Sociaal recht en het bijzonder onderwijs

Summary

The Dutch educational system is characterised by the division between state schools and private schools. The private schools which comprise more than two thirds of the total number of schools are maintained by nongovernmental trusts and associations. The private schools, or rather their governing boards being the governing boards of the legal persons that maintain the schools, can claim a certain amount of freedom from the government. This freedom of education has been constitutionally provided for since 1848. Its main purpose is to garantuee that schools can offer teaching without interference by the government on the basis of specific religious or philosophical convictions. Since 1917 private schools have been able to claim subsidies from the government on the basis of similar criteria as are applied to state schools: state schools in this respect meaning schools which are directly founded, maintained and financed by the government.

This study concerns the legal position of employees in private education and, more specifically, the private primary, special, and secondary education as well as higher vocational education. Academic education is not treated here.

The reason for giving special attention to the legal position of employees in private education lies, firstly, in the fact that both aspects of the basic right to education (freedom and subsidies) exert a great influence upon the legal position, as a result of which great differences occur with the legal position of employees elsewhere in the private sector. This is particularly the case for the protection against dismissal, employees' participation and the collective negotiation on employment conditions. A second reason to pay attention to the legal position of employees in private education is the fact that it is true that the exceptional position of private education in this respect for a long time has been self-evident against the background of the 'pillarisation' of Dutch society, but that this self-evidence has largely whithered away as a result of the developments since the sixties; developments which have considerably decreased the role of religion in society. For this reason it has become less urgent to underline the religious or philosophical identity of private education and to attach consequences to this identity in respect of the legal position of the employees.

The purpose of this study is the disclosure of the law with respect to the legal position of employees in private education from a labour law viewpoint and the integration of this law into labour law in general. For the achievement of this purpose the legal position of employees is described, the establisment of this legal position is studied from a historical viewpoint and a study is made whether there are, and if so, which are the differences in legal position between employees in private education and employees elsewhere in the private sector. Furthermore, it is examined to what extent the existent law pays justice to, in particular, the interests of the employee and the school board. Finally, it is examined whether it is necessary and possible, in view of the interests of the school board and the employee, to bring about changes in the legal position of the employees in private education.

Chapter II deals with the developments private education has gone through since 1795. Special attention is given to the period of the school struggle (between the protagonists of public education and those of private education) (1820-1917), the period of pillarisation of Dutch society (1920-1960) and the period of 'depillarisation' (1960-today). The conclusion is that private education in the last century and the first six decades of this century was evidently part of the pillarised Dutch society, that private education still looks pillarised, but that developments in society as a whole have eroded the pillarised system also with regard to private education.

The third chapter is devoted to those basic rights which concern the legal position of employees in private education. In this context the basic right to education is examined. An analysis of this basic right to education leads to the conclusion that the right to education consists of a number of aspects, each of which (can) influence the legal position of employees in private education.

Based on historical and legal arguments the conclusion with respect to freedom of education is, that freedom of denomination (defined as 'the freedom to express a religious and philosophical conviction on man and society in education') is the essence of freedom of education and that this, in principle, entails the inviolable right to governmental noninterference. The same goes, yet exclusively because and as far as there is a connection with the school's denomination, for the freedom of organisation (defined as 'the freedom concerning the internal organisation of the school') and for the freedom of appointment (and dismissal) as guaranteed in art. 23, par. 6 of the Dutch Constitution. Further historical and legal arguments show that, in the recent past, an independent claim to governmental noninterference with regard to the freedom of organisation outside the area of denomination, has, wrongfully, been based on – and recognized by legislation – the view that governmental interference is only allowed if the quality of education is at issue and on the view that school boards are, as such, responsible for the freedom of education. The school board's freedom should, consequently, be respected as much as possible by government, employees and parents. With regard to the freedom of educa-

tion, it is finally concluded that, since the nature of freedom of education is strongly determined by freedom of denomination, there are doubts about the legitimacy of the claim to governmental noninterference by schools, the teaching of which is not, or not any longer, explicitly and visibly based on religious or (otherwise) ideological principles.

