



## **INTRODUCTION TO VOLUME TWO**

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Education remains the most sensitive issue for societal and personal development, particularly in modern times. This counts for every country within any region, but from historical perspective especially for Europe, where education is regarded as a common primary binding factor for the refinement of fundamental rights and freedoms and of the range of pluralism in national society.

Since the country profiles in Volume 2 are all European (though note that several European countries will be found in volumes 3<sup>1</sup> and 4<sup>2</sup>) it seems appropriate to make some general comments here about the common framework of educational law and policy in Europe. The reader is also encouraged to consult the essay in Volume 1 on the Right to Education in Europe, by Ingo Richter.

Major changes have taken place in education in the wider Europe over the past decade. Most large-scale changes were initiated through legislators, governments, the international community, the socio-economic environment, donors, and schools themselves. The reform of the education framework has been a laborious process, not always spurred on by the schools themselves.

It is interesting to note that the way in which education has diversified in Europe has varied widely from one country to another. Although there is no need of an 'Europe-wide model' and there always will be more systems of education than countries in Europe, these tendencies need *common and coherent legal approaches*, contributing to the (already existing voluntary) convergence and internationalization within the European Union (EU) and the Council of Europe region. National legal systems are fully separate (in terms of public law) from one another, and are interconnected by means of another type of legal system, public international law, which is based on the equal sovereignty of its original subjects, i.e. the States.

Education has been brought under the influence of the EU by the European Court of Justice (ECJ). The argument was at first that education was preparation for the labour market. For this reason, it was considered to fall under the four freedoms of the internal market. The Court has now also chosen *the citizen* as the starting point for its jurisprudence. By taking the European citizen as the new basis of the jurisprudence, the Court has implicitly begun thinking in terms of a European system of education.

The *Treaty of European Union* (1992) included education as one of the policies of the Community in order to help it "meet its severely amended and extended objectives". Art. 3(q) stipulates that the EU shall deliver a "contribution to education and training of quality" and the Treaty introduces consequently the art. 165 and 166 (ex art. 149 and 150):

#### Article 165 (ex Article 149 TEC)

1. The Union shall contribute to the development of quality education by encouraging cooperation 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 teaching and the organisation of education systems and their cultural and linguistic diversity. The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
2. Union action shall be aimed at:
  - developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
  - encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
  - promoting cooperation between educational establishments,

- developing exchanges of information and experience on issues common to the education systems of the Member States,
  - encouraging the development of youth exchanges and of exchanges of socio- educational instructors, and encouraging the participation of young people in democratic life in Europe,
  - encouraging the development of distance education,
  - developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.
  4. In order to contribute to the achievement of the objectives referred to in this Article:
    - the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, EN C 83/120 Official Journal of the European Union 30.3.2010
    - the Council, on a proposal from the Commission, shall adopt recommendations

Article 166 (ex Article 150 TEC)

1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
2. Union action shall aim to:
  - facilitate adaptation to industrial changes, in particular through vocational training and retraining,

- improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,
  - facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,
  - stimulate cooperation on training between educational or training establishments and firms,
  - develop exchanges of information and experience on issues common to the training systems of the Member States.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.
  4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.”

As a result of the expansive interpretation by the ECJ of the concept ‘*professional training*’, positively mentioned in the EC Treaty, ‘*education*’ is part of the Community arena, as a consequence of the application of the non-discrimination principle of Member State subjects regarding access to education and of the principle of free movement. In a sense, articles 165 and 166 are the reflection of the series of European programmes that had been developed by the Community before the Union expressly included education, professional training and culture as a community objective – albeit within the framework of an application of the subsidiarity principle.<sup>3</sup>

The Union’s sphere of action increased continually, although it was the result of a voluntary system, of incentive measures, and of competition. While the original distrust that originally accompanied the creation of art. 1 of the second European Convention on Human Rights (ECHR) Protocol started to wane,<sup>4</sup> there grew a sense that the European dimension had a positive influence on the national education system.

