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FLEMISH COMMUNITY, BELGIUM by Jim Daridder

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Overview

Julius Caesar may well have called the ‘Belgians’ the bravest of all the Gauls in his *De Bello Gallico*, but this did not prevent the territory which is currently known as Belgium to become the most conquered and retaken piece of land in western Europe. Throughout the centuries, control over the fiefdom passed from (among others) the king of France over the Spanish king to the Austrian Habsburgs, back to the French (Napoleon) and finally to the Dutch. After the county of Flanders had been a pioneer in the formation of cities (Bruges, Ghent) and Antwerp had lived its golden era and brought forth artists of world renown such as Rubens, Van Dyck and Jordaens, the region lost most of its political power and stature. By the end of the sixteenth century, the county of Flanders and the duchy of Brabant were no longer the crown jewels for which battles were fought, they were merely the battlefield that the successive powers used to weaken their opponents and gain control over other, more desirable regions. More than once, Flanders and/or Brabant were offered as a gift during negotiations for peace; each time, the offer was rejected. It was a time of destruction, pillaging and decline of the population. There was no ‘national feeling’, nor any inclination to revolt against the ruling monarch.

Given these conditions and the rather docile nature of the population – as far as political aspirations and independence were concerned – it's remarkable that education, more specifically the freedom of education and the right to autonomously found and organise schools without too much governmental interference, has been a catalyst in the only two 'Belgian revolutions' in history.

Since 1713, the so-called 'Southern Netherlands' had been under Austrian rule. At that time, education was nearly completely in the hands of the Catholic Church, partly as the heir to the monasteries but mostly by lack of any 'public' initiative altogether. Emperor Joseph II was a man of his time – the Age of Enlightenment – and had drastic changes in mind. After granting the Protestants freedom of religion, the emperor abolished a number of 'useless' monasteries and introduced civil marriage. Adding insult to injury, he abolished the bishops' seminaries and reorganized the training of priests. When he also imposed new administrative and judicial authorities, clergy and nobility forged an alliance. Events quickly got out of hand, and in 1789 (alongside revolution in Paris and turmoil in Holland) Europe witnessed the birth of the 'Republic of the United Belgian States'. It lasted until 1790, when the 'Belgian State', already succumbing to internal strife, returned to Austrian control, only to be succeeded by the French in 1794.

After Napoleon's defeat at Waterloo, control over the region passed to the Netherlands and the United Kingdom of the Netherlands was formed. Like Joseph II before him, King William I had 'new ideas', and most were equally ill-received. He failed to fully integrate the southern provinces: they were underrepresented in parliament, French did not get the same status as Dutch in the army and the national administration. Moreover, King William made the same 'mistake' as his Austrian predecessor: he intervened radically in the educational system.¹ The training of priests was to become a matter of state, not of the church, and the existing church monopoly on the schools was to be ended. Primary schools could remain catholic, but were brought under state supervision; for secondary education, the state organised official schools and equally raised the level of supervision over the existing Catholic schools. History was about to repeat itself. Once again, two very dissimilar groups were driven into each other's arms. Since society had become more politically organised than in 1789, those groups no longer represented a social status (nobility, clergy) but political movements with a more formalised 'striking power'. The reforms of King William led to the 'monster coalition' of Liberals and Catholics and after a number of skirmishes rather than a full scale revolutionary war, the kingdom of Belgium was founded in 1830.

The organisation of the educational system was of course not the most important issue in both revolutions, but it was undeniably a strong catalyst, and it remained a delicate issue for more than a century. The significantly opposing views on education of Liberals and Catholics would lead to several open political conflicts and dominated elections. It wasn't until the *School Pact* of 1958² that hostilities finally ceased.

The independent unitary and centralized state of 1830 and the very liberal Constitution of 1831 were reformed in several steps between 1970 and 2012, to develop a complex federal system. At the bottom, there are communes (municipalities) and provinces. At the

top, there are the federal state, three Communities and three Regions. Since the three Communities as well as the three Regions cover the entire territory of the federal state, it is obvious that they overlap. Regions were formed in answer to the desire for more regional diversity in territory-related issues such as the economy, environmental and building regulations, housing, traffic, etc. Regions divide the country along strictly geographical lines, whereas Communities are based on geographical and linguistic criteria alike. There is no hierarchy between the three top levels, although the competences of the Communities and the Regions are determined by federal parliament via a legislative procedure of special majorities. In order to maintain a minimum of coherence, the principle of *federal loyalty* was imbedded in the constitutional reform of 1993: the federal authority, Communities and Regions not only adhere to their respective areas of responsibility but also act in such a way as to avoid all conflict of interest among themselves, the objective being to ensure that the various institutions function as a balanced whole.

Communities were formed to allow for specific policies in person-related issues such as culture, education, and welfare. etc. The powers of the Communities lie essentially in the following areas:

- cultural matters, i.e.: safeguarding and promoting the language; promoting the training of researchers; fine arts; cultural heritage, museums; libraries and record collections; radio and television; support for the press; youth policies; ongoing education and cultural events; physical education and sport; recreation and tourism; preschool training, adult education, and extracurricular, artistic, intellectual, civic and social training; social promotion;
- occupational training and redeployment;
- education, except for setting the upper and lower age limits for compulsory schooling, minimum requirements for degrees, and the education pension scheme, which continue to fall under federal jurisdiction;
- certain major aspects of the health care and social welfare policies;
- the use of languages, with exceptions concerning special status municipalities, services whose activities extend beyond the linguistic region in which they are established, and federal and international institutions whose activities are common to more than one Community.

The Parliament of the Flemish Community and its Government are now responsible for education policy in Flanders. The current constitutional and legal framework is the result of evolutions within the population in general, as well as significant historical and philosophical differences between the northern (Flanders) and southern (French-speaking Community) parts of the country who each gained, via the Communities, control over the organization of the educational system.

