
FINAL REPORT

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Executive Summary

NGMPE (5FW-EU)

Legal Framework of New Governance and Modern Policy in Education throughout Europe.

Topic

The current research activities deal with quality (including safety), responsibility and liability in education.

Objective

The objective is to create a network that deals with specific educational problems.

On the basis of analyses of the legal framework of educational systems, comparable information and comparative analyses on (1) educational freedom and accountability and (2) liability and responsibility in education are provided.

The descriptions (country reports) and comparative analyses result in a reference source on the legal framework of education systems in Europe that can be used by policy makers in selecting legal practices and instruments that are best adapted to the needs of a specific country.

Project financed within the Key Action Improving the Socio-economic Knowledge Base

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| ABSTRACT will be broadly disseminated and placed on the key action web site (1 page) |
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Background

The past quarter of a century has witnessed developments, which have contributed to a demand for structural change in education. It has become clear that improved teacher training and increased resources, while important, cannot by themselves produce the fundamental improvements, which the times require.

This new reality has led to a greatly increased interest, among policymakers, in learning from the experience of other countries. There is a growing rapprochement of national and state educational systems as EU institutions strengthen their provisions for comparability. Decisions by the European Court of Justice have reinforced this tendency.

A further development are the changes experienced by educational systems in the countries of Central and Eastern Europe and the candidates to join the European Union, at a time when many governments are committed to forming a "common European space" in education.

Finally, the changing world economy has made it impossible for those who set policy for educational institutions to continue to ignore developments beyond their own borders.

Objective

On the basis of analyses of the legal framework of educational systems, comparable information and comparative analyses on (1) educational freedom and accountability and (2) liability and responsibility in education are provided. The descriptions (country reports) and comparative analyses result in a reference source on the legal framework of education systems in Europe that can be used by policy makers in selecting legal practices and instruments that are best adapted to the needs of a specific country.

In part 1, the partners started their research on quality and the legitimacy of educational pluralism¹ and then moved on to discuss the legal aspects of introducing market-like competition in education.²

In part 2, the partners evaluated whether the quality control systems met the demands with respect to the criteria for quality assurance and whether the quality cycle in the respectively educational systems operate satisfactorily and how it is supported by liability legislation³.

Part 1: Educational Freedom and Accountability

The partners started by comparing education policies in their countries on the freedom for groups to organize schools and the right of parents to select from among such diverse schools the one most appropriate for their own children, taking into account the perspective within which they want their children to be educated and the quality of the

¹ Country reports were published in: Ch. Glenn & J. De Groof., *Finding the Right Balance, Freedom, Autonomy, and Accountability in Education*, Lemma, Utrecht, 2002, Volume 1, 595p. The theme of the establishments of educational institutions was dealt with in country reports in the publication: J. De Groof, Gr. Lauwers, *No Person shall be denied the Right to Education: The Influence Of The European Convention On Human Rights On The Right To Education And Rights In Education*, Wolf Legal Publishers, Nijmegen, 2004, 725 p.

² J. De Groof, Gr. Lauwers, G. Dondelinger (Eds.), *Globalisation and Competition in Education*, Wolf Legal Publishers, Nijmegen, 2003, 422 pages

³ Volume 6 of the European Journal of Education Law and Policy is dedicated to the issues of responsibility and liability in education, EJELP, Vol. 6, no. 1/2, 2002

teaching and school. Their research was later included in a much broader cooperation with other European, and non-European experts.

Three conclusions stand out.

- Although often only after considerable dispute, school choice is now accepted in democratic countries as a basic right of parents.
- Most governments thereby facilitate parents' exercise of school choice by providing some or much funding for non-governmental schools.
- Governments have devised effective ways to meet legitimate concerns for accountability, national cohesion, and school quality in a variety of ways.

The legitimacy of diverse schools and of government funding of non-governmental schools is acknowledged on the basis of the comparative analyses, which show that there is no need for governments to control schooling through a single model of schooling. The research shows that a single model of schooling is unnecessary as a means to the professed goals of equality and quality.⁴

Partners have also dedicated a conference to the legal aspects of market-like competition in education.⁵

Part 2 Quality control, Liability and Responsibility in Education

Part 2 is dedicated to the comparative analyses of liability in education.⁶ In the context of greater European integration there is often talk of harmonisation of laws and of convergence. However, it is clear that concrete and clear provisions governing transferability of general educational qualifications at pre-university level remain conspicuously absent from the European social policy agenda. Whether it would be possible to prescribe or recommend on a Europe-wide level certain minimum institutional and regulatory requirements to ensure that all states take effective steps to improve, monitor and enforce standards of education in their schools is very difficult to assess. Legislation should provide for the goal of high standards in the provision of education and the development of mechanisms and policies, and adequate allocations of public funding, to support this aim; but it would probably need to leave the degree of specificity for national standards to be determined by individual states.

⁴ Country reports were published in: Ch. Glenn & J. De Groof, *Finding the Right Balance, Freedom, Autonomy, and Accountability in Education*, Lemma, Utrecht, 2002, Volume 1, 595p. The theme of the establishments of educational institutions was dealt with in country reports in the publication: J. De Groof, Gr. Lauwers, *No Person shall be denied the Right to Education: The Influence Of The European Convention On Human Rights On The Right To Education And Rights In Education*, Wolf Legal Publishers, Nijmegen, 2004, 725 p.

⁵ J. De Groof, Gr. Lauwers, G. Dondelinger (Eds.), *Globalisation and Competition in Education*, Wolf Legal Publishers, Nijmegen, 2003, 422 pages

⁶ Volume 6 of the European Journal of Education Law and Policy is dedicated to the issues of responsibility and liability in education (EJELP, Vol. 6, no. 1/2, 2002), with a focus on higher education.

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| <ol style="list-style-type: none">1. Executive summary: 15 pages,<ul style="list-style-type: none">- format should be suitable for publication and presented separately- summary based on scientific description (3) and dissemination of results (5)- it will be made available within the web side |
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I. Scientific results

I.A. Results and outcomes of the network cooperation

1. an institutional framework for long-term collaboration between European experts on education law and policy, human rights in education, and education reform;
2. conferences and seminars with cooperation of the institutions which the experts represent. The initial research group draw participants from across all the EU, thus increasing the professional qualifications of other experts. Participants of the conferences also included young and mid-career professionals working in educational agencies and associations, including national and state authorities. They have had an opportunity never before available to interact with and learn from leading authorities from other countries while the latter have benefit from a framework for their continuing collaboration;
3. the publications can serve as valuable instructional and reference works;
4. a curriculum model for professional training that focuses upon commonalities and differences in the approaches taken by different countries and states, and by international law, to the pressing issues of education policy which all face, such as standards, accountability, diversity, under-achievement, school autonomy, and pupil and teacher rights.

1.B. Results and outcomes of the research cooperation

Part 1: Educational Freedom and Accountability

Accountability

The partners started by comparing education policies in their countries on the freedom for groups to organize schools and the right of parents to select from among such diverse schools the one most appropriate for their own children, taking into account the perspective within which they want their children to be educated and the quality of the teaching and school. Their research was later included in a much broader cooperation with other European, and non-European experts.

Three conclusions stand out.

- Although often only after considerable dispute, school choice is now accepted in democratic countries as a basic right of parents.
- Most governments thereby facilitate parents' exercise of school choice by providing some or much funding for non-governmental schools.

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- Governments have devised effective ways to meet legitimate concerns for accountability, national cohesion, and school quality in a variety of ways.

The legitimacy of diverse schools and of government funding of non-governmental schools is acknowledged on the basis of the comparative analyses, which show that there is no need for governments to control schooling through a single model of schooling. The research shows that a single model of schooling is unnecessary as a means to the professed goals of equality and quality.⁷

Partners have also dedicated a conference to the legal aspects of market-like competition in education.⁸

The purpose of the research has been to present, as objectively as possible, the solutions chosen by a number of countries to the tension between promoting educational freedom and advancing other legitimate goals in the organization of their educational systems such as quality and accountability. Having reviewed the laws and policies and the general landscape of elementary and secondary schooling in several dozen educational systems, what sorts of general conclusions can be drawn about the extent of educational freedom and quality assurance?

In most countries surveyed the decision to provide public funding for non-government schools has been in response to popular demand, often through political compromises, and not in response to the more recently-developed international norms (e.g. the Netherlands, Belgium and France). In Germany and England the emergence of public education in the 18th and 19th century was on a denominational basis. Greece and, to a large extent, Italy are exceptions. Greek public education has developed in close partnership with the Orthodox Church, to which the overwhelming majority of Greeks are at least nominally members; there has been little support for alternative forms of schooling. In Italy, the Catholic Church was perceived as an enemy by many for the unification of Italy. Anti-clericalism and a concern that the educational system be centralized and uniform in the interest of national unity have shaped public policy in Italy until very recently, and have limited financial support for nongovernmental schools to regional initiatives. In France limited autonomy is granted to schools under contract in France, while subsidized schools in Denmark enjoy wide discretion.

The barriers to educational diversity are clearly weakening, however. While in most of these countries there is now a great interest in measures to promote autonomy and diversity among schools, every government takes pains to provide a framework of regulation and accountability within which educational freedom is exercised. The study offers a brief overview of the extent of this government oversight, which varies a great deal from country to country, depending upon the political culture and historical circumstances of each.

The last decade has been marked, however, by a growing concern in many countries for effective systems of accountability. Willingness on the part of policy-makers to allow both public and subsidized non-public schools to function more autonomously has usually been accompanied by a heightened demand for measurable educational results. It seems probable that most citizens share the belief that government should ensure that schooling, whether provided by government, by civil society institutions, or by private sponsors, meets quality standards and complies

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⁸ J. De Groof, Gr. Lauwers, G. Dondelinger (Eds.). *Globalisation and Competition in Education*, Wolf Legal Publishers, Nijmegen, 2003, 422 pages

also with norms of fairness and democracy. Support for something like a regulated market in educational services seems in most cases to have little to do with an ideological commitment to markets. In most countries, there is a belief that government should play a regulating role as indeed it does in other sorts of markets.

Parent choice of schools is an established practice because country after country has concluded that educational freedom is a fundamental right. Belgium has enshrined this right in its *Constitution* since 1831, as have the Netherlands since 1848. Also in the new democracies, the same protections have been provided.

In short, parent choice of schools is guaranteed in every free society, and is widely practiced. In most cases, it is also subsidized with public funds even when the school chosen is not operated by the government itself. We have no need to speculate about what might happen under this or that arrangement, since there are dozens of real cases to illustrate what has worked well and what has not. It is useful, then, to look at how these various objections have been met in actual practice.

Indoctrination is the original argument for a government monopoly of schooling. The argument is that all of the children of the society need to be taught the same set of values and loyalties. The warning has been endlessly repeated in Europe and yet it has never yet been validated by historical experience. Despite millions of youth receiving their education in nonpublic schools, in most of the countries, the level of mutual suspicion and conflict on the basis of religion has dropped steadily. Northern Ireland is the exception that proves the rule.

It is true that some parents might choose schools that teach beliefs regarded with distaste or hostility by the general public. This does not, in a free society and under international human rights standards, imply that we should deny them the right to have these beliefs taught to their children or that government is entitled to impose any sort of orthodoxy of belief upon schoolchildren.

The need to protect children from messages from which we might reasonably want children to be shielded in school, or messages from outside the school to which we would want teachers to present an alternative, has been addressed by most Western democracies within the framework of publicly-supported school choice.

France requires that subsidized nonpublic schools (almost all of which are Catholic) provide instruction “with total respect for freedom of conscience.” In the Netherlands, the nonpublic schools (mostly Catholic and Protestant) that serve 70 percent of the pupils are reputed to be more open than are the country’s public schools to the growing cultural diversity of the population and are, in consequence, commonly chosen by Muslim parents. The ‘foundation’ (formerly ‘grant-maintained’ or ‘opted-out’) school in England in most respects cannot be differentiated from what are considered nonpublic schools in other countries.

Some observers at the conferences have expressed their believe that the polarity of public and non-public schools does not serve us well. There is no reason to believe that nonpublic schools are typically unaccountable or unable to provide a public benefit. On the other hand, government-operated schools are often not responsible—accountable—to the parents. It would be more appropriate, therefore, to draw a distinction between responsive and unresponsive schools, recognizing that some of each group are “public” and some of each group “private.”

While authorities in Western Europe have sometimes been concerned about the messages taught to the children of immigrant in the hundreds of ‘Koran schools’ that provide supplementary religious instruction which are neither

regulated nor funded by government, there is little evidence that the subsidized nonpublic schools teach intolerance or fail to develop civic virtue in their pupils. To the extent that such subversive schools may exist, it is surely appropriate to seek to protect children from them, whether or not public funds are involved.

School assignments based on residence produce inequities in education. Most poor families live near other poor families and send their children to schools with low expectations for achievement. Sometimes these schools have inferior resources, often they have less-qualified teachers, and very commonly they are characterized by a peer culture that does not support academic effort. There results in injustice in the allocation of educational opportunities. Parental choice of schools can exacerbate or ameliorate the unequal schooling experience that results from such residential patterns.

But what about the charge that nonpublic schools are free to select their pupils, and thus some will exclude (a) racial minority, or (b) low-income, or (c) handicapped or low-performing applicants?

The first charge is easier to answer than the others. Nondiscrimination clauses are common in policies supporting parental choice. Belgium (where two-thirds of pupils attend subsidized nonpublic schools) has made notable efforts in recent years to ensure that these schools contribute to the integration of immigrant children, and individual cities in the Netherlands and Germany have done the same. Some parental choice policies provide incentives for nonpublic schools to seek out and admit children from low-income families. Under the German Constitution, a nonpublic school may not be authorized as an alternative to public schools if it has the effect of separating children based upon the means of the parents. This has served as a legal basis for providing financial support to make it possible for low-income parents to send their children to these schools.

While in some countries which are struggling to support their educational systems the level of subsidy for nonpublic schools is inadequate to support their programs, and substantial supplemental tuition must be charged. This is the case, for example, in central and eastern Europe.

There are also some prosperous countries which provide a very significant subsidy to nonpublic schools which nevertheless falls short of the full cost of equivalent public schools. In Germany, apart from certain well-endowed confessional schools, most nonpublic schools must charge a partial tuition to make up the shortfall in public subsidy. This is not the case in France, the Netherlands, Belgium, England and other prosperous countries, where nonpublic schools that receive subsidies based upon the expenditure levels of equivalent public schools are not permitted to charge additional tuition. They may, in most cases, solicit voluntary contributions to pay for aspects of their programs that are additional to the program of public schools, but these cannot be made a condition for participation. The stated goal is to ensure that family income is not a factor in whether parents can exercise their right to select a school.

At the other extreme, nonpublic schools in Greece are a luxury which only the most prosperous can afford, since there is no public subsidy for them.

The lesson to be learned from this varied experience is that equity in access to educational opportunities is best served by funding approved nonpublic schools on the basis of parity with government-operated schools. Otherwise, it is inevitable that family income will play the major role in determining whether parents can exercise their right of educational freedom on behalf of their children. On the other hand, if the state funds nonpublic schools at a certain

rate of x percent of the expenditure level of local public schools only, this can cause financial difficulties if they are required to accept all applicants without regard to ability to pay additional tuition.

The issues raised by the use of handicap and low-performance as criteria for admission to subsidized nonpublic schools are quite different and not easy to resolve. In effect, these represent policy choices. For example, if it is the public policy that all children with special needs be integrated into regular classrooms, there seems no good reason to exempt subsidized nonpublic schools from serving their share of such pupils. If, on the other hand, law or policy requires extensive additional services for some categories of children, it is unreasonable to expect that a nonpublic school, without additional resources, could provide such services. Often, indeed, low-incidence populations of special-needs pupils are served on a regional basis, drawn from a number of schools or even school districts, and nonpublic schools should be free to participate in such arrangements without the implication that they are avoiding a responsibility or excluding difficult-to-serve pupils.

In most countries, subsidized nonpublic schools are held to the same academic standards as are public schools, and these are enforced in most cases by school inspections and high-stakes national examinations.

Nonpublic schools in Belgium, two-thirds of the total, must submit to government inspection that focuses upon the subjects taught, the level of instruction, and compliance with the country's strict language laws. This inspection does not, however, include the pedagogical methods used, which are entirely within the discretion of the school.

Portugal is another country that recognizes, in its education law-making, that the impulse to innovation and originality is not distributed evenly among schools. Some schools are allowed significant pedagogical independence, while others must follow the national curriculum more closely.

Subsidized nonpublic schools in Sweden are held accountable to the national curriculum frameworks by the fact that their pupils take national examinations at the end of elementary and lower-secondary school in Swedish, mathematics, English and civics. Danish nonpublic schools, while enjoying extensive freedom to shape their curriculum and teaching methods, are similarly accountable to parents for good results on the national tests in Danish, mathematics, English and elective subjects that pupils take at the end of lower-secondary school.

Finland has simplified the process of reviewing the adequacy of nonpublic schools by allowing them to deviate from the national curriculum frameworks if they are implementing an 'internationally recognized' pedagogical system and if their efforts are judged to be useful to Finnish society.

Some countries require that teachers in subsidized nonpublic schools have the same pay and protections as those in corresponding public schools. This is the case, for example, in Denmark, which is otherwise committed to allowing the most extensive freedom to each school. The German Constitution provides that a nonpublic school may not be authorized as an alternative to public schools if it does not ensure the "economic and legal position of its teachers."

Similarly, Belgium requires nonpublic schools to pay their staff (with the exception of members of religious teaching orders) at the same rate as staff of public schools. Teachers in Dutch nonpublic schools are paid on the nationally-negotiated salary schedule for all teachers, but schools may choose to devote more or less of their state funding to staff costs.

In France, teachers in subsidized nonpublic schools are actually employees of the national government, and thus enjoy precisely the same salaries, benefits, and protections as do teachers in public schools, in addition, to having the same qualifications.

Competition

Germany seeks to restrict competition between public and subsidized alternative schools by requiring that the latter offer a distinctive form of education not otherwise available locally. The competition may in fact operate also in the other direction. As German educational policy accords more autonomy to individual public schools to shape their pedagogical approach, this is creating pressure on nonpublic schools which no longer enjoy a monopoly on distinctiveness.

Sweden encourages diversity and, in effect, competition among public schools, with nonpublic schools part of the mix. Depending upon where they live, parents may be able to choose, with public funding support, among their local public schools, those of another community, nonpublic schools, and ‘intermediate’ schools (nonpublic schools under contract with local authorities). Municipalities are free to decide how to allocate their education funding; most distribute it on a per-pupil basis to the schools chosen by parents.

Similarly, nonpublic schools are in a sense only another alternative in the Danish educational system, which allows considerable diversity of approach even among the public schools in the same community.

This ‘Scandinavian model’ has been implemented in Finland as well: parent-run schools may contract with the municipality to offer a distinctive pedagogy in exchange for financial support.

Distinctiveness of Nonpublic Schools

There is no question that acceptance of public funding leads, in some countries, to a very substantial loss of autonomy. In France, there are two forms of contracts between government and nonpublic schools. The *contrat d’association* provides more complete funding but entails almost complete government control of the instructional program, apart from religious instruction. The *contrat simple*, by contrast, funds teacher salaries but requires the school’s sponsor to assume more of the operating costs. In both cases, schools under contract must follow the national curriculum, use approved textbooks, and follow the timetable of the public system, while free to express their distinctive character in teaching methods and the philosophical basis of the instruction.

The same distinction exists in England, between ‘voluntary controlled’ and ‘voluntary aided’ schools. Most are Catholic or Anglican schools which have been taken into the public system while maintaining a measure of autonomy to express their religious character. This autonomy is quite limited in the case of the ‘voluntary controlled’ schools, all of whose costs are paid by government and which function essentially like public schools, though with a religious character which can be expressed freely. The boards of ‘voluntary aided’ schools are responsible for facility but not personnel costs, but have considerably more freedom to differ from government-operated schools in staff appointments and the organization of instruction. Altogether, about 30 percent of the publicly-financed schools fall into these two categories.

The inspection of nonpublic schools in Belgium does not include the pedagogical methods used, which are entirely within the discretion of the school, as is how the school expresses its religious character. While, as in many countries, there are pressures in Belgium for greater public accountability and government direction, the nonpublic sector has successfully insisted on maintaining control over teaching methods, schedules, and the appointment of staff.

Germany assesses whether a nonpublic school meets the objectives set by state (*Land*) government; if so, substantial discretion is allowed as to schedule and teaching methods. A distinction is made, however, between those which are simply approved and those which are recognized. The diplomas of the former are not recognized (so that students may have to take a final year in a recognized school), nor do they receive public subsidy.

Beyond the external standard provided by national examinations, considerable discretion is left to local municipal authorities in Sweden to build flexibility into the contracts which they establish with the nonpublic schools which they subsidize.

Dutch nonpublic schools are responsible for meeting government standards in a variety of respects, but there is a constitutional guarantee of their right to do so “with due regard . . . to the freedom to provide education according to religious or other belief” and “to choose their teaching materials and to appoint teachers as they see fit”.

In both Sweden and the Netherlands, and also in England, the primary mechanisms by which accountability is exercised are, on the one hand, high-stakes national tests at the conclusion of mandatory schooling and, on the other, the requirement that subsidized nonpublic schools develop workplans showing how they will ensure that the national requirements are met.

This is also true in Norway, where each school’s educational plan must show how it will assess academic achievement. Once this plan is approved by the government, the school enjoys very extensive freedom to shape instruction and there is no provision for inspection of the sort that is a basis for accountability in England, the Netherlands, France, Germany and other countries.

Conclusion

The legitimate concerns about quality and accountability of nongovernmental schooling v. public schooling, have been addressed in a variety of ways by the Western democracies included in the research. Overly-positive or overly-negative scenarios should have no place in policymaking; we have sought to bring the debate about these issues down to earth by focusing on the concrete particulars of each country.

Part 2 Liability and Responsibility in Education

Part 2 is dedicated to the comparative analyses of liability and responsibility in education. In the context of greater European integration there is often talk of harmonisation of laws and of convergence.

There is a general trend in many countries towards a greater emphasis on measuring the ‘outputs’ of the process of education in schools. But it has only reached a high level of intensity in a small number of countries, namely those such as the UK and, to a lesser extent, the Netherlands, where features of a ‘market’ system are in operation. Part of the basis for the development of targets and performance indicators is to enable judgements to be made about the relative performance of schools, as measured by the results of the pupils. For this system of intense scrutiny and accountability to work effectively, it needs to be underpinned by a degree of regulation. As the quality ‘loop’ is dependent also on the inputs – such as the teachers, the curriculum and the school buildings/facilities – these too need to be subject to standards prescribed by law.

The use of school inspection regimes of various degrees of intensity and diverse organisational patterns (local or national), combined with rules about the qualification of teachers, form part of national educational traditions. There are comparable elements, but also quite distinctive characteristics. We have seen that, under the UK model, the rules on inspection and teacher qualification have become intensified because these matters are seen as integral aspects of the new quality agenda for schools. At the same time, new risks of civil liability have emerged, related to issues of quality in education. It is unsurprising that where mechanisms designed to promote, measure and enforce quality in schools operate, deficiencies are seen as having potential legal consequences. As civil liability frequently rests on notions of fault, it is easy to see how, against a background of increasing regulation of educational provision, a culture of blame can develop when expected standards are not reached. Where there is fault there is, potentially, liability. States that decide to adopt the UK model as a means to driving up standards of education in their schools will need to expect that an increase in legal claims is a possibility.

In the context of greater European integration there is often talk of harmonisation of laws and of convergence. Often the aim is to facilitate closer social and economic integration through, for example, the free movement and exchange of workers, including professionals (such as individual teacher), and students/pupils. There is already EU legislation designed to ensure greater international recognition of vocational qualifications, including those of teachers, and there are exchange programmes (such as ERASMUS). However, it is clear that ‘concrete and clear provisions governing transferability of general educational qualifications at pre-university level remain conspicuously absent from the European social policy agenda’.⁹ Whether it would be possible to prescribe or recommend on a Europe-wide level certain minimum institutional and regulatory requirements to ensure that all states take effective steps to improve, monitor and enforce standards of education in their schools is very difficult to assess. Art 126 of the EC Treaty provides that: “The Community shall contribute to the development of quality education by encouraging co-operation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of the teaching and the organisation of education systems and their cultural and linguistic diversity.”

⁹ H. Stalford, ‘Transferability of Educational Skills and Qualifications in the European Union: The Case of EU Migrant Children’, in J. Shaw (ed.), *Social Policy in an Evolving European Union* (Oxford, Hart, 2000) 243-258, 258.

So while, *in principle*, there are certainly common issues that could at least be the subject of broad regulatory aims – ‘soft’ law requirements – if there was the political will, there is a risk that measures on educational provision would conflict with the principle of subsidiarity in the EC Treaty and run the risk of undermining national autonomy in a field that is important for the cultural and national identity of and within Member States. Of course, one could argue that while this might be true of the content of education – the curriculum – it is less clear that national identity would be undermined by soft law requirements on matters such as school inspections or performance measures. Equally though, it is unclear how EC requirements on those matters would support the aims of free movement and the inculcation of a sense of common European identity, thereby making them incompatible with the subsidiarity principle. In any event, it is difficult to determine whether such a pan-European initiative would be necessary given the strong political, social and economic imperatives to maintain an effective schools system, underpinned by national legislation and, in many cases, constitutional requirements. This is part of a broader issue relating to governance and policy making which needs additional research.

Conclusion

Legislation should provide for the goal of high standards in the provision of education and the development of mechanisms and policies, and adequate allocations of public funding, to support this aim; but it would probably need to leave the degree of specificity for national standards to be determined by individual states.

2. Background and objectives of the project

1. Rationale for the project

Relationships between schools, government, parents and students are changing within education systems across Europe. Many governments are creating mechanisms for schools to become more accountable to parents and to government through standardisation of the curriculum and the increased use of quality assurance mechanisms. In some cases running alongside this increased accountability, is the delegation of greater responsibility to individual schools and school governors, often in the form of greater financial control. This also involves the individual school and sometimes volunteer school governors having to take greater legal responsibility for the management of their school and the safety of their students.

Underpinning all these changes is the legal and legislative framework established in education and other laws – which vary considerably across Europe.

This project has established a network of partners from Belgium (Flanders), the Netherlands, Greece, France, United Kingdom and Germany and other experts from old and new member states and candidate member states of the EU. It is comparing the various national education systems from a legal perspective in order to identify the best and most used legislative instruments focusing on quality, safety, responsibility and liability.

The key areas of concern, the rationale for the project were:

- Enhancing the quality of compulsory education
- Promoting greater equity and enhanced access through the assurance of quality in all schools
- Reducing inappropriate barriers for mobility in Europe at school level through establishing a more consistent promotion of quality and standards

2. Original objectives

On the basis of analyses of the legal framework of educational systems, comparable information and comparative analyses on (1) educational freedom and accountability and (2) liability and responsibility in education are provided. The descriptions (country reports) and comparative analyses result in a reference source on the legal framework of education systems in Europe that can be used by policy makers in selecting legal practices and instruments that are best adapted to the needs of a specific country.

In part 1, the partners started their research on quality and the legitimacy of educational pluralism¹⁰ and then moved on to discuss the legal aspects of introducing market-like competition in education.¹¹

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In part 2, the partners evaluated whether the quality control systems met the demands with respect to the criteria for quality assurance and whether the quality cycle in the respectively educational systems operate satisfactorily and how it is supported by liability legislation¹².