The focus within Europe on diversity referring to the national educational system and as a consequence of the Member States’ *exclusive* competence – unlike in the field of ‘research’, which has become an area of shared competence – and the variety

of language and culture, are continuously repeated as being the guiding principles, also in the field of quality assurance. However, the 'complementary role of the Union' in educational matters continues to be stressed in the European Parliament, whether a further mutual sharing of responsibilities between the Union and the Member States depends on the specific measures in accordance with the relevant community educational programme. As yet there is no detailed common European policy but on the other hand the *loyalty requirement* in respect of Europe will constantly question the national administration.

Even though the right to education "*is calling by its very nature for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals*" - according to the ECHR<sup>5</sup> - the conformity of national law to EU and ECHR<sup>6</sup> will have to be carefully checked in future. Here the interpretation will be considered of the basic rights as 'general principles of Community Law', where these rights arise from Art. 6 (ex art. F) of the *Maastricht Treaty*<sup>7</sup> arising from the 'common constitutional traditions of the Member States', albeit within the (educational) competence of the Union.<sup>8</sup>

In view of the 'complexity of (national) educational law' and despite the fact that the sphere of activity of the European Union with respect to education was regarded with suspicion, there was a growing realization that no Member State (party to the respective Conventions) could allow itself to (continue) to be isolated.

The Community educational space demands a common educational policy and must be supported by the same principles of law, leading to coherent regulation.

It can be argued that European practice correctly must lead to 'harmonisation', used in his correct legal definition and meaning 'coordination' – but not 'unification'. '*Harmonisation*' refers to the integration process that does *not* lead to the creation of uniform law, but rather to the creation of common goal, which leaves room for divergent specification.

The overall significance of the common constitutional principles, throughout Europe, was stressed by law and policy Europe wide, - although not in any uniform way.

These legal principles, common to the countries, include the *responsibility and neutrality* of the State, the *freedom to establish non-governmental schools* and the existence of a *plurality of schools and pluralism within the education system, subsidization of non-governmental schools* within the national legal (and quality) norm so that freedom of education is not an empty notion, *freedom to choose a school* according to one's conviction and the *equivalence of the diploma* delivered by state or non-state schools. Freedom of education is further refined through several (quasi-)constitutional rights, a.o. the right to found the school character on

a specific ideological, philosophical or religious ethos, the right to select pupils and teachers, the right of pedagogical concept, methodology and didactics, freedom to conceive the curriculum,...

National and international jurisprudence will articulate these fundamental rights, balancing responsibilities of the parents and children *versus* the State.

Art. 14 of the *Charter of Fundamental Rights of the European Union* guaranteed the co- existence of the individual education rights and the “freedom to found educational establishments with due respect for democratic principles and the right of the parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions, in accordance with the national laws governing the exercise of such freedom and right.”

#### Article 14 Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

This comparative study of 28 national systems of schooling grows out of collaboration between the authors over the past dozen years. It would not have been possible without the assistance of dozens of friends and colleagues in the countries discussed, as well as many others whom we have never met but who have been generous with their assistance. We have tried to acknowledge these contributions in the references for each country profile, and we apologize if we have omitted any.

Especially we appreciated the support of Walter Berka (Austria), Jim Deridder (Belgium (Flemish Community)), Xavier Del Grange and Mathias El Berhoumi (Belgium (French Community)), Milan Pol and Bohumíra Lazarová (Czech Republic), Susanne Wiborg (Denmark), Paul Meredith and Ann Blair (England), Merilin Kiviorg (Estonia), Päivi Gynther (Finland), André Legrand (France), Vanda Apostolopoulou (Greece), Conor O’Mahony (Ireland), Fulvio Cortese and Cinzia Piciocchi (Italy), Edvins Danovskis (Latvia), Birutė Pranevičienė and Agnė Margevičiūtė (Lithuania), Siggy Koenig (Luxembourg), Christopher Bezzina (Malta), Paul J.J. Zoontjens (Netherlands), Laura Lundy (Northern Ireland), Nina Volckmar

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In a few cases (Bulgaria, Germany, Scotland, Switzerland) we have been forced to include the country profile written for the 2004 edition.