As regards the right to subsidies on similar criteria as state education, the conclusion is that this furthers freedom of education, because it provides the private schools with sufficient financial means to realise – within the legal boundaries – their own views about the nature and contents of education. The principle of equal legal position in state and private education has a similar meaning. From the beginning of this century, this principle has been accepted by the legislator as well as by school governing boards and employees (and their organisations) of private schools. Unlike the principle of equal subsidising, the principle of equal legal positions also protects the interests of state education, because not only does it protect the private school boards from unwanted competition in the field of employment conditions, but also the state school boards. Finally it is indicated that the claim to subsidies on similar criteria and the principle of equal legal positions have resulted in a strongly dominant position of the government regarding the regulation of employment conditions for employees in private education and that this position has been brought up for discussion more and more often during the last few years. As a result the equal subsidies for secondary and higher vocational education have been regulated in a different, more general way; the changes in the manner of subsidising have also caused the principle of equal legal position to be considerably put into perspective.

Secondly, chapter III deals with the 'basic social rights', the basic rights from which the employees in private education (and their organisations) derive protection of their interests. In this respect it is found that international law offers specific leads for the right to collective negotiation, but that these leads are missing on national as well as international level when it comes to employment protection and employees' participation. In this context it is pointed out that art. 19, par. 2 of the Constitution seems to be of minor significance, because of its nature of social basic right and its inconsequential contents. The next conclusion is, however, that this is not consequential, when a connection is made between art. 19, par. 2 of the Constitution and article 1 of the Constitution, the latter dictating government to treat equal cases equally. Starting from there it follows that the government is obliged to regulate the legal position of employees in private education in a way equal or similar to the regulation of the legal position of employees elsewhere in the private sector, unless the right to education in particular justifies a regulation of lesser quality.

Finally, chapter III pays attention to the horizontal effect of the right to education and of the basic social rights. Attention is also paid to the issue of the restriction of basic rights and conflicting basic rights. In respect to these three doctrines it appears that they do not necessarily lead to final conclusions, but that much, if not all, depends on the case at issue and on the basic rights or

interests at issue.

The fourth chapter examines the nature of the legal relationship between school governing board and employee.

First of all the question arises whether employees in private education are civil servants. Based on an examination of the relevant legal rules it is concluded that this is not the case, because they are not employed in 'public service'. There is only one exception: employees in private education are civil servants in the sense of the 'Algemene burgerlijke pensioenwet' (Civil Servants Pensions Act). This part of the law concerning civil servants being applicable to private education can be explained, particularly in historical perspective, from the principle of the equal legal position of public and private education. Being a civil servant in the sense of the Civil Servants Pensions Act is an exception to the rule and does not alter the conclusion that the legal relationship between school board and employee is not a unilateral employment relation established by the government and directly ruled by public law.

This conclusion is followed by the question whether the legal relation between school governing board and employee is an employment contract in the sense of article 1637a of the Civil Code. Article 1637a of the Civil Code contains four criteria which have to be met before there is an employment contract: 'employment', 'wages', 'time' and 'authority'. The authority criterion requires most attention, because this criterion in particular is decisive to answer the question whether or not there is an employment agreement. The concept of 'authority' means that the employee's duties have not yet been defined at the time the agreement was concluded and that the employer is authorised to, one-sidedly, specify the duties.

Tested against that criterion the conclusion regarding employees in primary, special and secondary private education is that (bar a few exceptions) we are dealing with 'authority', as the school board is, indeed, authorised to give a more detailed outline of the duties. On account of the fact that it rarely happens that school boards execute authority on the employees and their duties, chiefly because of their lack of qualities to do so, it is concluded that school boards should show a great deal of restraint with regard to the actual execution of authority.

