all at all levels carry some conviction but that of an individual right to selection and enjoyment of schooling remains somewhat hollow.

The year 1966 proved to be one in which United Nations conventions of a general kind with regard to individual rights received particular attention with the International Convention on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights being opened for signature in December of that year (see *Appendix I*).

The final focus in this discussion is on the rights of the child, with such rights being specifically recognized in the 1959 Declaration on the Rights of the Child and most recently reinforced in the

Convention on the Rights of the Child. A range of rights complementary to that accorded adults is prescribed in these documents. With respect to education, particular mention is made of the right of disabled children to it in Article 23 of the Convention and general rights of access to education are outlined in Article 28 in the following terms:

> "The child has a right to education. The State undertakes to take measures to make primary, secondary and higher education, and vocational guidance, accessible to all. School discipline is to be consistent with the rights of the child and reflect the child's human dignity".

The convention goes further than what is expected in a document on rights to address the aims of education:

States agree that education should be directed to development of the child's personality and abilities, preparation of the child for responsible life, and development of respect for his or her parents, for human rights, for the natural environment, and for his or her own cultural and social identity and values and those of others. Individuals are to be free to establish educational institutions, subject to standards laid down by the State (Article 29).

The above is merely a selection of some of the significant instruments decided upon internationally and which have implications for the provision of education. There are others emanating from the United Nations and UNESCO on issues such as sexism and racial discrimination, and from the International Labour Organizations relating to employment. But sufficient has been cited to make the point that there is a body of international opinion on education which should be carried over into law, given the obligation to implement conventions, which accompanies the signing of them.

This review of international provisions provides the first discussion of law in this booklet which can be said to be generalized. Up to this point it has been frequently said that law is jurisdictionally discrete. But although international conventions apply in all the Member States which resolve to ratify or accede to them, their implementation is jurisdictionally discrete, apart from the international review undertaken by bodies set up to monitor their implementation. It is, therefore, the case that countries may sign such agreements because they are members of the international

community and want to be recognized as such without having the resources or, perhaps, the will to implement what has been agreed to. Some countries may accede in all good faith, utilizing the connection to an international agreement as a symbolic means of signifying their intention with regard to the education to be implemented in their country as and when that is possible. For education planners, the context of their country's subscribing to international instruments will be important in devising and implementing policy. But even a cursory reading of the above provisions will only alert them to the point made in the previous chapter, namely that their task will require the resolution of conflicting ideas and expectations amongst the parties providing schooling and those participating in it.

Review questions and issues

1. What international agreements, conventions or the like which affect the administration of education has your country ratified?
2 To what extent have international agreements changed school law in your country?
3. What international agreements would you say best assist the provision of quality education in your situation?

VII. Lawyers and planners: case studies

By way of concrete examples, it is proposed to describe two case studies which will highlight the problems facing educational planners. One of these case studies is negative in the sense that it will demonstrate how the alleged knowledge of school law by lawyers resulted in considerable difficulties for educational planners, partly because of the planners' ignorance of the law. Lessons can be learnt from mistakes made, but of the examples available this one has been taken from the writer's own country (Australia) to avoid any sense of embarrassment. Other positive examples will be taken to show how countries are grappling to join law and education in the interests of those most affected – the children.

Case study one

The circumstances of the first case study were that children attending a primary school were able to buy food at the school at a shop run by parents. The particular province in which the school was situated was well-known for its production of apples. In the school in question, the children were given one or more apples as change, when they went there to buy their food. On one occasion the apples were being thrown by the children at each other. One child received a serious injury and, as a result, the parents decided to sue the Education Department in negligence.

In the country concerned, Australia, its superior court, the High Court, had decided the rules about negligence in schools over several cases. To put the situation fairly simply, that Court had resolved that a duty of care for children existed in almost every

'school' situation and that where there was a breach of that duty and that such a breach resulted in a causal connection between the failure to take care and the injury sustained, negligence was likely to have been proven.