3. Re-orientation of the original objectives during the lifetime of the project with appropriate justification

| | | Planned | Realised |
|------|-----------|---|--|
| 2001 | july 2001 | Source Material - WS1 | |
| | Aug-01 | Source Material | |
| | Sep-01 | Source Material | WS1 Straatsburg |
| | Oct-01 | Source Material | WSI Antwerp |
| | Nov-01 | Source Material | |
| | Dec-01 | Source Material - WS2 | WS2a Brussels |
| | | REPORT | |
| 2002 | Jan-02 | Database | |
| | Feb-02 | Database | |
| | Mar-02 | Database + Questionnaire/reports | WS2b Bruges |
| | Apr-02 | Database + Questionnaire/reports | WS2c Zaragoza |
| | May-02 | Database + Questionnaire/reports | |
| | Jun-02 | Database + Questionnaire/reports ANNUAL REPORT (Hilde Penneman) | WS2d Antwerp |
| | Jul-02 | Database + Questionnaire/reports | |
| | Aug-02 | Database + Questionnaire/reports | |
| | Sep-02 | Database + Questionnaire/reports | |
| | Oct-02 | Database + Questionnaire/reports - WS3 | |
| | Nov-02 | Database + Comparative Study | WS3 Bruges 2002 |
| | Dec-02 | Database + Comparative Study | |
| | | Interim Report (Gracienne Lauwers) | |
| 2003 | Jan-03 | Database + Comparative Study | |
| | Feb-03 | Database + Comparative Study | |
| | Mar-03 | Database + Comparative Study - WS4 | WS4a Brussel |
| | Apr-03 | Database + Comparative Study | |
| | May-03 | Database + Comparative Study | |
| | Jun-03 | Database + Comparative Study | |
| | | REPORT | |
| | Jul-03 | Database + Mechanism Liability | WS4b Antwerp |
| | Aug-03 | Database + Mechanism Liability - WS5 | WS5a Tilburg |
| | Sep-03 | Mechanism Liability | |
| | Oct-03 | Mechanism Liability | |
| | Nov-03 | Mechanism Liability | WS5b Manchester 13-16 |
| | Dec-03 | Mechanism Liability | WS5c Bruges 18-21 |
| | | REPORT | |
| 2004 | Jan-04 | Policy Recommendations | |
| | Feb-04 | Policy Recommendations | |
| | Mar-04 | Policy Recommendations | |
| | Apr-04 | Policy Recommendations | |
| | May-04 | Policy Recommendations | Intern. Conf. part 2 06-08 May: Italy Intern. Conf. part 1 13-16 May: Norway |
| | Jun-04 | Policy Recommendations - Intern. Conf. | |
| | Jul-04 | FINAL REPORT | |
| | Aug-04 | FINAL REPORT | |
| | Sep-04 | Dissemination of the project results | |
| | Oct-04 | Dissemination of the project results | |
| | Nov-04 | Dissemination of the project results | World Conference on the Right to Education and Rights in Education, 25-30 November (Netherlands) |

¹² Volume 6 of the European Journal of Education Law and Policy is dedicated to the issues of responsibility and liability in education, EJELP, Vol. 6, no. 1/2, 2002

3. Scientific description of the project results and methodology (50/60 pages)

1. Analysis of the research carried out during the life-time of the project

| | | Planned | Realised | Paid for by the project |
|------|-----------|--|-------------|---|
| 2001 | july 2001 | Source Material - OWS1 | | |
| | Aug-01 | Source Material | | |
| | Sep-01 | Source Material | straatsburg | Seminar <i>paid for by the project</i> Akkermans, de groof, penneman |
| | Oct-01 | Source Material | antwerp | Seminar <i>paid for by the project</i> de groof, mentinck, huisman, penneman |
| | Nov-01 | Source Material | | |
| | Dec-01 | Source Material - WS2 | brussels | Seminar <i>paid for by the project</i> legrand, füssel, akkermans, mentinck, de groof, fortsakis, penneman |
| | | REPORT | | |
| 2002 | Jan-02 | Database | | |
| | Feb-02 | Database | | |
| | Mar-02 | Database + Questionnaire/reports | bruges | Seminar <i>paid for by the project</i> de groof, füssel, fortsakis, berka, mereu, zoontjens, nordberg, homem, cassamayor, otenanu, meredith, hanf |
| | Apr-02 | Database + Questionnaire/reports | zaragoza | seminar <i>paid for by the project</i> :de groof, penneman, legrand, embid, füssel, fortsakis, zoontjens |
| | May-02 | Database + Questionnaire/reports | | |
| | Jun-02 | Database + Questionnaire/reports ANNUAL REPORT (Hilde Penneman) | antwerp | workshop <i>paid for by the project</i> meredith, mereu, penneman, lauwers, de groof |
| | Jul-02 | Database + Questionnaire/reports | | |
| | Aug-02 | Database + Questionnaire/reports | | |
| | Sep-02 | Database + Questionnaire/reports | | |
| | Oct-02 | Database + Questionnaire/reports - WS3 | | |
| | Nov-02 | Database + Comparative Study | bruges 2002 | workshops/conference <i>paid for by the project</i> De Groof, Lauwers, Legrand, Fortsakis, Meredith, Füssel, Zoontjes, Ornelis, Harris, Richter, Farrington, Glendenning, Khudoley, Gouliou, Atanasio, Vidoni, Kodelja, Steyger, Lenn, O'Keeffe, Casamayor, Kapustin, Banus, Sehoole, Blair, Barbas Homem, Glenn, Avenarius, Singh, Ginter, Beyens, Gudynas, Larsen, Badacsonyi, Dondelinger, von Kopp, Perle, Saetre, Gori, Röhrer, Klintstedt, Kearns, Öfverström, Jimenez, Marga, Nowine-Konopka, Zgaga |
| | Dec-02 | Database + Comparative Study | | |
| | | Interim Report (Gracienne Lauwers) | | |
| 2003 | Jan-03 | Database + Comparative Study | | |
| | Feb-03 | Database + Comparative Study | | |
| | Mar-03 | Database + Comparative Study - WS4 | brussel | Attended by (but not paid for by the project) de groof, lauwers, gori, vidone (on final conference) |
| | Apr-03 | Database + Comparative Study | | |
| | May-03 | Database + Comparative Study | moscow | cancelled, instead replaced by visit of Russian delegation to belgium in july |
| | Jun-03 | Database + Comparative Study - WS4 | | |
| | | REPORT | | |

| | | | | |
|------|--------|--|-----------------------------|---|
| | Jul-03 | Database + Mechanism Liability | antwerp | Attended by (but not paid for by the project) workshop De Groof, Lauwers, Goudappel, Vanden Berg, Artyukhov, Buslov, Smolin, Lazutkin, Dachtchinskaia, Spasskaya, Mitil, Severukhin, Rojkov, Ryjakov, Dorofeeva, Kapustin, Vasileva |
| | Aug-03 | Database + Mechanism Liability - WS5 | tilburg | Attended by (but not paid for by the project) De Groof, Lauwers, Zoontjens |
| | Sep-03 | Mechanism Liability | | |
| | Oct-03 | Mechanism Liability | | |
| | Nov-03 | Mechanism Liability | manchester 13-16 | Workshop Attended by (but not fully paid for by the project) De Groof, Füssel, Richter, Harris, Meredith, Glendenning, Lauwers, Nordberg, Barbas Homem, Klingstedt, Glenn, Blair, Fain, Russo, Lundy, Van Wyk, Avenarius, Holm, Gynther |
| | Dec-03 | Mechanism Liability | bruges 18-21 | Workshop Attended by (and paid for by the project) De Groof, Lauwers, Fussel, Legrand, Richter, Barbas Homem, Birzea, Czuczai, De Varennes, De Witte, Farrington, Ford, Ginter Jaan, Ginter Juri, Glenn, Kapustin, Kaye, Khanin, Kwiek, Lundy, Martinez, Nordberg, Popov, Rotar, Sauvé, Scheerens, Toniatti, Tridimas, Zgaga |
| | | REPORT | | |
| 2004 | Jan-04 | Policy Recommendations | | |
| | Feb-04 | Policy Recommendations | | |
| | Mar-04 | Policy Recommendations | | |
| | Apr-04 | Policy Recommendations | | |
| | May-04 | Policy Recommendations | 06-08 May: Italy | final conference (compulsory education) <i>Paid for by the project De Groof, Lauwers,</i> Attended by (but not paid for by the project) Richter, Hanushek, De Tavernier, Battauz, Bond, Elias, Eusebi, Gori, Margiotta, McCaffrey, Olson, Rowan, Trainito, Allulli, Caputo, Checchi, Filippini, Ghigo, Glenn, Losito, Mauro, Melchiori, Picardo Joao, Raymond, Scaglioso, Ugolini, Zuliani, Aeschliman, Aprea, Bishop, Cominelli, Cosentino, De Maio, Elias, Gori, La Spada, Grassi, Trainito, Vegliante, Vidoni, Woessmann + local participants |
| | | | 13-16 May: Norway | final conference (higher education) <i>Paid for by the project: De Groof, Lauwers, Füssel,</i> Attended by (but not paid for by the project) Klingstedt, Dondelinger, Embid, Nielson, Ginter, Momii, Holm, Vidrinskaite, Pyorala, Gurrea Casamayor, Ole Bergesen, Rustad, Bernt, Mestad, Levy, Lokke, Henriksen, kvinesland, sorensen, pedersen, Vestre + participants of local organisations and institutions |
| | Jun-04 | Policy Recommendations - Intern. Conf. | | |
| | Jul-04 | FINAL REPORT | | |
| | Aug-04 | FINAL REPORT | | |
| | Nov-03 | Dissemination: Worldconference on the Right to Education and Rights in Education | 25-30 November: Netherlands | <i>Not paid for by the project</i> Adema, Akhundov, Anastasi, Andreevska, Askerov, Avenarius, Aydagül, Barbas homem, Barry, Beckmann, Bergesen, Daniel, De groof, De waal, De winter, Dorofeeva, Erdis, Evtimova, Farkas, Fliegel, Füssel, Glenn, Goossens, Gruskevics, Gynther, Hindle, Holm, Hupkova, Jacobs, Joubert, Kapustin, Katzova, Kaye, Keet, Klingstedt, Koenig, Kruk, Landoni, Langenfeld, Lauwers, Lazaro Delgado, Leenhouts, Lohrenscheit, Malizia, Mardanov, Marjanovic-panovska, Martinez lopez-muniz, Matuskova, Mawdsley, Mawdsley, Mestry, Mita, Mohd sallah, Motakef, Murenzi, Nag, Nordberg, Okoth-ogendo, Panaretos, Pandor, Perle, Pestalova, Polozani, Postma, Pretto, Richter, Rotar, Ruhs, Schoonheim, Serna garcia, Singh, Sørensen, Spasskaja, Steen, Storimans, Tie, Tkachenko, Trietsch, Turrell, Van der schyff, Van rooijen, Varnham, Verma, Verstegen, Vestre, Vidone, Yisa, Yogev, Yosifov, Zafar, Zoontjens, Berka, Blair, Du plessis, Ford, Gori, Graulich, Lathouwers, Lundy, Malherbe, Mclachlin, Pillay, Potgieter, Visser, Brown, Russo, Bonoan-dandan, Rychkova, Bedjaoui, Danielian, Marcel, Acquilla, Mbah, Ngum, Dondelinger, Echart, Elsamman, Esteban villar, Ghukasyan, Ginter, Gurrea casamayor, Houtman, Larsen, Mandor, Mentink, Mohacsi, Noorda, Olafsdottir, Owona |

2. Methodology used

- The methodological approach is structured around questionnaires written by *an education law expert in cooperation with the project coordinator*.
- The questionnaires were sent to the *country paper authors* who answered the questionnaires.
- The answers were then condensed into a country paper. Each country paper was written by selected specialists within educational law issues. The country paper is not based on new research but is a review of the existing situation and literature (used as basis for the databank) on the topic in that specific country.
- The country reports were subsequently analysed by *two notable educational law “opponents”*, who were also responsible for drawing the key-conclusions.
- The country reports, analyses and key-conclusions were discussed at workshops, seminars within broader conferences (whereby special meetings were arranged for the experts participating in the 5th framework programme attending the conference). The conferences were also used to allow education law experts who were not partners in the 5th framework programme to join the collaborative.
- Finally, a roundtable met in closed session in order to discuss and write the recommendations.

Questionnaire part 1: Quality Assurance In Governmental Versus Non-Governmental Schools

- a. Is compulsory education free of charge?
- b. Does government pay the entire cost of compulsory education received in government-recognized independent schools?
- c. If not, does the government pay at least half of the cost of such education?
- d. Are salaries and working conditions of teachers in government-recognized independent schools equivalent to those in government schools?
- e. Does government provide supplemental funding to enable independent schools to serve pupils from poor and/or ethnic minority families?
- f. Is public funding available without regard to the religious character of the school chosen by parents?
- g. May publicly-funded schools charge additional fees for curriculum-related activities?

Does the leadership of a subsidized/unsubsidised independent school which provides recognized compulsory education have authority:

- a. to make expenditure decisions for all aspects of the school budget, including staff, within a lump-sum allocation?
- b. to make expenditure decisions for most aspects of the school budget, excluding teaching staff, within a lump-sum allocation?
- c. to select staff without regard to the qualifications required for equivalent positions in government schools?
- d. to select staff on the basis of its own criteria in addition to those required for equivalent positions in government schools?

-
- e. to determine the core subjects that will be taught?
 - f. to determine the specific content of the core subjects?
 - g. to choose textbooks and other materials without prior government approval?
 - h. to choose methods of instruction?
 - i. to decide how and from what perspective to provide religious or moral instruction?
 - j. to decide, without government approval, whom to appoint to provide religious and moral instruction?
 - k. to dismiss, after due process, staff who do not support in their teaching and behaviour, the stated philosophy and mission of the school? -
 - l. to dismiss, after due process, staff who are negligent, ineffective, or unprofessional in carrying out their responsibilities in the school?
 - m. to decide which pupils to admit on the basis of their previous school career or behavioural record?

Questionnaire part 2 - Quality control, liability and responsibility

I. Setting of quality benchmarks or targets

Introduction

Which specific aspects of education do attainment targets cover in your country? What legal requirements exist within your school system for the setting of such attainment targets for individual schools, against which their performance may be measured? Who by law has responsibility for setting such targets? Is this done at the level of the individual school, or are the targets imposed on the school by an outside body? If the latter, how far does the school have an input into setting those targets? In the process of setting these attainment targets, what mechanisms exist for these to be challenged or reviewed? What timescale do these targets cover?

1. Outputs and indicators relating to learning performance

What legal and/or administrative requirements exist for formal compulsory examinations/tests/continuous evaluation within your school system? At what stages in a pupil's education are such examinations/tests taken?

Does the school or any other authority come under any legal obligation to disseminate and/or publish statistics derived from the scores/grades attained by pupils in these forms of assessment? If so, to whom and in what form? In particular are the statistics issued comparatively, in the sense of providing comparisons between the performance of each school within the area and/or comparisons with other schools on a nationwide basis? Are schools given an *official* ranking on the basis of these statistics? How far are such statistics accompanied by explanatory information focusing on the socio-economic background of the pupils attending the school(s) concerned? In this context, does your education system make specific provision in respect of education for ethnic, religious and linguistic minorities? If so, please give a brief description of such provision. Do the press make use of such information, as by publishing *unofficial* "league tables" comparing school performance? If so, in what form are such league tables published? Are they accompanied by socio-economic explanatory information?

2. Other measurable outputs and indicators

Are schools/education authorities/the central government department under a legal obligation to publish statistical information concerning any of the following: truancy rates, suspensions/permanent exclusions from school, other disciplinary actions against pupils, complaints made against school authorities by parents.

Are any such statistics published on a comparative basis, comparing statistics as between schools in the area or nationally? In this context, does your education system make specific provision in respect of education for ethnic, religious and linguistic minorities? If so, please give a brief description of such provision.

3. Consequences of recording of measurable outputs and indicators

In what ways does the publication of measurable outputs and indicators directly or indirectly impact on any of the following ?

Micro-level

Does it impact directly or indirectly upon parental choice of school? In particular, do parents have genuine choice as to which school their children attend? If so, is there any empirical evidence to the effect that they take into account such statistics in formulating their choices?

Meso-level

Do these measurable outputs impact upon the school's funding directly or indirectly? For example, are schools funded wholly or partly on the basis of the number of registered pupils? If so, is it true to say that there has developed an educational market place, with schools competing to attract pupils? Does the operation of such an educational marketplace bring about polarisation, whereby highly-ranked schools attract disproportionate funding and poorly-ranked schools fall into a spiral of decline?

Macro-level

Do these outputs impact upon educational policymaking/or strategic planning?

4. The school inspection process

What is the organisational structure of the school inspection process within your education system? In particular: Is school inspection organised at national or local level (or both)? Who bears the legal responsibility for school inspections? Please indicate the legal source of regulation in this field. How are school inspectors appointed? What is their legal status? What provision exists for ensuring the quality of individual inspectors? In particular is the inspection conducted on the basis of formal legal regulation or more informal administrative guidance/soft law. Please give a brief description of the substantive content of the school inspection process in your education system. In particular please elaborate upon the methodology used in the inspection process. In the course of an inspection, are the inspectors authorised to make an evaluation of the competence of individual teachers? If so, in what way may this influence a teacher's career development ? Self-evaluation : as a part of the inspection process is the school required to present a self-evaluation document. If so, please elaborate. Within your system is there any legal/administrative guarantee that the inspection process will not compromise the pedagogical autonomy of the individual teacher or/and teaching staff. Is religious education and/or worship in schools inspected separately from secular education. If so, please give a brief description of the form and content of such inspection. Is ethical/sex education inspected separately ? If so, please elaborate. Does your education system make specific provision in respect of the inspection of education for ethnic, religious and linguistic minorities? If so, please give a brief description. Is the personal counselling/pastoral care of pupils given by schools separately inspected? If so please elaborate. In cases of more serious behavioural/psychological problems, are pupils dealt with at the level of the

school or referred outside to a professional educational psychology service ? If the latter, how is the quality of this educational psychology service scrutinised ? What form do inspection reports take? What system of grading is used? How are they disseminated? Are they available to members of the public? Are they available on the web? By what (if any) means can school governing bodies/head teachers challenge the contents of an inspection report? Can they require a fresh inspection? Can they have any of the contents of a report amended? What remedy might be available in law in the event of a negligent inspection? What consequences may flow from an adverse inspection report? For example, may it lead to specific intervention mechanisms or adverse financial consequences for the school?

5. Ensuring the quality of school personnel

What is the legal status of school teachers and other school personnel within your education system? Please briefly indicate the human resources management structure operative within your system. In particular -

By whom are teachers and other school personnel employed? How are they appointed? Do they have contracts of employment ? Do they have a civil servant status ? What legal regulations exist as to the qualifications of teachers? Is there a national system for the registration/accreditation of teachers? Are teachers and other school personnel subject to formal processes of investigation as to their personal suitability (e.g. criminal records, offences relating to children)? Is there a legal requirement for a teacher before appointment and/or at any subsequent stage to undergo health screening ? In particular may a teacher be required to take an HIV test ? If found positive, to whom may the results of the test be divulged. What consequences may flow from this ? Is there any case law available ? What period of probation are teachers required to serve? What criteria exist for assessing whether a teacher has satisfactorily served the probationary period? What criteria exist for selecting teachers for promotion/additional remuneration? What forms of support/guidance/counselling are made available within your system for individual teachers. What provisions exist for the disciplining of teachers generally? What processes exist for the identification of incompetent teachers? May they be dismissed for incompetence? What rights of appeal exist?

II. Legal liability for personal injury within the school context

1. General principles of liability relating to schools:

Please outline briefly the general principles of legal liability for personal injury within your legal system. Please outline any particular legal rules and administrative regulations or guidelines within your legal system relating to liability for personal injury expressly applicable to the school context. Please outline any legal and/or administrative regulations within your system concerning health and safety in schools.

2. Specific issues relating to schools:

What legal or other requirements are imposed upon schools/other public authorities to ensure the security of school premises against intruders (e.g. those carrying firearms)? What steps have been taken to avoid repetition of tragedies such as those at Dublane in UK and Erfurt in Germany? What legal/administrative requirements or guidelines exist within your system for the regulation of school trips/ school activities away from the school premises (e.g. extra-mural activities such as climbing, sailing, canoeing etc.)? Do any specific regulations apply to trips abroad ? In what circumstances may a teacher/school/public authority be held liable for the actions of a pupil carried out during school time, on school premises or on a school excursion? Please indicate any case law on bullying/violence by pupils against other pupils. May liability be attached to a teacher/school/public authority for bullying/violence by pupils against other pupils carried out outside school premises and school time? In what circumstances may a school/public

authority be liable for an assault by a pupil against a teacher? Are schools/public authorities under an obligation to take specific measures to protect teachers from assault/harassment carried out by pupils/parents? Are schools/public authorities under an obligation to protect teachers from sexual or other forms of harassment by pupils/parents/colleagues? Do any specific issues arise within your system in respect of liability on the part of teachers/schools/public authorities in the context of ethnic, religious or linguistic minorities? What legal obligations are imposed upon teachers/schools/public authorities to insure against liability in any of the above contexts? In practice, what is the extent and scope of insurance cover taken out in this context?

3. Liability for educational failure

Please indicate within your system under what circumstances legal liability may arise for educational failure. In particular : Is there within your system a contractual relationship between the school/education authority and the pupil/parent under which breach of contractual obligations in respect of substantive educational provision may give rise to liability to pay damages. Please briefly outline the essential principles of negligence liability within your legal system in respect of educational failure. Please explain the approach taken within your system towards establishing causation and towards the quantification of damages in the context of educational failure. Please outline the circumstances in which vicarious liability may arise on the part of an employer for the negligent acts/omissions of an employee. Please indicate whether any cases have so far arisen within your system in which liability in negligence has been found on part of a public authority or a teacher or other employee of such an authority in respect of substantive educational provision. In particular: Have disputes/cases arisen in your system in the context of the identification and assessment of pupils with special educational needs and in respect of provision made for such pupils? Have disputes/cases arisen in the context of failure by pupils to reach particular levels of attainment in examinations/test/assessments? Have disputes/cases arisen in the context of the administration of examination/tests/assessments? Have any disputes/cases arisen with particular reference to the educational failure on the part of ethnic/religious/linguistic minority students by virtue of belonging to such a minority? In particular have any disputes/cases arisen through the failure of such pupils to attain majority language proficiency? Have any such disputes/cases arisen through inadequacy of educational provision for children subject to detention through the criminal justice system? Please indicate whether there are any legal obligations upon teacher/education authorities to insure against liability for educational failure even in the absence of legal obligations. Is it common practice for such insurance cover to be taken out?

3. DESCRIPTION OF THE RESULTS

PART 1 - Educational Freedom And Accountability

Introduction

The summary contains the comparative summary of key aspects of governmental versus non-governmental education, including financing of non-governmental schools, decisions about admitting pupils, decisions about staff, accountability for school quality. All these aspects influence the quality in education as any understanding of the effects of education must be informed by the educational and organisational processes and by the resources (human, structural and material input), against the background of contextual factors (the specific features of the school, the school's means and possibilities, quality of pupils who are admitted to the school).

A summary always involves some discretionary editing with the risk of being too general because of omitting most of the exceptions. For the details and information on less important exceptions, we would suggest to read the extensive country reports.

1. Establishment Of The State's Obligation To Provide Funding To Non-Governmental Educational Institutions

Most countries have a tradition of educational freedom and maintain funding practices that encourage a great deal of diversity. The right to public funding of non-governmental schools is laid down in the Constitution, set out under different legal provisions or shaped by the Courts. Public funding can be restricted to certain categories of non-governmental schools.

Group 1

Countries where the right to financing of non-governmental educational institutions of compulsory education is stated in the Constitution (explicitly or implied in the right to education and the right to freedom of education)

The Spanish Constitution opens the way to subsidy non-governmental schools by an "agreement" (concierto) between the authorities and the school.

According to the Constitutional Council of France, the freedom of education – being one of the fundamental principles recognised by the laws of the Republic and laid down in the 1958 Constitution - justifies the provision of state aid to non-governmental education.

According to the Irish Constitution non-governmental schools are to be granted aid. The Education Act provides a statutory basis for the funding of recognised schools by the State.

In the Netherlands, the Constitution provides that non-governmental schools are fully financed from public funds.

Group 2

Countries where the right to financing of non-governmental educational institutions is not stated in the Constitution but set out under different provisions.

The Private School Act of Austria, provides for subsidising of non-governmental schools with state recognition. With regard to subsidies, a distinction is made between denominational and non-denominational non-governmental schools.

The basic legal framework for the operation of non-governmental schools in Belgium is set out under the School Pact Law common to public and non-governmental schools.

In Luxembourg, the Government grants subsidies on an annual basis.

In Italy, the Constitution expressly states that those setting up private schools must do so without imposing burdens on the State. Law No. 62 (March 2000) specifies a new formula for financing of *scuole paritarie*.

Non-governmental schools in Denmark are eligible for public financial support.

The Law of 1991 and Ordinance for Independent Schools in Sweden grant financial support for an approved non-governmental school.

In Finland, public funding is provided for some non-governmental schools.

According to the Private School Law of Norway, non-governmental schools are granted funding. The Law gives a preferential claim for public funding to schools that are founded to offer a distinctively religious and ethical, or pedagogical, education, provided that they either follow the curriculum of the public system or offer an alternative curriculum that is approved by the Ministry.

The Compulsory School Act and Upper School Act in Iceland provide for funding of non-governmental schools.

Under the Education Act, registered non-governmental schools can be granted public funding in Australia.

In New Zealand, government funding can be granted on the basis of funding agreements.

According to the Law on Education of the Russian Federation, state educational institutions are entitled to state or municipal financing from the moment of their state accreditation.

Group 3

Countries where the policy of funding for non-governmental schools has been shaped by the Courts

The Canadian Supreme Court has ruled that the denominational schools of Catholics and Protestants have, under some circumstances, the right to receive public funding.

In general the Constitutional Court of Germany decided that the right to establish a non-governmental school includes a right of financial subsidies by the state. But these subsidies must not be paid from the first moment of establishing non-governmental schools because the state must have the right to see if this new non-governmental school has a chance to survive.

According to the Constitutional Court of South Africa, the state can subsidise non-governmental education.

Group 4

Countries that do not provide for funding of non-governmental schools.