At the time when the state was given the right to organize its own education, it was more and more accepted that non-believers also had the right to *non-religious education*, i.e. the so-called public schools organized by the municipalities, provinces and the national state, later the Communities. While historically the overwhelming majority of the Flemish have been Roman Catholic, in the Walloon part there have always existed strong socialist and atheist tendencies.

By consequence, there are relatively more public schools in the south than in Flanders. The intermittent political conflicts over the independence and public funding of (predominantly non-governmental Catholic schooling during the nineteenth and twentieth centuries were finally laid to rest by the law known as the *School Pact* of 1958, an inter-party agreement that continues to serve as the framework for law and policy in the non-university sector. Secularists and Catholics put aside their struggles for hegemony and returned to the earlier emphasis upon freedom of choice and democratization of education, establishing a school peace (the *Schoolvrede*) that has ensued.

As is the case in most western European countries, personal religious belief has become much less of a dominant factor in society in general and in the political landscape in particular. The difference in the presence of both official and free schools in both major Communities remains a witness of the historical evolution.

The constitutional and legal framework

To allow the transfer of education to the Communities, the federal Constitution has been deeply modified in 1988. Article 24 of the Constitution is the constitutional basis of educational freedom in Belgium.³ It consists of five major elements. First, the freedom of choice of the parents, that is the right to choose the school, is ensured by the Community (Art. 24, §1). Second, everyone has a right to instruction which respects fundamental freedoms and rights. Access to instruction is free until the end of compulsory schooling (Art. 24, §3). Third, access to education is free up to completion of mandatory schooling (Art. 24, §3). Fourth, all pupils subject to compulsory schooling are entitled to moral and religious education at the expense of the Community (Art. 24, §3) and fifth, all pupils or students, parents, staff members, and educational establishments are equal before laws or decrees. (Art. 24, §4).

However, the Constitution was only changed for internal purposes, without regard to the international obligations of Belgium. For example, the Constitution continues to allow imposing charges to parents of children in basic school, in contradiction with article 14 of International Covenant on Economic, Social and Cultural Rights.⁴

According to the (federal) Act of 29 June 1983, compulsory education in Belgium lasts for 12 years, from age 6 to 18. Children are required to attend school fulltime up to

the age of 15, completing primary education and the first two years of secondary education. Pupils who have not completed the first two years of secondary education are required to attend fulltime education until the age of 16.

After receiving the competence in Education in 1988, the Flemish Community has been working towards a unification of the legislation, mainly by means of so-called 'level-decrees' (*niveaudecreten*), each regulation a specific level of education. Thus, we have the decree of February 25, 197 on Primary Education, the decree of May 27, 2011 on Secondary Education and a number of decrees on higher education.

The structure of schooling

Distribution of competencies within the federal state of Belgium

The Communities have been given a nearly all-embracing competence over educational legislation and policy. In theory, this competence could be taken away again by the federal parliament, since the distribution of competences over Communities and Regions is governed by federal law. This is, from a political point of view, inconceivable. In accordance with art. 127, §1, 2° of the Constitution, there are nevertheless a number of specific issues that remain within the federal competence. They are meant to guarantee a common system of education. The most important are: the establishment of the beginning and end of obligatory schooling, the interpretation of the minimum conditions for receiving degrees, and support to various education-related institutions and activities.

Subsequently, the Flemish Community has, in its own legislation, upheld the long since established freedom of education and the decrees that provide the general legal framework redistribute a fair amount of that freedom to the variety of persons, institutions, public entities, etc. that founded and control the schools. The legal person responsible for the school is called the 'inrichtende macht', equivalent to the 'organizing body' or the 'school board'. Thus the legal status of the subsidized personnel is regulated by decree, but the appointing competence lies with the school board. The organization chart of school staff is regulated by decree and those principals, teachers and supporting staff are subsidized by the Community, but the school board is free to engage additional staff at its own expense. The board also has the right to draw up the pedagogic project and the school regulations, thereby having the opportunity to determine the specific identity of the school. In principle, the school board owns the school buildings., while subsidies concerning the buildings are regulated by decree.

As far as the curriculum is concerned, most competences remain at Community level. The attainment targets (eindtermen) terms are defined by the department of Education, the schools have considerable latitude on how to achieve them.

Who organizes the schools?

Primary and secondary education in Flanders can be either public (official) or private (free) and is provided by three ‘networks’.

First, the education organized and offered by the Community itself is the official financed (not subsidized because the grants remain within the Flemish Community and under (indirect) control of the Community’s political organs) education: in order to limit political influence of parliament and government, a separate legal person (*Gemeenschapsonderwijs*) has been created by special decree, which acts as the organizing body. ⁵ Secondly, other public authorities have also set up schools: municipalities (local schools, mostly primary schools), cities (also local schools, but usually both primary and secondary education) and even provinces (provincial schools) form the official subsidized education (*officieel gesubsidieerd onderwijs*). Thirdly, private persons or institutions (mainly the Catholic Church, but also Jewish schools and method schools) control the free subsidized schools (*vrij gesubsidieerd onderwijs*).

The structure of schooling in the Flemish community

Traditionally, there are three levels of education: elementary or primary education (For these levels, there also exist schools for special education (*buitengewoon onderwijs*), which focus on children with a handicap or a serious learning disorder), secondary education and higher education.

Elementary education includes nursery school and primary school. Nursery school is provided free of charge for children aged 2.5 to 6, but is not compulsory. In order to maximally develop social skills and avoid falling arrears linguistically (specifically the children who do not speak Dutch at home), school attendance in nursery school has been intensively promoted by the government in recent years (*‘kleuterparticipatie’*, preschooler participation). Primary education is meant for children aged 6 to 12 and consists of six consecutive grades. After successfully finishing this cycle, children are granted a certificate of elementary education. Until 2003, each school board could decide whether to organize nursery education, primary education or both. Since then, in order to decrease the number of independent schools all newly founded elementary schools have to include both sublevels.