The parties to this case were the parents, the Department of Education (the state department responsible for education) and the Crown Law Department (the department responsible for legal action and prosecution). It appears that although there was some mutual agreement that the student was the victim of negligence, an officer in the Crown Law Department decided that the matter should go to trial. This procedure was followed with the result that the Court found for the parents and child, and costs for the accident and the action were awarded against the Department of Education.

There was some considerable time, however, between the accident, the decision to defend the action of the school and the decision by the Supreme Court of the state/province concerned. In this interim, the teachers in particular became very agitated about the implications which such an action had for members of their association. A special conference was called to discuss the issue, almost as if such actions had never occurred before. In the end, the teachers' association and its members found that they had little to answer for. The amount awarded to the parents was paid by the government and, in monetary terms, at least, everyone was satisfied.

The case study suggests a number of concerns which need to be borne in mind by educationists and lawyers alike. In the first place, there is a need for each to know their own field of expertise. Were the lawyer in this instance better acquainted with the law on negligence, the action may never had been begun. Likewise, were the educational planners and administrators aware of the law on negligence, particularly those related to the teachers and their association, there never needed to be the panic into which the organization of teachers and its individual members were put by the incident. After all, the High Court had decided the basic principles several years before. The teachers involved were simply uninformed as to the law of negligence.

A second issue in this case example is that the two areas of law and education were considerably lacking in terms of dialogue between them. Western countries are examples of the degree to which there are professional distinctions such as between law and

education or health and education. This distinction has led to barriers being created which have prevented a coherent approach being taken to problems facing the clients of such systems – in this case the parents, the child and the teachers in particular.

The third concern is the trauma associated with such a case as this. Many people were involved including the supplier of the apple, the child, the parent, the teacher not to mention their respective associates. For these people there was not a win or a loss; there was injury, suffering and payment. There was also the conflict in which they were forced to engage as adversaries, when schooling is supposed to be anything but adversative.

Although this case study is somewhat exclusive in terms of being one more common to a developed country, it does raise some issues which all countries might seek to address. The first, and prime concern is that legal and educational discourse should have common ground. If the sectoral divisions within government are to be maintained by law or administrative decision, the fact that schooling should be the concern of educationalists, lawyers, psychologists, social welfare persons and other government agencies acting in concert is likely to be forgotten. The consequence is that educational planners and administrators may be put in the position of having to declare and defend their interests rather than working with colleagues for the well-being of the school system.

Secondly, this case study demonstrates how ignorance of the law can effect teachers and others in a way which should never have happened. Legal illiteracy is not something which educational planners can afford, even if lawyers may be pedagogically uninformed. In this instance, the law was well established and the destabilizing effect of this action amongst teachers and, consequently, their schools, and between parents and teachers should have been avoided.

Finally, this case is a reminder of the fact that although the courts may decide an issue in a clinical setting, the trauma is much more far-reaching. Critical relationships between law and education, principals and staff, teachers and parents, and teachers and students are affected in such a case. The tragedy is that were lawyers and educationists willing to address such issues of conflict, a change in

the law could result in no fault arrangements being devised which would be to the benefit of all parties.

Case study two

The existence of a law does not imply that it will be implemented or that its provisions are being or are able to be equitably supplied. Law related to universal primary education in Pakistan is but one example of law in a country where economic and other factors intervene to prevent primary education being available to all. But Pakistan is also an example of a case where educational planners have addressed the issue despite the difficulties involved and, in so doing, had the rules changed to overcome an obstacle parents faced in sending their children to school.

One strategy adopted in Pakistan (Jadoon, 1990) has been the reinforcing and expanding of the concept of the Mosque school. The premises of the Mosque have been put to use in settlements where there are no school facilities and the schools established are recognized as fully-fledged primary schools covering three to five years of primary education. A combination of teaching has been worked out so that the one appointed teacher works in co–operation with the Pesh Imam (Priest). The former is responsible for the secular subjects taught over the six days of the week – Friday being the holy day, and the Pesh Iman is responsible for the religious teaching of the Islamic faith. In-country research of this project suggests that it has proven to be a successful way of bringing Pakistan closer to its goal of universal primary education in line with the rules and regulations for achieving that goal.