The management of the secondary and higher vocational schools does not usually lie in the hands of the boards, but with the employees who together form the central management or the board of directors. Therefore it is these employees and not the school boards who are authorised to specify their own duties and those of the (other) employees. This means that we cannot speak of a authority relationship in the sense of article 1637a of the Civil Code – and consequently not of an employment agreement.

Because of its consequences, this conclusion is considered to be hardly acceptable and gives rise to a more profound examination of the question on the basis of what criteria the question of the existence or non-existence of an employment contract should be answered. The conclusion is, firstly, that the time

requirement can in many cases take over the role of the authority requirement, in a sense that the existence of an employment agreement is assumed when the employee (on payment of wages) spends the time he has available for work, completely or considerably, working for someone else during a longer period of time. Secondly, it is concluded that the criteria in article 1637a Civil Code are, in a way, relative and that the crucial question is whether the legal consequences of the qualification according to objective standards are relevant. Going from there, the conclusion is, that in secondary and higher vocational education the existence of an employment contract has to be assumed, too, because the time requirement has, as a rule, been met and because the consequences of the qualification as employment contract are also appropriate.

Based on the findings in chapter IV, the fifth chapter examines whether the labour law legislation for the private sector is applicable to private education.

With respect to the Civil Code, the conclusion is that the Civil Code is entirely applicable to the employment contract between school board and employee. The 'Buitengewoon besluit arbeidsverhoudingen' (Special decree on labour relations), being the basis for the preventative reviewing of dismissals by the 'Regionaal directeur voor de arbeidsvoorziening' (Regional Director for Employment Policy), appears, however, for the greater part not to apply. As it turns out opinions about the backgrounds of this being so, differ. The 'Hoge Raad' (Supreme Court of the Netherlands) finds a connection with the freedom of education. With regard to this opinion it is concluded that this may be true from a historical point of view, but that at the moment its consequences can (for no apparent reason) work out very badly for people employed in the non-subsidised part of private education. Therefore an alternative viewpoint is supported, viz. that the non-applicability of the BBA has to do with the strong government influence on the employment conditions in the state-financed private education. This viewpoint is not only obvious when placed in historical perspective, but it also leads to the conclusion that the BBA is applicable to the non-subsidised part of private education, where the applicability of the BBA is required, because the employees in question lack the special protection against dismissal by the committees of appeal.

Other than the BBA the 'Wet minimumloon en minimum vakantiebijslag' (minimum wages and minimum holiday allowance Act) and the 'Wet gelijke behandeling van mannen en vrouwen' (Act on the equal treatment of men and women) are entirely applicable to private education. The same goes for the legislation concerning the collective agreements, even though the practical relevance of this part of regular labour law is of minor importance, since in the greater part of private education no collective agreements are concluded. Against this background, the (almost entire) non-applicability of that part of legislation which provides state influence on the employment conditions in the private sector, is understandable.

Finally the 'Wet op de ondernemingsraden' (Act on the works councils) proofs to be (virtually) non-applicable to private education, which makes

sense now that the education legislation has its own regulations for employees' participation in private education.

The sixth chapter focuses on the question whether, and if so, in what way the legal position provisions in the legislation concerning education are applicable to private education. The reason for giving special attention to this question is the conclusion that the provisions in the legislation concerning education in general are 'rules' for public education as well as 'financing conditions' for private education.

On the basis of the Constitution, the legislation concerning education, case-law and educational law literature the conclusion is drawn that the financing conditions for the legal position differ in two aspects from the rules for public education and labour law for the privat sector, as dealt with in chapter V: (1) the financing conditions are not directly applicable to the legal relation between the school board and the employee; they are exclusively relevant in the relationship between the state and the state-financed school board; (2) observing the conditions cannot be enforced, neither by the employer, nor by the state: the only sanction on nonobservance is the withdrawal of subsidies by the state.