Secondary education is meant for youngsters aged 12 to 18 and consists of six years, divided into three cycles (called *‘graden’* – grades) of two years each. The first grade consists of the 1st and 2nd year of secondary education. Although there is a tendency towards fully integrated secondary schools, there also exist separate schools that offer only this first grade (so-called *‘middenschool’*). The first cycle is further divided in a first grade A and a first grade B, the latter being specifically designed for pupils with learning disabilities or less fit to attend predominantly theoretical education. The first grade B is a

transition grade between primary and secondary education.

After the first grade, a number of choices have to be made. Firstly, on the type of education, secondly on the emphasis within that type. The second and third grade of secondary education are divided into four types of education: ASO (General secondary education, providing a broad general training, mainly offering a solid foundation for attending higher education), TSO (Technical secondary education, concentrated on general and technical-theoretical subjects. After TSO, the youngster can hold an occupation or continue studies in higher education), KSO (Artistic secondary education, linking up a general and broad training with active arts practice. After KSO, the graduate can hold an occupation or attend higher (artistic) education) and BSO (Vocational secondary education, a practical education form in which the youngster learns a specific occupation, whereas he/ she is also given general training). Each type is subsequently divided in different orientations (e.g. emphasis on Latin and/or math and/or languages in ASO, specialization towards carpentry, plumbing etc. in TSO or BSO, etc.), sometimes with a significant number of possible combinations. There is currently much political and pedagogic debate on whether the choice towards a specific type of education shouldn't be postponed towards the end of the second grade. The current system is seen by some as partly responsible for what is called the 'waterfall- effect': as many pupils as possible try to start in the ASO, which is regarded to be superior to the other types (because of both social status as well as (presumed) career opportunities in professional life), when they fail they 'descend' into TSO and when forced to, they 'further descend' into BSO. It is argued that TSO and BSO are not socially inferior, that the current social perception is stigmatizing youngsters and furthermore is placing a mortgage of the country's economy, since skilled and motivated technicians are becoming scarce. In the third grade specific training aims at the eventual choice of occupation or the possible plans to study in higher education. In order to effectively 'specialize', it is mandatory to opt for the same orientation in both years of this third grade (5th and 6th year).

According to the liberal education regime of Belgium, secondary school graduates can start higher education without entry exams, except in a few Art programs and in Medicine and Dentistry.

The federal *Compulsory Education Act* of June 29, 1983 (*Leerplichtwet*) makes education mandatory for all children for a period of twelve years, starting in the month of September in the year of their 6th birthday until the end of the month of June of the year in which they turn 18. In practice, this means that school (or rather: education, see below) is mandatory in primary and secondary school.

Since repeating a year is not uncommon, especially in secondary school,⁶ quite a few youngsters graduate after turning 18, 19 or even older.

To avoid school drop-out, specific programs are offered in secondary school to pupils of 15 or 16 years of age, which allow a combination of school education and vocational training. A first option is to enroll in part time vocational secondary education (*deeltijds*

beroepsonderwijs), organized by specific centres that work autonomously or are connected to a school offering full time secondary education. Under specific conditions, these pupils can obtain a regular diploma of secondary education so that the road to higher education is not irrevocably cut off. Secondly, pupils that desire a more practical training towards a specific independent profession can enter an apprentice system which offers four days per week of practical training in a small business (KMO) or with an independent professional,⁷ and one day per week of theoretical education in a Syntra-centre.

Freedom to establish non-state schools

As illustrated above, the absolute freedom to establish a school has been pivotal in many a political battle and may be considered as one of the cornerstones of the Belgian constitutional system. Article 24 of the Constitution clearly states that education is free: the individual right to open a school may not, in any way, be made dependent upon a prior authorization by the government. Neither the legislator nor the executive power may promulgate any preventive measure that would hinder the freedom of the provision of education.

This implies, in theory, that anyone is able to teach; any measure intended to restrict this is unconstitutional. Furthermore, the constitutionally guaranteed freedom applies to all kinds of education, training of tuition. One notable exception are the driving schools, which need to be certified by the government.

However, this does not mean that every school can, will or must be recognised and subsidised. The government has the power to impose conditions for inclusion in the grant ruling and for use of funds (but only if the school calls for state intervention), and it can also impose conditions with a view to the recognition of certificates.

Homeschooling

Although the federal act of June 29, 1983 (*Leerplichtwet*) is often translated as the *Compulsory School Attendance Act*, it would be more accurately referred to as the *Compulsory Education Act*. While it obliges all parents (residing foreigners as well as Belgians) to have their children attend school for a period of twelve years⁸, it equally clearly states that this obligation can also be met by home teaching. Thus, the freedom of education is extended beyond the right to found schools, to include the right to teach.

The parents (or the persons who have custody over the child) have to declare and affirm that the education that they will give of have given by others, meets the minimum requirements laid down in the Act. They are responsible for the practical organization of the home schooling and they also have to bear the cost. Additionally,

the Flemish education Inspection has been empowered (albeit with only a ‘marginal discretion’) to verify whether the standards are indeed being met. A refusal to allow an inspection or two consecutive negative evaluations can result in a mandatory enrolment of the child in an accepted, financed or subsidised school. The home teaching can however resume with the permission of the Inspection and after verification that all shortcomings have been dealt with.

It is self-evident that parents who provide home teaching, are not competent to provide official diplomas. In order to get the certificate of primary education or the diploma of secondary education, the children who had home schooling will have to, respectively, pass an exam in one of the ten designated ‘exam schools’ or pass the exams of the so-called Exam Commission.

Home schooling or home teaching is not to be confused with education at home (onderwijs aan huis), which is a public service that is made available for pupils both in primary⁹ and secondary¹⁰ schools. Pupils who are temporarily (but for a longer period) unable to attend lessons at school because of illness or accident, have the right to be taught at home. The same right is granted to children who are permanently incapable of attending school because of a handicap.