In the following countries, there is no state obligation to award subsidies to non-governmental schools. Legislation and court decisions have held that the constitutional guarantee of educational freedom does not imply that non-governmental schools may claim public subsidies. Non-governmental schools are financed through fees and charitable donations

Ireland (schools without an agreement)

Greece

Spain (schools without an agreement)

most cantons in Switzerland (except Jura and Zurich)

Bulgaria

United States

Italy (except *scuole paritarie*)

England and Wales (except CTCs/CCTAs)

Scotland

| Countries where the right to financing of non-governmental educational institutions of compulsory education is stated in the Constitution (explicitly or implied in the right to education and the right to freedom of education) | Countries where the right to financing of non-governmental educational institutions is not stated in the Constitution but set out under different provisions. | Countries where the possibility of funding for non-governmental schools has been shaped by the Courts. | Countries where no funding for non-governmental schools is provided. |
|---|--|--|--|
| Spain France Ireland (schools with an agreement) Netherlands | Austria Belgium Luxembourg Italy (<i>scuole paritarie</i>) Denmark Sweden Finland Norway Iceland Australia New Zealand Russia | Canada Germany South Africa | Ireland (schools without an agreements) Greece Spain (schools without an agreement) most cantons in Switzerland (except Jura and Zurich) Bulgaria United States Italy (except <i>scuole paritarie</i>) England and Wales (except CTCs/CCTAs) Scotland |

2. Percentage Of Public Funding Of Non-Governmental Educational Institutions

The amount of funds awarded to non-governmental schools varies from no support at all to as much as 100% of the expenditure of public schools. In some countries there is a difference in funds awarded to schools that are religiously distinctive and those with a distinctive pedagogical approach. This unequal treatment has been appealed, unsuccessfully, to the European Commission on Human Rights.

Group 1

Countries where the amount of funds awarded to non-governmental schools is the same percentage of the expenditure of public schools

In Belgium, the government is required to provide subsidies (equal in relation to the number of pupils or students.) to any school that meets the objective criteria of quality, number of pupils, and so forth.

The Netherlands provide for full financial equalisation of state and non-governmental education.

In Finland schools under private supervision receive state aid according to the same principles as other schools.

Catholic schools in most of Canada enjoy full funding.

Group 2

Countries where the amount of funds awarded to non-governmental schools is a certain percentage of the funds awarded to public schools

In Austria, schools operated by legally recognized religious communities and established to deliver officially recognised diploma, receive public funding for personnel costs (full financial support). The Minister of Education can award subsidies to non-confessional non-governmental schools which offer a distinctive pedagogy. Other costs can be covered on a contractual basis

Non-governmental schools in Germany receive some proportion of funding provided to public schools. The procedures under which the *Länder* fund non-governmental schools continue to vary. The level of support can be as little as 55 percent or as much as 85 percent of the expenditure of equivalent public schools.

Non-governmental schools in Denmark receive a grant (per pupil per year) for their operational expenditures which in principle matches the public expenditures in the municipal schools - less the private school fees paid by the parents.

Limited subsidies are provided to non-governmental schools in Italy under various arrangements. They ensure neither effective parity with public schools nor stability and predictability of income.

In Ireland, the State funds primary schools but not entirely, after they concluded an agreement with the government. There are considerable distinctions in school resources, depending on funds raised by the parish.

In France, non-governmental schools may sign a contract entitling them to a public subsidy in exchange for a considerable measure of State control.

When there is a religious basis, or an alternative pedagogy, the Norwegian government recognizes and funds non-governmental schools (elementary: 85%, lower secondary: 85%, upper secondary: 75%).

There are various arrangements in Portugal by which public subsidies may be provided to non-governmental schools. Non-governmental schools under contract can receive funding on per-pupil basis equivalent to public schools.

In Scotland, the secondary education technology academy is jointly funded by government and private sponsors.

In Spain, schools that apply for a funding agreement, receive public funding to pay the salaries and benefits of the teachers, operating expenses (including administrative staff) at a level negotiated with government authorities, and assistance with capital costs.

In Sweden, funding of non-governmental schools is negotiated with the municipality based on the number of pupils in each school year for compulsory schools and based on the national average costs per programme and pupil for upper secondary schools.

Although public funding is not an entitlement in Iceland, non-governmental schools can make an agreement with the Ministry.

In the Russian Federation, educational institutions are entitled to state or municipal financing from the moment of their state accreditation. The Law does not establish equality for funding provided to public and non-governmental establishments according to the same criteria. Paid education in non-governmental accredited educational institutions should be compensated by the state within the extent of the state norms for the costs of education of the corresponding form and type of state or municipal educational institution.

The situation with respect to non-Catholic non-governmental schools in Canada, differs among provinces. Saskatchewan and Ontario are the most discriminatory provinces in their treatment of non-governmental schools. Both fully fund public Roman Catholic separate schools, but provide no support for the non-governmental schools attended by members of other denominations or religions with the exception of the historically-subsidized and special-needs schools in Saskatchewan.

Subsidized non-governmental schools in New Zealand receive a proportion of the average costs in public schools. Non-governmental schools operating Māori language programmes are eligible for special resource.

In Australia, authorization to operate a non-government school must be obtained from state education officials, on the basis of a finding of sufficient quality, before funding is provided. A score determines the amount of funding available to the school based on the socioeconomic mix of the students attending that school. The exception to this funding arrangement is the Catholic systemic schools.

Group 3

Countries where non-governmental schools generally do not receive public subsidy

Most non-governmental schools in England and Wales do not receive state funding and are financed through fees and charitable donations.

No public funding is provided in Ireland to private primary schools without an agreement with the government.

In Greece, non-governmental schools are self-financed except if decided otherwise by the Minister of Education and Religion.

In Spain, non-subsidised private schools do not participate in an agreement scheme and do not receive funding.

In Scotland, non-governmental schools do not receive government grants.

In most cantons in Switzerland, non-governmental schools do not receive public subsidy. There is no legal claim to governmental financing of non-governmental schooling but in some cantons there is provision for subsidy if the school fulfils the function of a public school and so supplements the public provision. Other cantons use non-governmental schools as part of their official systems especially at higher secondary level. Jura and Zurich are one of the few cantons to support non-governmental schools.

Non-governmental schools in Bulgaria do not receive public funding and are subjected to extra costs for property taxes and customs duties on the importation of textbooks.

In South Africa, non-governmental schools are established and maintained at one's own expense but the state can subsidise non-governmental education.

With a few exceptions, federal, state and local governments in the United States do not fund the educational mission of non-governmental schools, whether or not these schools have a religious character. Two states (Wisconsin and Ohio) have adopted publicly-funded 'voucher' programmes to allow pupils from low-income families in Milwaukee and Cleveland to attend non-governmental schools, including faith-based schools, at state expense.

| Countries where funds awarded to non-governmental schools receive the same percentage of the expenditure of public schools. | Countries where the amount of funds awarded to non-governmental schools is a certain percentage of the funds awarded to public schools | Countries where non-governmental schools generally do not receive public subsidy. |
|--|---|--|
| Belgium the Netherlands Finland Canada | Austria Germany Denmark Italy Ireland France (school with a contract) Norway Portugal Scotland (secondary education) technology academy) Sweden Iceland Russian Federation Canada (non-Catholic schools) New Zealand Australia | England and Wales Ireland (without an agreement) Greece Spain (without an agreement) <i>Switzerland (except Jura, Zurich)</i> Bulgaria South Africa United States Scotland |

3. School Choice Not Limited By Family Income

Except in Ireland where the near-monopoly of publicly-funded Catholic schools has created a situation in which the more important issue is to allow parents to make other choices, most countries provide public funding of non-governmental denominational schools. The enrolment in these schools is either free, or - in case fees may be charged - the fee levels are limited or related to certain items.

Payment of fees is common in case non-governmental educational institutions receive no equal funding from the government.

Group1

Countries where enrolment is free but parents may contribute to the cost of education on a voluntary basis.

In Belgium, the Communities subsidises both official and “free” education on an equivalent basis within the framework laid down in the legislative and regulatory provisions according to education level, pupil numbers, etc..

In the Netherlands, parents do not pay fees for their child attending grant-aided non-governmental educational institutions.

Although in Ireland, government must provide the financial support to make it possible for parents to choose among schools, frequently, the total amount does not meet the needs of the school and parents contribute to the costs on a voluntary basis.

Although in Italy, primary schools which are *parificate*, receive a grant and are forbidden to charge tuition, they must make up the difference from ‘voluntary’ contributions as well as inflated charges for services such as meals and transportation which reduces their ability to serve families unable to pay a substantial tuition.

In Portugal, education is free in schools with a *contrato de associação*.

In Sweden, compulsory education is free of charge and only non-governmental upper secondary schools may charge “reasonable” fees.

In England and Wales, only CTCs/CCTAs are free of charge.

In Spain, the *centros concertados* have to provide cost-free education.

The Finnish Constitution provides that everyone has the right to basic education free of charge and that education in primary schools shall be given free of charge to everyone. There are only a few non-governmental schools demanding tuition fees on the primary level (e.g. if an educational institution has been given special educational tasks).

The few non-governmental schools in Iceland receive public funding.

Group 2

Countries where non-governmental educational institutions charge fees (even if they receive a grant from the State) but the fee levels are restricted or related to certain budget items.

Because the German Constitution does not permit any segregation of pupils based on parents' financial means, fees demanded by non-governmental educational institutions are moderate. Non-governmental educational institutions provide concessions to pupils of parents with limited financial means.

In Luxembourg, the State takes responsibility for the range of operational costs not covered by fees. Fee levels are being kept quite low to prevent discrimination against children from disadvantaged backgrounds.

In France, in the case of *contrat d'association* (CA) schools, families could be asked for contributions only for certain specified purposes: cost of religious instruction and ceremonies, sports or classroom equipment, or payments on the mortgage for the facilities. *Contrat simple* (CS) schools may charge fees for the costs not covered by government payment of teacher salaries. In either case, the school's contract must specify in detail and justify the costs that will be charged to parents, and this is subject to verification by government inspectors.

According to the Danish Constitution, all children of school age shall be entitled to free instruction in primary schools. But for institutions that offer alternatives to the public system, there will often be a user-charge to supplement the state subsidies.

In Portugal, schools with a *contrato simples* or with a *contrato de patrocínio* may charge fees but the State may reduce the cost of parent choice by subsidizing all or part of the tuition.

In Norway, approved non-governmental schools at the elementary and lower-secondary levels are funded 85 percent of the expenditure of public schools and those at the upper-secondary level at 75 percent. They are allowed to charge fees to make up the difference.

Group 3

Countries where virtually all non-governmental schools charge tuition. The amount of the fee is not restricted.

In Austria, no regulations exist in relation to school fees at non-governmental schools.

Non-governmental schools in Greece are all profit-making and mostly expensive.

In Bulgaria non-governmental schools are tuition-charging.

In Spain, the *centros not concertados* are free to determine tuition fees.

Although in England and Wales, all children between the ages of five and 16 are entitled to free education, students attending non-governmental schools have nevertheless to pay tuition fees.

Also in Scotland, parents pay fees for the attendance of their children at non-governmental schools.

Non-governmental schools in Switzerland may charge tuition fees.

With a few exceptions, federal, state and local governments in the United States do not fund the educational mission of non-governmental schools, whether or not these schools have a religious character. Non-governmental schools are tuition-charging.

In Russia, non-governmental schools may charge tuition fees.

The financial difficulties of the South African government have made it necessary to allow even public schools, even at the elementary level, to charge fees from those parents able to pay.

In Australia, all non-governmental schools charge fees. There is no limit to the level of fees that can be charged.

In New Zealand, fees are charged by state schools as well as integrated and private schools, though only the last can make them involuntary.

Remark:

In some countries, the situation is extremely varied from province to province as for example in Canada.

| Countries where enrolment is free but parents may contribute to the cost of education on a voluntary basis. | Countries where non-governmental educational institutions charge fees (even if they receive a grant from the State) but the fee levels are restricted or related to certain budget items. | Countries where virtually all non-governmental schools charge tuition that are not restricted. |
|---|---|--|
| Belgium Netherlands Ireland Italy (<i>parificate</i>) Portugal (<i>contrato de associação</i>) Sweden England and Wales (only CTCs/CCTAs) Spain (<i>centros concertados</i>) Finland Iceland | Germany Luxembourg France Denmark Portugal Norway | Austria Greece Bulgaria Spain (<i>centros not concertados</i>) England and Wales Scotland Switzerland United States Russia South Africa Australia New Zealand |

4. School Distinctiveness Protected By Law And Policy

Although in most countries, national education authorities still prescribe which subjects will be taught or attainment targets, there have been significant measures of decentralization in recent years, which has in turn provided more scope for pedagogical innovation. The primary concern seems to be to protect the freedom of the parents to choose a school and the freedom of the pupil to receive an adequate education, more than the freedom of the school to be distinctive.

Group 1

Countries which do not really permit school distinctiveness.

There is little scope to offer alternative pedagogies in Greek schools as non-governmental schools in Greece, must conform to public education requirements.

In Portugal, schools must implement national curricular plans (although government inspection of non-governmental schools may not extend to the ideological, philosophical or religious basis of the teaching).

In Luxembourg, the denominational schools offer the same syllabus as the public system (except the Waldorf school).

The Swiss educational system was one of the least flexible in Europe, with few opportunities to create distinctive schools and with a top-down approach even to pedagogical decisions.

Group 2

Countries where non-governmental schools develop a distinct profile in the implementation of the compulsory national curriculum.

In the Netherlands, non-governmental schools are restricted by many requirements laid down in statutes and regulations in exchange for the full financial support that they receive from the government. Non-governmental schools have to follow a set core curriculum defined by government but with considerable autonomy to develop distinctive approaches to meeting these goals. The sponsor has the responsibility of defining its distinctive character.

In Finland, non-governmental schools can obtain approval to serve as alternatives for the years of compulsory schooling and the school may obtain public funding even though the curriculum may be significantly different from that prescribed nationally (if the school is able to reach an agreement with the municipality).

In Sweden, non-governmental schools can have a distinct profile and may comply with specific teaching principles or be denominational or specialised in particular subjects. Subsidized non-governmental schools must develop workplans showing how they will ensure that the national requirements are met.

In Spain, schools have to work out an educational project taking into account a minimum curriculum. In some cases this direction-setting project was religious, in others it was pedagogical, and in many it was both.

In Iceland, the staff of each school is required to develop an educational plan showing how it will apply the national curriculum guidelines to its local circumstances.

In Norway, each school is responsible for developing its own working plan, within the context of the national guidelines (laid down by the Ministry) and in cooperation with the municipal authorities.

In Portugal, schools have curricular autonomy implementing national curricular plans.

All non-governmental schools in Australia have been required since 1999 to follow the curriculum framework established by the respective states but a school may adapt or supplement the curriculum according to its specific religious affiliation or educational philosophy.

Group 3

Countries where non-governmental schools are not restricted to the same curriculum but have an obligation to pursue the same objectives of the public sector.

In Germany, non-governmental schools must pursue the same objectives and provide a level of education similar to that of public sector schools, but are not restricted to the same curriculum.

In France, the Constitutional Court ruled that safeguarding the distinctive character of a school under contract . . . is simply to put into practice educational freedom. Each intermediate and secondary school is required to develop and implement a *projet d'établissement*. Schools with a *contrat d'association* offer the same curriculum as the public sector. Schools operating under a *contrat simple* must make reference to the curriculum of the public sector education. Schools *hors contrat* must respect basic standards of required knowledge and skills.

In Italy, the unitary character of the national educational system is protected through the national definition of curriculum goals, timetables, and specific learning objectives but the curriculum laid down nationally may be supplemented with elective courses. Regulations require each school to develop an educational plan that serves as the “fundamental constitutive document” of the cultural and programmatic identity of the school and to make explicit the curricular, extra-curricular, educational and organizational arrangements that the individual school is adopting within the scope of its autonomy.

Group 4

Countries where non-governmental schools have broad freedom to shape the education they provide.

In Austria, non-governmental schools have broad freedom in theory to shape the education they provide, but this has been limited significantly by the conditions attached to public funding, on the one hand and, on the other, by the requirements for obtaining public status.

In Belgium, schools are free to determine the way in which they implement the final attainment levels as the implementing bodies are free to shape specific types of education according to their own requirements.

In Ireland, the law gives explicit recognition to the need to protect the ethos of subsidized schools. Schools (with the exception of secondary schools) must not abide by the same curriculum as in public schools. The Minister may grant recognition provided that the conditions in the Education Act 1998 are met by non-governmental schools seeking public subsidy. Secondary schools which wish to receive state recognition must abide by the curriculum of public schools.

In England and Wales, with the exception of CTCs/CCTAs, there is no legal requirement to follow the same curriculum, but the tendency in recent years toward a higher demand for accountability creates pressures for schools to be more similar one to another.

In Bulgaria, apart from the non-governmental schools which reflect a distinctive worldview or culture, many non-governmental schools have a career focus.

Denmark has a long tradition of educational freedom and maintains laws, policies and practices that encourage a great deal of diversity (due to denominational preferences, pedagogic theories or political and social leanings), both outside the public sector and within it.

In New Zealand, individual schools are allowed to develop a distinctive approach to education.

In the United States, the educational mission of non-governmental schools may have a religious character.

In Russia, the principle of autonomy is accepted in the Law in a visible way. But the minimum conditions for accreditation barely leave any room for complementarities.

| | | | |
|--|---|--|---|
| Countries which do not permit school distinctiveness. | Countries where non-governmental schools develop a distinct profile in the implementation of the compulsory national curriculum. | Countries where non-governmental schools are not restricted to the same curriculum but have an obligation to pursue the same objectives of the public sector. | Countries where non-governmental schools have broad freedom to shape the education they provide. |
| Greece Portugal Luxembourg Switzerland | the Netherlands Finland Sweden Spain Iceland Norway Portugal Australia | Germany France Italy | Austria Belgium Ireland England and Wales Bulgaria Denmark New Zealand United States Russia |

5. Decisions About Admitting Pupils

In most countries institutions have admission policies based on specified religious denominations of the pupil, on the language spoken by the pupil or on the place where the pupil lives.

Only in a few countries, publicly-funded non-governmental schools must accept applicants who meet only admission requirements of equivalent public schools.

Group 1

Countries where non-governmental schools are free to use criteria for admission provided that the grounds are not based on improper criteria.

In Austria, non-governmental schools shall be permissible to select pupils for admission according to religion, creed or native tongue.

In Belgium, the school board can deny admission provided that the grounds are not based on improper criteria by which human dignity could be at stake. Non-governmental schools can use religious criteria in admissions.

Non-governmental school in Bulgaria, do not generally have high entrance requirements. Some schools use criteria for admission based upon academic ability.

In Canada, it is in principle accepted that Catholic schools give preference to Roman Catholics to give effect to their denominational rights. It should be mentioned that several faith-based schools in Calgary (Alberta) had to admit nevertheless students regardless of their religious background.

In Denmark, a non-governmental school is free to determine what criteria they will use in admitting and dismissing pupils.

In England and Wales, in the case of non-governmental schools, admission is generally within the discretion of the governing body.

In France, a private school which is not under contract is free to discriminate in admission, unless the discrimination is on the basis of race, which would be subject to criminal penalties.

In Ireland, the Minister of Education is authorized to issue regulations governing the admission of pupils to subsidized schools. The Education (Welfare) Act states that the board of management of a recognised school shall not refuse to admit a child as a student except where such refusal is in accordance with the policy of the recognised school concerned.

In the Netherlands, the board responsible for each non-governmental school or group of schools has the authority to admit or deny admittance.

In Germany, non-governmental schools are in theory free to admit pupils who, in the school's judgment, are most likely to benefit from their programmes. However, it is forbidden to admit only children from wealthy families.

In Portugal, non-governmental schools have the right to decide whether to admit applicants, without any non-discrimination requirement and may adapt admission policies that give preference to children from specified religious denominations.

Although students in Iceland usually attend their local school, parents may choose a school outside their district.

In Spain, the *centros not concertados* are free to set out admission procedures.

In Russia, the registration procedure is defined by the founder of an educational establishment and laid down in its charter.

In Switzerland, a non-governmental school has authority to decide which pupils to admit on the basis of the commitment of their parents to the school's philosophy and mission and which pupils to admit on the basis of their previous academic or behavioral record.

In the United States, non-governmental schools may consider applicants' academic records during admission and use religious affiliation as an admission criterion.

In Australia, enrolment preference in non-governmental schools may be given to a student whose family is a member of the relevant church or religious body.

Group 2

Countries where non-governmental schools are not free to use specified religious denominations of the pupil, the language spoken by the pupil or the place where the pupil lives, as criteria for admission.

In Finland, children are supposed to attend schools of their own municipality. The children are supposed to register as students in primary and secondary schools functioning in their own language.

To be legally approved, a non-governmental school in Sweden must admit all pupils who apply, within its limits of capacity and they must be open to all and free of charge to get public funds.

In Norway, publicly-funded non-governmental schools must accept applicants without regard to where they live, and must accept any applicants who would meet the admissions requirements of equivalent public schools.

In Spain, the *centros concertados* must admit pupils on the same basis as public schools, without applying religious criteria. But in choosing a school with a religious *ideario*, parents are accepting the religious instruction and related practices on behalf of their children.

In Italy, non-governmental schools that seek recognition as equivalent to public schools are to admit any applicants who are willing to accept the educational project of the school. In addition, extra-curricular activities that presuppose or demand commitment to a particular ideology or religious confession may not be required.

In France, the *loi Debré* explicitly forbids schools under contract from discrimination in admission. Although the school under contract may not seek to impose belief, parents who enroll their child in a non-governmental school, can be asked to sign a contract which requires them to respect the way the school operates.

| Countries where non-governmental schools are free to use criteria for admission provided that the grounds are not based on improper criteria. | Countries where non-governmental schools are not free to use specified religious denominations of the pupil, the language spoken by the pupil or the place where the pupil lives, as criteria for admission. |
|--|--|
| Austria Belgium Bulgaria Canada Denmark England and Wales, France (private schools) Ireland the Netherlands Portugal Iceland Spain (<i>centros not concertados</i>) Russia Switzerland United States Australia Germany | Finland Sweden Norway Spain (<i>centros concertados</i>) Italy (schools seeking recognition) France (schools under contract) |

6. Decisions About Staff

In most countries, although the qualifications required for employment as a teacher are the same in the public sector as in the non-governmental sector, non-governmental schools have some freedom concerning recruitment of teachers and can require within certain limits that a teacher uphold the mission and the distinctive character of the school.

Group 1

Countries without legal requirements of similarity with the public sector set by the Minister of Education regarding the qualifications of the teaching staff of non-governmental schools.

The leadership of non-governmental schools in Denmark are free to select qualified staff taking into account the schools' program and goals. Non-governmental schools may dismiss teachers if they do not support the mission of the school.

In Sweden, a teacher in a non-governmental school must be qualified (not necessarily required to have the same qualifications) to be employed by the person that runs the non-governmental school.

In the England and Wales, teachers in non-grant-aided non-governmental schools are not necessarily required to have the same qualifications as those required in the public sector, although they often do.

Boards of schools with a denominational character may use religious criteria in deciding upon staff appointments, in order to preserve the distinctiveness of the school.

In Scotland, requirement of registration with the GTC of teachers employed in non-educational schools, is not compulsory.

In South Africa, school governing boards are allowed to employ professional and nonprofessional staff taking into account certain conditions.

The Law on Education of the Russian Federation does not specify the obligations concerning staff in case funds are given by the State.

In the United States, some states require private schools to employ state-certified teachers but most do not.

Group 2

Countries where non-governmental schools are free to use criteria additional to the requirement established by the Government of similar qualifications for employment in the public and non-governmental education sector.

In Austria, the leadership of a subsidized non-governmental school has authority to select staff on the basis of its own criteria additional to those established by the government, based on the school's distinctive character.

In Belgium, non-governmental educational institutions have the right to freely recruit their personnel within several provisions of the education legislation, that provides general conditions for the recruitment of teachers who must have the necessary qualifications. Those requirements being met, free school boards are totally free and do not have to explain why they have chosen someone and they may make decisions about employing and dismissing staff based upon the religious or pedagogical character of the school.

In Germany, non-governmental schools may select their teachers on whatever basis their sponsors think appropriate, but must employ teachers who meet the same qualifications as those in the public schools.

All appointments of teachers in Ireland in schools shall be made by the Board of Management in accordance with the Rules for National Schools and subject to the prior approval of the Patron and of the Minister for Education and Science.

In the Netherlands, non-governmental schools must employ teachers who meet the standards for public schools, and they must provide instruction that is equivalent to, though not necessarily identical with, that provided in public schools. Teachers in a Catholic schools must work loyally for the fulfillment of the goals of the school, including those reflecting a distinctive worldview.

In Portugal, non-governmental schools have the right to decide whether to admit applicants, without any non-discrimination requirement and may adapt admission policies that give preference to children from specified religious denominations.

All teachers in the comprehensive and secondary schools in Finland have been obliged to have a university degree.

In Spain, non-governmental schools have complete freedom concerning recruitment of teachers, limited only by the requirement that candidates hold the necessary qualifications for teaching a certain subject at the particular level for which they are appointed. Teachers in non-governmental schools are required to possess the qualifications established for teachers in the public sector.

In Italy, subsidized non-governmental schools have freedom to select teachers, provided that they are somewhere on the national list but have a right to limit the educational freedom of teachers. The responsibility of a teacher may even extend to his/her behaviour outside the school.

In France, the director of a non-governmental school can take religion into account in deciding whom to accept for a teaching position in the school since s/he has responsibility for protecting the distinctive character of the school.

Some cantons in Switzerland require that teachers in non-governmental schools possess state qualifications.

In Bulgaria, all teachers in non-governmental as well as public schools must meet state requirements.

The Canadian courts have upheld the right of religious or educational institutions to require conformity to beliefs and lifestyle standards.

In Norway, the Ministry issues regulations concerning requirements regarding educational qualifications and experience for persons appointed to teaching posts on different class levels and types of school.

In New Zealand, boards of all schools have authority to hire teachers according to the particular needs of their school rather than having to accept whoever was sent by local government. Integrated schools are free to use religious criteria in appointing key staff.

Group 3

Countries where the Ministry has authority to select staff.

In Greece, the Ministry has authority to select staff.

| No legal requirements of similarity with the public sector set by the Minister of Education regarding the qualifications of the teaching staff of non-governmental schools. | Countries where non-governmental schools are free to use criteria additional to the requirement established by the Government of similar qualifications for employment in the public and non-governmental education sector | Countries where the Ministry has authority to select staff |
|--|---|---|
| Denmark Sweden England and Wales South Africa Russian Federation Scotland United States | Austria Belgium Germany Ireland Luxembourg, the Netherlands Portugal Finland Spain Italy France Switzerland Bulgaria Canada Norway New Zealand | Greece |

7. Accountability For School Quality

All countries exercise some control over the quality of education provided by non-governmental schools at compulsory level. In the large majority of cases this is done through inspection. In general, non-governmental schools which have greater parity with state schools or enjoy greater levels of state subsidy than others are subject to control which has a broader scope, extending especially to the curriculum, teaching staff, buildings, maximum/minimum enrolment and financial administration. Federal states differ in the extent of control over education exercised by the central government or the entities of the federation.

Group 1

Countries where the overall responsibility for the supervision and inspection of non-governmental educational institutions lies with the relevant Ministry or Department at central government level.

Non-governmental schools in Greece, must conform to public education requirements. Non-governmental and State schools are subject to the same inspectorate. Inspection relates i.e. to the adequacy of staffing, and the pupil numbers per class and, on occasion, the textbooks. The School Buildings Organization is responsible for the buildings.

In France, schools under contract are subject to close supervision, including whether they are following the instructional programs prescribed for public schools. Government supervision of schools under contract consists in ensuring that: the national rules concerning in particular school timetables and curricula are respected, the pupils' right to freedom of thought is strictly observed, as required by law, the school admits pupils regardless of national origin, opinion and religion and requirements of administrative and financial control are met.

