1-1-1999

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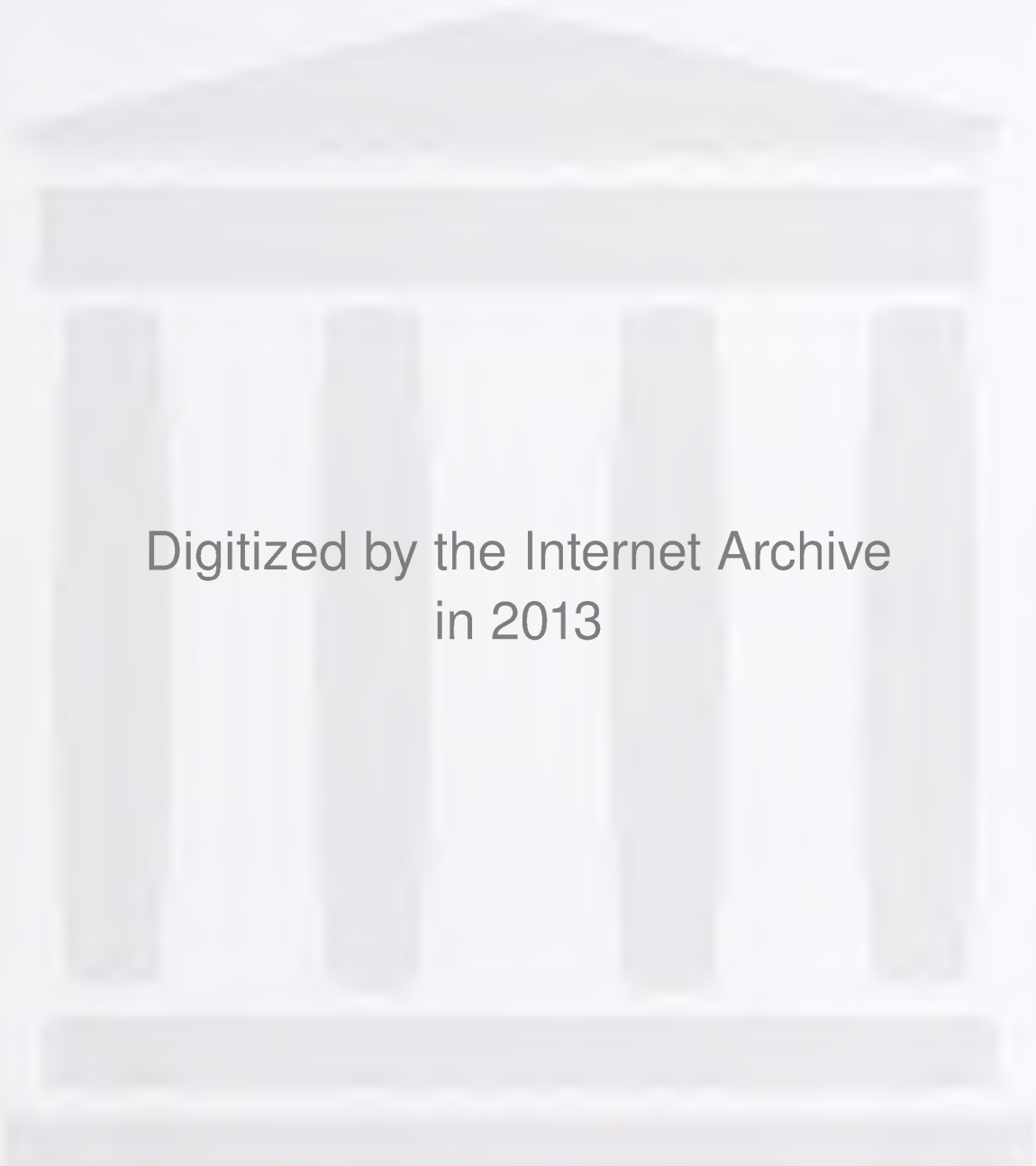

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Licentiaat in de Rechten Vrije Universiteit Brussel, 1992

Magister Iuris Universität Trier, 1993

A Thesis Submitted to the Graduate Faculty

of The University of Georgia in Partial Fulfillment of the

Requirements for the Degree

MASTER OF LAWS

ATHENS, GEORGIA

1999

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Introduction

A comparative study can be conducted on either a macro-comparative or a micro-comparative scale. In the former, two different systems are compared; in the latter, specific legal institutes can be compared.[1] In comparing different legal systems it is important to note how a legal system deals with the sources of the law, how these sources are codified, and how this system deals with dispute resolutions.

It is impossible to describe a legal institution in a country without having a general understanding of the basic principles of law that rules a particular system.

But an important factor that hampers an adequate comparison is the language barrier. Some concepts cannot be easily translated. This can be due to the fact that there is no existing translation. But a much more complicated problem is the existence of an equivalent word in the other language, which has a different legal meaning. Once again, it shows the necessity of not merely "translating" two institutions, but of "immersing" in the other legal system. Only then, will one become aware of the shortcomings of translating dictionaries, be they legal dictionaries or not. The only way to overcome this problem is to describe, rather than to translate the term.

The legal status of the teacher refers to his life both inside and outside the classroom. The most obvious part of his job is teaching, which consists of the passing of knowledge to his students. Yet before he enters the classroom, there are issues to be resolved. For instance, the nature of the employment contract must be determined. Since job security is a substantial matter, the teacher needs to know whether the employment

contract is at will.[2] If it is not an at-will contract, the reasons for dismissal should be clearly established. The teacher also will be concerned about the prospect of tenure and its conditions.

Inside the classroom, other legal issues may arise: what potential liability is there with respect to the children and to what extent can the school control the teacher's private life? The teacher must set an example for the students. As such, must the teacher's life be at all times irreproachable? What is the standard? Can the school regulate the teacher's speech? These issues may vary according to where the teacher works.

An interesting question is whether all the teachers of the world face the same problems in their job. Is the duality of two competing school systems present in all countries? In order to compare two different countries, it is important to determine the organization of the school system, the contract of the teacher, and the sources of law governing education and teachers.

This paper will examine both public and private schools in the United States and Belgium. Particular attention will be paid to the status of teachers in both types of schools in both countries. In Belgium, the tort liability of the teacher is different from that in the U.S.

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[1] 1 KONRAD ZWEIGERT AND HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 5 (North Holland 1977).