School choice not limited by family income

Strictly private schools set aside,¹¹ the Flemish Community directly finances or subsidizes all primary and secondary schools. Since these grants encompass teachers fees, the majority of the working costs and even subsidies for buildings, the school board’s net cost to organize education in Flanders is very low. This justifies the policy that financed or subsidized schools (both official and free) are not allowed to impose tuition fees as such; the financial participation of the parents is limited and must bear a relation to specified and mandatory expenses that are directly linked with the provided education. In short, it is both federal (constitutional) and Flemish policy that children should be given maximal opportunities to enjoy education and that all financial hurdles should be cleared.¹²

Article 24, §3 of the Constitution states that everybody has the right to education and that access to education is free of charge until the end of the mandatory education (as seen above, normally between the ages of 6 and 18). One notes that the Constitution, thus altered in 1988, doesn’t make education as such (i.e. entirely) free of charge, but only access to education. Parliament did have complete gratuitousness in mind, but was hampered by financial restraints.¹³ However, parliament’s philosophy has been picked up and supported by the Constitutional Court: the schools may impose a contribution for didactic materials and certain activities, but this may not exceed the real cost of those goods or services and school books and other school requisites should be financed by the grants received.¹⁴

The constitutional principles have been further elaborated in the decrees of the Flemish

Community. Moreover, the Flemish Department of Education has been working at a gradual implementation of effectively free education.

This has already been achieved in primary education. Since the Decree of July 6, 2007 primary school must be completely free of charge for everything in connection to reaching the ‘attainment targets’ (*eindtermen*) and the pursuit of ‘development aims’ (*ontwikkelingsdoelen*). School books, calculators, other necessary materials and even compasses, fountain pens, etc. have to be furnished per pupil per year to allow all schools to meet this requirement. In addition, the fees and costs that can be charged are strictly limited. The current legal framework is based on three principles. Firstly, the education authority stipulates the amount of the maximum fee (*maximumfactuur*) the school can charge for costs that are related to mandatory participation but not directly related to the attainment targets (Swimming lessons (except for one year, during which they are part of the end terms), entrance fee of museums, one day school trips, subscriptions to magazines used in class, etc.). Currently (2012), the maximum is set at 25 to 40 euro per year in nursery school and 70 euro per year in elementary school. Secondly, a separate maximum has been set for extramural activities (school trips) lasting longer than one day (currently 400 euro for the duration of elementary school, i.e. 6 years). Finally, schools can charge contributions for goods or services that are used on a voluntary basis, such as school meals, child care before or after regular school hours, etc. Prices must be in proportion to the real economic cost.

In secondary school, access is free of cost but the level of gratuitousness of primary school has not yet been reached. Schools may charge for specific activities and materials, but again the contribution must be based on effective, provable and justifiable costs. The regulations concerning contributions must be announced in writing, as part of the school regulations, no later than the beginning of the school year.

School distinctiveness protected by law and policy

The right of every organizing body, and indeed of every school to formulate its own pedagogical project and school regulations, and the wide margin of appreciation they enjoy to that respect, could in theory lead to a situation in which all schools are so different and distinct, that no two are alike. The Constitution and the legal framework do indeed allow for such a situation. However, both practical and regulatory obstacles stand in the way. First of all, legislation on staff, pupil’s rights, conditions regarding recognition etc. inevitably have an effect of uniformity. Second, co-operation between organizing bodies within ‘umbrella organisations’ has also led to a certain degree of harmonisation. Although in recent years the Community schools have shown a tendency towards developing a more individual identity, the fact that part of the organizing body remains centralised on the Flemish level secures a more than minimal ‘interchangeableness’ between those schools. On the other side, showing a reverse evolution, small organizing bodies that are often in charge of a single school (e.g. private initiatives that founded a single school, local municipal schools) have

joined forces, forming ‘umbrella organisations’ (koepelorganisaties), in order to share know-how, lighten administrative burdens, etc. This too has inevitably had an effect of equalisation or harmonisation

Nevertheless, the right of free choice between sufficiently distinct schools remains guaranteed, both in law and in practice. The state inspection is not qualified to evaluate teaching methods or the ‘*schoolwerkplan*’ of the educational institution, because these are covered by the principle of educational freedom. Neither may the courses of religion or secular ethics be inspected by the state: this falls to the legal representative bodies of each recognized philosophical and religious community.

Furthermore, government is required to provide subsidies to any school that meets the preset objective criteria of quality, number of pupils, etc. Officials may not exercise discretion about which schools they will fund. The criteria for approval and thus for subsidy include compliance with the language laws, adopting an approved grade-level structure, having the required number of pupils and an adequate facility and school equipment, following the curriculum guidelines set by the government for all schools of that type, and accepting state inspection to ensure that the other requirements are met.

Each school may employ its own curriculum and pedagogy in meeting the government guidelines, and arrange for staff development and consultation services. The Community sets forth final attainment targets (*eindtermen*) and development goals (*ontwikkelingsdoelen*). The schools work out a curriculum by themselves in relation to the attainment targets and development goals that reflects, among other factors, the individual school’s pedagogical project. Schools organised on a certain methodological or ideological basis which cannot function within this system may ask exemption from the attainment targets and development goals. In the process, they must identify their own attainment targets. These are subject to approval by the Flemish government and ratification by the Flemish Parliament.

In practice (though certainly not in law or in theory), the right of parental choice in Flanders is defined largely in terms of the alternatives of secular or Catholic schooling. There are, however, a number of non-Catholic subsidized free schools, with either a religious or a pedagogical distinctiveness.

The legal significance of a school’s distinctive character makes it essential that the school’s governing board explain its pedagogical project clearly, along with any philosophical basis, and update this as regularly as necessary. Parents have a right to this information as they choose schools, and staff have a right to know to what pedagogical project they are committing themselves.