Government inspection of non-governmental schools which are not under contract is limited to questions of morality, hygiene, and meeting the requirements of compulsory school attendance.

In Ireland, a subsidized school has an agreement to submit to inspection by government representatives.

In Italy, non-governmental schools seeking 'equivalent' status are subject to evaluation by the national system of evaluation of their processes and outcomes on the basis of the standards established by the regulations in force. Oversight is provided by school inspectors.

In Luxembourg, non-governmental schools are subject to inspection.

In the Netherlands, non-governmental schools have to follow a set core curriculum defined by the government. The education inspectorate evaluates whether schools have brought the education they offer in line with the core objectives. Non-governmental schools have considerable autonomy in developing distinctive religious or pedagogical approaches to meet these goals (specified in the "school workplan").

The Portuguese Constitution declares that non-governmental schools are under government inspection. Schools

under contract with the State are subject to compulsory inspection by the State's Education Inspection Services. Other schools may be subject to the same type of inspection. The concern of the educational authorities is related only to pedagogical standards.

The non-governmental schools in England in Wales are subject to inspection requirements and to registration by the Secretary of State for Education and Skills in England and the National Assembly for Wales Education Department in Wales. Non-governmental schools are normally inspected once every five years.

Her Majesty's Inspectors of Schools make up a distinct unit within the Scottish Office of education Department and also inspect non-governmental schools.

In New Zealand, the Education Review Office conducts reviews of the quality of education provided in subsidized non-governmental schools.

In Russia several control mechanisms are implemented. The condition which an education establishment must fulfill in order to obtain state accreditation is that it must successfully pass the attestation test. The Law prescribes the creation of the state attestation service which will function independently of education authorities.

The South African Qualifications Authority (SAQA) was established to oversee the development of the National Qualifications Framework (NQF), covering standard-setting and quality assurance not inferior to those in comparable public schools.

Group 2

Countries where the overall responsibility for the supervision and inspection of non-governmental educational institutions may be laid with the regional or local level of government.

In the Flemish Community of Belgium, final attainment levels have been defined as the legal reference with respect to quality control to provide a legal foundation for the time-tables and curriculum drawn up by the implementing bodies. There is a partition between the internal supervisory services and the inspectorate as a monitoring state body, in conjunction with a system of quality control and the Educational Development Authority (DVO).

In the French Community, the inspectorate is i.e. responsible for assessing the quality of the teaching provided.

In Austria, non-governmental schools which are considered equivalent to public schools and are recognised by the State, are inspected in the same way as public schools. They come under the venue of the district school boards (in first instance), the provincial school boards (in second instance) and the Federal Ministry of Education and Cultural Affairs (in third instance).

In Germany (the *Länder*), the state education authorities have a responsibility to monitor the continued compliance by approved non-governmental schools with the standards applicable to state schools,

In Spain, the Autonomous Communities controls whether all educational establishments meet certain minimum conditions so that the quality of instruction provided is guaranteed. The State's Higher Inspection Service ensures that plans, curricula, pedagogical guidelines and teaching materials, are suitably adapted to the core curriculum and that such curriculum is taught in accordance with State regulations.

In the United States, the states have the power to regulate non-governmental schools. But government supervision of faith-based schools should not inquire about the focus of their teaching.

Inspectors are responsible in most cantons of Switzerland for the inspection of schools. If non-governmental schools wish to award the same certification as public schools, they must submit to governmental supervision.

Group 3

Countries without a governmental formalised national inspection mechanism as such.

Denmark is the only country which does not exercise control over the standards of teaching staff and teaching. Ensuring the quality of non-governmental schools is left up to the parents, who can select the person who will supervise their compliance with the quality requirements for public subsidy. Parents may also ask municipalities to perform monitoring functions on their behalf.

There are almost no rules defining the Ministry of Education's control of the educational performance of the schools. Supervision of schools by the national government which funds them is concerned almost exclusively with the accuracy of their financial accounting, which is closely monitored. Legislation in 1999 established a *Danish Evaluation Institute (EVA)* providing systematic quality assurance and evaluation of all levels of education.

In Finland, the National Board of Education adopts the core curricula and is responsible for the evaluation of the Finnish education system. Although there is no formal inspection as such, the National Agency for education is responsible for supervising non-governmental schools.

In Sweden, monitoring and evaluation of the system, have been delegated to government agencies.

The National Agency for Education examines and approves non-governmental schools and municipal grants. There is no national school inspection system. Subsidized non-governmental schools are held accountable to the national curriculum frameworks by the fact that their pupils take national examinations at the end of elementary and lower-secondary school in Swedish, mathematics, English and civics. Municipalities may inspect the activities of schools to which they award grants.

There is no national inspectorate in Iceland. Supervision of education takes place at the local level, with the ultimate responsibility resting with the Ministry of Education, Science and Culture. Each school adopts a method of self-evaluation. The national Ministry of Education reviews these self-evaluations every five years.

There is no system of government inspection of schools in Norway and self-evaluation plays an important role in maintaining the quality of education.

Australia has no formalised inspection system for non-governmental schools. Non-governmental schools may voluntarily participate in the Monitoring Standards in Education Programmes.

| Overall responsibility for the supervision and inspection of non-governmental educational institutions lies with the relevant Ministry or Department at central government level | Overall responsibility for the supervision and inspection of non-governmental educational institutions lies with the regional or local level of government | Countries without a governmental formalised national inspection mechanism as such. |
|---|---|---|
| Greece France Ireland Italy (<i>scuole paritarie</i>) Luxembourg Netherlands Portugal England in Wales Scotland New Zealand Russia South Africa | Belgium Austria Germany Spain United States Switzerland | Denmark Finland Sweden Iceland Norway Australia |

1. Introduction

Educational policy is changing in all European countries, and it is a change accompanied by a new legal framework. Policy makers in all European countries are proposing new school laws in order to facilitate educational change. The *quality* of schooling is the main preoccupation within this educational change. Although the quality of schooling might be an old concern of educational policy, it has acquired a new meaning. Traditionally the measurement of school quality was input-oriented: expenditure on schools, the quality of the school personnel, the condition of the school buildings, the quality of the schoolbooks, and so on. Nowadays the measurement of school quality is output-oriented. In particular, it focuses on the results of schooling, such as pupils' examination grades and other factors.

This fundamental change of educational policy has enormous consequences for the governance of education. Traditional features of responsibility have included making sure that schools are run in an orderly manner. The school building has to be safe, the teachers qualified and the syllabus suitable for producing good results among pupils.¹³ There was no responsibility on the part of the teacher, the headteacher or the school authorities for the results themselves - at least not in a legal sense. If pupils failed it was their own fault, not the responsibility of the school. And as the school was not held responsible for the results, there could be no question of any *liability* on the part of the school. Liability existed for accidents and any harm done to the pupils in the school, but there was no liability for educational failure. This might change now in Europe because of the new output orientation of educational policy and the new legal framework for governance.

The schools are increasingly becoming accountable, at least socially and politically, not only for the process of education but also for the results of education. Schools are expected to be well run and efficient, but they must also 'produce' competent citizens. It is considered that if schools are to be responsible for the results, they have to be set *targets* and subjected to *performance indicators*. There will need to be a process of measurement and comparison, e.g. through benchmarking. The *teacher* and the *inspector* will both have a vital role in relation to responsibility for the results of the educational process. Their own quality will be supremely important.

Clearly, in a legal sense there is no meaningful responsibility without liability. So, if the schools are responsible for the results they must in a sense also be liable for them. Of course, liability can only exist if there is failure on the part of the educators. No teacher can be held liable for bad results in mathematics if it is the pupil's fault. But, the idea that the teacher could be liable for the bad results of his teaching is in itself a revolutionary idea in the context of the new educational administration and governance.

This new system of governance in education has not yet been fully established in Europe, but a process of change is under way. So far we can see two models of this new governance which, while distinct, have many common elements:

¹³ We have adopted the term 'pupil' rather than 'student' throughout.

1. The Continental model, which still relies very much on central inspection and control and which operates principally by disciplinary and control measures and not by the establishment of school liability.

2. The UK model which, while based on strong elements of central direction, organises the schools as a decentralised market with strong elements of school autonomy and school liability.

The responsibility of the school for pupil results is accepted as a principle in both models. Only the procedures to implement responsibility for the results seem to differ. The country reports gathered during the course of this research provide details of these two models and a comparative analysis (below) tries to group the countries and their educational policy on the basis of these two models of governance, with the exception of the analysis of liability, which does not fit into this dichotomy. In the examination of elements of this new governance there will be four sections of comparative analysis:

- Targets and indicators of school quality
- School personnel
- The process of inspection
- Liability.

2. Targets and Indicators

If they are to contribute properly to responsibility and liability in education, targets and performance indicators need to be measurable in order to facilitate judgments about quality and relative achievement, based on comparison.

Targets may be set for the achievement of the individual pupil or for pupils as a whole. Traditionally targets were very wide, e.g. reading competence. Now there is a tendency to prescribe targets in much more detail: for instance, they could provide that at the end of the first year of the foreign language teaching the pupils should know certain words of that language and be able to communicate via effective sentences in a range of social situations. It makes an enormous difference whether we talk about reading competence in general or whether we define reading competence with preference to precise targets known. And this example could be exemplified for all subjects within the curriculum. The targets can be complicated in some subjects, such as history or science, where knowledge of specific facts is likely to be insufficient to measure strength of learning.

The place of targets and performance indicators under the two models identified above will now be considered.

2.1. The UK Model

In the UK there are quality targets and indicators which measure the success of the school, such as the percentage of pupils who pass specific standardised tests as the SAT (Standard Assessment Tasks), the suspension (exclusion) numbers and the truancy rates. In 2003, for the first time, the quality of a school is also judged by the *progress* made by pupils between different assessments. There are statutory instruments specifying the factors to be used in

measuring the success of the school. Elsewhere, in Belgium (Flemish Community), the Netherlands and Estonia, there is a trend towards this approach. Targets are set for each school separately. A good example is the Dutch 'Quality Card,' which contains the performance data of the school including the average marks obtained in the national examination. Setting the targets for the individual school is a job done by the school and the relevant authority. This can be the local education authority, like in England and Wales, the local community as in Estonia, the inspectorate like in the Netherlands, or a Government Educational Development Agency as in Belgium. As schools are different regarding pupils' socio-economic background, particularly the percentage of migrants or ethnic minorities including religious minorities, the question as to whether these differences are taken into account is raised. They are to some extent in the UK and the Netherlands, whereas in Flanders and in Estonia school segregation on the basis of ethnic background seems to make it unnecessary.

In the UK and in the Netherlands results are published. While 'league tables' are not published by the authorities themselves, the press can easily create them from published data in order to establish a ranking, and this tends to be done. There is a great deal of criticism concerning this practice because the press does not take into account the specific conditions of the schools, as for example the socio-economic background or the religious or ethnic particularities. This is particularly true for the Netherlands.

Setting precise targets, defining indicators, measuring the attainment of the targets and publishing the results, is a whole process that helps to transform the schools system into a quasi-market system. Elements of this quasi-market system have been introduced in the relevant countries by law. There is a degree of parental choice on the basis of the given information, but the parents do not yet pay the price for the 'educational goods' which they select on the market. However, at least in one educational system (UK), the quality of the schools influences the level of public funding. It looks as if several countries are on the way to establish this quasi-market model of education like the UK: the Netherlands, Belgium (Flemish Community) and Estonia. This means that the Continental model does not comprise all European Continental education systems.

2.2. The Continental Model

Schools on the Continent are not used to targets for their work and for the measurement of their success. General goals for the education system as such are formulated by the educational administration and approved by Parliament. There are examinations at various points during the school career of the pupils and especially at the end of the period of school education. But the educational administration in these countries is interested more in the pupil's performance than the performance of the individual school. More and more Continental countries adopt the traditional French system of central examinations. This is particularly true for Germany, where most of the states left the responsibility for the examinations with the school. Of course, on the Continent the examinations have to be 'colour-blind,' not taking into account the ethnic, religious or socio-economic background of the pupils as the schools can do if their performance is measured by the educational administration.

Even though the examinations measure the success of the individual pupil and not the success of the school, the public does compare the performance of the schools. The educational administration does not publish statistics on

the performance of the schools, but in some countries the press does. Therefore there cannot be an official ranking of the school but of course there are rumours about the quality of the schools and some kind of unofficial ranking. The educational administration in these countries does not publish statistics on other indicators of school quality as truancy, suspension (exclusion) rates and the number and character of disciplinary measures. So, when choosing a secondary school for their child, the parents cannot rely on official information about the school quality. They have to make use of the unofficial information, and that is mainly traditions and rumours.

Change is, however, underway. The publication of the PISA results has had some effect on the educational policies in those countries which did not do that well, one of them being Germany. National educational standards of the kind that exist in the countries of the UK model, including the Scandinavian countries, will be worked out and introduced. They are intended to ensure regular measurement and finally to raise the competence of the pupils. Primarily their purpose is not to measure schools and improve their performance, but they can and will be used for that purpose.

On the Continent, schools do not compete for funding, because they are funded mainly on the basis of the number of pupils and not on the basis of school quality measured by the outputs. But, as Continental Europe has a declining population and low birth-rates, the schools will have to compete for pupils in the future, and this process is already underway. School quality is an issue here, but if there is no official information on school quality, the choice has to be made very informally, as noted above.

School quality on the Continent is also important for educational planning, but the basis for this planning is still the knowledge of the educational administration and it is not so much based on wider empirical data on school quality. These countries will follow the administrative model of educational policy, but the joint consequences of PISA and the budget-crisis might make them move more into the direction of the quasi-market model.

3. School Personnel

The quality of the school depends very much on the quality of the school personnel, particularly the teachers. It is common knowledge that good teacher education is necessary to ensure a good schools system. But what is good teacher education? A second factor in guaranteeing a good school quality could be the process of selection and promotion of staff. Finally, there has always been talk about the status of the teacher. Does the legal status of teachers have any influence on school quality?

3.1. Qualification

The European tradition was that the teachers of the secondary schools studied two or three subjects at university, with no special pedagogical training. They were supposed to acquire professional competencies on the job. For the teachers of the primary schools there were special educational colleges. The pupils were supposed to study several if not all subjects. They got an intense professional training with some internships. This divided system of teacher education seems to persist in some European countries, such as Austria or Baden-Württemberg in Germany. But the

general trend goes in another direction. This is the traditional Anglo-American graduate/postgraduate system. It means that all prospective teachers go to the university, the teachers at primary schools for a shorter period (graduate) and the teachers at secondary school for an additional period (postgraduate). The so-called Bologna Process makes this the general system of teacher education. The German Länder have started it recently and, to some extent, it exists in Slovenia and Romania. To organise the teacher education at the university on the basis of the graduate/postgraduate system does not necessarily mean that the students take only one to three subjects. There is a strong trend to add some professional training with internships to university studies. Compared to the traditional European system of teacher education one could say that the teachers of primary schools should get a higher qualification in subject matters and the teachers at secondary schools will get a better professional training.

When there is a discussion on the reform of teacher education it tends to feature the question of the further training of teachers. Often it seems as if the further training of teachers is supposed to compensate for the deficits of the initial teacher training. Should it be an in-service training or at least a re-training within the school system? Or should the teachers go back to the university or the teacher colleges for a certain period of time? Who should have the say in teacher re-training, the inspectorate and the school administration or the education institutions like universities? The further education of teachers is in general not regulated by law. Teachers are supposed to take some re-training, but there are no strict regulations as to when, where, for how long, and so on. Mostly, the additional education is voluntary, which means in general that the good teachers profit from the re-training and the bad teachers do not do anything to raise their professional competencies. The idea to make the re-training mandatory for every teacher and to pay an additional salary for re-trained teachers until now has not been implemented in the European countries.

We shall discuss the development of EU regulation of teaching qualifications and recognition of qualifications in part 6 (the Conclusion) below.

3.2. Selection

There are different responsibilities for the selection of teachers in the European states. In some countries – for example, Slovenia, Estonia and Lithuania – it is the headteacher who is responsible for the selection process. He or she can choose the personnel him- or herself. The responsibility stays with the school. In these countries it is believed that this serves the quality of the school very well. In other countries it is the local community or the governing body that is responsible. The Central European tradition involves state responsibility for the selection process. When the churches lost their influence on the schools at the end of the 19th century the state took over. In Germany and Austria, state means the Länder; in Austria, for some kind of school, it could mean the Federation. Of course, the selection process itself is organised by the inspectorate and there is some kind of participation by local communities, the headteachers and the schools. There are two dimensions to this. In a centralised system grades will be important, whereas if the headteacher and the teachers have the responsibility to choose their colleagues they will look at the personality of the future teacher and consider how well he or she would fit into the particular school.

The personal suitability of the teachers will be a universal concern. Most countries institute checks on criminal

records. They also ask for a health screening but they do not require a HIV-test. There are questions as to the targeted recruitment of persons from particular religious or ethnic minorities to certain schools, especially those in areas where such minorities are well represented. Such affirmative action can give rise to a range of legal issues, including constitutional issues, which it is not possible for us to explore in detail here.

Everywhere there seems to be a probation period for new teachers, but it goes from one month (Austria) to several terms or years (for example, in Germany and Romania). The responsibility for the supervision of the teacher during the probation period is with the headteacher and the inspectorate, but in the UK, schools also participate. But there is no useful information on how effective this supervision is and we do not have any data about the retention rate of the teachers after the probation period. There are even some doubts that the probation period is a suitable instrument to guarantee high teacher qualification. The experience of a couple of months may not really be sufficient to judge on the qualification of the teachers.

The other context in which access to the role of teacher is considered is where there is a dismissal. All countries have procedures for disciplinary actions against incompetent teachers, including in some cases a salary reduction, as in Slovenia. However, dismissal on the grounds of educational incompetence is fairly exceptional. In many cases, the dismissal will be the consequence of criminal behaviour by teachers. There is evidence that even if the dismissal of a teacher may be possible (in a legal sense) in the case of professional incompetence, the inspectorate or employer will often give the teacher a second chance. As long as disciplinary action – particularly dismissal - is a relatively rare occurrence its importance for school quality will be very limited. Often, individual decisions on the dismissal of a teacher can, in any event, be difficult to put into effect because of the likelihood of a legal challenge.

3.3. Legal status

In terms of their legal status, teachers in public sector schools can be civil servants or employees. In Germany, Austria and Slovenia teachers used to be civil servants, but they can now be employees. Indeed, there is a general trend to change the legal status of teachers from membership of the civil service to the contract model. In several countries, such as the UK, in Estonia and Lithuania, the teachers are employees. In some countries the law provides for a special status for teachers within the public administration, as is the case in Flanders and in Romania. In the UK, there are standard terms to the teacher's contract of employment specified by law; they are subject to periodic review.

A question arises as to whether their status makes a practical difference and as to whether it is important for the quality of the education provided by the school. We can only speculate on this matter. A change in the status mostly affects matters such as individual salaries and trade union membership. The impact on quality seems to be intangible. Is a school system on the basis of school autonomy, contracts and collective bargaining a better school system compared to a civil servants system within the public administration? One cannot say. The decisions on the status of the teacher will be made more on the basis of general political trends and not so much in the interests of raising standards of educational provision per se.

One factor that may be important is the permanence of the teacher's contract or appointment. In some countries temporary staff are employed not only to cover periods of sickness absence or maternity but also for financial reasons by providing for greater flexibility and economy. Questions may arise, however, as to whether educational quality is prejudiced by the use of temporary staff whose contracts may be of short duration (although may also be renewed repeatedly).

4. Inspection

There is a fundamental change in the functions and roles of the inspectorate in Europe. One might assume that if there are two models of governance in Europe, there should be also two models of inspection. And if the observation is correct that the Continental model is becoming closer to the UK model, then the Continental model of inspection should also change in that direction. As we discussed below, this vision would be too simplistic.

4.1. The Continental Model of Inspection

Let us first assume that the world of inspection is as simple as the model suggests: the Continental model of governance is based on the responsibility of the inspectorate for the output of the educational process. If the inspectorate has to guarantee a certain output, the inspectors need the status and the procedures to fulfil this role. Indeed, in Germany and Austria as well as in Slovenia and Romania the inspectorate is organised at the state level. The inspectors are civil servants and they are part of the public administration. There is no formal guarantee of school autonomy. The inspectors exercise supervision over the individual teachers and report on them, and at least in Germany and Austria, but not so in Slovenia and Romania. It is the inspectorate's function to supervise the school and to control the quality of the school. Everything seems to fit into the Continental model of governance.

But how can the inspectorate guarantee outputs? By examining the work in the classroom? By giving advice to the headteacher and to the teacher? By writing reports on the inspection? Inspectors say that they are not the supervisors of the teachers but their counsellors. Their self-image is not that of the police officer but that of a helpful or 'critical' friend. In Germany and Austria the self-evaluation of the schools seems to be important, and so in Slovenia and Romania. The inspector asks for a self-evaluation first before he or she starts with the inspection and later asks the school for its opinion on his/her report.

There is no clear and uniform picture of the Continental inspectorate. There seem to be contradictions and disparities. Change seems to be needed, to ensure a clearer role for the inspectors and for inspections. Whether it may move in the direction of the UK model of inspections remains to be seen.

4.2. The UK Model of Inspection

In one sense, if the analysis of the UK model of governance is correct, there is no need for inspection at all. The schools are autonomous and they compete for the pupils. The process is organised on the basis of the market model. The teachers are employees and their working conditions are regulated by statute. What then is the role or purpose of inspection? In fact, in the countries whose arrangements conform to the UK model the inspectorate seems to be even stronger and more powerful than on the Continent. How does one explain this apparent contradiction?

There is an inspectorate on the national level in the UK but also in Belgium, the Netherlands, in Estonia and Lithuania, countries which are on the Continent but which nevertheless are moving in the direction of the UK model, as we pointed out above. Even if there are regional inspectors (which is not the case in England and Wales), the inspection on the national level is there in order to guarantee national standards of education and the quality of education in all regions. Inspectors are appointed by the governments, in other words at a very high level, and they have a national standing. While teachers in these countries are employees, inspectors are civil servants.

Although there are some similarities with Continental inspection systems, there are some important differences. For example, the inspection reports on individual schools are in the public domain; they are on the web. Parents are involved in the inspection process. The inspection can have financial consequences for the schools. All this is not true within the Continental model. Self-evaluation of the school is considered essential under the UK model, although we can find it also on the Continent. The inspection process on the basis of the UK model is more school-centred, whereas the Continental model primarily seems to be teacher-centred. But, as we have seen, the latter is becoming much less true today. On the other hand, in the UK the work of the individual teacher can be scrutinised by the inspectors and there are individual reports on them.

What then can be the functions of the inspectorate in the UK model? There appear to be two: first to guarantee the functioning of the model as such (particularly by facilitating comparison and thus competition between schools), and secondly to check the results (outputs) against the inputs and processes that are supposed to produce them. Therefore even in the UK model of governance the inspectorate can have an important function.

4.3. Inspection and the Law

In all countries the inspection is highly formalised and regulated by statute law. This shows the great importance placed on the inspectorate and on the inspection process. While some other areas of schooling are not regulated by law at all, because the educational process is said to be resistant to legal regulation, here we find detailed regulations. Why is this so? One may assume that there is a wide political interest involved, in view of the general public's, and particularly the parents', interest in the functioning of the educational system and particularly in the results of schooling. The inspectorate stands for 'law and order' within the education system as well as serving the interests of 'good education'. Statute law accordingly provides for the orderly functioning of the inspection system. Such regulation is important in view of the importance of the inspection outcome to headteachers, teachers and schools. If a report is negative, their role can become very difficult and careers can be damaged. In many countries there is a right of appeal against the inspection conclusions. In fact, such appeals are not common.

5. Liability

5.1. Introduction

Liability is having an increasingly important influence in shaping the relationship between the agencies responsible for educational provision – schools, teachers, education authorities and state/national government departments – and parents and pupils. The sense in which the duty on the state to ensure that proper educational provision is made for its population gives rise to specific legal obligations is gaining currency. The more that regulation is used to set and enforce standards of education, and the greater the formalised commitment of the state towards concrete educational objectives, the greater the legitimacy of claims by parents and children that any failure by the education system may infringe basic rights and therefore demands redress. Resort to legal action gives the courts an opportunity to subject the education powers and duties of education bodies to juridical analysis and to clarify the legal framework in which education is provided. At the same time, findings of liability can generate insecurity within education institutions and result in defensive practices: although, in the absence of widespread research, objective evidence of such a reaction to litigation is ‘slim’,¹⁴ the teaching associations in the UK are reporting that school outings or sporting activities are being curtailed because of fear of possible legal consequences if someone is injured.

The risk of legal liability is a feature of modern social, administrative and industrial life. Yet the evidence shows that in many countries the education system has been relatively untouched by it until recent years. It is true that signatories to the European Convention on Human Rights have from time to time been called to account before the European Commission or Court of Human Rights in Strasbourg on education matters; but, at the national level, findings of liability by a court of law have been relatively uncommon in many countries and have been mostly limited to cases involving physical injury due to defective premises or inadequate supervision of pupils. Yet it is important to understand that the legal environment is changing across Europe and that a key feature of social change across states is greater ‘consumer’ awareness and demands and an increased propensity to advance individual claims.

One of the most interesting aspects of this trend, at least in those countries (such as the UK, France and Germany) where litigation has become most common, has been the ways in which the legal system has applied aspects of mainstream civil and criminal law to the specific context of education. As the legal claims and arguments that are presented become more sophisticated and directed towards the quality of the educational process itself – in other words, at deficiencies in the standard of educational provision – one can envisage the capacity of national laws to deal with such issues becoming stretched to their limits. As the judgment by the House of Lords in the UK in the landmark case of *Phelps v London Borough of Hillingdon*¹⁵ in 2000 made clear, there are significant policy reasons why the judiciary might feel uncomfortable about subjecting the educational processes in schools, colleges and higher education institutions to intense juridical scrutiny. In that case and the earlier case of *X (Minors) v Bedfordshire County Council*¹⁶ the House of Lords tried to draw a distinction between two types of failure. First, there are failures by teachers and other education workers (such as educational psychologists) in the performance of their professional roles, which can be judged with reference to ordinary principles of negligence that have been

¹⁴ Markenisis et al., *Tortious Liability of Statutory Bodies* (Oxford, Hart, 1999), p. 79.

¹⁵ [2000] ELR 499.

¹⁶ 1995] ELR 404; 2 AC 633; 3 WLR 153; 3 All ER 353; 2 FLR 276, HL.

applied to, for example, surgeons, dentists or train drivers. Secondly, there are failures in the performance of specific statutory duties (such as administrative decisions about the placement of a child at a particular school), where the task of the education authorities responsible for such decisions in carrying out their day to day functions would be seriously hindered if every decision could potentially be the subject of litigation.

5.2. Forms of liability

For the purposes of analysing legal liability in the context of education, we can distinguish between liability in two categories:

1. Civil liability based on principles of contract or tort (principally negligence) or public liability (which in some instances, as in France, is governed by administrative or public law).
2. Criminal liability

5.2.1 *Civil liability*

In most states there is considerable experience of civil liability arising from injuries to pupils or teachers, whether caused deliberately or by reason of negligent act or omission. This will usually be covered by the general law of tort, often under the general Civil Code¹⁷ (but in the UK it is governed by a combination of the ‘common law’ principles and specific statutory provisions, such as the Occupier’s Liability Act 1957¹⁸). In some instances, the liability will arise under public liability legislation, as in the Austria.¹⁹ In France, public law contains various special rules that determine the liability of administrative authorities,²⁰ particularly a law of 1937 on the responsibility of teachers, which is still in force. There are common elements to tort liability across many states. For example, in relation to negligent acts or omissions, the central elements are generally the existence of fault in the performance of a duty (although there is the French tradition of liability for risk and, in Germany, growing support for the notion of no-fault liability), resulting (causation) in injury (damage or loss) recognised by law.