## Overview

The structure of the country reports follows a uniform format. The goal of this volume is to provide a brief explanation of the issues that we have sought to address for each country.

The first necessary observation is that the information we have provided about the various countries is not always equivalent. We have placed more emphasis upon the issues that have been most debated in one country or another, and upon the distinctive aspects of the solutions that each has found to the common issues of school autonomy and common standards. Our goal has not been to give an encyclopaedic account, but rather to bring into relief those aspects of educational law and policy in each country from which policymakers and educators in other countries might usefully learn.

Needless to say, it is possible to learn from successes, and also from difficulties...

Particularly in the 'overview' sections of each country report, the reader should expect that the comments reflect to some extent the opinions of the authors. They claim no final authority for these views, but perhaps there is some interest in impressions refracted through many years of experience with many different educational systems.

The reader will also find that some country reports are considerably longer than others. These differences do not reflect a judgment about the importance of the countries or their educational systems, of course, but the extent to which particular arrangements seemed to us worthy of attention. In some cases, the federal structure of the country requires a distinct report.

Finally, no attempt has been made to assess the relative quality of the educational systems, or of different sectors within each country. There is an abundant (though often inconclusive) literature on such quality assessments, and we concluded that it would serve no useful purpose for us to seek to join in those debates.

## *The structure of schooling*

The concern in these studies has been with the ways in which different countries allow or promote educational freedom - the freedom to establish schools and the freedom to choose schools for one's children and the ways in which the claims of freedom are balanced against those of social justice and educational standards. Inevitably, therefore, we have inquired especially about non-governmental schools, but without neglecting the ways in which freedom may be exercised in the sector of schooling operated by government. For example, groups of teachers and others may be allowed to develop schools with a distinctive educational approach within the state sector, and to operate them with considerable autonomy. Parents may exercise their educational freedom, then, in choosing among schools in the state sector.

This section of the country reports provides an overview of the structure of schooling. There are at least 65 different ways to organize an educational system, as the country reports in volumes 2, 3, and 4 demonstrate, and it can be quite confusing to penetrate behind such labels as "public education" and understand what is referred to. We have sought to provide a brief orientation to each system.

## *The legal framework*

In the constitutions of some of the countries, the responsibility for education and the scope of educational freedom are specified quite explicitly; in other cases it is not. We have reviewed the constitutional provisions, and the controversies which in some cases surround their interpretation.

There is of course a vast body of legislation affecting schools in most countries, and many court decisions on the application of this legislation, as well as of constitutional principles. Even a perfect understanding of the legal situation in each country would not substitute for knowledge of how it operates in practice. Not every law is enforced, or applied strictly and vigorously, and both government procedures and explicit - or tacit - understandings among the various 'stakeholders' have a profound effect upon the autonomy of schools and the accountability to which they are subjected. A number of our authors have therefore sought, in considering the following topics, to inquire beyond the letter of the law to give an account of what actually happens in the relationship between schools and government, between schools and parents, between schools and their staff.

## *Freedom to establish non-state schools*

Each of the educational systems included in this volume provides a process for approval of schools that are not operated by government, or at least for the recognition of the diplomas and certificates that they offer as equivalent to those obtained through study in a state school. The process is by no means similar in all cases, however; in some, for example, there are extra burdens upon pupils in non-state schools to take examinations that are offered through the state system.

Nor does the existence of a formal legal process for approval of non-governmental schools necessarily mean that they can be approved. Under the former communist regime in Poland, for example, regulations adopted by the Ministry of Education in 1965 made provision for approval of schools outside the state system, but the Ministry's officials simply didn't approve any, except in the rare cases of organizations considered entirely reliable ideologically, until the breakthrough in 1989. We have asked the authors to ascertain to what extent the formal procedures for approval really make it possible for educators and others to start schools outside of the public system.

## *Homeschooling*

If all of these educational systems allow non-state schools, and allow pupils to earn recognized qualifications through study in such schools, by no means all of them allow parents to choose to school their children at home. In a number of countries, this is permitted only for reasons of health or excessive distance from any appropriate school, and is very rare.