The background of the nature of the financing conditions appears to be freedom of education: in giving the educational legislation the form of financing conditions, the state leaves the school board (at least legally speaking) the choice between, on the one hand, accepting the subsidies along with the conditions, and, on the other hand, not (or not any longer) claiming subsidies, which puts an end to being tied to the financing conditions. The fact that financing conditions for the legal position as such do not affect the relationship between school board and employee follows from that: consequently the school board also keeps its freedom with respect to the employee.

After giving brief attention to the question how the financing conditions can be fitted in into the greater complex of state decrees, it is examined what consequences the nature of the financing conditions have for school board and employees.

A first conclusion in this context is that the school boards, as a rule, cannot do without state subsidies, so that the freedom, which, at first, seems to be offered by the nature of the financing conditions to the school board in its relation to the state, on further consideration, does not exist. A second conclusion is that the state compels the school board to incorporate those financing conditions concerning the legal position of the individual employees into the legal relation with these employees, which means that the school board loses its freedom of acting in its relation with the employees. With regard to the employees it is, furthermore, concluded that the nature of the financing conditions for the legal position provisions results in the necessity of making all sorts of complicated constructions in order to realise that the provisions are applicable to the legal relation with the school board; that the lack of possibilities to enforce direct observance of, particularly, the provisions for employees' participation is a

major drawback; and that the legislator, with respect to the provisions concerning collective negotiation, has not created much clarity with regard to the nature of these provisions.

All this leads to the conclusion that the nature of the financing conditions does not offer the apparently expected advantages with respect to the relation between school board and government, whereas it causes a lot of problems with respect to the relation between school board and employee. Taking this into account it is, secondly, concluded that the legislator would be wiser to give the financing conditions the nature of 'normal' legal provisions, meant for the subsidised school boards and their employees. Until then, the third conclusion reads, the nature of financing conditions should be ignored in those cases in which it causes difficulties, without the freedom of education being at issue (as with regard to the provisions regulating the negotiations between the Education Secretary and the organisations of civil servants and educational staff. Finally it is concluded that, seeing that the freedom to accept or not accept the financing conditions is actually lacking, it would be unfair to consider government intervention in the form of financing conditions more acceptable than intervention in the form of 'normal' legal provisions; decisive for the answer to the question which government intervention is in conformity with the freedom of education is solely the nature of the intervention.

The seventh chapter deals with the collective negotiations on the establishment of labour conditions of employees in private education. It is observed that the labour conditions are established partly in employment contracts and collective wage agreements, which are negotiated by (organisations of) school boards and employees. These negotiations usually only concern the subject of 'appointment and dismissal'. With regard to other subjects the labour conditions of employees in private education are established by the government (and more in particular by the Education Secretary). Before establishing the labour conditions the Secreatry enters into joint consultation with organisations of civil servants and educational staff. For private education the establishment mainly takes place in the form of financial conditions. In secondary and higher vocational education 'joint consultation' also takes place within the seperate institutes of (state and) private education; this consultation takes on a different form, to the detriment of the organisations of employees.

This scheme of collective negotiation just mentioned is largely due to the principle of equality of legal position and, more particularly, to the view that it is up to the government to garantuee this equality. Furthermore, the fact that the government pays for the costs of the labour conditions in private education is, albeit slightly less, relevant. The fact that only in secondary and higher vocational education joint consultation is held within the seperate institutes can be explained from the increase of powers of the respective schoolboards as regards the legal position of employees, and also from the change in the way that the subsidies are organised. This different form of consultation is a consequence of the freedom of education.

At the end of the chapter the relationship between the collective negotiations on labour conditions of employees in private education and the basic right to collective negotiation is studied; this right is laid down, for school boards and organisations of employees alike, in the European Social Charter and some ILO-conventions. The conclusion is drawn that the way in which the joint consultation with the Secretary of Education presently takes place constitutes a serious and unjustifiable breach of the right to collective negotiation of, in particular, the school boards acting as employers in private education, whereas the way the joint consultation takes place within the seperate institutes of secondary and higher vocational education constitutes an equally serious and unjustifiable breach of the right to collective negotiation of the organisations of employees.