In some states there are specific obligations on teachers, such as in the Netherlands, where, under the Civil Code,²¹ they may be liable for damage caused by their pupils during the time they are under the supervision of the school. This involves a presumption of liability that is rebuttable by evidence that the pupils were sufficiently and carefully supervised or that the damage was sudden, unpredictable and could not reasonably have been prevented. In other states, such as Germany, Belgium and the UK, the obligations for preventing harm to pupils, or to others as a result of the acts of pupils, mostly derive from the general law as applied by the courts in specific situations. In England, the duty of care to ensure the safety of school pupils, whether from their own acts or those of other pupils, has derived from the *in loco parentis* principle, so that the teacher has to show the care that would be expected of the ‘careful and prudent parent’: ‘A headteacher and teachers have a duty to take such care of pupils in their charge as a

¹⁷ See, for example, the Civil Code in Germany (Arts 823 and 839), Belgium (Arts 1382-1386) and Slovenia (Arts 131 and 132).

¹⁸ See, for example, *Fowles v Bedfordshire County Council* [1996] ELR 51

¹⁹ *Amtschaftungsgesetz* (Public Liability Act). See also Art 839 of the German Civil Code.

²⁰ Summarised in B.S. Markesinis et al., *Tortious Liability of Statutory Bodies* (Oxford, Hart, 1999), 15-20.

²¹ Art. 1384 §4

careful parent would have in like circumstances, including a duty to take positive steps to protect their well-being. . . .²²

In Germany, the teacher would owe a duty to the individual pupil to protect his or her interests, because of the special relationship that would be deemed to exist.²³ In Germany and the UK the duty to ensure that pupils are properly supervised, especially during breaks, has been confirmed by the courts.²⁴ However, some differences seem to exist between national states over the responsibility of teachers or schools for the supervision of pupils outside school hours, such as before school starts.²⁵

These obligations are often reinforced by specific responsibilities placed upon teachers under their contracts of employment. For example, in England one finds among the terms in the teacher's contract of employment as laid down by law²⁶ a duty to safeguard the health and safety of pupils both when they are authorised to be on school premises and when they are engaged in authorised school activities elsewhere.

In the case of defective premises or facilities, again liability could arise from general law (as with the liability incurred by the owner of defective premises and structures under the Civil Code in the Netherlands²⁷) or from specific statutory obligations, such as the School Instruction Act (*Schulunterrichtsgesetz*) in Austria or the Education (School Premises) Regulations 1999²⁸ or case-law in England.²⁹ In France, this liability, which traditionally is regulated by administrative law, was transferred in the 1980s from the national to local level by a new decentralization law.

In many states there are specific regulations on matters of health and safety in schools which normally give rise to civil rather than criminal liability. They may be general in their scope (such as the Lithuanian comprehensive schools regulations). In some cases they relate specifically to potentially dangerous activities (for example in Germany there are specific regulations covering matters such as sports, scientific experiments and excursions). Criminal liability may result from serious breaches of general health and safety legislation as applied to schools in some states.

Liability under contract law is generally only applicable to private education, because state-provided education is not based on a contractual relationship between the parent and child or the state. One of the effects of this contractual relationship is to bring certain situations of liability, such as where it is alleged that the exclusion of a pupil from school was wrong, within the realm of contract law rather than public/administrative law. This is, for example, the position in the UK and the Netherlands. In the public sector, contract law has a lesser role to play, although in Lithuania a new law of education could establish a contractual relationship via a parent-school contract. In England, statute law specifically provides that home-school agreements (which all public sector schools must ask parents to

²² *Gower v London Borough of Bromley* [1999] ELR 356, CA. See also, *Beaumont v Surrey County Council* (1968) 66 LGR 580.

²³ BGH of 27 April 1981, NJW 1982, 37, 38; BGH of 10 March 1983, FamRZ 1984, 1211.

²⁴ Federal Supreme Court, LM § 839 (Fd) BGB Nr. 12a; Court of Appeals at Oldenburg, VersR 1968, 655 (656); *Beaumont v Surrey County Council* (1968) 66 LGR 580, *Carmarthenshire County Council v Lewis* [1955] 1 All ER 565.

²⁵ In the UK, for example, there may be liability where an injury occurs (*Kearn-Price v Kent County Council* [2003] ELR 17, whereas in Slovenia the law in effect exempts schools from responsibility prior to the start of school hours.

²⁶ Via the School Teachers' Pay and Conditions Document, which is given legal effect by the relevant Education (School Teachers' Pay and Conditions) Order in the year in question.

²⁷ Art 1386.

²⁸ SI 1999/2.

²⁹ See *Refell v Surrey County Council* [1964] 1 All ER 743.

sign) 'shall not be capable of creating any obligation in respect of whose breach any liability arises in contract or in tort'.³⁰

Many actions and decisions by schools and education authorities may be challenged via recourse to administrative justice, whether in form of litigation in an administrative court (as in France or Germany) or within the High Court (England and Ireland), or by an appeal to a specialist tribunal. Liability in public or administrative law is something that education authorities have become used to facing over recent decades. Generally the primary aim of the complainant is to have the decision overturned rather than to secure compensation, although that is not always the case. The loss or damage, in legal terms, that is suffered in the kinds of case where the remedy lies in public law will normally be difficult to quantify. For example, if a pupil is excluded from school and the case succeeds, the pupil may return to the school. If it fails, the state will generally be under an obligation to find an alternative placement at a school or special facility and in any event the parent would also have a duty to ensure that the child or young person is educated. On exclusion the pupil might suffer damage to his or her reputation, but if the exclusion was unlawful his or her name will be cleared and if, on the other hand, it was a justified exclusion then any responsibility cannot extend beyond the pupil him/herself.

As noted above, if the school in question is a private rather than public institution then liability in relation to decisions on matters such as exclusion in these schools will be governed exclusively by the law of contract. However, there are possible exceptions. In the UK, for example, private schools are, in relation to limited areas of activity, sometimes considered to be exercising public law functions, which means that particular decisions could be amenable to judicial review, the process whereby the courts may consider the legality and fairness involved in certain decisions by public bodies.³¹ This is similar to the way in which in the Netherlands private subsidised education is considered to be a 'functional public service' so far as examination and assessment decisions are concerned, as is also the case in France and Germany.

One final point concerns the definition of 'civil right' for the purposes of Article 6(1) of the European Convention on Human Rights. The European Commission of Human Rights has held that the right to education (for the purposes of Article 2 of Protocol 1) is not a civil right under Article 6 but a right in public law.³² This means that the right to a fair hearing in the determination of a civil right may not apply in the context of education decisions.³³

5.2.2 *Criminal liability*

Teachers, like any other citizens, are subject to the criminal law. It is, however, unusual for teachers to incur criminal liability for acts or omissions in the performance of their duties. Traditionally, the main circumstances in which criminal liability might arise are where a teacher acts fraudulently (such as by diverting school funds to his own bank account³⁴) or assaults a pupil (sexually or otherwise). These will generally involve deliberate (or possibly reckless) conduct, but criminal offences can in some circumstances be committed without fault (strict liability) or by neglect.

³⁰ School Standards and Framework Act 1999, s 111(4).

³¹ *R v Cobham Hall School ex parte S* [1998] ELR 389; *R v Governors of Haberdashes' Aske College Trust ex p T* [1995] ELR 350; cf *R v Muntham House School ex p R* [2000] ELR 287.

³² *Simpson v United Kingdom* (1989) 64 DR 188.

³³ See also *Lalu Hanuman v U.K.* [2000] ELR 685.

³⁴ Under the Greek Penal Code Art 259, a teacher commits an offence if acting in breach of duty in service if he or she acts with a view to personal profit.

In Germany, for example, a teacher was found guilty of negligent manslaughter in a case where a pupil died in a swimming accident when on a school trip,³⁵ and in the Netherlands, under the Criminal Code,³⁶ there is a crime of careless negligence in putting another person in great danger, such as by failing to prevent abuse. In the UK, a teacher was recently jailed for twelve months after pleading guilty to manslaughter after a 10 year old boy drowned in a small flooded river while on a school trip; according to the teaching associations in the UK, this was the first time a teacher had received imprisonment in such circumstances. He was also guilty of a breach of health and safety law in failing to take effective measures to prevent injury, which also gives rise to a criminal offence. The notion of ‘corporate manslaughter’ has gained currency under English law but has yet to be applied to education authorities whose overall management of educational provision lies behind a pupil’s death. Although, in France, there have been very only very few cases where public servants have been held criminally liable, the French Criminal Code has been revised recently in order to restrict such liability in respect of criminal offences without fault.³⁷

Returning to Article 6(1) of the European Convention on Human Rights, it is accepted in Greece that discipline (such as in the context of a school) is a criminal matter for the purposes of the Article’s requirement for a fair hearing in the determination of a criminal charge. In the UK (in England), however, the courts have rejected the idea that the disciplinary sanction of exclusion from school should be considered as a criminal matter for this purpose.³⁸

5.3. Who is liable, and to whom?

In the educational environment, the most likely cause of any harm to a pupil or member of staff is either the wrongful act of another pupil, the negligence of the teacher or, in the case of defective premises or equipment, the body with legal or administrative responsibility for the organisation and maintenance of educational provision.³⁹ So far as liability is concerned, if the misbehaviour of a pupil is the direct cause of the injury to another pupil, there may nevertheless be legal implications for the school and its staff if they failed to maintain a proper system of pupil discipline. In several countries (such as Austria, Belgium, the Netherlands and the UK) it is clearly established that a teacher or school may be liable under civil law where a pupil is injured as a result of the violence of another pupil in such circumstances; in Germany the law places the school under a duty to prevent pupils causing harm to others or damage to property (including a car belonging to a third party, which a pupil damaged during a school excursion⁴⁰). However, there must be fault on the part of the teacher. The onus of proof will either lie with the teacher, in showing

³⁵ CA, Cologne, NJW 1986, 1947.

³⁶ Art. 422bis.

³⁷ The law of the 10th July 2000, which has clarified the scope of non-intentional breaches of the criminal law. The law stipulates that individuals who have not directly caused damage, but who have created or contributed to the creation of a situation which causes damage, or who have failed to take appropriate measures to avoid harm, are criminally liable if it can be established that they have either: (i) deliberately acted in breach of a statutory duty to preserve safety; or (ii) exposed another person to a risk of such exceptional gravity that they are criminally responsible for failing to acknowledge and address that risk.

³⁸ *The Queen (on the application of B) v Head Teacher of Alperton Community School and Others; The Queen v Head Teacher of Wembley High School and Others ex parte T; The Queen v The Governing Body of Cardinal Newman High School and Others ex parte C* [2001] ELR 359 [2001] ELR 359.

³⁹ It will be whichever branch of the state that has this responsibility. In England and Wales, for example, the legal responsibility for school premises will be divided between the local education authority (LEA) (in effect the municipal authority) and the governing body of the school. In France, since the laws on decentralisation (law of 22 July 1983, modified by the law 85-97 of the 25 January 1985), the responsibility of building, maintaining, undertaking repairs and the day-to-day running of secondary schools is undertaken at local level. In the case of colleges (secondary school from 11-14), this is undertaken by the département, whereas the running of lycées (14 yrs plus) is managed at regional level. The responsibility by local councils for infant and primary schools can be traced back to the laws of 20 March 1883 and 30 October 1886. It is these local agencies that are liable when damage caused to a pupil or member of staff results from defective maintenance of the premises.

⁴⁰ LG Hamburg of 26 April 1991, NJW 1992, 377, cited in Markenisis et al (1999) op cit, p.35.

that he or she could not have prevented the wrongful act (as in Belgium),⁴¹ or with the victim, in showing that the required standard of care was not met (as in the UK). If the teacher is not liable, the injured pupil will have to make their claim against the pupil who injured them, in which case the matter will often depend on whether the offending pupil had legal capacity – for example, by being of a sufficient age and understanding⁴². A claim could also be brought against both the teacher and the perpetrator, perhaps on the basis of shared responsibility (as in the Flemish region of Belgium).

It seems to be a common position across states that the teacher is not generally sued personally.⁴³ The principle, referred to under English law as ‘vicarious liability’ (so that the employer is liable for the torts committed by the employee when acting in the course of their employment), seems to operate widely. In Austria, for example, the pupil would sue the Bund (Federation) under the Public Liability Act,⁴⁴ whilst in Ireland the boards of schools would be vicariously liable. Under vicarious liability, the teacher or other employee of the state is not absolved of legal responsibility, but the general practice is to seek compensation from the state because of its greater resources to meet claims. In France, the Education Code stipulates that where pupils are under the care and supervision of state school personnel (ie. a teacher, or education/supervisory staff), any damage suffered to or caused by pupils may be actionable *not* against school personnel, but against the state.⁴⁵ Effectively, individual civil liability is *substituted* by state liability. This means that it is exclusively the *civil liability* of the *state* which is called into question, and this is judged, exceptionally, by the civil courts rather than the administrative tribunals. If a member of staff has been negligent it is the state which will compensate the victim (or those acting on his or her behalf). In several countries, notably France, the UK and Ireland, the state may bring an action against the teacher in order to recoup some of the compensation costs paid out to the claimant, although this happens very rarely.

If the teacher is the victim, he or she will have rights as an employee and the education authorities will often find it necessary to maintain insurance cover for such eventualities, unless the state makes provision (see below). A school could be liable for an assault on a teacher by a pupil in some countries,⁴⁶ but the school may lack the necessary legal personality in others (for example, Austria) and the state will generally have responsibility in such a case.

Where educational provision falls below required standards or fails to meet the specification as set out under statute there is also potentially public law liability unconcerned with compensation per se, although in some instances the adjudicator might have a power to award it. If a person complains that, for example, their child’s school is overcrowded or that the school acted unfairly in refusing to admit a child to the school, they may have to pursue the complaint against the school or appropriate state authority in an administrative court or before a specialist tribunal or

⁴¹ As, for example, in Belgium where liability is based on Art 1384 of the Civil Code.

⁴² For example, a minimum age of 7 in Germany and 10 in Greece, in both cases provided the necessary understanding of the nature of the wrong committed is necessary. In Finland a person under the age of 18 may be liable for damage he has caused, but only so far as it can be considered reasonable in the light of the young person’s age, development and financial circumstances, the nature of the act itself, and other relevant circumstances: Tort Act 1974, art 2.

⁴³ In Romania, however, the staff may be liable for the acts of their pupils: Art 1000 para 4 of the Civil Code.

⁴⁴ *Amtschaftungsgesetz*. Under Art 34 of the Basic Law the duty to compensate is transferred to the state, but the state may recover some of it from the teacher.

⁴⁵ The law of the 5th April 1937, now consolidated in Article 911-4 of the Education Code. The same approach has been developed by case law to extend to those working in private educational facilities under a ‘contrat d’association’ (essentially this is a contract to provide public services and therefore remains subject to state supervision/control). Note that, significantly, personal liability of education workers can never be challenged before the civil courts.

⁴⁶ For example, Slovenia, under Art 144 of the Code of Obligations.

even an ombudsman or complaints authority. In the first situation they might want the school to introduce an additional class to prevent the overcrowding, while in the second case they would want the school to be directed to admit the child. In Germany, for example, a claim concerning the way that a pupil's examination was assessed could be pursued in the administrative court.

5.4. What are they liable for?

Generally issues of liability or illegality in the education system are determined under ordinary principles of the law of tort or in accordance with principles of administrative law. In the case of private schools, administrative law will mostly be inapplicable and some matters may instead be governed with the terms of the contractual relationship between the school and parents or child. As noted above, criminal sanctions may be imposed by law for certain forms of conduct or omissions by school staff, such as the use of excessive physical force (assault) or failing to maintain appropriate safety procedures.

An emergent aspect of civil liability concerns sub-standard education. Here we are concerned with the rights of the individual child who has suffered adverse consequences to his or her educational attainment, mental well-being or employment opportunities as a consequence of failures by teachers and schools to make satisfactory educational provision or to maintain appropriate professional standards. Most states would recognise the right of the child or their parents to pursue a complaint about such matters to the school or other appropriate authority. But in the UK, two decisions by the highest court, the House of Lords (the cases of *X (Minors)*⁴⁷ and *Phelps*⁴⁸), have held that teachers and other educational professionals (notably psychologists, who assess children with learning difficulties and in some cases advise their parents) owe a 'duty of care' towards the children and could therefore be liable in tort if they do not maintain the appropriate standard of care in the way they perform this professional role. Thus there was a right to bring a negligence claim where a young person's condition was not diagnosed by the school while she was a school pupil and as a result she did not attain the academic qualifications that she might have done if she had received appropriate provision in the light of her educational needs. More recently, it has been confirmed that the same principle applies to the disciplinary aspect of the role of teachers.⁴⁹

There are policy arguments against permitting such claims to be brought and the House of Lords took account of them.⁵⁰ For example, there is a risk that vexatious claims might be brought perhaps many years after the child has left school, although in the UK there is a limitation period that bars some potential claims. There is also the cost to local education authorities of defending baseless claims. Fear of being sued could also engender a defensive approach to educational practice. Furthermore, in some cases it might be unfair that a particular professional is identified among a number responsible for a child's education. Ultimately, though, the court considered that these arguments were insufficient to justify the denial of a duty of care by the court in such circumstances. The situation also met the general policy test in English tort law as to whether the existence of a duty is fair, just and reasonable.

⁴⁷ Above, n 3.

⁴⁸ Above, n 2.

⁴⁹ *Bradford-Smart v West Sussex County Council* [2002] ELR 139.

⁵⁰ Fairgrieve explains that the policy arguments hold much less sway in France: D. Fairgrieve, *State Liability in Tort* (Oxford: Oxford University Press, 2003), pp. 129-135.

Both cases confirmed that local education authorities and their employees (teachers, psychologists etc) cannot, however, be liable for action taken under *statutory* powers, otherwise their statutory functions would be unduly hindered. But a duty of care may be owed in respect of other, general professional duties, and so liability is possible. It should be noted that the House of Lords also confirmed that a failure to mitigate the adverse consequences of congenital defect are capable of giving rise to ‘personal injuries’ to a person.⁵¹ This means that claim resulting from a failure to identify a pupil as having a congenital condition that ought to have been diagnosed (in *Phelps* it was dyslexia) can proceed as a personal injury case. Compensation could be based on this failure of diagnosis and to take appropriate action resulting in a child’s reduced level of achievement, reduced employment prospects and depressed earnings. Miss Phelps suffered adverse psychological consequences due to her academic under-performance and frustration and incurred costs through having to pay for private remedial provision after leaving school and through reduced career potential.

The UK experience has shown that these negligence cases are not straightforward. The claimant will have to show that a teacher has fallen below generally accepted standards within the profession. He or she will also have to show that there was fault, a process which is rendered all the more difficult when the evidence is incomplete because school records are inadequate and the recollections of staff some time after the event are unclear. Then the claimant will have the burden of showing that there is a causal connection between the alleged negligence and the alleged loss. In *Phelps*, one of the judges (Lord Nicholls)⁵² distinguished cases where there is ‘manifest incompetence or negligence comprising specific, identifiable mistakes’, such as where a teacher ‘carelessly teaches the wrong syllabus for an external examination’, from a more general claim that a child did not receive an adequate education at the school or was not properly taught. He emphasised that ‘proof of under-performance by a child is not by itself evidence of negligent teaching’, given the range of external factors that can affect it. A final problem in this kind of case is that assessing an appropriate level of compensation might be problematic. Another of the judges in *Phelps*, Lord Clyde, nonetheless stressed that ‘these possible difficulties should not be allowed to stand in the way of the presentation of a proper claim’.⁵³

No other country in Europe has as yet seen similar developments on this scale. Indeed, very few other countries have any experience of tort cases concerned with educational quality. In France, in a case which came before the Conseil d’Etat, a pupil was wrongly denied seven hours per week of teaching in core national curriculum subjects and the state’s lack of funds was not accepted as a defence; damages of 1,000 francs were awarded.⁵⁴ In Austria, there was a legal claim arguing that examination answers had been incorrectly assessed and career prospects damaged as a result. The court considered that damage was too hypothetical, but the outcome might have been different if, for example, the claimant’s appointment to a position had been dependent upon a particular examination grade. In Germany, compensation of DM8000 was awarded to a university student whose examination mark was miscalculated, resulting in reduced earnings.⁵⁵ Such a claim will depend upon a temporal connection between the end of school studies and the lost opportunity. In Austria it is considered to be conceivable that parents could sue if they had to arrange private lessons to compensate for inadequate teaching in a public sector school. A barrier to claims in some states is likely to

⁵¹ Above n. 3 at 529.

⁵² *Ibid.*, 532A-D, 532C-D.

⁵³ *Ibid.*, at 537F.

⁵⁴ CE 27 January 1988, *Giraud* [1988] Rec 39.

⁵⁵ *Süddeutsche Zeitung*, 7 Nov 2000 pV2 (24).

be the difficulty in securing compensation for future economic loss. In France, for example, the courts tend to view it as too speculative.⁵⁶

The UK is also in the vanguard when it comes to claims based on contract in connection with universities and private schools. The courts have recognised that failures to meet appropriate standards of educational provision could result in contractual liability, although they consider that questions of academic judgement are unsuitable for judicial evaluation.⁵⁷ In one case in the UK there was a settlement of £30,000 to a claim of breach of contract brought by a pupil at a private school who complained about the poor standard of teaching in Latin which, she alleged, result in her achieving only a low-grade pass, well below expectation, damaging her employment prospects.⁵⁸ Other states, such as Germany, recognise the potential for contractual liability for sub-standard provision by private schools.

5.5 Insurance against claims

There is considerable concern about the potential financial consequences of liability. Practice varies between states as regards insurance against these consequences. For some states (for example, Austria) the cost of insurance premiums is prohibitory. In some states, such as France and the UK, schools or school authorities are strongly recommended to have insurance. For others, insurance in respect of accidents is a statutory requirement. In Germany, it is a requirement under the Social Code in relation to personal injury or damage to property. However, this does not apply to violations of the right of personality; so, in one case the authorities incurred liability to compensate a pupil who had been teased by his teachers in the presence of his peers, which resulted in psychological harm to him.⁵⁹ In some countries, insurance is left to the discretion of individual school boards (for example, Ireland). In the UK, controversy has surrounded the lack of compulsory insurance by private schools for accidents to pupils in playing contact sports, such as rugby. In one case,⁶⁰ a 16-year-old boy suffered crippling injuries in a game of rugby at a private school. One part of his claim against the school was that the school did not advise his father to take out an accident insurance policy. The court held that while it was desirable for the school to arrange insurance or to inform the parents of the need to take out independent personal accident insurance, this went beyond the school's duty in respect of the welfare of pupils.

The subject of insurance is one on which the imposition of greater uniformity ought perhaps to be considered.

II. Policy implications

We have seen that while there is a general trend in many countries towards a greater emphasis on measuring the 'outputs' of the process of education in schools, it has only reached a high level of intensity in a small number of countries, namely those such as the UK and, to a lesser extent, the Netherlands, where features of a 'market' system

⁵⁶ Markenisis et al., op cit., p.18.

⁵⁷ *Clark v The University of Lincolnshire and Humberside* [2000] ELR 345

⁵⁸ See G. Hackett, 'Private school pays out for poor teaching', *The Sunday Times*, 10 November 2002. See, as to the contractual basis, *Herring v Templeman* [1973] 3 All ER 569.

⁵⁹ OLG Zweibrücken of 6 May 1997, NJW 1998, 995.

⁶⁰ *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (Court of Appeal).

are in operation. Part of the basis for the development of targets and performance indicators is to enable judgements to be made about the relative performance of schools, as measured by the results of the pupils. For this system of intense scrutiny and accountability to work effectively, it needs to be underpinned by a degree of regulation. As the quality 'loop' is dependent also on the inputs – such as the teachers, the curriculum and the school buildings/facilities – these too need to be subject to standards prescribed by law.

The use of school inspection regimes of various degrees of intensity and diverse organisational patterns (local or national), combined with rules about the qualification of teachers, form part of national educational traditions. There are comparable elements, but also quite distinctive characteristics. We have seen that, under the UK model, the rules on inspection and teacher qualification have become intensified because these matters are seen as integral aspects of the new quality agenda for schools. At the same time, new risks of civil liability have emerged, related to issues of quality in education. It is unsurprising that where mechanisms designed to promote, measure and enforce quality in schools operate, deficiencies are seen as having potential legal consequences. As civil liability frequently rests on notions of fault, it is easy to see how, against a background of increasing regulation of educational provision, a culture of blame can develop when expected standards are not reached. Where there is fault there is, potentially, liability. States that decide to adopt the UK model as a means to driving up standards of education in their schools will need to expect that an increase in legal claims is a possibility.

In the context of greater European integration there is often talk of harmonisation of laws and of convergence. Often the aim is to facilitate closer social and economic integration through, for example, the free movement and exchange of workers, including professionals (such as individual teacher), and students/pupils. There is already EU legislation designed to ensure greater international recognition of vocational qualifications, including those of teachers, and there are exchange programmes (such as ERASMUS). However, it is clear that 'concrete and clear provisions governing transferability of general educational qualifications at pre-university level remain conspicuously absent from the European social policy agenda'.⁶¹ Whether it would be possible to prescribe or recommend on a Europe-wide level certain minimum institutional and regulatory requirements to ensure that all states take effective steps to improve, monitor and enforce standards of education in their schools is very difficult to assess. Art 126 of the EC Treaty provides that

The Community shall contribute to the development of quality education by encouraging co-operation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of the teaching and the organisation of education systems and their cultural and linguistic diversity.

So while, *in principle*, there are certainly common issues that could at least be the subject of broad regulatory aims – 'soft' law requirements – if there was the political will, there is a risk that measures on educational provision would conflict with the principle of subsidiarity in the EC Treaty and run the risk of undermining national autonomy in a field that is important for the cultural and national identity of and within Member States. Of course, one could argue that while this might be true of the content of education – the curriculum – it is less clear that national identity would

⁶¹ H. Stalford, 'Transferability of Educational Skills and Qualifications in the European Union: The Case of EU Migrant Children', in J. Shaw (ed.), *Social Policy in an Evolving European Union* (Oxford, Hart, 2000) 243-258, 258.

be undermined by soft law requirements on matters such as school inspections or performance measures. Equally though, it is unclear how EC requirements on those matters would support the aims of free movement and the inculcation of a sense of common European identity, thereby making them incompatible with the subsidiarity principle. In any event, it is difficult to determine whether such a pan-European initiative would be necessary given the strong political, social and economic imperatives to maintain an effective schools system, underpinned by national legislation and, in many cases, constitutional requirements. This is part of a broader issue relating to governance and policy making which will be considered later in the research.