Decisions about admitting pupils

The right to refuse the enrolment of a pupil has long time been seen as an integral part of the freedom of education. Specifically, the free subsidised schools consider(ed) this to be elementary, and contrary to official schools (who have always been limited in their grounds to refuse pupils. Official schools could only refuse pupils who didn't meet the legal requirements for admittance) they wanted to reserve to themselves the right to deny admission to a pupil on grounds of religious or philosophical differences or 'incompatibility'. In practice however, in some cases this led to situations that were considered undesirable by authorities, e.g. the implicit refusal of pupils based on ethnic grounds or social status.

While the original version of the decree of February 25, 1997 on Primary Education (decreet Basisonderwijs) still left the school a relatively wide margin of discretion,¹⁵ the current decree of June 28, 2002 on Equal Opportunities in Education intends to give parents an enforceable right to select the school for the primary and secondary education of their children. By consequence, the motives to refuse enrolment are now limited to the reasons listed by (government) decree. The Constitutional Court has ruled that this restriction of the freedom of education is acceptable, because free schools also provide in a public service.¹⁶

First, there are the preset requirements concerning the qualifications of the pupil. Art. III.7 of the 2002 Decree states that the school board refuses the enrolment of a person (of age or not) who does not fulfil the conditions of admittance that have been set by law. In primary school, there are no specific standards the pupil has to meet in order to be admitted, nor are there qualifications (diploma, certificate) required. In view of the fact that the school board is given the freedom to organise its nursery school and primary education,¹⁷ it is generally accepted that the school does have the competence to decide in which class or grade the inscribed pupil will be admitted, based on the acquired skills. In secondary education however, the certificate of primary education is principally required to be admitted, albeit that exceptions have been foreseen by government decree.¹⁸ Pupils possessing certificates of previous studies, not issued by a school recognized, financed, or subsidised by the Flemish Community, can only be admitted after a favourable decision by the class council for admittance.¹⁹

Subsequently, enrolment can only be refused if the school has already reached its maximum capacity²⁰ (the school is declared 'full' in accordance with preset procedures)²¹ or if the pupil has been expelled for disciplinary reasons in the last two years.²²

If all requirements are met and none of the motives for refusal of enrolment apply, the effective admittance in both primary and secondary school depends on the explicit agreement of the parent(s) (or the pupil above the age of 18) with the pedagogical project of the school and with the school regulations (concerning

conduct, in-house rules, discipline, etc.). Without this agreement (by signature), enrolment is not possible.

Every refusal of admittance must be justified and the parents must be notified of the decision within four days. A specific appeals procedure is available within the administration of the Flemish Community, leading to an advisement on whether the refusal is in accordance with the statutory rules. If the dispute remains unresolved, the parent will have to turn to a judicial procedure.

Once acquired, the enrolment remains valid for all the remaining years within the same level of education (primary school and secondary school), except in case of disciplinary expulsion or voluntary deregistration.

The impact of the 2002 Decree must not be underestimated. However, the fact that this decree has significantly narrowed the margins of discretion for the school board to refuse the enrolment of a pupil, does not mean that those margins are now clear, definite and beyond discussion. On the contrary, several new points of controversy have arisen.

For example, the condition that parents must confirm their agreement with the pedagogic project of the school (and, of course, act accordingly during the school term) could inspire school boards to include stipulations aimed at discouraging application by certain pupils, families, etc. By consequence, one may ask whether the competence of the school board to determine the specifics of the project is in any way limited. The decree states only that the international and constitutional principles concerning human rights and children's rights must be honoured.²³ In view of those principles, the question whether single-sex schools are in accordance with national and international regulations remains undecided;²⁴ in any case, such (subsidized) schools do still exist, albeit that they have become rare and are mostly situated in schools with a very specific religious project. Discrimination based on race however, is strictly forbidden. Such a distinction violates the non-discrimination principle of the Constitution (art. 10 and 11) and cannot possibly find any grounds of justification within the pedagogic project, since the freedom of the organizing body to define its content does not stretch that far. Furthermore, the Commission on Pupil's Rights (*Commissie Leerlingenrechten*), an administrative commission that is part of the Flemish administration and advises on disputes concerning the refusal of admittance of pupils, has advised that the pedagogic project may not be so restrictive or specific that it imposes veritable conditions for admittance of a religious or philosophical nature, such as belonging to a specific religious cult.²⁵ However, in 1999 the Court of Appeals of Antwerp has ruled that parents do not enjoy an 'unconditional' right of enrolment in the school of their choosing, and that belonging to a specific religion or even community within a religion is a matter of religion itself. Thus, it was decided that a school (in this case: a Jewish school) may propose the condition of membership of a specific community within the Jewish faith, and that the assessment whether the applicants meet that requirement is up to the religious authorities.²⁶ This judgement dates back to the period – and thus the legal framework – before the 2002 Decree,

but it is still unclear whether the freedom of education as seen and interpreted by the Court, has been affected by the 2002 Decree to such a degree that the Court's vision on the pedagogic project could no longer be upheld.

Another question is whether every formal agreement with the pedagogic project must be accepted as such, or whether the school may nevertheless refuse admittance because that agreement is perceived as being obviously simulated, and coming from someone who is clearly unable or unwilling to conform to that project. It has been argued that the right of enrolment cannot be absolute²⁷ and that it must be weighed against other fundamental rights and liberties²⁸, including the freedom of education. This matter has been raised especially in relation to Jewish schools and method schools like Steiner or Montessori.²⁹ Some doctrine has concluded that since the 2002 decree, the difference between official and free schools no longer lies in the motives to refuse the admittance of pupils but in the freedom to draw up the pedagogic project and root their philosophical principles therein.³⁰ Depending on the weight the pedagogic project carries within the whole of the legal framework of 2002, one could conclude that an apparent religious incompatibility between the pupil and that project could give grounds to a refusal of admittance. In accordance with a circular letter (*omzendbrief*) of the Department of Education,³¹ the Commission on Pupil's Rights (Commissie Leerlingenrechten) has always maintained that it is not up to the school to estimate in advance whether the pupil will be able to adhere to the pedagogic project.³² It can be argued that under extreme circumstances, an apparent and predictable unwillingness to adhere to the pedagogical project should be sufficient grounds for a refusal of admittance.