[2] In private schools, the basic employment contract is at-will. It refers to a contract without a specific duration or term. The rule means that a person can be fired for a good or a bad reason, that he even may be fired in the absence of a reason, except for Title VII or the PDA. Since the relationship between the parties is governed by contract, except for the erosions of the at-will doctrine, such as public policy, or tortious interference of the discharge, all the provisions concerning the promotion or the denial and the termination of the contract, must be stipulated. It is also possible that they figure in an employment manual. *See* Skagerberg v. Blandin Paper Co., 197 Minn. 291 (1936); Lockhart v. Cedar Rapids Community School Dist., 577 N.W.2d 845 (1998); Estes v. Lewis and Clark College, 152 Or. App. 372 (1998).

Chapter I. The United States

A. Brief historical overview

Historically, the federal Constitution did not specifically pertain to education.[3] At the time the Constitution was written, no general awareness existed that education was necessary regardless of class or wealth.[4] "[F]ree and universal education was far beyond the eye of the most progressive leaders".[5] Influenced by revolutionary ideas coming from England, the interest in an education in the United States grew. Although in England under the Industrial Revolution a general education was not the top priority, on the European continent, other countries were more progressive in realizing of the value of education.[6] Shortly after the United States gained its independence, the value of education began to be realized. People began to see that education could unify the states and build the foundation of the ideas of the American independence, such as freedom and democracy.[7] Although the U.S. Constitution does not provide a general clause for education, all fifty state constitutions do.[8]

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[3] *See* V. James Santaniello, *School Law: a Legacy of the Twentieth Century* 46 R. I. B. J. 5.
[4] *See* KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW, 19 (West 3rd Ed.).
[5] *Id.* at 19.
[6] Actually, Belgium, since its creation in 1830 does not belong to those countries. The compulsory school attendance exists but after W. W: I. *See* ELS WITTE, POLITIEKE GESCHIEDENIS VAN BELGIE [POLITICAL HISTORY OF BELGIUM], (VUB Press ed.) (1998) [hereinafter Political History of Belgium].
[7] Hartzell v. Connell, 35 Cal. 3d 899, 908 (1984); Bethel School District v. Fraser, 478 U.S. 675 (1986).
[8] The first education law was the Massachusetts Statute of 1647 (MASSACHUSETTS COLONY LAWS AND STATUTES, Ch. 88 (1647)). Although the colonial period produced a beginning of the American system of public education, it was not until 1820 that a movement for public schooling began. Yet after the independence of the United States, a number of states incorporated provisions about public education in their respective constitutions. Pennsylvania adopted in 1776 a rather vague educational clause in its constitution. About 1790, Georgia and Delaware adopted educational provisions in its constitutions as well. Yet it took until the late nineteenth Century and the early twentieth Century to make education compulsory and free for all students. *See* HARRY G. GOOD AND JAMES D. TELLER, A HISTORY OF AMERICAN EDUCATION, 83 (MacMillan 3rd Ed). Today, the Constitution of Connecticut provides:" There shall always be free public elementary and secondary schools in the state." CT. CONST. Art. 8, § 1. In Colorado the provision goes as following:" The general assembly shall, ... provide for the establishment

It was not only the states that realized the value of education. Traditionally, churches have provided education as well. As the interest in education grew, the nineteenth century became a decade of struggle between those who advocated a public school and those who advocated church instituted schools.[9] Gradually states accepted the idea that education had to be organized, not only by private institutions, but also by the state. This theory was reflected by the state courts, which often held that society was served by a good education organized by the state.[10]

One of the consequences of this struggle is that in the United States, public schools as well as private schools exist side by side.[11] Since education as such is not stipulated in any specific article of the U.S. Constitution, the responsibility for the creation of a public school system remains in the realm of the states. Yet the Constitution does provide a basis for the public school system. The law regulating education is complex. There are federal statutes, rules, regulations and case law, as well as state law. The laws are intertwined.[12] But it is the States that have far reaching authority in the regulation of the private schools.

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and maintenance of a thorough and uniform system of free public schools throughout the state...gratuitously". CO CONST. Art. 9, § 2. Rhode Island provides in its constitution: "... [I]t shall be the duty of the general assembly to promote public schools..." RI. CONST. Art. 12, § 1.

[9] This struggle did not only take place in the United States but also in Belgium, *supra* Chapter II. *See* KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 21 (West 3rd Ed.) and ELS WITTE, Political History of Belgium (VUB Press Ed.) (1998). The landmark case for the United States is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[10] In *Leeper v. State*, 53 S.W. 962 (1899) the court held "[t]he contribution of education to democracy has a political, an economical, and a social dimension".

[11] *See* 268 U.S. 510 (1925).

B. Sources of law

1. Federal Law

Congress has enacted statutes that specifically regulate school law.[13] Under the threat of cutting back the funding, Congress is able to impose its rules.[14] In addition, other statutes, not specifically enacted with schools or teachers in mind, such as non-discrimination rules, sex discrimination, pregnancy protection, safety on the work place, have nevertheless had an impact on the status of teachers.[15]

Moreover, an important amount of school law consists of First Amendment claims – free speech and the separation of state, in the form of schools, and church.

2. State Law

State constitutions all contain clauses related to education.[16] While the language may vary from constitution to constitution, they all have underlying principles in common. Public schools are a unit, a system of free education and unlimited access guaranteed by the legislatures.[17] Yet the school systems differ from state to state. In every state, the state legislature is responsible for the creation of the public school system. The legislature is authorized to enact statutes, administrative regulations or orders, and to create agencies that have delegated powers. Although state courts are an

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[12] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 25 - 55 (The Michie Company 3 rd Ed.).

[13] An example of the impact of Congress over the State's education is The Education for All Handicapped Children Act (20 U.S.C. § 1401 *et. seq.*) which charges the States to provide a free public education for all handicapped children. The Family Educational Rights and Privacy Act of 1974 (20 U.S.C.A. § 1232g) protects the confidentiality of student records by unauthorized parties. The Elementary and Secondary Education Act (20 U.S.C. § 2701 et. Seq.) is another example of the influence at the federal level on the state's school system. This statute is one of the most sweeping attempts at the federal level to provide federal aid to the elementary and secondary schools. It provides federal funds to local educational agencies for educationally deprived children who reside in low-income areas. The types of grants are fixed by the statute, but the amount is set yearly by Congress.

[14] *See* MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 10 (Allyn and Bacon ed. 6th ed.) (1998), *see also* Chapter II, section D of this paper for the Belgian part.