The planners' approach to the problem has also had the effect of bringing new approaches to teaching in Pakistan. Peer teaching has been recognized as valuable not only to assist the teacher confronted with teaching three to five grades in one group. Pupils are used as monitors in the class situation and brighter students are linked with others to assist them in their learning. Whilst peer teaching is not a new concept, its utilization in the Mosque schools in Pakistan has been an insightful piece of planning. It has not only served to meet a local need, it has also contributed to a national goal as stated in the laws of that country.

Where the law has changed to fit the circumstances was with regard to the school holidays. The traditional times set for schooling had taken little heed of the needs of the families and their societies. In many areas of Pakistan children are an integral part of the family/village economic unit. It is little wonder, therefore, that parents withhold their children from school at critical times. The result is disruption for schools and students and, with the repetition rule in operation, children were being forced to repeat their schooling on account of their absences from school. The situation in Pakistan was recognized by the planners and action was taken to change the rules for school attendance times. Schools were closed for the two critical periods of the year – the harvesting of the 'Rabi' and 'Kharif' crops – so that children were free to work with their families at this time. A simple, perhaps even obvious, solution to some but nevertheless an example of how laws difficult to implement can be changed in the interests of all parties.

The issue of compulsory education laws has also had to be addressed in the People's Republic of China, the law in this case arising from the 1985 reforms in that country, which resulted in compulsory education being required for nine years of schooling. In the intervening years attempts had been made to bring that law to reality but, in rural areas in particular, this had been a difficult assignment. The problem was formally addressed in 1990 when the National Commission for the UNESCO in China arranged a workshop to which were invited educational planners including classroom teachers, educational experts and key administrators from some eleven provinces.

The participants to the workshop identified a number of strategies to assist in having the law implemented and identified three priorities, namely:

- the need to provide a form of rural education that permitted flexibility at the lower level and made the curriculum more relevant in terms of study patterns, its actual content and the teaching methodologies used;
- the joining of local communities and local governments in support of schooling along with the integration of initiatives in schools with agricultural and economic developments in the wider community; and

- variations and improvements to teacher education programmes to provide teachers able to adapt to and operate effectively in rural contexts.

Although the benefits of such a workshop take time to be implemented and assessed, it is a fact that planners can be effective in addressing situations regulated by laws and rules. Many other countries have made similar decisions to the above. Indonesia for one has varied its law to ensure that the curriculum has local content in allowing twenty per cent of the school time to be used for the inclusion of indigenous curriculum – Balinese writing, for example, in schools in Denpasar. In that city, noted for its tourist trade, the law was also varied to encourage children to attend afternoon school, leaving the rest of the day available for tourist business.

Of interest in the workshop in China was the conclusion reached that planners were in need of research to assist in making the links between education and the rural sector. The proposed fields of research were research into teacher effectiveness, the curriculum especially integrating core curriculum requirements, vocational education and secondary education for rural students. Research should be important to both lawyers and educationalists as they attempt to prescribe what are the obligations and content of education. In particular, research should be of assistance to planners as they have to have to determine the educational appropriateness of laws and rules.

One law related to primary schooling in both developed and developing countries is that related to requiring students to repeat grades of schooling. Repetition may be required either because students have not met the attendance requirements or because their standard of achievement at the end of one school year is not high enough to allow them to proceed to the next grade. The factors that relate to the need for repetition and the likely success of repeating students have been widely researched. The most recent report is that on the situation in Honduras (McGinn, 1992). The law in Honduras prescribes that children who do not attain an average of sixty marks should not be promoted. The impact of that law is examined in this research and one cannot escape the conclusion from this and other studies that repeaters are likely to become drop outs. Where they do repeat they are not likely to be very successful. Is the

conclusion that the law is 'bad'? Perhaps, but not necessarily so. The research in Honduras itemizes a number of factors which are said to lead to children being unable to reach the required level of performance. A number of recommendations flow from this research, which, if adopted, might lead to the conclusion that the rule applying in Honduras is 'good' law.