Decisions about staff

The legal status of the school staff is complex. Both in primary and secondary schools, the relations between public organizing bodies and their personnel are governed solely by statute, while the relations between private legal persons (free schools) and their staff are partly of statutory nature and partly governed by private labour law. In addition, a distinction has to be made between the financed and the subsidized official schools.

The legal status of most staff members in the education organized by the Community (*Gemeenschapsonderwijs*) is outlined in one decree of March 27, 1991;³³ the status of the subsidized personnel of subsidized (official and free) schools is governed by another decree of the same date. At the same time, subsidized personnel in free schools also have a contractual relationship with the organizing body. One of the legal consequences is that personnel in free schools does not have access to the administrative court (Raad van State) but only to the judicial courts.

Disciplinary regulations are equally split up: there is a government decree of May 22, 1991 concerning the disciplinary rules in the Community organised education, and a

government decree of the same date concerning the disciplinary rules *and* the rules on staff evaluation in subsidized schools.

Members of staff that fall under the provisions of either of the 1991 decrees and that received an evaluation ‘insufficient’, can lodge an appeal with the College of Appeal. This consist of three chambers, one for each educational network. The competent chamber takes a motivated decision and can nullify the challenged evaluation. The decisions of the chamber for the Community Education and those of the camber for the subsidized official education can be appealed against before the Council of State (*Raad van State*). Decisions concerning the subsidized free education must be brought before the industrial tribunal (*arbeidsrechtbank*).

Along the same lines, there exists a Chamber of Appeal, competent to hear appeals against disciplinary sanctions, preventive suspensions and dismissals based on severe and urgent reasons (*dringende redenen*). This board is equally composed of three separate chambers, one for each educational network. Again, the further appeals procedure differs according to the network involved.

The recruitment and appointment of education staff belongs to the competence of the organizing body, but not all of them enjoy the same amount of freedom or discretion. The aforementioned decrees of 1991 provide a number of general conditions for the recruitment of new teachers. The subsidized schools (both official and free) must employ staff who have the necessary qualifications, equivalent to those possessed by (Community organized) public-school staff. The choice among applicants with the same qualifications is limited by a system of priority appointment: only is there is no teacher with priority or existing teacher with a right in the position, is the school board free to choose among equally qualified applicants. Those requirements being met, free school boards are however totally free in making their choice and do not have to explain why they have chosen someone instead of another. They may make decisions about employing and dismissing staff based upon the religious or pedagogic character of the school. Subsidized official schools enjoy less freedom, since they have to adhere to the so-called general principals of good management, including the obligation to formally motivate their decisions (such as the decision to appoint or not to appoint). Obviously, the financed official schools have to abide by the same rules.

Accountability for school quality

*Inspection*³⁴

Teachers must conform their teaching to the distinctive character of the school that employs them, whether neutral (official schools) or denominational. Failure to do so can result in disciplinary action, up to and including dismissal. It goes without saying

that the considerable grants received by the subsidized schools justify a minimum supervision and control. At the same time, freedom of education must be respected. In general, two types of supervision have been put in place.

Firstly, there is the audit of verification (*verificatie*). The auditors control the schools on the number of inscribed and regularly attending pupils and the relevant administration and documents. Besides that, the audit checks the use of the grants for operational costs.

The inspection regulated by the Inspection Decree of July 17, 1991, on the other hand, is competent to verify whether the school respects the attainment targets, the legislation on the use of language and the minimal school rosters. The inspection is also competent to check the quality of the didactic materials and to advise on the retention or suspension of subsidies.³⁵

Repeating a year

With relation to primary education, the decree of February 25, 1997 contains no specific stipulations on whether the final decision about passing or repeating a year is taken by the school or by the parents. There are arguments on both sides.³⁶ The Council of State has expressed its doubts on the competence of the school;³⁷ the president of the tribunal of first instance in Brussels³⁸ has ruled that the Decree grants primary schools the right to organize the education freely (which has to be understood as ‘contrary to secondary education’, as far as primary schools are not obliged to organize six different classes for the six years of elementary school) and that a school can impose its decision when the school regulations have allocated that competence to the class council. Some clarification on the precise intentions of Parliament seems to be in order. Meanwhile, it could be argued that the Decree hasn’t granted the primary school the competence to decide the matter, but that is hasn’t excluded the assumption of that competence by the school either, in which case the parents may decide whether their child passes or not, unless the school regulations (with which the parents have agreed) explicitly reserve that competence to the school council.

The state of affairs is quite different in secondary education.³⁹ Regulations⁴⁰ clearly state that only the class council is competent to decide whether the goals have been attained and the pupil can therefore pass to the next year. Should the class council have insufficient data at its disposal at the end of the year (June 30th), additional tests can be imposed, in which case the final decision is postponed to the end of August or the beginning of September. This final decision, be it in June or later, can only be one of three possibilities: an A-certificate means that the pupil has succeeded and that he or she can progress to the next year with an orientation of this of her

choosing; a B-certificate means the student has succeeded and that he or she can progress to the next year but with exclusion of some orientations which are considered too difficult; a C-certificate is given when the pupil did not acquire the necessary competences and is thereby forced to repeat the year.

In deciding over the certificate, all schools, including the free subsidized schools originating from private initiative, act in the capacity of a public authority. In other words, when deliberating over a pupil, the class council of a secondary school is furnished with a competence of a public nature, that is binding for other secondary schools. No secondary school is allowed to register a pupil in year X if the pupil received a C-certificate for the previous year in any other school. That is why, after the internal appeals procedure, even decisions by class councils of free schools can be appealed against before the Council of State.

Teaching of values⁴¹

Each school must establish the goals of its educational program. Sometimes, these goals can only be realized on an ideological, denominational, or methodical basis. These goals and the way to realize them are part of the pedagogical project and can therefore be chosen by the school, but only as long as they remain within the framework of the educational legislation. One of the limits is imposed by art. 24, §3 of the Constitution: every education has to respect human rights and liberties. This means the school can make adjustments for the sake of its own pedagogical project, provided that it continues to satisfy the objectives set by the education authorities.