[15] Title VII, Pregnancy Discrimination Act, American with Disabilities Act, Age Discrimination in Employment Act.

important source of education law as well, it seems that plaintiffs generally, when it is possible, prefer to choose the federal forum in educational matters.[18]

C. Private schools

1. Constitutional Right

For those not satisfied with that state public education, there is private education. Citizens have a constitutional right to create private schools and it would be a violation of the U.S. Constitution if the state were to prevent the establishment of private schools by imposing a monopoly over education. This principle was confirmed in *Pierce v. Society of Sisters*[19], where the Supreme Court held that no statute could denigrate a parents' choice of school. It would "unreasonably interfere [ ] with the liberty of parents and guardians to direct the upbringing and education of children under their control".[20] According to the Court there is a "fundamental liberty" that "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only".[21] This case is often referred to as establishing the right of parents to choose the most appropriate education of their children. This liberty of freedom of choice of the parents embraces also that they can have their children instructed at home.[22] The state legislature may control private education by setting the minimum standards of attendance, content of the curriculum, length of education, etc. *Pierce* held that compulsory school attendance, as regulated by statute is legitimate.

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[16] *See* note 8.
[17] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 27 (West 3rd Ed.).
[18] MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 13, 14 (Allyn and Bacon ed. 6th ed.) (1998), *see* Richard Fossey and Todd A. DeMitchell, *"Let the Master Answer": Holding Schools Vicariously Liable When Employees Sexually Abuse Children* 25 J. OF L. & EDUC. 574, 577 (1996).
[19] 268 U.S. 510 (1925).
[20] *Id.* at 534.
[21] *Id.* at 510.

2. School Attendance

While *Pierce* provides the basis of the right to choose the type of education, parents may not choose not educate their children. The states may compel parents to send their children to a school, be it public or private, or to educate them at home through accredited home instruction. Even Amish parents, allowed to remove their children, who would otherwise be subject to compulsory attendance laws from school, can do this only after the eight grade.[23]

It is legitimate for the state to require that the private school or the home instruction meet certain minimum standards. For instance the state could require that private schools all provide professional teachers. It could also require the parents who prefer home instruction to provide a professional teacher, or that the parents give some proof of substantial education, or even that the students pass state tests.[24] Case law also establishes that home instruction is not an absolute right.[25] *Pierce* may establish the right to freedom of school choice, but it established no such right to home instruction. Whenever parents fail to meet the standards and are compelled to send their children to school, whether private or public, courts seem to accept that the state's interest in an appropriate education for its children outweighs the interests of the parents.[26]

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[22] People v. Levisen, 404 Ill. 574 (1950); Jeffery v. O' Donnel, 702 F. Supp.513 (1987).
[23] Wisconsin v. Yoder, 406 U.S. 205 (1972); Fellowship Baptist Church v. Benton, 815 F.2d 485 (1987).
[24] *See* New Jersey v. Massa, 95 N.J.Super. 382 (1967); Grigg v. Virginia, 224 Va. 356 (1982).
[25] If home instruction is understood as the instruction of a child at home by its parents, it is not an absolute right. In *Burrow v. State*, 282 Ark. 479 (1984), the court held that home instruction by a parent is not a compliance with a compulsory attendance statute. Moreover, some states may require prior approval by state officials before a home school can replace public school attendance. *See* State v. McDonough, 468 A.2d 977 (1983); Care and Protection of Charles, 399 Mass. 324 (1987); State v. Schmidt, 29 Ohio St. 3d 32 (1987); Matter of Kilroy, 121 Misc.2d 98 (1983).
[26] MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 23 (Allyn and Bacon ed. 6th ed.) (1998).

3. Minimal Requirements

Moreover, *Pierce* did not shelter the non-public school from control by the state. It is completely legitimate for a state to organize some form of control in order to have minimum requirements met. The question is what is the extent of the control. Occasionally, the state's interest in quality education may conflict with the private school views of their purpose. This could result in onerous burdens being imposed on the private schools.

The Supreme Court never defined the parameters of state control. It defined the federal government's compelling interest in *Wisconsin v. Yoder,*[27] without indicating the boundaries of the statutory regulations of the state. But the interests of the state do not always match the interests of the private schools, especially when it comes to teacher certification.[28]

The absence of clear rules set forth by the U.S. Supreme Court also led to a vast array of varying state judicial decisions. However, some common principles can be drawn. First, as long as the state does not interfere with the religious orientation of the school, the control seems legitimate. In other words, when there is no unreasonable interference with the parties' right of free exercise of religion and the control is justified by a compelling interest, the state can exercise its control.[29] Second, when the action is "one of the least restrictive means" to accomplish the state's interest in safeguarding a good education.[30] Once again, the extent of the control is a state matter, but control over the curriculum, the attendance, the course materials, and the certification of the teacher will be common themes in every state. Third, states exercise some form of control in

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[27] 406 U.S. 205 (1972).
[28] Ralph D. Mawdsley, *Emerging Legal Issues in Nonpublic Education* 83 Ed.Law Rep. 1, 10 (1993).

order to have the private school meet certain quality standards. This is absolutely legitimate, as long as the restrictions do not interfere with the religious or non-religious project of the school. The state might thus require minimum degree requirements, minimum hours of classes to be followed, and minimum number of days for attendance; even the number of holidays may be fixed by the state. But a more delicate question is whether the state may proscribe which days of the week classes must be held. In the light of a long-standing Supreme Court decision, it does not seem evident that the state could proscribe that Saturday and Sunday have to be compulsory days off.[31]

4. Financing

Since *Pierce*, parents have had a right of choice. They have an option to send their children to either a private or a public school. It does not mean that, the state has to guarantee this choice by supporting the private schools financially. States willing to finance private schools are limited by the federal Constitution. Judicial decisions have interpreted the First Amendment under the doctrine of the "establishment clause", which prohibits the state from advancing or prohibiting religion. An "[e]xcessive entanglement of government with religion may be viewed both as government's sponsorship of religion and as its interference with the free exercise of religion".[32] Some forms of funding are possible. In *Board of Education of Central School District No. 1 v. Allen*[33], the Supreme Court found that " ... cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate".[34] The judge writing for the majority applied the "public purpose theory", which is an abandonment of the presumption that a

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[29] 268 U.S. 510, 534 (1925); Runyon v. McCrary, 427 U.S. 160, 179 (1976); State of Ohio v. Whisner, 47 Ohio St.2d 181 (1976).
[30] *See* Ohio Association of Independent Schools v. Goff, 92 F.3d 419 (1996).
[31] *See* Cantwell v. State of Connecticut, 310 U.S. 296 (1940).
[32] Agostini v. Felton, 117 S. Ct. 1997, 2014 (1997).
[33] 392 U.S. 236 (1968).

state aides a religion to a certain extent when it finances a private school. A state may provide a financial aid, as long as the aid serves secular purpose. In *Allen*, the judgement teaches that "a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students".[35] Such language opens the door for discussions of how far the state can go in aiding secular acts of private schools.