Implications for planners

These case studies and examples cover some of the relationship between law and educational planning. It is clear that there is law which can place educational planners at a considerable disadvantage. This is the law which, rather than resolving relationships between the participants in education, leads to their taking up adversative positions with all the complications for the 'winners' and the 'losers'. It is very difficult to see how an adversative approach to education is likely to lead to quality schooling.

Other law is regulatory of persons involved in education, determining the rules for teachers, students, parents and administrators. Some laws are symbolic yet remain important law since they are the national goals which planners need to attain. Some laws are over-regulatory leaving planners with the task of trying to sort what works from what does not, retaining the former and attempting to get rid of the latter. Some law is also intended to effect change for the benefit of the nation, the family, the parent and the child. Other law is allocative, determining the power structure for the operation of schools and the powers, rights and duties to be exercised by the various participants. Educational planners need to be aware of all of these in determining advances to be made in the provision of schooling.

Conclusion

The simple conclusion to be drawn for educational planners from all that has gone before is that the law is complex, confusing, but still necessary. The final comment is reserved to an Indian scholar (Singhal, 1990):

"About six decades ago, there were few laws on school education. Now there are laws and laws. The proliferation of school law throughout the country has led to complexities, ineffectiveness, non-enforceability and the denial of justice. It is high time that these laws were rationalized and unified into one or two central laws, bringing clarity and uniformity in objectives, structures, processes, and goals. Until then, who is the ultimate sufferer?"
The Child!

Appendix I. United Nations Convention with regard to individual rights

The Covenant on Civil and Political Rights (Osmañczyk, 1985) made no particular reference to education but, as with the constitutions of countries which guarantee civil rights, it promulgated a range of rights which could affect educational policy and planning. Rights with an educational overtone recognized in this Convention include the right of self-determination (Article 1), individual rights recognized by the state with regard to 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Article 2), the right not to be subject to 'inhuman or degrading treatment or punishment' (Article 7), no deprivation of liberty (Article 10), 'freedom of thought, conscience and religion' (Article 18) and the rights to hold opinions (Article 19), and to peaceable assembly and association (Articles 21 and 22 respectively). The final Articles on rights stress the family as the fundamental unit of society (Article 23) and pay particular attention to the rights of the child in Article 24 asserting 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his (sic) status as a minor, on the part of his family, society and the state'. Without reference to education at all, the provisions of this covenant impinge on its operation in almost every jurisdiction.

Complementary to the Covenant on Civil and Political Rights is the Covenant on Economic, Social and Cultural Rights (Osmañczyk, 1985). The latter prescribes rights in fields cognate with education such as employment (Article 6) as well as general social conditions such as health (Article 12) and welfare (Article 11). Matters educational are addressed at length in

Article 13 in which the right to education for all is asserted and education is perceived as being tied to the 'full development of the personality'. There follow a number of assertions which bear repeating in full. They are:

- Primary education shall be compulsory and available free to all;
- Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; and
- The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Of the following mainly procedural Articles, one attracting attention is Article 15 which addresses the right to participation in the cultural life of a country and to enjoy its scientific achievements.

The Covenant on Economic, Social and Cultural Rights is the first United Nations instrument to put forward a programme for the rights of people to education. Planners in countries which are signatories to it need to be acquainted with it regardless of the extent to which it may have been implemented.

Along with the mounting interest in education has come in the international arena a concern for particular classes of persons and the child as child. As to the former, reference is made to the United Nations Declaration on the Rights of Mentally Retarded Persons of 1971 and its Charter on the Rights of Disabled Persons of 1974. Amongst the rights afforded mentally retarded persons in the former is that "... such education, training, rehabilitation and guidance as will enable him (sic) to develop his ability and maximum potential". As to the latter the sixth right is one to "... education, vocational training and rehabilitation ... which will

enable them to develop their capabilities and skills to the maximum ....". These two examples serve to indicate the extent to which the international community relates education to particular classes of students.

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