The former leads to the conclusion that the collective negotiation on labour conditions of employees in private education should as much as possible take place within private education itself, in a way which is in principle decided by the parties concerned themselves. Furthermore, the proposal is put forward as much as possible to involve the school boards acting as employers in education in the consultations which are held by the Education Secratary with the organisations of civil servants and education staff.

Chapters VIII and IX deal with the law governing dismissal in private education.

Based on an analysis of the law governing dismissal elsewhere in the private sector and where government is concerned it is observed that it is true that the law governing dismissal in private education is based on the Civil Code, but that on this basis a system of protection against dismissal is created which is very similar to the one in force in the law on civil servants. The latter is characterised by a closed system of grounds for dismissal, whilst an often active appeal committee reviews decisions of dismissal against the relevant legislation, the contract concerned and 'the general principles of proper administration'; a negative judgement of the committe leads to the restoration of the appointment.

This tendency to follow the law on civil servants is partly due to the subsidy conditions which are set by the government, but is mostly due to choices made by the parties concerned with private education themselves. In chapter VIII as well as in chapter IX it appears that the law governing dismissal according to the Civil Code does not fully match the law governing dismissal in respect of private education as laisd down in employment contracts and collective agreements on conditions of employment; this situation is mainly due to the provision of art. 1639o of the Civil Code which gives an in principle unlimited power of dismissal to the employer, but is also due to the fact that the order by the appeal committee to restore the appointment is a poor match to the prohibitions on dismissal and the provisions on irregular terminations of contract in the Civil Code.

Chapter VIII is concluded with a paragraph which is concerned with the

specific subject of the relationship between the freedom of denomination and the principle of equality c.q. the prohibition on discrimination of art. 1 of the Dutch Constitution. It is observed that the school boards in denominational-private education generally put high demands on their employees with respect to the denomination of the school and that the failure to meet those demands often leads to dismissal. However, it is also observed that the dismissals are accompanied by many garantuees as a result of the far-reaching review of the appeal committee. Subsequently it is observed that the legislator by introducing the Act on the equal treatment of men and women has barred specific demands on the basis of the denomination of the school, thereby undoubtedly restricting the freedom of denomination of specific school boards. With regard to the bill on a general act on equal treatment which has recently been introduced into the Second Chamber of Parliament it is, however, observed that it pays great respect to the freedom of education. This happens to such a far-reaching extent that the conclusion is drawn that the introduction of the Act in its present form would mean a deterioration of the legal position of employees in private education which can find no justification at all.

At the end of chapter VIII and subsequently in chapter IX the question is raised if the law governing dismissal in private education is in accordance with the requirements which flow from the relevant basic rights.

With respect to the basic right concerning education it is observed that the government indeed is reserved, mainly due to the fact that the 'Buitengewoon besluit arbeidsverhoudingen (BBA)' (Special decree on labour relations) is not applicable to private education. On the other hand it appears that the government does exert influence on dismissals in private education: directly (through the prohibitions on dismissal in the Civil Code and the Act on the equal treatment of men and women) and indirectly (trough subsidies, for example). This influence is, on the one hand, greater than one would expect on the basis of the freedom of appointment and dismissal of art. 23, par. 6 of the Dutch Constitution; on the other hand this influence meets few objections, because the (freedom of) denomination is not at stake.

With regard to the position of the employees in private education it is firstly observed that the present law governing dismissal in private education does not, in spite of shortcomings, fall short of the general law governing dismissal in the private sector, which also has shortcomings. A fundamental objection remains the situation that the government obliges the school boards to set up appeal committees without being obliged to do so by the basic right of education, as a result of which the 'ius de non evocando' ex art. 17 of the Dutch Constitution is unnecessarily restricted. In this respect the conclusion is drawn that the view according to which the review of dismissals within private education by the Regional director on the provision of employment or by the civil courts constitutes a danger for the freedom of education of the school boards has to be rejected, because both are very well able, where it is appropriate, to maintain the necessary reservation with regard to denominational or philosophical aspects of dismissal disputes.