States have been creative in providing aid to private schools. Some have established tax credits or tax deductions for parents of students at private schools. The issue was addressed by the Supreme Court in the case of *Committee for Public Education and Religious Liberty v. Nyquist*[36], where the state provided reimbursement of tuition for nonpublic school parents and tax relief for those parents who had to pay the tuition.[37] The Court held that the statute had the effect of advancing religion and therefore violated the Establishment Clause.[38] In a subsequent case, *Lemon v. Kurtzman*[39], the Supreme Court developed a three-pronged test to determine whether aid to private schools was constitutional. The test "requires (1) that a statute have a secular purpose, (2) that is principal or primary effect must be one that neither advances nor inhibits religion and (3) the statute must not foster an excessive entanglement with religion".[40] But it is often a thin line whether the state went beyond its competencies in financing private schools. The test is not absolute, as demonstrated in *Mueller v. Allen*.[41] In this case, a tax exemption was made possible for all parents, regardless of the school they had chosen for

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[34] *Id.* at 247.
[35] *Id.* at. 247.
[36] 413 U.S. 756 (1973).
[37] *Id.*
[38] *Id.*
[39] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[40] *Id.* at 614.
[41] 463 U.S. 388 (1983).

their children. The Supreme Court held that this was valid because private schools form a viable alternative to public schools. They enhance competition, which justifies state support to private schools. The Supreme Court allows financing of private schools beyond material items such as textbooks or transport. As long as the state statute serves a secular purpose, and the aid is offered to all, the states seems to be allowed to finance private education.[42] This decision seems far-reaching, and in later decisions it looked as if the Supreme Court went back to a stricter standard of separation of church and state under the Establishment Clause.[43] Yet *Agostini v. Felton*[44] seems to overrule the stricter standard and apparently goes back to the reasoning of Allen. The fact is that while private schools enhance competition and provide a public service, they remain entirely private corporations.

5. Employment Contract

In general, there are no special state or federal statutes that determine the terms and conditions of employment contracts for teachers in private schools. Yet the state does require minimum qualification standards, such as a degree requirement, that constitutes a prerequisite for employment. The vast array of rules that governs the relationship between the teacher and the employer in the public school does not exist in the private context. In private schools, the basic employment contract is at-will.

Private schools are subject to the general statutes that are applicable to other employers, such as statutory prohibitions against discrimination. Title VII of the Civil Rights Act of 1964[45] prohibits discrimination in employment on the basis of race, color,

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[42] G. Sidney Buchanan, *Governmental Aid to Religious Entities: The Total Subsidy Position Prevails*, 58 FORDHAM L. REV. 53 (1989).
[43] *See* School District of City of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).
[44] 521 U.S. 203 (1997).
[45] Title VII of the Civil Rights Act of 1964, amended in 1991, 42 U.S.C. § 2000e *et seq.*

sex, national origin and religion. It applies to the terms, conditions and privileges of the employment situation, which includes hiring and firing decisions, promotions and salary. It also extends to seniority, all fringe benefits, job descriptions and assignments. But the statute provides an exception to the prohibition of discrimination. It is possible for the employer to make decisions based on sex, religion or national origin when this is "a bona fide occupational qualification reasonably necessary to the operation of that particular business or enterprise". There is no exemption for race. Thus a religious school may invoke the bona fide occupational qualification of Title VII and the First Amendment.

Teachers only enjoy the general protection of employees in the private sector. Thus, there is no general protection other than a contract claim for a denial of tenure because specific grounds for tenure or dismissal do not exist in the private sector. A private teacher does not have the protection of his public school counterpart. Since private school teachers do not have any relationship with the government under the terms of their employment, they cannot prevail on the constitutional guarantees, because the Constitution does not restrict the actions of private employers.

6. Employment At-Will

The default for a contract for the teacher in a private school is the at will employment contract.[46] When the contract provides no specific term for the termination, as to time or cause for the dismissal, the contract can be terminated at all times and for no reason,[47] except for reasons violating Title VII and PDA. The employer need not have a reason for the dismissal. But the doctrine has been eroded somewhat by a few courts that have allowed at the at will rule to be circumvented through reliance on the language in

[46] Skagerberg v. Blandin Paper Co., 197 Minn. 291 (1936).
[47] Massey v. Houston Baptist University, 902 S.W.2d 81 (1995).

written contracts, implied-in-fact contracts, the employment handbooks, customs or the facts that implied certain conditions in the employment contract.[48]

A contract that specifies dismissal upon just cause, is probably exceptional. Moreover, it is not always easy to determine what circumstances establish a termination. In *Johnson v. Savannah College of Art*[49], an employee was transferred from a teaching job to a non-teaching staff position. The Court found that the new position was related to his experience. Thus, it held that the language of the contract was broad enough not to recognize this transfer as a breach of contract.[50]

7. Employment Manuals

For the private school teacher in particular, the contract clauses regulating termination is very important. It can provide that prior to discharge, the teacher must be informed of the charges and be given a right to be heard. This constitutes binding language on the employer.[51] It is also possible that instead of regulating termination provisions in each contract individually, the school addresses this in an employment manual. However, such manuals by their nature are not binding. Instead, courts often require reliance.[52] A handbook can regulate the conditions of tenure, demotion or dismissal, and the procedural issues that are applicable. But handbooks can also contain disclaimers. Because of these contingencies, it is not possible to state that handbooks vest rights for the employee.[53] In order to be controlling, the language must be clear on

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[48] 2 MARK A. ROTHSTEIN, EMPLOYMENT LAW 231 (West 1994), 2 WILLIAM D. VALENTE, EDUCATION LAW, PUBLIC AND PRIVATE, 378 (West, 1985). *See* Wiethoff v. St. Veronica School, 48 Mich. App.163 (1973); Walters v. Amityville Union Free School Dist., 251 A.D.2d 590 (1998) (reliance on estoppel).
[49] 218 Ga.App. 66 (1995).
[50] *Id.*
[51] Savannah College of Art & Design v. Nulph, 216 Ga. App. 48 (1994).
[52] *See* Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458 (1982), *see also* (specific for the school context) Taggart v. Drake Univ., 549 N.W.2d 796 (1996).
[53] Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986).

its face.[54] The employment handbook for private school teachers may duplicate rules applicable to teachers in state schools. If there is consideration, these rules become legally binding for private school teachers as well. Sometimes the handbook may integrate only a part of these rules. In order to determine which provisions apply, the teacher must examine the language in the handbook.

8. Other Erosions of Employment At-Will

Occasionally, courts may focus on an implied-in-fact contract to circumvent the at will presumption. Although accepted by the courts as a means of overcoming the at will doctrine, an implied-in-fact contract is not easy to prove. The intention of the parties must be established. Courts often look to additional consideration, clear oral statements, that are not vague, handbooks, past treatment of the employee, etc. in order to have an implied-in-fact contract.[55] When a jury could find that the teacher has legitimate expectations grounded in the employer's statements, the teacher will have an implied-in-fact contract, although without duration, that would not be merely at will.