Relating specifically to issues of responsibility and liability for education, we can highlight the following as principles to which states ought to commit themselves, as minimum general requirements:

1. Legislation should provide for the goal of high standards in the provision of education and the development of mechanisms and policies, and adequate allocations of public funding, to support this aim; but it would probably need to leave the degree of specificity for national standards to be determined by individual states.
2. In relation to all schools (whether in the public or private sector), states should prescribe and enforce minimum standards for the quality and safety of school buildings and premises and should require that teachers have a contractual or statutory duty to ensure the safety of school pupils.
3. Adequate arrangements should be required in every state, at national or local level, to ensure that there is proper insurance cover in respect of accidents to pupils (and staff, if not covered by teaching association or other schemes) in the course of educational and associated recreational activities at all schools or during school excursions.
4. Europe-wide minimum qualifications for qualified teacher status and for entry to the teaching profession could be specified, building on EC legislation on mutual recognition of professional qualifications;⁶² but the legal status of teachers as either employees or civil servants does not appear to need attention at present.
5. States could be required to maintain independent arrangements (in other words, independent from government) for the inspection of schools, to conduct inspections at regular intervals, and to ensure that appropriate action is taken in the case of schools where provision is inadequate.
6. National legislation could stipulate that information relevant to the quality of educational provision in schools, including the results of examinations (but set in the context of pupils' backgrounds, which can be influential in this regard, and taking note of other factors such as individual progress over time), should be made publicly available.

⁶² Such as Directive 89/48 of 21 December 1988 ([1989] OJ L16/16), as supplemented by Directive 92/51 of 18 June 1992 ([1992] OJ L209/25).

7. Issues of legal liability, while of growing importance, are unsuitable for prescription at an international level given the distinct legal cultures and traditions in different states. Nonetheless, these issues should continue to be monitored closely, particularly those concerned with the emergent field of liability for breach of professional duties of teachers in areas such as teaching, meeting the special needs of pupils, discipline and pupil welfare.

8. The relevant forms of liability need to be better understood by teachers and other staff, including administrators, to help ensure that educational practice can operate in a lawful manner and with due respect to the rights of school pupils and their parents. To this end, the initial and further training of teachers (and the further training of head teachers and senior administrators) should include coverage of the legal context to teaching and should focus on issues of liability.

3. Innovative aspects with respect to the state of the art in the specific field(s) of research

As authorities on comparative educational law and policy, the coordinators are keenly aware of the lack of opportunities for future policymakers to become familiar with the ways in which different countries have chosen to address the common issues faced by educational systems. There are indeed individual experts who include these dimensions in their teaching, and some law schools offer courses in international law as some graduate schools of education offer courses on comparative education.

What was not yet available was the opportunity for education law experts to form relationships with their counterparts in other countries in a more structured way.

The workshops, seminars during conferences and Forum offered unique opportunities to interact with experts from other countries, on a broad range of current policy issues in education and fostered cooperation between future experts and policy-makers in educational policy in Europe.

In addition, the experts participating in the project will form stronger ties, and explore new forms of collaboration.

Added value

In this project, cooperation is not an added value but the very heart of the idea: the project was all about learning how other countries address the educational challenges which all face, and then translating this into specific policy prescriptions through research projects and international conferences.

The increasing globalization of education, with millions of immigrant pupils and hundreds of thousands of international students in higher education and in international schools, makes it more necessary than ever before that policymakers in education have a good understanding of other systems and solid experience working with colleagues from other countries. The project aimed to provide both.

Results

1. Databank (copy see annex, will be further elaborated for use in a master programme on comparative education law and policy)

Questionnaire: workpackage 2

Reports on country studies part 1(see annex); workpackage 3

Reports on country studies part 2(see annex); workpackage 3

Comparative analyses: workpackage 4

Books

- De Groof, J. and Lauwers, G., *No Person Shall Be Denied The Right To Education: The Influence Of The European Convention On Human Rights On The Right To Education And Rights In Education*, 2004, Wolf Legal Publishers, Nijmegen, 725 p.

- J. De Groof, Gr. Lauwers, G. Dondelinger (Eds.). *Globalisation and Competition in Education*, Wolf Legal Publishers, 2003, 422 pages

- Ch. Glenn & J. De Groof., *Finding the Right Balance, Freedom, Autonomy, and Accountability in Education*, Lemma, 2002, Volume 1, 595pages

Articles in a journal

Volume 6 of the European Journal of Education Law and Policy is dedicated to the issues of responsibility and liability in education

EJELP, Vol. 6, no. 1/2, 2002

1. Responsabilité civile et pénale des personnels de l'enseignement primaire et secondaire en cas d'accidents : Etat des lieux et perspectives - Martine Denis-Linton
2. General developments in our society linked to responsibility and liability - Charles Glenn
3. Civil liability within the education system : The Belgian Framework - Daniëlle Deli
4. Liability under education law in the UK – How much further can it go? - Neville Harris
5. La sécurité des établissements scolaires : Etat et collectivités face au partage de responsabilités - Jean Marie Schleret
6. Occupational accidents in education - Ria Janvier
7. Responsibility and Liability for the Behaviour of Minors - E.M.V. Dubelaar
8. Liability issues in American Schools - Charles Russo
9. The new challenges of education and the law - Kishore Singh
10. Responsibility and liability in education in Austria - Werner Hauser
11. Responsibility and liability in education in England and Wales - Paul Meredith
12. Réponse Française au questionnaire - André Legrand
13. Liability and responsibility in education. A German perspective - Georgios Gounalakis

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14. Responsibility and Liability in Education in Greece - Panayiotis Poulis and Theodore Fortsakis
 15. Responsibility and liability in education in Ireland - Dympna Glendenning

4. Conclusions and policy implications (30 pages)

1. Results that are relevant across Europe or large parts of it

On the basis of analyses of the legal framework of educational systems, comparable information and comparative analyses on (1) educational freedom and accountability and (2) liability and responsibility in education are provided. The descriptions (country reports) and comparative analyses result in a reference source on the legal framework of education systems in Europe that can be used by policy makers in selecting legal practices and instruments that are best adapted to the needs of a specific country.

In part 1, the partners started their research on quality and the legitimacy of educational pluralism⁶³ and then moved on to discuss the legal aspects of introducing market-like competition in education.⁶⁴

In part 2, the partners evaluated whether the quality control systems met the demands with respect to the criteria for quality assurance and whether the quality cycle in the respectively educational systems operate satisfactorily and how it is supported by liability legislation⁶⁵.

Part 1: Educational Freedom and Accountability

1.a. Accountability

The partners started by comparing education policies in their countries on the freedom for groups to organize schools and the right of parents to select from among such diverse schools the one most appropriate for their own children, taking into account the perspective within which they want their children to be educated and the quality of the teaching and school. Their research was later included in a much broader cooperation with other European, and non-European experts.

Three conclusions stand out.

- Although often only after considerable dispute, school choice is now accepted in democratic countries as a basic right of parents.
- Most governments thereby facilitate parents' exercise of school choice by providing some or much funding for non-governmental schools.
- Governments have devised effective ways to meet legitimate concerns for accountability, national cohesion, and school quality in a variety of ways.

The legitimacy of diverse schools and of government funding of non-governmental schools is acknowledged on the basis of the comparative analyses, which show that there is no need for governments to control schooling through a

⁶³ Country reports were published in: Ch. Glenn & J. De Groof., *Finding the Right Balance, Freedom, Autonomy, and Accountability in Education*, Lemma, Utrecht, 2002, Volume 1, 595p. The theme of the establishments of educational institutions was dealt with in country reports in the publication: J. De Groof, Gr. Lauwers, *No Person shall be denied the Right to Education: The Influence Of The European Convention On Human Rights On The Right To Education And Rights In Education*, Wolf Legal Publishers, Nijmegen, 2004, 725 p.

⁶⁴ J. De Groof, Gr. Lauwers, G. Dondelinger (Eds.). *Globalisation and Competition in Education*, Wolf Legal Publishers, Nijmegen, 2003, 422 pages

⁶⁵ Volume 6 of the European Journal of Education Law and Policy is dedicated to the issues of responsibility and liability in education, EJELP, Vol. 6, no. 1/2, 2002

single model of schooling. The research shows that a single model of schooling is unnecessary as a means to the professed goals of equality and quality.⁶⁶

Partners have also dedicated a conference to the legal aspects of market-like competition in education.⁶⁷

The purpose of the research has been to present, as objectively as possible, the solutions chosen by a number of countries to the tension between promoting educational freedom and advancing other legitimate goals in the organization of their educational systems such as quality and accountability. Having reviewed the laws and policies and the general landscape of elementary and secondary schooling in several dozen educational systems, what sorts of general conclusions can be drawn about the extent of educational freedom and quality assurance?

In most countries surveyed the decision to provide public funding for non-government schools has been in response to popular demand, often through political compromises, and not in response to the more recently-developed international norms (e.g. the Netherlands, Belgium and France). In Germany and England the emergence of public education in the 18th and 19th century was on a denominational basis. Greece and, to a large extent, Italy are exceptions. Greek public education has developed in close partnership with the Orthodox Church, to which the overwhelming majority of Greeks are at least nominally members; there has been little support for alternative forms of schooling. In Italy, the Catholic Church was perceived as an enemy by many for the unification of Italy. Anti-clericalism and a concern that the educational system be centralized and uniform in the interest of national unity have shaped public policy in Italy until very recently, and have limited financial support for nongovernmental schools to regional initiatives. In France limited autonomy is granted to schools under contract in France, while subsidized schools in Denmark enjoy wide discretion.

The barriers to educational diversity are clearly weakening, however. While in most of these countries there is now a great interest in measures to promote autonomy and diversity among schools, every government takes pains to provide a framework of regulation and accountability within which educational freedom is exercised. The study offers a brief overview of the extent of this government oversight, which varies a great deal from country to country, depending upon the political culture and historical circumstances of each.

The last decade has been marked, however, by a growing concern in many countries for effective systems of accountability. Willingness on the part of policy-makers to allow both public and subsidized non-public schools to function more autonomously has usually been accompanied by a heightened demand for measurable educational results. It seems probable that most citizens share the belief that government should ensure that schooling, whether provided by government, by civil society institutions, or by private sponsors, meets quality standards and complies also with norms of fairness and democracy. Support for something like a regulated market in educational services seems in most cases to have little to do with an ideological commitment to markets. In most countries, there is a belief that government should play a regulating role as indeed it does in other sorts of markets.

⁶⁶ Country reports were published in: Ch. Glenn & J. De Groof, *Finding the Right Balance, Freedom, Autonomy, and Accountability in Education*, Lemma, Utrecht, 2002, Volume 1, 595p. The theme of the establishments of educational institutions was dealt with in country reports in the publication: J. De Groof, Gr. Lauwers, *No Person shall be denied the Right to Education: The Influence Of The European Convention On Human Rights On The Right To Education And Rights In Education*, Wolf Legal Publishers, Nijmegen, 2004, 725 p.

⁶⁷ J. De Groof, Gr. Lauwers, G. Dondelinger (Eds.), *Globalisation and Competition in Education*, Wolf Legal Publishers, Nijmegen, 2003, 422 pages

Parent choice of schools is an established practice because country after country has concluded that educational freedom is a fundamental right. Belgium has enshrined this right in its *Constitution* since 1831, as have the Netherlands since 1848. Also in the new democracies, the same protections have been provided.

In short, parent choice of schools is guaranteed in every free society, and is widely practiced. In most cases, it is also subsidized with public funds even when the school chosen is not operated by the government itself. We have no need to speculate about what might happen under this or that arrangement, since there are dozens of real cases to illustrate what has worked well and what has not. It is useful, then, to look at how these various objections have been met in actual practice.

Indoctrination is the original argument for a government monopoly of schooling. The argument is that all of the children of the society need to be taught the same set of values and loyalties. The warning has been endlessly repeated in Europe and yet it has never yet been validated by historical experience. Despite millions of youth receiving their education in nonpublic schools, in most of the countries, the level of mutual suspicion and conflict on the basis of religion has dropped steadily. Northern Ireland is the exception that proves the rule.

It is true that some parents might choose schools that teach beliefs regarded with distaste or hostility by the general public. This does not, in a free society and under international human rights standards, imply that we should deny them the right to have these beliefs taught to their children or that government is entitled to impose any sort of orthodoxy of belief upon schoolchildren.

The need to protect children from messages from which we might reasonably want children to be shielded in school, or messages from outside the school to which we would want teachers to present an alternative, has been addressed by most Western democracies within the framework of publicly-supported school choice.

France requires that subsidized nonpublic schools (almost all of which are Catholic) provide instruction “with total respect for freedom of conscience.” In the Netherlands, the nonpublic schools (mostly Catholic and Protestant) that serve 70 percent of the pupils are reputed to be more open than are the country’s public schools to the growing cultural diversity of the population and are, in consequence, commonly chosen by Muslim parents. The ‘foundation’ (formerly ‘grant-maintained’ or ‘opted-out’) school in England in most respects cannot be differentiated from what are considered nonpublic schools in other countries.

Some observers at the conferences have expressed their believe that the polarity of public and non-public schools does not serve us well. There is no reason to believe that nonpublic schools are typically unaccountable or unable to provide a public benefit. On the other hand, government-operated schools are often not responsible–accountable–to the parents. It would be more appropriate, therefore, to draw a distinction between responsive and unresponsive schools, recognizing that some of each group are “public” and some of each group “private.”

While authorities in Western Europe have sometimes been concerned about the messages taught to the children of immigrant in the hundreds of ‘Koran schools’ that provide supplementary religious instruction which are neither regulated nor funded by government, there is little evidence that the subsidized nonpublic schools teach intolerance or fail to develop civic virtue in their pupils. To the extent that such subversive schools may exist, it is surely appropriate to seek to protect children from them, whether or not public funds are involved.

School assignments based on residence produce inequities in education. Most poor families live near other poor families and send their children to schools with low expectations for achievement. Sometimes these schools have inferior resources, often they have less-qualified teachers, and very commonly they are characterized by a peer culture that does not support academic effort. There results in injustice in the allocation of educational opportunities. Parental choice of schools can exacerbate or ameliorate the unequal schooling experience that results from such residential patterns.

But what about the charge that nonpublic schools are free to select their pupils, and thus some will exclude (a) racial minority, or (b) low-income, or (c) handicapped or low-performing applicants?

The first charge is easier to answer than the others. Nondiscrimination clauses are common in policies supporting parental choice. Belgium (where two-thirds of pupils attend subsidized nonpublic schools) has made notable efforts in recent years to ensure that these schools contribute to the integration of immigrant children, and individual cities in the Netherlands and Germany have done the same. Some parental choice policies provide incentives for nonpublic schools to seek out and admit children from low-income families. Under the German Constitution, a nonpublic school may not be authorized as an alternative to public schools if it has the effect of separating children based upon the means of the parents. This has served as a legal basis for providing financial support to make it possible for low-income parents to send their children to these schools.

While in some countries which are struggling to support their educational systems the level of subsidy for nonpublic schools is inadequate to support their programs, and substantial supplemental tuition must be charged. This is the case, for example, in central and eastern Europe.

There are also some prosperous countries which provide a very significant subsidy to nonpublic schools which nevertheless falls short of the full cost of equivalent public schools. In Germany, apart from certain well-endowed confessional schools, most nonpublic schools must charge a partial tuition to make up the shortfall in public subsidy. This is not the case in France, the Netherlands, Belgium, England and other prosperous countries, where nonpublic schools that receive subsidies based upon the expenditure levels of equivalent public schools are not permitted to charge additional tuition. They may, in most cases, solicit voluntary contributions to pay for aspects of their programs that are additional to the program of public schools, but these cannot be made a condition for participation. The stated goal is to ensure that family income is not a factor in whether parents can exercise their right to select a school.

At the other extreme, nonpublic schools in Greece are a luxury which only the most prosperous can afford, since there is no public subsidy for them.

The lesson to be learned from this varied experience is that equity in access to educational opportunities is best served by funding approved nonpublic schools on the basis of parity with government-operated schools. Otherwise, it is inevitable that family income will play the major role in determining whether parents can exercise their right of educational freedom on behalf of their children. On the other hand, if the state funds nonpublic schools at a certain rate of x percent of the expenditure level of local public schools only, this can cause financial difficulties if they are required to accept all applicants without regard to ability to pay additional tuition.

The issues raised by the use of handicap and low-performance as criteria for admission to subsidized nonpublic schools are quite different and not easy to resolve. In effect, these represent policy choices. For example, if it is the public policy that all children with special needs be integrated into regular classrooms, there seems no good reason to exempt subsidized nonpublic schools from serving their share of such pupils. If, on the other hand, law or policy requires extensive additional services for some categories of children, it is unreasonable to expect that a nonpublic school, without additional resources, could provide such services. Often, indeed, low-incidence populations of special-needs pupils are served on a regional basis, drawn from a number of schools or even school districts, and nonpublic schools should be free to participate in such arrangements without the implication that they are avoiding a responsibility or excluding difficult-to-serve pupils.

In most countries, subsidized nonpublic schools are held to the same academic standards as are public schools, and these are enforced in most cases by school inspections and high-stakes national examinations.

Nonpublic schools in Belgium, two-thirds of the total, must submit to government inspection that focuses upon the subjects taught, the level of instruction, and compliance with the country's strict language laws. This inspection does not, however, include the pedagogical methods used, which are entirely within the discretion of the school.

Portugal is another country that recognizes, in its education law-making, that the impulse to innovation and originality is not distributed evenly among schools. Some schools are allowed significant pedagogical independence, while others must follow the national curriculum more closely.

Subsidized nonpublic schools in Sweden are held accountable to the national curriculum frameworks by the fact that their pupils take national examinations at the end of elementary and lower-secondary school in Swedish, mathematics, English and civics. Danish nonpublic schools, while enjoying extensive freedom to shape their curriculum and teaching methods, are similarly accountable to parents for good results on the national tests in Danish, mathematics, English and elective subjects that pupils take at the end of lower-secondary school.

Finland has simplified the process of reviewing the adequacy of nonpublic schools by allowing them to deviate from the national curriculum frameworks if they are implementing an 'internationally recognized' pedagogical system and if their efforts are judged to be useful to Finnish society.

Some countries require that teachers in subsidized nonpublic schools have the same pay and protections as those in corresponding public schools. This is the case, for example, in Denmark, which is otherwise committed to allowing the most extensive freedom to each school. The German Constitution provides that a nonpublic school may not be authorized as an alternative to public schools if it does not ensure the "economic and legal position of its teachers."

Similarly, Belgium requires nonpublic schools to pay their staff (with the exception of members of religious teaching orders) at the same rate as staff of public schools. Teachers in Dutch nonpublic schools are paid on the nationally-negotiated salary schedule for all teachers, but schools may choose to devote more or less of their state funding to staff costs.

In France, teachers in subsidized nonpublic schools are actually employees of the national government, and thus enjoy precisely the same salaries, benefits, and protections as do teachers in public schools, in addition, to having the same qualifications.

1.b. Competition

Germany seeks to restrict competition between public and subsidized alternative schools by requiring that the latter offer a distinctive form of education not otherwise available locally. The competition may in fact operate also in the other direction. As German educational policy accords more autonomy to individual public schools to shape their pedagogical approach, this is creating pressure on nonpublic schools which no longer enjoy a monopoly on distinctiveness.

Sweden encourages diversity and, in effect, competition among public schools, with nonpublic schools part of the mix. Depending upon where they live, parents may be able to choose, with public funding support, among their local public schools, those of another community, nonpublic schools, and ‘intermediate’ schools (nonpublic schools under contract with local authorities). Municipalities are free to decide how to allocate their education funding; most distribute it on a per-pupil basis to the schools chosen by parents.

1.d. Conclusion

The legitimate concerns about quality and accountability of nongovernmental schooling v. public schooling, have been addressed in a variety of ways by the Western democracies included in the research. Overly-positive or overly-negative scenarios should have no place in policymaking; we have sought to bring the debate about these issues down to earth by focusing on the concrete particulars of each country.

Part 2 Liability and Responsibility in Education

Part 2 is dedicated to the comparative analyses of liability in education. In the context of greater European integration there is often talk of harmonisation of laws and of convergence. However, it is clear that ‘concrete and clear provisions governing transferability of general educational qualifications at pre-university level remain conspicuously absent from the European social policy agenda’. Whether it would be possible to prescribe or recommend on a Europe-wide level certain minimum institutional and regulatory requirements to ensure that all states take effective steps to improve, monitor and enforce standards of education in their schools is very difficult to assess. Legislation should provide for the goal of high standards in the provision of education and the development of mechanisms and policies, and adequate allocations of public funding, to support this aim; but it would probably need to leave the degree of specificity for national standards to be determined by individual states.

Anyone interested in liability and responsibility in Education should read Volume 6 of the European Journal of Education Law and Policy is dedicated to the issues of responsibility and liability in education (EJELP, Vol. 6, no. 1/2, 2002).

2.a. Introduction

Educational policy is changing in all European countries, and it is a change accompanied by a new legal framework. Policy makers in all European countries are proposing new school laws in order to facilitate educational change. The *quality* of schooling is the main preoccupation within this educational change. Although the quality of schooling

might be an old concern of educational policy, it has acquired a new meaning. Traditionally the measurement of school quality was input-oriented: expenditure on schools, the quality of the school personnel, the condition of the school buildings, the quality of the schoolbooks, and so on. Nowadays the measurement of school quality is output-oriented. In particular, it focuses on the results of schooling, such as pupils' examination grades and other factors.

This fundamental change of educational policy has enormous consequences for the governance of education. Traditional features of responsibility have included making sure that schools are run in an orderly manner. The school building has to be safe, the teachers qualified and the syllabus suitable for producing good results among pupils.⁶⁸ There was no responsibility on the part of the teacher, the headteacher or the school authorities for the results themselves - at least not in a legal sense. If pupils failed it was their own fault, not the responsibility of the school. And as the school was not held responsible for the results, there could be no question of any *liability* on the part of the school. Liability existed for accidents and any harm done to the pupils in the school, but there was no liability for educational failure. This might change now in Europe because of the new output orientation of educational policy and the new legal framework for governance.

The schools are increasingly becoming accountable, at least socially and politically, not only for the process of education but also for the results of education. Schools are expected to be well run and efficient, but they must also 'produce' competent citizens. It is considered that if schools are to be responsible for the results, they have to be set *targets* and subjected to *performance indicators*. There will need to be a process of measurement and comparison, e.g. through benchmarking. The *teacher* and the *inspector* will both have a vital role in relation to responsibility for the results of the educational process. Their own quality will be supremely important.

Clearly, in a legal sense there is no meaningful responsibility without liability. So, if the schools are responsible for the results they must in a sense also be liable for them. Of course, liability can only exist if there is failure on the part of the educators. No teacher can be held liable for bad results in mathematics if it is the pupil's fault. But, the idea that the teacher could be liable for the bad results of his teaching is in itself a revolutionary idea in the context of the new educational administration and governance.

This new system of governance in education has not yet been fully established in Europe, but a process of change is under way. So far we can see two models of this new governance which, while distinct, have many common elements:

1. The Continental model, which still relies very much on central inspection and control and which operates principally by disciplinary and control measures and not by the establishment of school liability.
2. The UK model which, while based on strong elements of central direction, organises the schools as a decentralised market with strong elements of school autonomy and school liability.

The responsibility of the school for pupil results is accepted as a principle in both models. Only the procedures to implement responsibility for the results seem to differ. The country reports gathered during the course of this

⁶⁸ We have adopted the term 'pupil' rather than 'student' throughout.

research provide details of these two models and a comparative analysis (below) tries to group the countries and their educational policy on the basis of these two models of governance, with the exception of the analysis of liability, which does not fit into this dichotomy. In the examination of elements of this new governance there will be four sections of comparative analysis:

- Targets and indicators of school quality
- School personnel
- The process of inspection
- Liability.

2.b. Targets and Indicators

If they are to contribute properly to responsibility and liability in education, targets and performance indicators need to be measurable in order to facilitate judgments about quality and relative achievement, based on comparison. Targets may be set for the achievement of the individual pupil or for pupils as a whole. Traditionally targets were very wide, e.g. reading competence. Now there is a tendency to prescribe targets in much more detail: for instance, they could provide that at the end of the first year of the foreign language teaching the pupils should know certain words of that language and be able to communicate via effective sentences in a range of social situations. It makes an enormous difference whether we talk about reading competence in general or whether we define reading competence with preference to precise targets known. And this example could be exemplified for all subjects within the curriculum. The targets can be complicated in some subjects, such as history or science, where knowledge of specific facts is likely to be insufficient to measure strength of learning.

The place of targets and performance indicators under the two models identified above will now be considered.

i. The UK Model

In the UK there are quality targets and indicators which measure the success of the school, such as the percentage of pupils who pass specific standardised tests as the SAT (Standard Assessment Tasks), the suspension (exclusion) numbers and the truancy rates. In 2003, for the first time, the quality of a school is also judged by the *progress* made by pupils between different assessments. There are statutory instruments specifying the factors to be used in measuring the success of the school. Elsewhere, in Belgium (Flemish Community), the Netherlands and Estonia, there is a trend towards this approach. Targets are set for each school separately. A good example is the Dutch ‘Quality Card,’ which contains the performance data of the school including the average marks obtained in the national examination. Setting the targets for the individual school is a job done by the school and the relevant authority. This can be the local education authority, like in England and Wales, the local community as in Estonia, the inspectorate like in the Netherlands, or a Government Educational Development Agency as in Belgium. As schools are different regarding pupils’ socio-economic background, particularly the percentage of migrants or ethnic minorities including religious minorities, the question as to whether these differences are taken into account is raised.

They are to some extent in the UK and the Netherlands, whereas in Flanders and in Estonia school segregation on the basis of ethnic background seems to make it unnecessary.

In the UK and in the Netherlands results are published. While 'league tables' are not published by the authorities themselves, the press can easily create them from published data in order to establish a ranking, and this tends to be done. There is a great deal of criticism concerning this practice because the press does not take into account the specific conditions of the schools, as for example the socio-economic background or the religious or ethnic particularities. This is particularly true for the Netherlands.

Setting precise targets, defining indicators, measuring the attainment of the targets and publishing the results, is a whole process that helps to transform the schools system into a quasi-market system. Elements of this quasi-market system have been introduced in the relevant countries by law. There is a degree of parental choice on the basis of the given information, but the parents do not yet pay the price for the 'educational goods' which they select on the market. However, at least in one educational system (UK), the quality of the schools influences the level of public funding. It looks as if several countries are on the way to establish this quasi-market model of education like the UK: the Netherlands, Belgium (Flemish Community) and Estonia. This means that the Continental model does not comprise all European Continental education systems.

ii. The Continental Model

Schools on the Continent are not used to targets for their work and for the measurement of their success. General goals for the education system as such are formulated by the educational administration and approved by Parliament. There are examinations at various points during the school career of the pupils and especially at the end of the period of school education. But the educational administration in these countries is interested more in the pupil's performance than the performance of the individual school. More and more Continental countries adopt the traditional French system of central examinations. This is particularly true for Germany, where most of the states left the responsibility for the examinations with the school. Of course, on the Continent the examinations have to be 'colour-blind,' not taking into account the ethnic, religious or socio-economic background of the pupils as the schools can do if their performance is measured by the educational administration.