## *School choice not limited by family income*

Obviously, the right to exercise educational freedom by choosing a school for one's children is limited for those who cannot afford to pay tuition in the non-state schools available.

When the choice involves religious convictions, a state monopoly on free-of-charge schooling can be a serious limitation on religious freedom as well. Under those circumstances, the state fails in its obligation of neutrality with regard to religion by making it more difficult for a religious parent than for a nonreligious parent to exercise the internationally-recognized right "to choose the kind of education that shall be given to their children."<sup>9</sup>

In this section, therefore, the authors review the arrangements in the various educational systems to make it possible for parents to exercise the right to choose among schools. Almost all of these countries provide partial or full funding for (state-approved) schools with a religious character, or in some cases with a distinctive pedagogical approach, on the basis of parental choice. This is not the case in Greece and Bulgaria, and it is only recently and very unevenly becoming the case in Italy.

## *School distinctiveness protected by law and policy*

The right to choose a non-state school is of only limited value if that school is compelled by government regulations, or seduced by government funding requirements, to be essentially identical to the government's own schools. In this section the authors consider some of the most significant ways in which the distinctiveness of schools may be limited, and the laws or policies which, in some countries, explicitly protect it.

### *Distinctive character*

First, the reports provide an overview of the actual range of choices among schools providing general education – the authors do not attempt, in most cases, to discuss specialized and vocational schools - to give some idea of the nature of the choices available to parents ... and, implicitly, how hospitable the policy and social climate is to educational diversity.

It is clear that in some countries very considerable diversity exists within the public sector, while in other countries it is necessary to go outside the public sector to find such diversity. This should be a warning against too-simple classifications of the range of schools into “public” and “private.”

### *Decisions about admitting pupils*

Next the authors consider the sensitive question of whether schools may select which applicants to admit as pupils on the basis of religious or worldview factors, or of the commitment of parents to the particular pedagogical approach of the school. This is distinct, it should be noted, from the question whether schools- especially at the post-primary level - may set admission standards based upon academic qualifications or previous disciplinary record.

While it may seem obvious that schools with a distinctive religious character should be able to use that as a factor in admissions decisions, the question is a difficult one

in practice. What if such considerations are being used to exclude applicants considered undesirable for other reasons, such as social class or immigrant or minority status? In most of the countries included that accusation has been raised, and different approaches have been taken by public authorities in the effort to balance freedom with social justice concerns.

## *Decisions about staff*

Questions of similar difficulty arise in connection with employing teachers and other staff or, as the occasion arises, dismissing them. Most countries require that schools follow fair employment practices, whether or not they are publicly subsidized. Most require that non- state schools employ teachers whose qualifications are equivalent if not identical to those of teachers in state schools. It is generally understood that schools with a distinctive pedagogical character (for example, a Montessori or a Steiner school) may use that character as a basis for deciding which prospective staff will be able to further the mission of the school. Specialized training, or experience, or a strong interest in that approach to education would justify the selection.

Is it legitimate, though, to use an applicant's religion as the basis for deciding whether he or she should be hired? Or is it legitimate not to continue the employment of a teacher who is otherwise satisfactory because he or she changes religious beliefs, or acts in ways contrary to religious teachings? One of the fundamental principles of modern democratic regimes is that an individual's religion should not be the basis for special treatment, and this is specified in legislation forbidding discrimination. On the other hand, it is obvious that a school cannot retain its religious character unless it may take effective measures to ensure that its staff gives that character their whole-hearted support. Different legal systems have found different ways to balance individual rights with the rights of those who sponsor religious schools ... and the right of parents who choose to send their children to those schools to be confident that it will actually have the character that it professes.

Over the last decade, an impressive body of national and European law has focused on equal treatment and non-discrimination within the education sector, private or public.

## *Accountability for school quality*

Educational standards and the means of holding schools accountable are of course an enormous topic, which we have not attempted to deal with in any depth. Our concern

in this study has been limited to the ways in which educational standards may prevent schools from developing a distinctive educational program, and especially one intended to satisfy the desire of parents for a school that is distinctive in religious confession or secular worldview.