9. Collective Bargaining

The National Labor Relations Act (NLRA)[56] also regulates the teacher's employment relationship. One of the earliest federal laws, it provides employees a right to form or to join labor unions that can bargain with the employer. Absent a general statute that regulates the employment relationship, the NLRA could be an important statute when it comes to collective bargaining over terms and conditions of employment.

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[54] Jacobs v. Mundelein College, 256 Ill. App.3d 476 (1993).
[55] Hetes v. Schefman & Miller Law Office, 152 Mich.App. 117 (1986), Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579 (1980), Beck v. Phillips Colleges, Inc., 883 P.2d 1283 (1994).
[56] 29 U.S.C.A. § 167.

Wherever collective bargaining for the teachers in the public schools is allowed, it determines the terms and conditions of the contract.[57] There is much information about collective bargaining in the public school. Although the NLRA initially applied only to private employees, there is not much information on collective bargaining in the private schools.[58] Whether this might be because no problems occur within the private context is doubtful.

The NLRA determines when an employer is compelled to bargain with a union and under what conditions the process of collective bargaining will occur. The statute protects private employees when they act in concert. At first blush, the NLRA does not provide an exception for private school teachers. In *National Labor Relations Board v. Catholic Bishop of Chicago*[59] the Supreme Court observed that the term "employee" does not include a teacher from a religious school.[60] The Court reasoned that the NLRB is an agency of the state, and controlling or interfering with the employment practices of a private school would be an interference that goes beyond the boundaries of the First Amendment. Moreover, Congress did not intend to include the private religious school within the definition of the term "employer".[61] This decision is the basis for excluding teachers from of the scope of the Act.[62] The Board is a part of the collective bargaining process, since the NLRB "will be called upon to decide what ... the terms and conditions

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[57] The NLRA does not apply to employment contracts in public schools. Since teachers are public employees, the right to bargain collectively is not provided by the NLRA, but has to come from a state statute. Because school districts are governmental agencies, only allowed to act within the boundaries of the power granted to them, they need to be vested with the power of engaging into collective bargaining. *See* section D public schools, collective bargaining.

[58] *See also* Michael E. Hartmann, *Spitting Distance: Tents Full of Religious Schools in Choice Programs, the Camel's Nose of State Labor Law Application to Their Relations With Lay Faculty Members, and the First Amendment's Tether*, 6 CORNELL J.L. & PUB. POL'Y 553 (1997).

[59] 440 U.S. 490 (1979).

[60] *Id.*

[61] *Id.*

[62] Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act* 17 BERKELEY J. EMPLOYMENT & LAB. L. 185, 219 (1996).

of employment [are]...".[63] It is the Board that decides what the mandatory bargaining issues are. Therefore, it would constitute an interference of the state when the NLRB decides these issues with respect to religious schools.

But this is not a simple issue. Once again, it will depend on the state as to whether a statute or case law allows the lay teacher to unionize and to bargain.[64] The task of distinguishing between teachers from a private school with a religious nexus and teachers from a private school without such a nexus cannot always be performed with ease.[65] While it is true that schools without any religious nexus would have more difficulties to show a constitutional claim under the First Amendment, the contrary is not automatically true. The exclusion of these teachers leads to a substantial group of employees who are exempt from the right to collective bargaining.

State constitutions or statutes that guarantee a right to collective bargaining are not preempted by the NLRA. Church operated schools have tried to challenge these constitutions or statutes under the First Amendment.[66] Subsequently some courts have held that the state's interests in guaranteeing a right to unionize does not outweigh the private school's interest.[67] But the state's right is not absolute, even if the state allows unionization and collective bargaining, because the state is bound by the federal Constitution.[68] The union has a right to bargain collectively over everything, except the issues exempted by the First Amendment. The scope of bargaining is in fact limited to

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[63] 440 U.S. 490, 502 (1979).
[64] Since *Catholic Bishop* demonstrates that the right to bargain collectively for private school teachers is not provided by the NLRA, state law thus can provide such a right, but within the limits of the First Amendment. As a matter of fact, some states do, like New Jersey. *See* South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School, 150 N.J. 575 (1997).
[65] RALPH D. MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 116 – 123 (3rd ed. NOLPE)(1995).
[66] 150 N.J. 575 (1997).
[67] Catholic High School Association v. Culvert, 753 F.2d 1161 (2d Cir. 1985).
[68] 150 N.J. 575, 592 (1997).

"wages, benefit plans and any other secular terms or conditions of employment".[69] Only a few states guarantee the right for lay teachers to unionize.[70] Is it then the case that teachers from private non-religious schools enjoy the protection of the NLRA?

The relevance of this distinction seems questionable. The protection of the First Amendment not only embraces the right to a religion, but also the right to have no religion. Inasmuch as a non-religious school, proclaiming a philosophy of no religion, has a protectable First Amendment right, such schools, too, are not bound by the NLRA. This narrows the group of teachers of private schools that are able to enter into collective bargaining. It seems hard to accept why there should exist a difference from other private employees.

The absence of a right does not mean that there is no collective bargaining at all in the private school. It simply means that the NLRB cannot force the school authority to enter into collective bargaining. Collective bargaining simply does take place. Its subjects vary from wages, benefits, working hours, number of students in the class, etc. It most likely will not involve educational or ecclestical policies or supervision of the teacher.

There are various reasons why the religious schools do not believe that certain labor and employment laws apply to them. Another more prosaic reason is that such laws are not very popular with any employer, including the religious school employer.[71]

Invoking religious autonomy of the church-related school is an easy way to avoid the obligations imposed by the statutes. But it does not seem justified that the private

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[69] *Id.*

[70] Michael E. Hartmann, *Spitting Distance: Tents Full of Religious Schools in Choice Programs, the Camel's Nose of State Labor Law Application to Their Relations With Lay Faculty Members, and the First Amendment's Tether*, 6 CORNELL J.L. & PUB. POL'Y 553, 574 (1997).