Even though the examinations measure the success of the individual pupil and not the success of the school, the public does compare the performance of the schools. The educational administration does not publish statistics on the performance of the schools, but in some countries the press does. Therefore there cannot be an official ranking of the school but of course there are rumours about the quality of the schools and some kind of unofficial ranking. The educational administration in these countries does not publish statistics on other indicators of school quality as truancy, suspension (exclusion) rates and the number and character of disciplinary measures. So, when choosing a secondary school for their child, the parents cannot rely on official information about the school quality. They have to make use of the unofficial information, and that is mainly traditions and rumours.

Change is, however, underway. The publication of the PISA results has had some effect on the educational policies in those countries which did not do that well, one of them being Germany. National educational standards of the kind that exist in the countries of the UK model, including the Scandinavian countries, will be worked out and introduced. They are intended to ensure regular measurement and finally to raise the competence of the pupils. Primarily their purpose is not to measure schools and improve their performance, but they can and will be used for that purpose.

On the Continent, schools do not compete for funding, because they are funded mainly on the basis of the number of pupils and not on the basis of school quality measured by the outputs. But, as Continental Europe has a declining population and low birth-rates, the schools will have to compete for pupils in the future, and this process is already underway. School quality is an issue here, but if there is no official information on school quality, the choice has to be made very informally, as noted above.

School quality on the Continent is also important for educational planning, but the basis for this planning is still the knowledge of the educational administration and it is not so much based on wider empirical data on school quality. These countries will follow the administrative model of educational policy, but the joint consequences of PISA and the budget-crisis might make them move more into the direction of the quasi-market model.

2.c. School Personnel

The quality of the school depends very much on the quality of the school personnel, particularly the teachers. It is common knowledge that good teacher education is necessary to ensure a good schools system. But what is good teacher education? A second factor in guaranteeing a good school quality could be the process of selection and promotion of staff. Finally, there has always been talk about the status of the teacher. Does the legal status of teachers have any influence on school quality?

i. Qualification

The European tradition was that the teachers of the secondary schools studied two or three subjects at university, with no special pedagogical training. They were supposed to acquire professional competencies on the job. For the teachers of the primary schools there were special educational colleges. The pupils were supposed to study several if not all subjects. They got an intense professional training with some internships. This divided system of teacher education seems to persist in some European countries, such as Austria or Baden-Württemberg in Germany. But the general trend goes in another direction. This is the traditional Anglo-American graduate/postgraduate system. It means that all prospective teachers go to the university, the teachers at primary schools for a shorter period (graduate) and the teachers at secondary school for an additional period (postgraduate). The so-called Bologna Process makes this the general system of teacher education. The German Länder have started it recently and, to some extent, it exists in Slovenia and Romania. To organise the teacher education at the university on the basis of the graduate/postgraduate system does not necessarily mean that the students take only one to three subjects. There is a strong trend to add some professional training with internships to university studies. Compared to the traditional

European system of teacher education one could say that the teachers of primary schools should get a higher qualification in subject matters and the teachers at secondary schools will get a better professional training.

When there is a discussion on the reform of teacher education it tends to feature the question of the further training of teachers. Often it seems as if the further training of teachers is supposed to compensate for the deficits of the initial teacher training. Should it be an in-service training or at least a re-training within the school system? Or should the teachers go back to the university or the teacher colleges for a certain period of time? Who should have the say in teacher re-training, the inspectorate and the school administration or the education institutions like universities? The further education of teachers is in general not regulated by law. Teachers are supposed to take some re-training, but there are no strict regulations as to when, where, for how long, and so on. Mostly, the additional education is voluntary, which means in general that the good teachers profit from the re-training and the bad teachers do not do anything to raise their professional competencies. The idea to make the re-training mandatory for every teacher and to pay an additional salary for re-trained teachers until now has not been implemented in the European countries.

We shall discuss the development of EU regulation of teaching qualifications and recognition of qualifications in part 6 (the Conclusion) below.

ii. Selection

There are different responsibilities for the selection of teachers in the European states. In some countries – for example, Slovenia, Estonia and Lithuania – it is the headteacher who is responsible for the selection process. He or she can choose the personnel him- or herself. The responsibility stays with the school. In these countries it is believed that this serves the quality of the school very well. In other countries it is the local community or the governing body that is responsible. The Central European tradition involves state responsibility for the selection process. When the churches lost their influence on the schools at the end of the 19th century the state took over. In Germany and Austria, state means the Länder; in Austria, for some kind of school, it could mean the Federation. Of course, the selection process itself is organised by the inspectorate and there is some kind of participation by local communities, the headteachers and the schools. There are two dimensions to this. In a centralised system grades will be important, whereas if the headteacher and the teachers have the responsibility to choose their colleagues they will look at the personality of the future teacher and consider how well he or she would fit into the particular school.

The personal suitability of the teachers will be a universal concern. Most countries institute checks on criminal records. They also ask for a health screening but they do not require a HIV-test. There are questions as to the targeted recruitment of persons from particular religious or ethnic minorities to certain schools, especially those in areas where such minorities are well represented. Such affirmative action can give rise to a range of legal issues, including constitutional issues, which it is not possible for us to explore in detail here.

Everywhere there seems to be a probation period for new teachers, but it goes from one month (Austria) to several terms or years (for example, in Germany and Romania). The responsibility for the supervision of the teacher during the probation period is with the headteacher and the inspectorate, but in the UK, schools also participate. But there is

no useful information on how effective this supervision is and we do not have any data about the retention rate of the teachers after the probation period. There are even some doubts that the probation period is a suitable instrument to guarantee high teacher qualification. The experience of a couple of months may not really be sufficient to judge on the qualification of the teachers.

The other context in which access to the role of teacher is considered is where there is a dismissal. All countries have procedures for disciplinary actions against incompetent teachers, including in some cases a salary reduction, as in Slovenia. However, dismissal on the grounds of educational incompetence is fairly exceptional. In many cases, the dismissal will be the consequence of criminal behaviour by teachers. There is evidence that even if the dismissal of a teacher may be possible (in a legal sense) in the case of professional incompetence, the inspectorate or employer will often give the teacher a second chance. As long as disciplinary action – particularly dismissal - is a relatively rare occurrence its importance for school quality will be very limited. Often, individual decisions on the dismissal of a teacher can, in any event, be difficult to put into effect because of the likelihood of a legal challenge.

iii. Legal status

In terms of their legal status, teachers in public sector schools can be civil servants or employees. In Germany, Austria and Slovenia teachers used to be civil servants, but they can now be employees. Indeed, there is a general trend to change the legal status of teachers from membership of the civil service to the contract model. In several countries, such as the UK, in Estonia and Lithuania, the teachers are employees. In some countries the law provides for a special status for teachers within the public administration, as is the case in Flanders and in Romania. In the UK, there are standard terms to the teacher's contract of employment specified by law; they are subject to periodic review.

A question arises as to whether their status makes a practical difference and as to whether it is important for the quality of the education provided by the school. We can only speculate on this matter. A change in the status mostly affects matters such as individual salaries and trade union membership. The impact on quality seems to be intangible. Is a school system on the basis of school autonomy, contracts and collective bargaining a better school system compared to a civil servants system within the public administration? One cannot say. The decisions on the status of the teacher will be made more on the basis of general political trends and not so much in the interests of raising standards of educational provision per se.

One factor that may be important is the permanence of the teacher's contract or appointment. In some countries temporary staff are employed not only to cover periods of sickness absence or maternity but also for financial reasons by providing for greater flexibility and economy. Questions may arise, however, as to whether educational quality is prejudiced by the use of temporary staff whose contracts may be of short duration (although may also be renewed repeatedly).

2.d. Inspection

There is a fundamental change in the functions and roles of the inspectorate in Europe. One might assume that if there are two models of governance in Europe, there should be also two models of inspection. And if the observation is correct that the Continental model is becoming closer to the UK model, then the Continental model of inspection should also change in that direction. As we discussed below, this vision would be too simplistic.

i. The Continental Model of Inspection

Let us first assume that the world of inspection is as simple as the model suggests: the Continental model of governance is based on the responsibility of the inspectorate for the output of the educational process. If the inspectorate has to guarantee a certain output, the inspectors need the status and the procedures to fulfil this role. Indeed, in Germany and Austria as well as in Slovenia and Romania the inspectorate is organised at the state level. The inspectors are civil servants and they are part of the public administration. There is no formal guarantee of school autonomy. The inspectors exercise supervision over the individual teachers and report on them, and at least in Germany and Austria, but not so in Slovenia and Romania. It is the inspectorate's function to supervise the school and to control the quality of the school. Everything seems to fit into the Continental model of governance.

But how can the inspectorate guarantee outputs? By examining the work in the classroom? By giving advice to the headteacher and to the teacher? By writing reports on the inspection? Inspectors say that they are not the supervisors of the teachers but their counsellors. Their self-image is not that of the police officer but that of a helpful or 'critical' friend. In Germany and Austria the self-evaluation of the schools seems to be important, and so in Slovenia and Romania. The inspector asks for a self-evaluation first before he or she starts with the inspection and later asks the school for its opinion on his/her report.

There is no clear and uniform picture of the Continental inspectorate. There seem to be contradictions and disparities. Change seems to be needed, to ensure a clearer role for the inspectors and for inspections. Whether it may move in the direction of the UK model of inspections remains to be seen.

ii. The UK Model of Inspection

In one sense, if the analysis of the UK model of governance is correct, there is no need for inspection at all. The schools are autonomous and they compete for the pupils. The process is organised on the basis of the market model. The teachers are employees and their working conditions are regulated by statute. What then is the role or purpose of inspection? In fact, in the countries whose arrangements conform to the UK model the inspectorate seems to be even stronger and more powerful than on the Continent. How does one explain this apparent contradiction?

There is an inspectorate on the national level in the UK but also in Belgium, the Netherlands, in Estonia and

Lithuania, countries which are on the Continent but which nevertheless are moving in the direction of the UK model, as we pointed out above. Even if there are regional inspectors (which is not the case in England and Wales), the inspection on the national level is there in order to guarantee national standards of education and the quality of education in all regions. Inspectors are appointed by the governments, in other words at a very high level, and they have a national standing. While teachers in these countries are employees, inspectors are civil servants.

Although there are some similarities with Continental inspection systems, there are some important differences. For example, the inspection reports on individual schools are in the public domain; they are on the web. Parents are involved in the inspection process. The inspection can have financial consequences for the schools. All this is not true within the Continental model. Self-evaluation of the school is considered essential under the UK model, although we can find it also on the Continent. The inspection process on the basis of the UK model is more school-centred, whereas the Continental model primarily seems to be teacher-centred. But, as we have seen, the latter is becoming much less true today. On the other hand, in the UK the work of the individual teacher can be scrutinised by the inspectors and there are individual reports on them.

What then can be the functions of the inspectorate in the UK model? There appear to be two: first to guarantee the functioning of the model as such (particularly by facilitating comparison and thus competition between schools), and secondly to check the results (outputs) against the inputs and processes that are supposed to produce them. Therefore even in the UK model of governance the inspectorate can have an important function.

iii. Inspection and the Law

In all countries the inspection is highly formalised and regulated by statute law. This shows the great importance placed on the inspectorate and on the inspection process. While some other areas of schooling are not regulated by law at all, because the educational process is said to be resistant to legal regulation, here we find detailed regulations. Why is this so? One may assume that there is a wide political interest involved, in view of the general public's, and particularly the parents', interest in the functioning of the educational system and particularly in the results of schooling. The inspectorate stands for 'law and order' within the education system as well as serving the interests of 'good education'. Statute law accordingly provides for the orderly functioning of the inspection system. Such regulation is important in view of the importance of the inspection outcome to headteachers, teachers and schools. If a report is negative, their role can become very difficult and careers can be damaged. In many countries there is a right of appeal against the inspection conclusions. In fact, such appeals are not common.

2.e. Liability

i. Introduction

Liability is having an increasingly important influence in shaping the relationship between the agencies responsible for educational provision – schools, teachers, education authorities and state/national government departments – and parents and pupils. The sense in which the duty on the state to ensure that proper educational provision is made for

its population gives rise to specific legal obligations is gaining currency. The more that regulation is used to set and enforce standards of education, and the greater the formalised commitment of the state towards concrete educational objectives, the greater the legitimacy of claims by parents and children that any failure by the education system may infringe basic rights and therefore demands redress. Resort to legal action gives the courts an opportunity to subject the education powers and duties of education bodies to juridical analysis and to clarify the legal framework in which education is provided. At the same time, findings of liability can generate insecurity within education institutions and result in defensive practices: although, in the absence of widespread research, objective evidence of such a reaction to litigation is 'slim',⁶⁹ the teaching associations in the UK are reporting that school outings or sporting activities are being curtailed because of fear of possible legal consequences if someone is injured.

The risk of legal liability is a feature of modern social, administrative and industrial life. Yet the evidence shows that in many countries the education system has been relatively untouched by it until recent years. It is true that signatories to the European Convention on Human Rights have from time to time been called to account before the European Commission or Court of Human Rights in Strasbourg on education matters; but, at the national level, findings of liability by a court of law have been relatively uncommon in many countries and have been mostly limited to cases involving physical injury due to defective premises or inadequate supervision of pupils. Yet it is important to understand that the legal environment is changing across Europe and that a key feature of social change across states is greater 'consumer' awareness and demands and an increased propensity to advance individual claims.

One of the most interesting aspects of this trend, at least in those countries (such as the UK, France and Germany) where litigation has become most common, has been the ways in which the legal system has applied aspects of mainstream civil and criminal law to the specific context of education. As the legal claims and arguments that are presented become more sophisticated and directed towards the quality of the educational process itself – in other words, at deficiencies in the standard of educational provision – one can envisage the capacity of national laws to deal with such issues becoming stretched to their limits. As the judgment by the House of Lords in the UK in the landmark case of *Phelps v London Borough of Hillingdon*⁷⁰ in 2000 made clear, there are significant policy reasons why the judiciary might feel uncomfortable about subjecting the educational processes in schools, colleges and higher education institutions to intense juridical scrutiny. In that case and the earlier case of *X (Minors) v Bedfordshire County Council*⁷¹ the House of Lords tried to draw a distinction between two types of failure. First, there are failures by teachers and other education workers (such as educational psychologists) in the performance of their professional roles, which can be judged with reference to ordinary principles of negligence that have been applied to, for example, surgeons, dentists or train drivers. Secondly, there are failures in the performance of specific statutory duties (such as administrative decisions about the placement of a child at a particular school), where the task of the education authorities responsible for such decisions in carrying out their day to day functions would be seriously hindered if every decision could potentially be the subject of litigation.

⁶⁹ Markenisis et al., *Tortious Liability of Statutory Bodies* (Oxford, Hart, 1999), p. 79.

⁷⁰ [2000] ELR 499.

⁷¹ 1995] ELR 404; 2 AC 633; 3 WLR 153; 3 All ER 353; 2 FLR 276, HL.

ii. Forms of liability

For the purposes of analysing legal liability in the context of education, we can distinguish between liability in two categories:

3. Civil liability based on principles of contract or tort (principally negligence) or public liability (which in some instances, as in France, is governed by administrative or public law).
4. Criminal liability

- *Civil liability*

In most states there is considerable experience of civil liability arising from injuries to pupils or teachers, whether caused deliberately or by reason of negligent act or omission. This will usually be covered by the general law of tort, often under the general Civil Code⁷² (but in the UK it is governed by a combination of the ‘common law’ principles and specific statutory provisions, such as the Occupier’s Liability Act 1957⁷³). In some instances, the liability will arise under public liability legislation, as in the Austria.⁷⁴ In France, public law contains various special rules that determine the liability of administrative authorities,⁷⁵ particularly a law of 1937 on the responsibility of teachers, which is still in force. There are common elements to tort liability across many states. For example, in relation to negligent acts or omissions, the central elements are generally the existence of fault in the performance of a duty (although there is the French tradition of liability for risk and, in Germany, growing support for the notion of no-fault liability), resulting (causation) in injury (damage or loss) recognised by law.

In some states there are specific obligations on teachers, such as in the Netherlands, where, under the Civil Code,⁷⁶ they may be liable for damage caused by their pupils during the time they are under the supervision of the school. This involves a presumption of liability that is rebuttable by evidence that the pupils were sufficiently and carefully supervised or that the damage was sudden, unpredictable and could not reasonably have been prevented. In other states, such as Germany, Belgium and the UK, the obligations for preventing harm to pupils, or to others as a result of the acts of pupils, mostly derive from the general law as applied by the courts in specific situations. In England, the duty of care to ensure the safety of school pupils, whether from their own acts or those of other pupils, has derived from the *in loco parentis* principle, so that the teacher has to show the care that would be expected of the ‘careful and prudent parent’: ‘A headteacher and teachers have a duty to take such care of pupils in their charge as a careful parent would have in like circumstances, including a duty to take positive steps to protect their well-being. . . .’⁷⁷ In Germany, the teacher would owe a duty to the individual pupil to protect his or her interests, because of the special relationship that would be deemed to exist.⁷⁸ In Germany and the UK the duty to ensure that pupils are properly supervised, especially during breaks, has been confirmed by the courts.⁷⁹ However, some differences seem

⁷² See, for example, the Civil Code in Germany (Arts 823 and 839), Belgium (Arts 1382-1386) and Slovenia (Arts 131 and 132).

⁷³ See, for example, *Fowles v Bedfordshire County Council* [1996] ELR 51

⁷⁴ *Amtschaftungsgesetz* (Public Liability Act). See also Art 839 of the German Civil Code.

⁷⁵ Summarised in B.S. Markesinis et al., *Tortious Liability of Statutory Bodies* (Oxford, Hart, 1999), 15-20.

⁷⁶ Art. 1384 §4

⁷⁷ *Gower v London Borough of Bromley* [1999] ELR 356, CA. See also, *Beaumont v Surrey County Council* (1968) 66 LGR 580.

⁷⁸ BGH of 27 April 1981, NJW 1982, 37, 38; BGH of 10 March 1983, FamRZ 1984, 1211.

⁷⁹ Federal Supreme Court, LM § 839 (Fd) BGB Nr. 12a; Court of Appeals at Oldenburg, VersR 1968, 655 (656); *Beaumont v Surrey County Council* (1968) 66 LGR 580, *Carmarthenshire County Council v Lewis* [1955] 1 All ER 565.

to exist between national states over the responsibility of teachers or schools for the supervision of pupils outside school hours, such as before school starts.⁸⁰

These obligations are often reinforced by specific responsibilities placed upon teachers under their contracts of employment. For example, in England one finds among the terms in the teacher's contract of employment as laid down by law⁸¹ a duty to safeguard the health and safety of pupils both when they are authorised to be on school premises and when they are engaged in authorised school activities elsewhere.

In the case of defective premises or facilities, again liability could arise from general law (as with the liability incurred by the owner of defective premises and structures under the Civil Code in the Netherlands⁸²) or from specific statutory obligations, such as the School Instruction Act (*Schulunterrichtsgesetz*) in Austria or the Education (School Premises) Regulations 1999⁸³ or case-law in England.⁸⁴ In France, this liability, which traditionally is regulated by administrative law, was transferred in the 1980s from the national to local level by a new decentralization law.

In many states there are specific regulations on matters of health and safety in schools which normally give rise to civil rather than criminal liability. They may be general in their scope (such as the Lithuanian comprehensive schools regulations). In some cases they relate specifically to potentially dangerous activities (for example in Germany there are specific regulations covering matters such as sports, scientific experiments and excursions). Criminal liability may result from serious breaches of general health and safety legislation as applied to schools in some states.

Liability under contract law is generally only applicable to private education, because state-provided education is not based on a contractual relationship between the parent and child or the state. One of the effects of this contractual relationship is to bring certain situations of liability, such as where it is alleged that the exclusion of a pupil from school was wrong, within the realm of contract law rather than public/administrative law. This is, for example, the position in the UK and the Netherlands. In the public sector, contract law has a lesser role to play, although in Lithuania a new law of education could establish a contractual relationship via a parent-school contract. In England, statute law specifically provides that home-school agreements (which all public sector schools must ask parents to sign) 'shall not be capable of creating any obligation in respect of whose breach any liability arises in contract or in tort'.⁸⁵

Many actions and decisions by schools and education authorities may be challenged via recourse to administrative justice, whether in form of litigation in an administrative court (as in France or Germany) or within the High Court (England and Ireland), or by an appeal to a specialist tribunal. Liability in public or administrative law is something that education authorities have become used to facing over recent decades. Generally the primary aim of the complainant is to have the decision overturned rather than to secure compensation, although that is not always the

⁸⁰ In the UK, for example, there may be liability where an injury occurs (*Kearn-Price v Kent County Council* [2003] ELR 17, whereas in Slovenia the law in effect exempts schools from responsibility prior to the start of school hours.

⁸¹ Via the School Teachers' Pay and Conditions Document, which is given legal effect by the relevant Education (School Teachers' Pay and Conditions) Order in the year in question.

⁸² Art 1386.

⁸³ SI 1999/2.

⁸⁴ See *Refell v Surrey County Council* [1964] 1 All ER 743.

⁸⁵ School Standards and Framework Act 1999, s 111(4).

case. The loss or damage, in legal terms, that is suffered in the kinds of case where the remedy lies in public law will normally be difficult to quantify. For example, if a pupil is excluded from school and the case succeeds, the pupil may return to the school. If it fails, the state will generally be under an obligation to find an alternative placement at a school or special facility and in any event the parent would also have a duty to ensure that the child or young person is educated. On exclusion the pupil might suffer damage to his or her reputation, but if the exclusion was unlawful his or her name will be cleared and if, on the other hand, it was a justified exclusion then any responsibility cannot extend beyond the pupil him/herself.

As noted above, if the school in question is a private rather than public institution then liability in relation to decisions on matters such as exclusion in these schools will be governed exclusively by the law of contract. However, there are possible exceptions. In the UK, for example, private schools are, in relation to limited areas of activity, sometimes considered to be exercising public law functions, which means that particular decisions could be amenable to judicial review, the process whereby the courts may consider the legality and fairness involved in certain decisions by public bodies.⁸⁶ This is similar to the way in which in the Netherlands private subsidised education is considered to be a 'functional public service' so far as examination and assessment decisions are concerned, as is also the case in France and Germany.

One final point concerns the definition of 'civil right' for the purposes of Article 6(1) of the European Convention on Human Rights. The European Commission of Human Rights has held that the right to education (for the purposes of Article 2 of Protocol 1) is not a civil right under Article 6 but a right in public law.⁸⁷ This means that the right to a fair hearing in the determination of a civil right may not apply in the context of education decisions.⁸⁸

- *Criminal liability*

Teachers, like any other citizens, are subject to the criminal law. It is, however, unusual for teachers to incur criminal liability for acts or omissions in the performance of their duties. Traditionally, the main circumstances in which criminal liability might arise are where a teacher acts fraudulently (such as by diverting school funds to his own bank account⁸⁹) or assaults a pupil (sexually or otherwise). These will generally involve deliberate (or possibly reckless) conduct, but criminal offences can in some circumstances be committed without fault (strict liability) or by neglect. In Germany, for example, a teacher was found guilty of negligent manslaughter in a case where a pupil died in a swimming accident when on a school trip,⁹⁰ and in the Netherlands, under the Criminal Code,⁹¹ there is a crime of careless negligence in putting another person in great danger, such as by failing to prevent abuse. In the UK, a teacher was recently jailed for twelve months after pleading guilty to manslaughter after a 10 year old boy drowned in a small flooded river while on a school trip; according to the teaching associations in the UK, this was the first time a teacher had received imprisonment in such circumstances. He was also guilty of a breach of health and safety law in failing to take effective measures to prevent injury, which also gives rise to a criminal offence. The notion of

⁸⁶ *R v Cobham Hall School ex parte S* [1998] ELR 389; *R v Governors of Haberdashes' Aske College Trust ex p T* [1995] ELR 350; cf *R v Muntham House School ex p R* [2000] ELR 287.

⁸⁷ *Simpson v United Kingdom* (1989) 64 DR 188.

⁸⁸ See also *Lalu Hanuman v U.K.* [2000] ELR 685.

⁸⁹ Under the Greek Penal Code Art 259, a teacher commits an offence if acting in breach of duty in service if he or she acts with a view to personal profit.

⁹⁰ CA, Cologne, NJW 1986, 1947.

⁹¹ Art. 422bis.

‘corporate manslaughter’ has gained currency under English law but has yet to be applied to education authorities whose overall management of educational provision lies behind a pupil’s death. Although, in France, there have been very only very few cases where public servants have been held criminally liable, the French Criminal Code has been revised recently in order to restrict such liability in respect of criminal offences without fault.⁹²

Returning to Article 6(1) of the European Convention on Human Rights, it is accepted in Greece that discipline (such as in the context of a school) is a criminal matter for the purposes of the Article’s requirement for a fair hearing in the determination of a criminal charge. In the UK (in England), however, the courts have rejected the idea that the disciplinary sanction of exclusion from school should be considered as a criminal matter for this purpose.⁹³

iii. Who is liable, and to whom?

In the educational environment, the most likely cause of any harm to a pupil or member of staff is either the wrongful act of another pupil, the negligence of the teacher or, in the case of defective premises or equipment, the body with legal or administrative responsibility for the organisation and maintenance of educational provision.⁹⁴ So far as liability is concerned, if the misbehaviour of a pupil is the direct cause of the injury to another pupil, there may nevertheless be legal implications for the school and its staff if they failed to maintain a proper system of pupil discipline. In several countries (such as Austria, Belgium, the Netherlands and the UK) it is clearly established that a teacher or school may be liable under civil law where a pupil is injured as a result of the violence of another pupil in such circumstances; in Germany the law places the school under a duty to prevent pupils causing harm to others or damage to property (including a car belonging to a third party, which a pupil damaged during a school excursion⁹⁵). However, there must be fault on the part of the teacher. The onus of proof will either lie with the teacher, in showing that he or she could not have prevented the wrongful act (as in Belgium),⁹⁶ or with the victim, in showing that the required standard of care was not met (as in the UK). If the teacher is not liable, the injured pupil will have to make their claim against the pupil who injured them, in which case the matter will often depend on whether the offending pupil had legal capacity – for example, by being of a sufficient age and understanding⁹⁷. A claim could also be brought against both the teacher and the perpetrator, perhaps on the basis of shared responsibility (as in the Flemish region of Belgium).

⁹² The law of the 10th July 2000, which has clarified the scope of non-intentional breaches of the criminal law. The law stipulates that individuals who have not directly caused damage, but who have created or contributed to the creation of a situation which causes damage, or who have failed to take appropriate measures to avoid harm, are criminally liable if it can be established that they have either: (i) deliberately acted in breach of a statutory duty to preserve safety; or (ii) exposed another person to a risk of such exceptional gravity that they are criminally responsible for failing to acknowledge and address that risk.

⁹³ *The Queen (on the application of B) v Head Teacher of Alperton Community School and Others; The Queen v Head Teacher of Wembley High School and Others ex parte T; The Queen v The Governing Body of Cardinal Newman High School and Others ex parte C* [2001] ELR 359 [2001] ELR 359.

⁹⁴ It will be whichever branch of the state that has this responsibility. In England and Wales, for example, the legal responsibility for school premises will be divided between the local education authority (LEA) (in effect the municipal authority) and the governing body of the school. In France, since the laws on decentralisation (law of 22 July 1983, modified by the law 85-97 of the 25 January 1985), the responsibility of building, maintaining, undertaking repairs and the day-to-day running of secondary schools is undertaken at local level. In the case of colleges (secondary school from 11-14), this is undertaken by the département, whereas the running of lycées (14 yrs plus) is managed at regional level. The responsibility by local councils for infant and primary schools can be traced back to the laws of 20 March 1883 and 30 October 1886. It is these local agencies that are liable when damage caused to a pupil or member of staff results from defective maintenance of the premises.