As far as religious education lessons are concerned, only official schools have the obligation to offer optional instruction in faiths and philosophies of life recognized by the Education Department,⁴² and to respect the beliefs of every family with children in the school.⁴³ Free subsidized schools can offer a choice between different philosophical tendencies on a voluntary basis. Currently, a debate is going on whether it should be a part of the school's mission to provide religious education, or whether this isn't rather a matter of private life and the upbringing and education of children at home, in which case the two hours a week could perhaps be put to better use instructing courses in comparative religion or a general introduction in philosophy.

In both primary and secondary education, parents choose between the courses of secular humanism or one of the recognized religions at the moment of enrolment. The choice can be renewed or altered at the beginning of every new school year. Children of twelve and older have the right to be consulted in making that choice.

In order to respect the religious beliefs of those who do not adhere to one of the recognized denominations, there is the possibility to opt out of any course of religious

education. The right to choose a religious education in accordance with one's beliefs has been deemed so important that even a temporary obligation to attend religious classes whilst awaiting a decision on the demanded exemption is considered a violation of art. 24 of the Constitution.⁴⁴ This possibility to opt out exists only, specific exceptions set aside,⁴⁵ in the official schools. The parents who have religious objections against one of the provided courses, fill out an application to secure an exemption. The school has no competence to evaluate the demand, nor does the applicant have to specify which religion or denomination he does adhere to. The school merely takes note of the application; control is limited to the right to verify that the hours during which the other pupils attend religious education, are usefully spent in relation to the pupil's own philosophical beliefs.

Endnotes

- ¹ L.M. VENY, *Onderwijsrecht. I. Dragende beginselen*, Bruges, Die Keure, 2010, pp. 3-5.
- ² E. WITTE, J. DE GROOF and J. TYSENS (eds.), *Het schoolpact van 1958. Ontstaan, grondlijnen en toepassing van een Belgisch compromis*, Brussels, VUBPress, 1999, 895 p. For an account in English of the Belgian historical developments, see C. GLENN, *Contrasting Models of State and School*, New York and London: Continuum, 2011.
- ³ J. DE GROOF, *La révision constitutionnelle de 1988 et l'enseignement*, Brussel, Story Scientia, 1989, p. 233.
- ⁴ X. Delgrange, "Mixité sociale, mixité religieuse: le droit de l'enseignement face à la diversité", in ringelheim, J., *Le droit et la diversité culturelle*, Bruxelles, Bruylant, 2011, pp. 503-567, esp. pp. 520-523.
- ⁵ Special Decree of July 14, 1998.
- ⁶ There is currently some debate on whether the school can force a pupil in primary school to repeat a year (J. DERIDDER, "Meester, mag ik overgaan, ja of nee? Zittenblijven in het basisonderwijs: wie beslist?", *TORB* 2011-12, 273-278) since the lawgiver has not explicitly given primary schools competence over this matter. In secondary school, the class counsel (klassenraad), comprised of the principal and the teachers that taught the pupil, decides whether the pupil can progress to the next year with an orientation of this of her choosing (A-certificate), he or she can progress to the next year but with exclusion of some orientations which are considered too difficult (B-certificate), of whether the pupil did not acquire the necessary competences and is thereby forced to repeat the year (C-certificate). Internal appeal and external appeal (Council of State – Raad van State) procedures are available against the latter two certificates.
- ⁷ Carpenter, plumber, etc.
- ⁸ From the month of September in the year of their 6th birthday until the end of the month of June of the year in which they turn 18.
- ⁹ Art. 34-36 of the Decree of February 25, 1997 on primary education. See also the Government Decree of July 13, 2007.
- ¹⁰ Art. 116-122 of the Codex of Secondary Education.
- ¹¹ They usually omit to request recognition because they are unable – but mostly unwilling – to conform to all the preset conditions and requirements. See also L.

VENY, “(Onderwijs) rechten van kinderen: een stand van zaken. Een merkelijke verbetering na 8 jaar kinderrechtenverdrag”, in E. VERHELLEN et al., *KinderrechtengIDS*, Ghent, Mys & Breesch, 1998, p. 30.

- ¹² L. VAN SLYCKEN, “Wie betaalt de kosten voor het leren zwemmen in het basisonderwijs?”, *TORB* 1999-2000, p. 229; J. DE GROOF, *De grondwetsherziening van 1988 en het onderwijs*, Brussels, Story-Scientia, 1988, p. 112.
- ¹³ A. TIMMERMANS, “Recht op kosteloze toegang en op kosteloos onderwijs”, in F. ANG et al. (eds.), *Kids-Codex III – Onderwijsrecht, Vrijtijdsrecht, Vreemdelingenrecht*, Brussels, Larcier, 2010, p. 32.
- ¹⁴ Arbitragehof 21 april 1992, nr. 28/92.
- ¹⁵ J. DERIDDER, “Leerlingenrechten”, in F. ANG et al. (eds.), *Kids-Codex III – Onderwijsrecht, Vrijtijdsrecht, Vreemdelingenrecht*, Brussels, Larcier, 2010, pp. 50-51; F. ORNELIS en B. STEEN, “Het inschrijvingsrecht in het Vlaamse leerplichtonderwijs: hoeksteen of struikelsteen voor meer gelijke onderwijskansen?”, *CDPK* 2004, pp. 188-190.
- ¹⁶ Arbitragehof November 4, 1998, nr. 110/98 and Arbitragehof, October 8, 2003, nr. 131/2003.
- ¹⁷ Art. 7, §2, decree February 25, 1997.
- ¹⁸ Art. 6 and following of the government decree of July 19, 2002 concerning the organization of the full time secondary education.
- ¹⁹ Art. 115/1 Codex Secondary Education.
- ²⁰ This means the school does not have the physical space available to take on more pupils without compromising health and safety.
- ²¹ Art. III.8 of the 2002 Decree.
- ²² Art. III.8 of the 2002 Decree.
- ²³ Art. II.1, §2 of the Decree. F. ORNELIS en B. STEEN, “Het inschrijvingsrecht in het Vlaamse leerplichtonderwijs: hoeksteen of struikelsteen voor meer gelijke onderwijskansen?”, *CDPK* 2004, pp. 194-195.
- ²⁴ R. VERSTEGEN, “Gelijke onderwijskansen in de Vlaamse Gemeenschap. Verkenning van enkele principiële vragen”, *TORB* 2003-04, pp. 296-297.
- ²⁵ Commissie Leerlingenrechten 13 oktober 2004, nr. 2004/062. J. DERIDDER