[71] Douglas Laycock, *Towards a General Theory of the Religion Clauses: the case of the Church Labor Relations and the Right to Church Autonomy*, 81 COLUM.L. REV. 1373, 1400 (1981).

schools can invoke the First Amendment. Teachers must illustrate indeed the tenets of a religion, in religious as well as in secular classes, although not to the same extent that a minister does. Moreover, the activities of the private school employer are comparable to the activities of any other private employer. The Supreme Court's decision *NLRB v. Catholic Bishop of Chicago*[72] does not exclude private schools from the labor or employment laws. In the five to four decision, the Court examined the legislative history of the act and concluded that the Congress did not intend to include the private religious schools as employers under the NLRA.[73]

The Court reasoned that the NLRA enumerates the exceptions of the employer in clear language. According to the parties in the said case, the definition of the term employer was not clear. When a statute is not clear, either Congress must enact an interpretatory statute or more likely, the courts will are called upon to unravel the meaning of the statute. In the latter case, a judge may use several techniques to interpret the statute. First, he should try to determine what Congress intended. If that is not clear, the judge may further look to the aim of the act and try to interpret it according to this aim. The court may go in the direction of adapting the statute to changed societal needs. In *Catholic Bishop of Chicago*[74], the Court opted for the historical perspective in concluding that a private school was not an employer in the sense of the act. The Supreme Court had an important motivation to do this, because it wanted to avoid the question that would inevitably raise of whether the NLRA would violate the First Amendment. The Court decided to avoid this problem by interpreting the act to exclude private school from its scope, but the Court added one more exception. According to the

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[72] 440 U.S.490 (1979).
[73] *Id.* at 504.
[74] 440 U.S. 490 (1979).

dissent, this was an unusual way to proceed.[75] As the dissent states, the outcome of the case could have been different. In fact, Congress enacted a special statute to include non-profit hospitals within the scope of the act. This was never questioned. But according to the dissent, if the Court had taken the other direction, the question would have arisen whether too excessive an entanglement would exist between Church and State. But this was not a big hurdle, since the Free Exercise clause is not absolute. A governmental action that burdens on the Free Exercise of religion may be justified by a compelling State interest, as long as this action falls within the state's power.[76] The NLRA would stand the challenge. Examining this issue, something very important seemed to be overlooked: the right of the teachers.

10. Duties on the Job

The essence of the job of a teacher is to pass knowledge. However, the nature of education reaches beyond the development of cognitive skills and techniques. It implies also that a teacher attempts to instruct the future generation with the traditions of the present generation. The teacher's role is pivotal. Thus, in addition, the school can require the teacher to adhere to the philosophy of the school. This can be raised in the employment contract or in the employment handbook. Breaching this requirement could constitute employee misconduct. The misconduct can consist of several forms, such as failing to provide proper teaching assignments, criminal behavior, or simply an infringement of the rules the private schools.

11. Duties off the Job

Private schools exist because of philosophical and religious reasons. The school generally expects its teachers to represent the school. It is apparent that the teacher

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[75] *See* Justice Brennan, dissenting in 440 U.S. 490 (1979).

during work time has to obey the rules set out in the contract. Issues arise when the teacher is off duty, especially when parts of the teacher's private life become publicly visible and have repercussions on the school. In some cases, state or federal laws, such as Title VII may apply. The scope of Title VII is broad, but it is not all encompassing. Consider, for instance, the case of *Boyd v. Harding Academy of Memphis Inc.*[77] In this case, a private school had a policy of firing teachers that engaged in sex outside marriage. In *Boyd*, the plaintiff was first told that she was fired because of her pregnancy. She sued under Title VII and lost in the lower court. On appeal, the teacher's claim was rejected since she had not met the burden of proving the elements of a prima facie sex discrimination case under Title VII.[78] First, she had to prove that she was qualified for the job, secondly, that she was pregnant, and third that she was terminated because of the pregnancy. In this case, the employer could establish a legitimate non-discriminatory reason, by showing that it had consistently disallowed extra-marital sexual relationships, by terminating employees that found themselves in such a situation. The plaintiff could not rebut this reason in showing that it was pretext. Therefore, the court noted that this is no discrimination case, and found for the school.

Another interesting issue involves the religious beliefs a teacher must hold. This issue can encompass both private off-duty conduct and work time conduct. Although Title VII generally prohibits religious discrimination, section 702 of Title VII permits

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[76] Sherbert v. Verner, 374 U.S. 398, 406 (1963).
[77] 88 F. 3d 410 (6th Cir. 1996).
[78] A discrimination claim under Title VII must contain four elements: the plaintiff belongs to a protected class, the plaintiff was qualified and applied for the job, the plaintiff was rejected, the vacant job remained open. The plaintiff has the burden of persuasion. Once a plaintiff has met the burden of a prima facie discrimination claim, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason. The burden of persuasion never shifts. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. Of Community Affairs v. Burdine; 450 U.S. 248 (1981), Hazen Paper v. Biggins, 507 U.S. 604 (1993).

religious preferences.[79] However, the employer must be a religious corporation or educational institution and must have a non-profit character. In addition the institution must be substantially owned by a church or a religious organization. Often disputes arise as to how broad this exception can be. It is not clear whether the exemption allows only hiring or discharge on the absolute basis of religious belief, or whether it includes also all rules of conduct of a particular religious belief. Such a question arose in *Little v. Wuerl*.[80] The school policy prescribed teachers not to engage in – among other things – a rejection of the laws of the Roman Catholic Church. While on a leave, the teacher in question remarried after a previous divorce that had not been approved by the Church, since the divorce had not followed the canonical law. The teacher brought suit against the school, claiming that the school violated Title VII, by discriminating against her on the basis of religion. After the dismissal the teacher claimed that the school violated Title VII. The Court of Appeal found for the school, interpreting Title VII as broad enough to encompass conduct consistent with the employer`s religious practices.

Litle v. Wuerl may be contrasted with *EEOC v. Kamahameha Schools / Bishop Estate*[81] in which the 9th Circuit decided that religion does not constitute a bona fide occupational qualification merely because of the nature of a private school. Title VII imposes that discrimination on the basis of religion constitutes a bona fide occupational qualification. In the case *EEOC v. Kamahameha Schools / Bishop Estate*, it was decided that religion could not be a veritable bona fide occupational qualification. Although the school was private, and required that its teachers be of protestant confession, it admitted

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[79] Corp. Of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
[80] 929 F.2d 944 (3rd Cir. 1991).
[81] 990 F.2d 458 (9th Cir. 1993).

children of all persuasions. The judge held that the school, in educating in a pluralistic way, was not a religious educational institution for purposes of Title VII.[82]

12. Pregnancy

Discrimination against pregnant teachers has also been an issue. Title VII, the Pregnancy Discrimination Act of 1978 (PDA) and the Family and Medical Leave Act of 1993 form the basis of protection for the female teacher. Under Title VII it is unlawful to refuse to hire, to discharge, or otherwise to discriminate on the basis of gender. Of course, a problem for plaintiffs lies in proving that the reason for termination of employment is due to pregnancy.[83] The PDA refined Title VII by stating that women affected by pregnancy, childbirth or related medical conditions shall be treated as other persons not so affected but similar in their ability or inability to work