⁹⁵ LG Hamburg of 26 April 1991, NJW 1992, 377, cited in Markenisis et al (1999) op cit, p.35.

⁹⁶ As, for example, in Belgium where liability is based on Art 1384 of the Civil Code.

⁹⁷ For example, a minimum age of 7 in Germany and 10 in Greece, in both cases provided the necessary understanding of the nature of the wrong committed is necessary. In Finland a person under the age of 18 may be liable for damage he has caused, but only so far as it can be considered reasonable in the light of the young person’s age, development and financial circumstances, the nature of the act itself, and other relevant circumstances: Tort Act 1974, art 2.

It seems to be a common position across states that the teacher is not generally sued personally.⁹⁸ The principle, referred to under English law as ‘vicarious liability’ (so that the employer is liable for the torts committed by the employee when acting in the course of their employment), seems to operate widely. In Austria, for example, the pupil would sue the Bund (Federation) under the Public Liability Act,⁹⁹ whilst in Ireland the boards of schools would be vicariously liable. Under vicarious liability, the teacher or other employee of the state is not absolved of legal responsibility, but the general practice is to seek compensation from the state because of its greater resources to meet claims. In France, the Education Code stipulates that where pupils are under the care and supervision of state school personnel (ie. a teacher, or education/supervisory staff), any damage suffered to or caused by pupils may be actionable *not* against school personnel, but against the state.¹⁰⁰ Effectively, individual civil liability is *substituted* by state liability. This means that it is exclusively the *civil liability* of the *state* which is called into question, and this is judged, exceptionally, by the civil courts rather than the administrative tribunals. If a member of staff has been negligent it is the state which will compensate the victim (or those acting on his or her behalf). In several countries, notably France, the UK and Ireland, the state may bring an action against the teacher in order to recoup some of the compensation costs paid out to the claimant, although this happens very rarely.

If the teacher is the victim, he or she will have rights as an employee and the education authorities will often find it necessary to maintain insurance cover for such eventualities, unless the state makes provision (see below). A school could be liable for an assault on a teacher by a pupil in some countries,¹⁰¹ but the school may lack the necessary legal personality in others (for example, Austria) and the state will generally have responsibility in such a case.

Where educational provision falls below required standards or fails to meet the specification as set out under statute there is also potentially public law liability unconcerned with compensation per se, although in some instances the adjudicator might have a power to award it. If a person complains that, for example, their child’s school is overcrowded or that the school acted unfairly in refusing to admit a child to the school, they may have to pursue the complaint against the school or appropriate state authority in an administrative court or before a specialist tribunal or even an ombudsman or complaints authority. In the first situation they might want the school to introduce an additional class to prevent the overcrowding, while in the second case they would want the school to be directed to admit the child. In Germany, for example, a claim concerning the way that a pupil’s examination was assessed could be pursued in the administrative court.

⁹⁸ In Romania, however, the staff may be liable for the acts of their pupils: Art 1000 para 4 of the Civil Code.

⁹⁹ *Amtschaftungsgesetz*. Under Art 34 of the Basic Law the duty to compensate is transferred to the state, but the state may recover some of it from the teacher.

¹⁰⁰ The law of the 5th April 1937, now consolidated in Article 911-4 of the Education Code. The same approach has been developed by case law to extend to those working in private educational facilities under a ‘contrat d’association’ (essentially this is a contract to provide public services and therefore remains subject to state supervision/control). Note that, significantly, personal liability of education workers can never be challenged before the civil courts.

¹⁰¹ For example, Slovenia, under Art 144 of the Code of Obligations.

iv. What are they liable for?

Generally issues of liability or illegality in the education system are determined under ordinary principles of the law of tort or in accordance with principles of administrative law. In the case of private schools, administrative law will mostly be inapplicable and some matters may instead be governed with the terms of the contractual relationship between the school and parents or child. As noted above, criminal sanctions may be imposed by law for certain forms of conduct or omissions by school staff, such as the use of excessive physical force (assault) or failing to maintain appropriate safety procedures.

An emergent aspect of civil liability concerns sub-standard education. Here we are concerned with the rights of the individual child who has suffered adverse consequences to his or her educational attainment, mental well-being or employment opportunities as a consequence of failures by teachers and schools to make satisfactory educational provision or to maintain appropriate professional standards. Most states would recognise the right of the child or their parents to pursue a complaint about such matters to the school or other appropriate authority. But in the UK, two decisions by the highest court, the House of Lords (the cases of *X (Minors)*¹⁰² and *Phelps*¹⁰³), have held that teachers and other educational professionals (notably psychologists, who assess children with learning difficulties and in some cases advise their parents) owe a 'duty of care' towards the children and could therefore be liable in tort if they do not maintain the appropriate standard of care in the way they perform this professional role. Thus there was a right to bring a negligence claim where a young person's condition was not diagnosed by the school while she was a school pupil and as a result she did not attain the academic qualifications that she might have done if she had received appropriate provision in the light of her educational needs. More recently, it has been confirmed that the same principle applies to the disciplinary aspect of the role of teachers.¹⁰⁴

There are policy arguments against permitting such claims to be brought and the House of Lords took account of them.¹⁰⁵ For example, there is a risk that vexatious claims might be brought perhaps many years after the child has left school, although in the UK there is a limitation period that bars some potential claims. There is also the cost to local education authorities of defending baseless claims. Fear of being sued could also engender a defensive approach to educational practice. Furthermore, in some cases it might be unfair that a particular professional is identified among a number responsible for a child's education. Ultimately, though, the court considered that these arguments were insufficient to justify the denial of a duty of care by the court in such circumstances. The situation also met the general policy test in English tort law as to whether the existence of a duty is fair, just and reasonable.

Both cases confirmed that local education authorities and their employees (teachers, psychologists etc) cannot, however, be liable for action taken under *statutory* powers, otherwise their statutory functions would be unduly hindered. But a duty of care may be owed in respect of other, general professional duties, and so liability is possible. It should be noted that the House of Lords also confirmed that a failure to mitigate the adverse consequences of

¹⁰² Above, n 3.

¹⁰³ Above, n 2.

¹⁰⁴ *Bradford-Smart v West Sussex County Council* [2002] ELR 139.

¹⁰⁵ Fairgrieve explains that the policy arguments hold much less sway in France: D. Fairgrieve, *State Liability in Tort* (Oxford: Oxford University Press, 2003), pp. 129-135.

congenital defect are capable of giving rise to ‘personal injuries’ to a person.¹⁰⁶ This means that claim resulting from a failure to identify a pupil as having a congenital condition that ought to have been diagnosed (in *Phelps* it was dyslexia) can proceed as a personal injury case. Compensation could be based on this failure of diagnosis and to take appropriate action resulting in a child’s reduced level of achievement, reduced employment prospects and depressed earnings. Miss Phelps suffered adverse psychological consequences due to her academic under-performance and frustration and incurred costs through having to pay for private remedial provision after leaving school and through reduced career potential.

The UK experience has shown that these negligence cases are not straightforward. The claimant will have to show that a teacher has fallen below generally accepted standards within the profession. He or she will also have to show that there was fault, a process which is rendered all the more difficult when the evidence is incomplete because school records are inadequate and the recollections of staff some time after the event are unclear. Then the claimant will have the burden of showing that there is a causal connection between the alleged negligence and the alleged loss. In *Phelps*, one of the judges (Lord Nicholls)¹⁰⁷ distinguished cases where there is ‘manifest incompetence or negligence comprising specific, identifiable mistakes’, such as where a teacher ‘carelessly teaches the wrong syllabus for an external examination’, from a more general claim that a child did not receive an adequate education at the school or was not properly taught. He emphasised that ‘proof of under-performance by a child is not by itself evidence of negligent teaching’, given the range of external factors that can affect it. A final problem in this kind of case is that assessing an appropriate level of compensation might be problematic. Another of the judges in *Phelps*, Lord Clyde, nonetheless stressed that ‘these possible difficulties should not be allowed to stand in the way of the presentation of a proper claim’.¹⁰⁸

No other country in Europe has as yet seen similar developments on this scale. Indeed, very few other countries have any experience of tort cases concerned with educational quality. In France, in a case which came before the Conseil d’Etat, a pupil was wrongly denied seven hours per week of teaching in core national curriculum subjects and the state’s lack of funds was not accepted as a defence; damages of 1,000 francs were awarded.¹⁰⁹ In Austria, there was a legal claim arguing that examination answers had been incorrectly assessed and career prospects damaged as a result. The court considered that damage was too hypothetical, but the outcome might have been different if, for example, the claimant’s appointment to a position had been dependent upon a particular examination grade. In Germany, compensation of DM8000 was awarded to a university student whose examination mark was miscalculated, resulting in reduced earnings.¹¹⁰ Such a claim will depend upon a temporal connection between the end of school studies and the lost opportunity. In Austria it is considered to be conceivable that parents could sue if they had to arrange private lessons to compensate for inadequate teaching in a public sector school. A barrier to claims in some states is likely to be the difficulty in securing compensation for future economic loss. In France, for example, the courts tend to view it as too speculative.¹¹¹

¹⁰⁶ Above n. 3 at 529.

¹⁰⁷ *Ibid.*, 532A-D, 532C-D.

¹⁰⁸ *Ibid.*, at 537F.

¹⁰⁹ CE 27 January 1988, *Giraud* [1988] Rec 39.

¹¹⁰ *Süddeutsche Zeitung*, 7 Nov 2000 pV2 (24).

¹¹¹ *Markenisis et al.*, op cit., p.18.

The UK is also in the vanguard when it comes to claims based on contract in connection with universities and private schools. The courts have recognised that failures to meet appropriate standards of educational provision could result in contractual liability, although they consider that questions of academic judgement are unsuitable for judicial evaluation.¹¹² In one case in the UK there was a settlement of £30,000 to a claim of breach of contract brought by a pupil at a private school who complained about the poor standard of teaching in Latin which, she alleged, result in her achieving only a low-grade pass, well below expectation, damaging her employment prospects.¹¹³ Other states, such as Germany, recognise the potential for contractual liability for sub-standard provision by private schools.

v. Insurance against claims

There is considerable concern about the potential financial consequences of liability. Practice varies between states as regards insurance against these consequences. For some states (for example, Austria) the cost of insurance premiums is prohibitory. In some states, such as France and the UK, schools or school authorities are strongly recommended to have insurance. For others, insurance in respect of accidents is a statutory requirement. In Germany, it is a requirement under the Social Code in relation to personal injury or damage to property. However, this does not apply to violations of the right of personality; so, in one case the authorities incurred liability to compensate a pupil who had been teased by his teachers in the presence of his peers, which resulted in psychological harm to him.¹¹⁴ In some countries, insurance is left to the discretion of individual school boards (for example, Ireland). In the UK, controversy has surrounded the lack of compulsory insurance by private schools for accidents to pupils in playing contact sports, such as rugby. In one case,¹¹⁵ a 16-year-old boy suffered crippling injuries in a game of rugby at a private school. One part of his claim against the school was that the school did not advise his father to take out an accident insurance policy. The court held that while it was desirable for the school to arrange insurance or to inform the parents of the need to take out independent personal accident insurance, this went beyond the school's duty in respect of the welfare of pupils.

The subject of insurance is one on which the imposition of greater uniformity ought perhaps to be considered.

¹¹² *Clark v The University of Lincolnshire and Humberside* [2000] ELR 345

¹¹³ See G. Hackett, 'Private school pays out for poor teaching', *The Sunday Times*, 10 November 2002. See, as to the contractual basis, *Herring v Templeman* [1973] 3 All ER 569.

¹¹⁴ *OLG Zweibrücken* of 6 May 1997, NJW 1998, 995.

¹¹⁵ *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (Court of Appeal).

2. Policy implications (transnational applicability/relevance of the results), recommendations

Key Conclusions

1. In most democracies, although only after considerable dispute, *school choice* is accepted as a basic right of parents.
2. Governments have facilitated parents' exercise of school choice by providing some or much funding for non-governmental schools.
3. They have also devised effective ways to meet legitimate concerns for accountability, national cohesion and school quality in a variety of ways.
4. However, there is no need for governments to control schooling through a single model of schooling. It does not necessarily meet the goals of equality and quality.
5. Educational systems with a high degree of educational freedom are able to provide a high degree of autonomy and quality at the same time.
6. The introduction of *decentralisation policies* has a profound effect on the administration of the education system at all levels. This presents officials and educationalists from the central ministry, regional, municipal and district authorities and schools with demanding challenges to adapt to new responsibilities.
7. As some legislation describes attainment targets in rather general terms checking schools' compliance can be difficult in some cases.
8. The processes of educational change, in any country, are extremely complex affairs and can be difficult to control, particularly as responsibility is increasingly delegated towards institutions and individuals.
9. "Change management" in educational reform is not one of managing, or controlling change, but of attempting to shape the environment in which it is to take place by creating conditions that are conducive to successful implementation. Monitoring quality assurance tends to lead to successful implementation of changes.
10. Schools are now being given more *autonomy and responsibility* for their own quality, with less rules and regulations - at the input-side – for the curriculum and finance. However, - at the output side - parents, the government and other stakeholders want to hold schools accountable for their quality and want this quality to be controlled and expect that actions to be taken if there seems to be quality problems.
11. As a consequence of the policy move towards decentralization, the role of evaluation has changed. External evaluation by the Inspectorate has shifted from merely supervision of the legal requirements to educational monitoring and quality assessment, based upon evaluation criteria and standards. Internal, school self-evaluation is strongly encouraged in order to fulfil both the improvement and the accountability function. Educational institutions are expected to bear responsibility for safeguarding the quality of the education they provide and systematic self-evaluation is strongly encouraged.
12. Increasingly, schools are being made financially accountable through the auditing of block grants received from government.
13. In some countries, the Inspectorate has developed standards to monitor the quality of education, which includes decision rules and qualifications for judging the extent to which a certain standard has been met. One method is a school quality profile that reveals the strong and weak points and is used as a basis for discussions with the school regarding possibilities and plans for further development.
14. An emerging, but increasingly important issue, that still needs to be resolved in some regions, is who has the right to information on schools and the quality of education – parents, the inspectorate or the general public?

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15. Concrete and clear provisions governing transferability of general educational qualifications at pre-university level remain conspicuously absent from the European social policy agenda.

Key Recommendations

There is no legislation at European Union level to compel educational authorities to adopt common practices. The laws relating to education policy can only be changed at national or regional level. Therefore, such changes can only take place across the European Union through the dissemination and sharing of best practice and initiatives be established to stimulate and encourage: -

1. The development of a common monitoring system that uses the same performance indicators and enables comparisons to be made across Member States.
2. Better coordination of social and educational policies through addressing and sharing good practice concerning the lack of achievement of poor and minority groups of children.
3. Non-discrimination that results in national governments addressing human rights issues in the field of education. Although, education acts and laws set by national government normally quote the principle of non-discrimination, the reality can be more problematic. An analysis with a human rights audit could be the first stage in understanding the size of this issue.
4. Best practice in ways of establishing, independent of government, regular inspections of schools. It should also consider how an independent inspectorate can ensure that appropriate action is taken by schools when the inspection found provision to be inadequate.
5. Best practice in the distribution and publication by states of local information about schools so parents may make effective choices. This should be considered in the context of making educators more accountable and the need for national legislation requiring the state authorities to publish this information, including the results of examinations. It should also address the issue of what further information should be included like pupils' backgrounds and initial attainment on entry, when assessing a school's overall performance over time.
6. Ways of building on EU legislation for mutual recognition of professional qualifications, in order to create a common and accepted Europe-wide system of recognising minimum qualifications for qualified teacher status and for entry to the teaching profession.
7. The most effective ways of introducing health and safety legislation that ensures schools and teachers have a contractual or statutory duty to ensure the safety of pupils in school and outside school whilst on educational and associated recreational visits. It should also address what appropriate insurance cover might be needed in respect of liability and accidents to pupils and staff.
8. Better understanding by teachers and other staff, including administrators, of relevant forms of liability to help ensure that educational practice can operate in a lawful manner and with due respect to the rights of school pupils and their parents. The initial and the continuous professional development of teachers including that of head teachers and senior administrators should include coverage of the legal context to teaching and should focus on issues of liability. The EU Socrates programme could be a useful instrument for such activities.

At national or regional level initiatives and policies should be developed that: -

9. Help, stimulate and enforce poorly performing schools achieve higher standards though making the schools more accountable and responsible for poorly performing children.
10. Teachers also need to be able to have access to the necessary resources and acquire appropriate skills to help them make the education system more responsive to a wider range of children's needs. This should be achieved through granting schools more autonomy, providing them with further training and encouraging the dissemination of good practice.
11. Help schools and the local community reduce the increase in school violence and crimes committed against students and teachers inside schools. Multi-agency teams should be established and measures like police in schools, youth-courts in schools using real judges and other intermediary actions should be considered.

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12. Provide financing resources to recognised private educational or non-governmental institutions that can offer alternative options, for parents and students, in the provision of high quality education.
 13. Empower and increase local control of schools, not only in terms of use of resources and maintenance of building stock, but also in terms of a school setting its own educational goals and in the determination of how the curriculum should be taught.
 14. Enable schools and school districts to become agents of reform, by reducing excessive rules and regulation and by increasing flexibility at the local level to enable them to become more responsive to the educational needs of their students.
 15. Ensure that schools and school districts are more accountable to parents, the local community and the state through clearly established evaluation and reporting systems.

3. How the European collaborative effort has contributed to the obtained results

As authorities on comparative educational law and policy, the partners are keenly aware of the lack of opportunities for future policymakers to become familiar with the ways in which different countries have chosen to address the common issues faced by educational systems. What is not presently available is the opportunity for graduate students and professionals to learn about these issues while also forming relationships with their counterparts in other countries and gaining experience as policy researchers under expert supervision.

4. Future need for research effort, in particular at the European level

A peculiarity of the educational system in many countries is the high degree of formal regulation of educational legislation, which extend to nearly every aspect of school life. It is partly due to a strict understanding of the principle of legality as it is expressed in many Constitutions, which demands that every act of administration be founded in a formal parliamentary act. With regard to the rights of pupils or students, this concept of formal legality has prompted the introduction of legal procedures and remedies, leaving little room for complaints based directly on rights granted in the constitution. Thus, “legality” partially replaced “constitutionality”; that is to say the protection by constitutional rights. Whether the recent trend towards deregulation might alter this situation, giving more discretion to administrative agencies, is still open to debate in most countries.

5. Dissemination and/or exploitation of results (2/3 pages)

1. Strategy for dissemination of knowledge that has been elaborated during the life-time of the project:

Modular ELA-Master

Modular part-time master programme

The *Modular European Master of Education Law and Administration* (Modular ELA-Master) is a part-time master programme.

Duration

Total duration of studies necessary to complete the programme may be several years, depending on the number of modules taken each year.

Modular master programme

Students can choose a number of modules or courses to take during a year within the programme framework.

The programme is built up by BLOKS and by MODULES, which cover subjects from basic courses modules and functional courses modules to consulting, exchange and research modules.

Aims

This programme is focused on practical issues and aims to develop high-level decision makers or executives who combine vision and decision making and implementation abilities. The highly interactive instruction approach is designed to integrate different disciplines and provide synergy of academic knowledge and practice.

The aims should be reached through the following objectives:

- (1) an institutional framework for long-term collaboration between experts on education law and policy, human rights, and education reform, and the institutions which they represent, to provide professional training for practitioners and those preparing for careers in this field.
- (2) a curriculum model for professional training that focuses upon commonalities and differences in the approaches taken by different countries and states, and by international law, to the pressing issues of education policy which all face, such as standards, accountability, diversity, under-achievement, school autonomy, and pupil and teacher rights.
- (3) training based upon this model to a group of students, integrating and supplementing the training already received in their national institutions, and thus increasing their professional qualifications.

Teaching staff

The members of teaching staff are professors and executives, practitioners and scholars, researchers and consultants.

They come from various universities:

TIAS - (University of Tilburg (the Netherlands))
Europa College (Belgium)
Ministère de la Culture de l'Enseignement Supérieur et de la Recherche (Luxemburg)
University Paris X-Nanterre (France)
Hochschule Bremen (Germany)
Deutsches Institut für Internationale Pädagogische Forschung (Germany)
University of Trento - Faculty of Law (Italy)
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University of Southampton - Faculty of Law (UK)
University of Manchester - School of Law (UK)
Ethniko kai Kapodistriako Panepistimio Athinon (Greece)

THE PROGRAMME CONTENT

| PROGRESS | CONTENT/ MODULES DESCRIPTION | | PROGRESS ASSESSMENT |
|----------|---|--|---|
| BLOK 1 | BLOK 1 - Module 1: Basic courses module | At the start, students upgrade their knowledge and skills in basic principles governing education in Europe. This basic module provides the basics necessary for the rest of the programme. | Students' performance is assessed through written examinations at the end of each module or course. |
| | BLOK 1 - Functional courses module (Legal, Policy and Management modules are the main functional modules of the corresponding disciplines as applied in the educational field) | BLOK 1 – Module 2 - Legal module | |
| | | BLOK 1 – Module 3 - Policy module | |
| | | BLOK 1 – Module 4 - Management module | |
| BLOK 2 | Concurrently with studies, students work individually or in teams on consulting projects. The projects are targeted on solving certain practical educational problems. | | Projects are presented at the end of the programme and evaluated by the Examination Commission. |
| BLOK 3 | All students will study together comparative education law, policy and management in the 12-day cross-country module. All students will take a common first section (foundation courses) and then will choose two specialized seminars which will lead into their individual research projects. Each student will thus take a 40-hour course spread over two weeks, and two twenty-hour courses, each lasting one week. Obviously, the costs will be considerably larger for the students coming from a greater distance. The project will try to provide through Erasmus Mundus each student with a stipend to cover travel and living expenses while participating in the course. | | |
| | BLOK 3 - Module 1 - Foundation Course | The 12-day cross-country module will begin with a two-week general overview of education law and policy, taught by at least two but probably more of the ten experts participating in the master programme. This overview will consider principles of education law and policy, international and European education law, the relationship between national and international law, the relationship between constitutions, statutes, and jurisprudence. It will also consider the general impact of globalization and international trade in educational services, the societal pluralism caused by immigration and by enhanced assertion by minority groups, and the rapid evolution of higher education institutions. Some of these topics will then be considered further in the specialized seminars. There will be advance reading and writing assignments. | |
| | BLOK 3 - Module 2 - Specialized Seminars | Each of the following two weeks there will be four specialized seminars on particular topics in education law and policy, to be determined during the curriculum development. Each student will choose two seminars; if any is over-subscribed it may be offered twice to accommodate demand. Students will register for preferred seminars in advance, and there will be advance reading and writing assignments for each. Although the focus and content of these seminars will to some extent in response to student interest, it is possible to identify some topics which have already been the subject of discussion during the previous modules: - Culture and language issues in education - Educational accountability and common standards elementary and secondary - Educational accountability and common standards higher education - Private educational institutions and the State - Human rights and education law - Rights of parents in relation to schools - Rights and responsibilities of teachers - Religious expression and instruction in schools - Preparation and supervision of teachers - Third-world development issues in education - Leadership in international schools - Finance of public and private schooling - Finance of public and private higher education - Teacher employment and working conditions Most of these are topics which have already been dealt with in the conferences and publications of the European Association for Education Law and Policy, and are the subject of teaching and publications by the experts who have been selected for participation. | |
| | BLOK 3 - Coordination and establishment of mentoring relationships | Subsequent to the courses, the institutional representatives (who will have formed the academic board of the master) will gather for a planning session at which each will accept mentoring assignments for (on average) four of the graduate students, based upon areas of interest and upon relationships formed during the master courses. The intention will be that at least three quarters of these relationships be with graduate students attending a different institution than that of the mentor. In this way, each student will be able to work with an expert in another institution as well as with the professor who selected him for the program. | |

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|--------|---|--|--|
| BLOK 4 | Concurrently with writing the research paper, students will participate in a 1-month exchange programme or internship with an educational institution or government agency in Europe. To the extent possible, they will do so in settings where one of the other students participating in the program is either an intern or a regular employee. | | |
| BLOK 5 | Research project | Concurrently with the exchange programme, students work individually on research study on a topic of their choosing, working with a mentor (in most cases) from another institution. This study might well be the basis of a doctoral dissertation or a master's thesis, and those of publishable quality (hopefully, all of them!) will be published on-line and in print. The product (for the purpose of this project) is intended to be a practical inventory of issues and problem-solving strategies related to a particular topic. To take an example, a student might look at how different educational systems have reacted to student dress, which makes a religious statement (e.g. the hijab or Islamic scarf has caused controversy in France and Belgium but generally not in other countries; what policies seem to work best and on what principles should they be based?) | Research projects are presented at the end of the programme and evaluated by the Examination Commission. |
| | Defence (Forum) | A three-day Forum will be held for all students, both graduate students and experts. Each student will present the results of his or her research (copies distributed in advance) and experts will react with suggestions for improvement and for future research. Each student will gain a broad overview of the field of education law and policy through the presentation and discussion of many different topics. | The final graduate assessment is based on academic examination grades and an evaluation of the consulting and research projects and the defence. |

2. Follow-up of results foreseen by the partners: databases, publications, conferences, etc.

| | | Place Activity | Title |
|------|--------|----------------------------|--|
| 2004 | Sep-04 | | |
| | Oct-04 | | publication: the Right to Education and Rights in Education |
| | Nov-04 | 25-30 November Amsterdam | Worldconference on the Right to education and Rights in Education |
| | Dec-04 | | |
| 2005 | Jan-05 | | |
| | Feb-05 | | |
| | Mar-05 | | publication: religious instruction in state schools in Europe |
| | Apr-05 | | |
| | May-05 | | publication: IJELP special issue Bologna (Norway conference) |
| | Jun-05 | Workshop in Luxembourg | Cultural and linguistic rights in education, mobility and migration - education and the law |
| | Jul-05 | | |
| | Aug-05 | | |
| | Sep-05 | | |
| | Oct-05 | | publication: linguistic rights in education in Europe |
| | Nov-05 | Bruges (College of Europe) | 3th EDUCATIONAL FORUM |
| | Dec-05 | | |
| 2006 | Jan-06 | | |
| | Feb-06 | | |
| | Mar-06 | | |
| | Apr-06 | | |
| | May-06 | | |
| | Jun-06 | Austria | Quality assurance and accreditation in higher education |
| | Jul-06 | | |
| | Aug-06 | | |
| | Sep-06 | | |
| | Oct-06 | | |
| | Nov-06 | Conference in Finland | Financing of Higher Education - the role of the state in guaranteeing equal access to higher education |
| | Dec-06 | | |

6. Acknowledgements and references

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Belgium - College of Europe
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 Netherlands – Erasmus University
 United Kingdom - University of Southampton
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7. Annexes

1. Information on the conferences including the conference programmes which were also used for discussions between the partners and associates for workshop meetings on the 5th framework research programme
2. Part 1: compendium of country reports on educational freedom and accountability
3. Part 2: compendium of country reports on liability and responsibility in education
4. Information used for the databank