## *Teaching of values*

This is most likely to be a point of tension to the extent that legislation or educational policies require that every school - including those not operated by government-teach certain values regarded as essential for civic virtue or social peace. This may well lead to conflict with the sponsors of religious schools. For example, some religious groups teach that men and women have very distinct roles in family and social life; this could conflict with a requirement that schools stress the elimination of “stereotypes” about such roles.

While most of the countries included in this study make conscientious efforts to allow non-governmental schools to present a distinctive understanding of life and an alternative set of values, they draw the line at the teaching of what are considered anti-social messages such as anti-Semitism and racism. Several countries, indeed, require that the education in all schools be consistent with international standards of human rights and promote respect for those rights.

The present volume includes a considerable expansion in the number of European countries studied compared with earlier editions, and a reorganization which we believe will make our work even more useful to students and policy-makers. The additional material in this new publication was in many cases prepared by other hands and only revised by us.

These volumes ought to be seen as a start. Next volumes include a number of other countries from Eastern Europe, from Africa, from Asia, and from Latin America. We hope this edition will also correct the errors which may have made their way into this account, and take note of new developments in the various countries. Our email addresses, for those who are willing to assist us in either respect, are [jan.degroof@ua.ac.be](mailto:jan.degroof@ua.ac.be) and [glennsed@bu.edu](mailto:glennsed@bu.edu).

All reports pay honour to the saying: “*Dans l’enseignement de l’enfant, il y a le tout de sa vie...*”.

## Endnotes

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<sup>1</sup> Volume 3: Albania, Belarus, Iceland.

<sup>2</sup> Volume 4: Azerbaijan, Bosnia and Herzegovina, Georgia, Hungary, Russia, Ukraine, and Wales.

<sup>3</sup> LENAERTS K., Subsidiarity and Community Competence in the Field of Education, in DE GROOF J. (Ed.), *Subsidiarity and Education. Aspects of comparative Educational Law*, Leuven, 1994, p. 117-144; DE WITTE B., Equivalentie van studieperiodes en erkenning van diploma's, *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid (Journal for Education Law and Policy)*, 1992-1993, nr.5-6, p.290; DE GROOF J., The Scope of and Distinction between Art.126 and 127 of the Treaty on European Union and the Implementation of the Subsidiarity Principle, in DE GROOF J. (Ed.), *Subsidiarity and Education. Aspects of Comparative Educational Law*, Leuven, 1994, p. 77-114.

<sup>4</sup> cF. DE GROOF J. and LAUWERS G., *No Person Shall be Denied the Right to Education*, Nijmegen, Wolf Legal Publishers, 2004.

<sup>5</sup> In its first judgement on the principle dated 23 July 1968, Series A no 32.

<sup>6</sup> See also BERKA W., 'Human Rights: A Challenge to Educational Law: A Survey within the Systems of the' European Convention on Human Rights', in DE GROOF J., MALHERBE R. (eds.), *Human Rights in South African Education*, 1997, p 199 et seq.; Compare with USA: LENAERTS K., 'Fundamental Rights in the European Union', *European Law Rev.*, 2000, 575; See MENTINK D. and GOUDAPPEL F., The Education Provision in the Charter of Fundamental Rights of the European Union: a Bleak Perspective, in *European Journal for Education Law and Policy*, vol. 4, nr. 2, 2000, p. 145-148; BERKA W., The Right to Education in the Charter of Fundamental Rights in the European Union, in *European Journal for Education Law and Policy*, vol. 5, nr. 1, 2001; Cf. with respect to the right of education as it is guaranteed in international human right's documents DELBRUCK R., *The Right to Education as an International Human Right*, 35 German Yearbook on International Law (1992) 92 (100 et seq.); Nowak (n 15) 195.

<sup>7</sup> Dated 7 February 1992 'concerning the European Union'.

<sup>8</sup> Compare with USA: LENAERTS K., 'Fundamental Rights in the European Union', *European Law Rev.*, 2000, 575.

<sup>9</sup> Universal Declaration of Human Rights (1948), article 26 (3).