Another source of contention is employee benefits. Here the issues have focused on whether maternity leaves should be financed or not, and the length of the leave, especially when compared to other sick leaves. *California Federal Savings & Loan Associates v. Guerra*[84] confirmed that the right to job reinstatement from maternity leave, when regulated by a state statute is certainly not preempted by the PDA. The case did not definitively establish whether a mother is entitled reinstatement. However, the statute dictates that female teachers have to be treated as any other employee, able or unable to perform their job. Thus, a policy providing guaranteed reinstatement to other workers must be accorded to female teachers as well.[85] Where there is no policy, maternity leave must be regarded as any other sick leave, and any decision by the employer to refuse a

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[82] *Id.*
[83] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981), Hazen Paper v. Biggins, 507 U.S. 604 (1993).
[84] 479 U.S. 272 (1987).

request for a leave must not be based on a prohibited motive. It is interesting to note that Title VII also applies to male teachers, wish to take a leave in order to raise their children. Nothing in the statutes seems to preclude the right to leave for male teachers, since gender does not include pregnancy alone.[86]

To some extent, there is protection for female teachers. Title VII however only applies to the discrimination based on sex. When a private school has a policy of discharging unwed pregnant teachers, there is not much protection for the teacher under Title VII. Some state courts merely accept the validity of the policy and the subsequent discharge.[87] Other courts, when the plaintiff is successful in her showing that the pregnancy was the real reason, find that Title VII has been violated.[88] One day it may be possible to challenge such a discharge as conflicting with public policy. But it takes a change in society to accept that pregnancy and childbirth are inalienable rights regardless of the circumstances and that does not affect the employment in the private school.

D. Tort liability

1. Employee Liability

The teacher's duties lie not only within the context of the contract, but also outside the scope of the contract. His duties refer to his liability for torts. "A tort is a civil wrong", outside the scope of a contract. The remedy will be in the form of damages. The tort is generated by the harm a person inflicted to another person. In order to obtain damages, the plaintiff must prove the existence of the tortious act, the harm or injury and the causal nexus between the act and the harm. Torts involve two major

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[85] A lot of pregnancy related policies have been challenged. In Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), the teacher successfully challenged the policy, asserting that it violated her 14th Amendment due process right.

[86] *See also* Schafer v. Board of Education of the School District of Pittsburgh, 903 F.2d 243 (3rd Cir. 1990).

[87] 88 F.3d 410 (1996); Ganzy v. Alen Christian School, 995 F. Supp. 340 (1998); Gosche v. Calvert High School, 997 F. Supp. 867 (1998).

categories: they can be malicious and intentional, they can result of the negligence. Negligence refers to a conduct that falls below an acceptable standard, which results in an injury.[89] There is no fix standard and often the judge will be asked to decide on the basis of the facts. Negligence can refer to carelessness or the failure to foresee potential harm. The line between negligence and intentional misconduct is not always very clear. In examining whether an act constitutes negligence, courts have developed a set of criteria, the first to be an obligation of a standard of care to another. The second point to be examined is whether someone failed to exercise this standard of care. The third point is obvious: did any accident happen in which a person suffered some kind of injury. The forth matter to examine is whether the cause of injury was the failure of the ample care, this failure being the direct cause. The standard of care a teacher owes has been described as that of a reasonable and prudent person.[90] Thus a court will compare the degree of care the teacher in question owed with the degree of care that a reasonable and prudent teacher would have exercised placed in the same circumstances.[91] But the standard varies depending on the circumstances. For instance, a gym class or a laboratory class requires a higher standard of care than a class of English literature, since the students are moving around, and engaging in actions that are more likely to cause accidents, than when they sit and read. Age of the children is also a factor to take into account. The duty will vary with children that are less mature. Usually the issue is whether there was an adequate supervision. The school and the teachers must take all necessary precautions to prevent any hazardous condition.[92] Courts look to " ... whether

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[88] Vigars v. Valley Christian Center of Dublin, 805 F. Supp. 802 (1992).
[89] W. PAGE KEETON, DANN B. DOBBS, ROBERT E. KEETON, DAVID G. OWEN, PROSSER AND KEETON ON TORTS, 165 – 173 Hornbook Series (West 5th Ed.).
[90] MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 401 (Allyn and Bacon ed. 6th ed.) (1998).
[91] *Id.*
[92] Laneheart v. Orleans Parish School Bd., 524 So.2d 138 (1988).

the actual harm fell within a general field of danger which should have been anticipated".[93]

Whenever a teacher is accused of negligence, the teacher's first defense usually is to demonstrate that the constitutive elements for negligence were not established. In most cases, however, it will not be easy to use this as a defense. Then, the teacher probably will attempt to demonstrate that the injured individual is to blame integrally or partially for the injury and is thus contributorily negligent. But it is often difficult for the teacher to prove that the victim is fully to blame for the injury, because children are not always able to estimate the consequence of their deeds. However, a child is not immune from negligence, and the child's age, physical characteristics, gender, education, will be taken into account in assessing blame.[94] In *Cormier v. Sinegal*[95], the judge found the child contributory negligent in committing an act in gross disregard of safety in the face of known, perceived, and understood dangers.[96]

If a teacher is successful in showing that the child was contributory negligent, the teacher can avoid having to pay damages, although his conduct may still constitute a civil wrong. While this may seem unduly harsh, since children are usually not able to properly assess whether a situation is hazardous, the teacher may not be completely absolved, since the court may hold the parties jointly responsible.[97] This defense constitutes comparative negligence and damages will be awarded according to the degree of responsibility of each party. Sometimes, the teacher is not at all to blame. This is when the teacher foresees a hazardous situation and tells a child to adapt its conduct, but the child does not.

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[93] McLeod v. Grant County School Dist. No. 128, 42 Wash.2d 316, 321 (1953).
[94] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 471 (West 3rd Ed.).
[95] 180 So. 2d. 567 (1965).