“Leerlingenrechten. Recht op toegang tot de onderwijsinstelling”, in F. ANG et al. (eds.), *Kids-Codex III – Onderwijsrecht, Vrijtijdsrecht, Vreemdelingenrecht*, Brussels, Larcier, 2010, p. 52.

²⁶ Antwerpen, December 19, 2000, *TORB* 2000-2001, pp. 313-314.

²⁷ Arbitragehof 8 oktober 2003, nr. 131/2003.

²⁸ *CDPK* 2004, 196. L. M. VENY, *Onderwijsrecht. I. Dragende beginselen*, Brugge, Die Keure, 2010, 162.

²⁹ F. ORNELIS en B. STEEN, “Het inschrijvingsrecht in het Vlaamse leerplichtonderwijs: hoeksteen of struikelsteen voor meer gelijke onderwijskansen?”,

³⁰ B. STEEN, “Elk kind heeft recht op onderwijs in de school naar keuze...of toch niet?”, *TJK* 2002, 260; B. STEEN, “Het inschrijvingsrecht in het leerplichtonderwijs is niet strijdig met de actieve onderwijsvrijheid”, *TJK* 2004, nr. 5; F. ORNELIS, “Het Vlaamse decreet voor gelijke onderwijskansen”, *School en Wet* 2003, 255; F. ORNELIS en B. STEEN, “Het inschrijvingsrecht in het Vlaamse leerplichtonderwijs: hoeksteen of struikelsteen voor meer gelijke onderwijskansen?”, *CDPK* 2004, 194. See also R. VERSTEGEN, “Gelijke onderwijskansen in de Vlaamse Gemeenschap”, in F.H.J.G. BREKELMANS, C.W. NOORLANDEER en R. VERSTEGEN, *Gelijke onderwijskansen. Verslagboek Symposium 14 november 2003*, in VOR, *Onderwijsrecht* 23, Den Haag, SDU, 2003, nrs. 11-17.

³¹ Circular Letter SO/2005/07, art. 1.1.2.

³² See J. DERIDDER and C. DRIESEN, *Recht naar school. Onderwijsrecht voor secundaire scholen*, Antwerpen-Cambridge, 2011, p. 36.

³³ Decree concerning the legal status of certain personnel of the ‘Gemeenschapsonderwijs’.

³⁴ L.M. VENY, *Onderwijsrecht. I. Dragende beginselen*, Bruges, Die Keure, 2010, pp. 148-151.

³⁵ R vS 28 februari 1995, nr. 51.833, Van Craenenbroeck.

³⁶ Recently: B. VERBEECK, “Zittenblijven in het basisonderwijs: een juridische anomalie?”, *TORB* 2011-12, pp. 270-272; B. PLETINCK, “Zittenblijven: wie beslist?”, *TORB* 2011-12, pp. 272-273; J. DERIDDER, “Meester, mag ik overgaan, ja of nee? Zittenblijven in het basisonderwijs: wie beslist?”, *TORB* 2011-12, pp. 273-278.

³⁷ RvS 4 oktober 2001, nr. 215.532, De Troyer, *TORB* 2011-212, pp. 267-270.

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- ³⁸ Voorz. Rb. Brussel 17 november 2011, *TORB* 2011-12, pp. 279-280.
- ³⁹ DERIDDER and C. DRIESEN, *Recht naar school. Onderwijsrecht voor secundaire scholen*, Antwerpen-Cambridge, 2011, pp. 113-243.
- ⁴⁰ Art. 68 of the executive decree of July 19, 2002 and art. 254 of the Codex Secondary Education (Decree of May 27, 2011).
- ⁴¹ J. DERIDDER and C. DRIESEN, *Recht naar school. Onderwijsrecht voor secundaire scholen*, Antwerpen-Cambridge, 2011, pp. 83-98; A. OVERBEEKE, “Levensbeschouwelijk onderricht: keuzepalet en keuzevrijheid in Vlaanderen anno 2002”, *TORB* 2002-03, pp.116-117; see also M. MAGITS en E. BORMS, “Ethiek en levensbeschouwing in het onderwijs”, *TORB* 2003-04, pp. 220-225; M. VAN STIPHOUT, “Een nieuw ‘neutraal’ vak over levensbeschouwing en ethiek?”, *TORB* 2003-04, pp. 212-21.
- ⁴² Art. 24, §1 of the Constitution. Currently recognized are: Roman Catholic, Anglican, Islamic, Jewish, Orthodox, Protestant and non-confessional (secular humanism, evolved into atheist). The lack of recognition of additional beliefs such as Hindu, Sikhs, Mormons etc. is mainly due to a lack of financial resources.
- ⁴³ Art. 2 of the first additional Protocol to the European Convention on Human Rights and Fundamental Liberties.
- ⁴⁴ RvS 13 november 1990, nr. 35.834, *TBP* 1991, p. 628; *TORB* 1990-91, 94.
- ⁴⁵ A. OVERBEEKE, “Levensbeschouwelijk onderricht: keuzepalet en keuzevrijheid in Vlaanderen anno 2002”, *TORB* 2002-03, p. 138, nr. 53.