The former has led to the conclusion to make the BBA in principle applicable to private education, whereby the parties directly concerned (school boards and employees alike) would be given a possibily to choose, in the sense that the schoolboard is given the possibility to acquire an exemption from the applicability of the BBA, provided the employees agree and sound provision is made for the possibility to appeal to the appeal committee. The background to this freedom of choice is the observation that the system of protection against dismissal through the appeal committees can be improved to such an extent that a better protection against dismissal can be provided for than is possible on the basis of the BBA and the Civil Code. It does not seem justified to take away from school boards and employees the possibility to choose for that option if they jointly wish to do so.

Chapters X and XI deal with the participation of employees in private education on the basis of the 'Wet medezeggenschap onderwijs' (Act on participation in education).

It is observed that the Act is based on the basic assumption that the rank of employees as well as parents and pupils participate through a council of participation, in which both ranks occupy half of the seats. The choice for such a system is connected with the freedom of education and particularly with the view of the legislator that the school boards as such, and not the parents, are the bearers of the freedom of education. It appears, too, that the Act only comprises socalled 'basic provisions and garantuees', as a result of which a considerable responsibility lies upon the school board and the council of participation to establish the required provision on participation. This conciseness of the Act is related to the basic right to education as well, more in particular with the freedom of organisation and with the view that the legislator has to pay respect to the position of the school board. In a number of respects the basic right to education (and more particularly the freedom of denomination) has urged to legislator to act. This, for instance, is true for art. 18 WMO, that offers a possibility of complete exemption in case the denomination of the school – also in the opinion of employees and parents – opposes the applicability of the Act on participation in education. Finally, also connected with the basic right to education (particularly with the principle of equality of legal position) is the decision to make the Act applicable to state as well as private education.

Because of these fundamental choices the Act on participation in education differs clearly from the 'Wet op de ondernemingsraden' (Act on the works councils). which regulates participation of employees elsewhere in the private sector, a difference which is largely to the detriment of the employees in private education. That is not only true from the point of view of substantive law, but also for the possibilities of legal protection. With respect to this latter point the Act on participation in Education lingers far behind the possibilities which are offered by the Act on the works councils. This lack of legal protection is due, not so much to the basic right to education, but to the fear for many costly

and time-consuming procedures. In chapter IX it appears that the only provision in the field of legal protection which is offered by the Act on participation in education is so badly conceived that, taking the views of the legislator as a starting-point, one can speak of a breach of the freedom of education.
A discussion of various arguments of the legislator to establish a different, and as is shown worse, regulation on participation for employees in private education than is provided by the Act on the works councils leads to the conclusion that none of these arguments is valid.

This conclusion leads to the proposal to in principle bring private education under the sphere of influence of the Act on the works councils, provided that, for instance by governmental decree, the provisions are adapted to the situation in private education, among other things in connection with the existing possibility of exemption in art. 18 of the Act on participation in education; this latter possibility is necessary with a view to the freedom of denomination of some school boards. Also in the area of legal protection the Act on the works councils should be followed, with this reservation that the existing dispute committees take over the tasks of the industrial tribunals and the 'Ondernemingskamer'. With regard to the parents a proposal is made to establish a seperate council or, alternatively, to give the parents an immediate influence on the school board. This last solution is to be prefrerred, because it fits in with the view – not shared by the legislator as shown – that the parents are the bearers of the freedom of education and not the school boards.

Finally, chapter XII contains a short summary of the most important findings in the earlier chapters. At the end of the chapter it is concluded that the principles which underlie the present regulation of the legal position of employees in private education do not urge for the preservation of the characteristic features of this regulation and that the present regulation of the legal position of employees in private education has many drawbacks which can be put right in an appropriate way by explicitly seeking more alliance with regular labour law, unless it would appear that there are good reasons to create an exceptional provision for private education on the basis of the basic right to education.