A second category of torts consists of intentional interference. Contrary to its name, the wrongdoer does not need to plan to inflict an injury. However, invading the rights of another constitutes an intentional tort. The intent can be deduced from the act.[98] For instance, assault and battery form one category of intentional torts, defamation forms another. In the education context, claims based on these grounds are uncommon, but may occur in the course of disciplining a student.[99] Although courts apparently are rather willing to accept that teachers can discipline students under the doctrine of "in loco parentis" [100] they have held that teachers must act within the boundaries of reasonableness.[101]

2. Employer Liability

A private school can be held liable for the misconduct of its employee. This is certainly the case when teachers engage in intentional acts.[102] The question is whether the school knew or could have known of the employee's propensity to a certain conduct.[103] In order for the school to be held liable, the employee must have acted within the scope of the employment, which means that the employee must have committed an act that is in the "prosecution of the employer's business and within the scope of the

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[96] *Id.* at 569.
[97] Akins v. Glens Falls City School Dist., 53 N.Y. 325 (1981).
[98] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 459 (West 3rd Ed.)
[99] *See Id.* at 460, and MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 10 (Allyn and Bacon ed. 6th ed.) (1998).
[100] *In loco parentis* stands for the fact that the "teacher stands in place of the parent and in such capacity has a right to chastise a pupil". KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 460 (West 3rd Ed.).
[101] *See* Simms v. School Dist. No. 1 13 Or.App. 119 (1973) and KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 460 (West 3rd Ed.). *But see* Ingraham v. Wright, 430 U.S. 651 (1977). In this case, the Supreme Court upheld corporal punishment in a public school, after students claimed it to be a violation of their constitutional rights.
[102] *See* Gebsen v. LagoVista School District, 118 S.Ct. 1989 (1998).
[103] Thatcher v. Brennan, 657 F. Supp. 6 (1986), Copeland v. Samford Univ., 686 So.2d 190 (1996).

employee's authority".[104] An act that is substantially different from the acts that are authorized, are not considered in the scope of the employment.[105]

E. Public schools

Teachers working for a public school are public employees. In the United States, it is well established a separation between the state and the church exists. This separation between church and state in the United States, results in the fact that public schools have to provide a neutral education. The United States Supreme Court has held that there is a "wall of separation" between church and state.[106] As a consequence, teachers must avoid engaging in a conduct that fosters a religious view. To check whether the separation of church and state has been violated, the Supreme Court developed the Lemon test.[107] The latest decision, *Lee v. Weisman*[108], where the constitutionally of a prayer at graduation after a student vote was challenged, also gave birth to heated discussion whether this test has been overruled or not, because it was a 5 to 4 decision.[109] It also led to a split in the circuits[110], which reveals that the neutrality, especially the extent of it, in the public school is a highly debated matter.

No matter what test is used to determine whether an exercise is constitutional[111], there is the basic principle of separation of church and state, forbidding any endorsement of religion by the state. It means that a display of the Ten Commandments is not

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[104] Loper v. Yazoo and M.V.R. Co., 145 So. 743 (1933).
[105] Forester v. State, 169 Misc.2d 531 (1996).
[106] Everson v. Board of Education, 330 U.S. 1. (1947) citing Reynolds v. United States, 98 U.S. 146, 164 (1878).
[107] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[108] 505 U.S. 577 (1992).
[109] This test has been the subject of vigorous attack. It is said that the test is too strict, because it leaves out too much religion of the public school. *See* Michael A. Berg, *The Religious Right, Constitutional Values, and the Lemon Test*, 1995 ANN. SURV. AM. L. 37, 72 (1995) and Timothy V. Franklin, *Squeezing the juice out of the Lemon Test*, 72 EDUC. L. REP. 1, 3 (1992).
[110] Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992) and Ingebretsen v. Jackson Public School District, 88 F.3d 274 (5th Cir. 1996).

possible[112], unless thy are demonstrative -- part of a general display, showing other religions as well. Some states try to overcome this prohibition in providing the opening of the school day with a brief reflection not intended to be a prayer.[113]

The essence of public education is that the schools provide free education, not limited to the elementary schools. The public schools are funded with public resources.[114] Judicial decisions have held that fees for matriculation or registration constitute a condition of attendance, which violates this principle of free education.[115] Yet a school can charge fees for extracurricular activities, such as athletic events, theatre, literary events or school transport.[116] However, the extent to which fees are regarded as incidental and therefore legitimate is a state matter[117], because each state constitution and legislation must be analyzed. The distinction seems to lie between the fees charged for essential activities and fees charged for extra-curricular activities, with an ongoing discussion of where to classify a fee for textbooks. An outstanding analysis is provided in *Hartzell v. Connell.*[118] *Hartzell* postulated that as long as the fee does not keep the student from equal access to basic education, the fee might be legitimate. Hence, it is the state's responsibility to provide a school system free of charge with access to all. Yet school financing has undergone drastic cutbacks recently, with apparent detrimental consequences to the quality of public education. If the financing of public schools is threatened to such an extent that schools are forced to close, or if the quality of education

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[111] The Lemon test is not the only one developed. In Shervert v. Verner, the Supreme Court held that the state must have a compelling justification, when it places a burden on religion. 374 U.S. 398 (1963).
[112] Ring. V. Grand Forks School District No. 1, 483 F. Supp 272 (D. North Dacota 1980).
[113] Ga. Code Ann. § 20-2-1050 (1994). This statute has been upheld in Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997).
[114] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 36 (West 3rd Ed.).
[115] MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 83 (Allyn and Bacon ed. 6th ed.) (1998)
[116] Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988).
[117] Hartzell v. Connell, 35 Cal.3d 899 (1984).
[118] *Id.*

suffers, it is clear that this undermines the purpose of the free public school. Thus financing of public education and quality of the education related to its financing are important state responsibilities.[119]

The state constitutions provide the basis upon which each state legislature acts. The legislature must establish the public education system, and can do so according to its discretion. As long as it stays within the boundaries of the competence bestowed by the state constitution, the legislature can model, remodel, enlarge or shrink and control the system.

Although the state provides for the establishment of public education, the legislature does not operate the school system.[120] The classical explanation for this is that a state has to function through administrative agencies, because in the United States the view has been one of not confusing the branches of power.[121] In educational matters, this means that the authority for the operation of the public schools is delegated to a board of education, which may be either elected or appointed, and which has authority to perform administrative functions.[122] The officials can be elected; but in some states, the legislature appoints the officials. The organization and its nomenclature may vary from state to state, but all of these bodies act on the local level.[123] Its officials are state officials.[124] These school districts are clothed with powers they cannot give away. This is very important in the case of class voting on prayers or other religious acts in the

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[119] San Antonio v. Rodriguez, 931 S.W. 2d 535 (1996).
[120] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 59 (The Michie Company 3 rd Ed.).
[121] Contrast this to the model in Belgium, where the legislative branch sometimes delegates power to the executive branch.
[122] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 73 (West 3rd Ed.).
[123] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 58 (The Michie Company 3 rd Ed.).
[124] Board of Educ. Louisville v. Society of Alumni of Louisville Male High School, 239 S.W.2d 931 (1951).

schools.[125] The boards are vested with discretionary power, which means that they can act within the boundaries of their judgment.[126] It means that their decision has the power of law, without any further approval being needed. The board exercises such power when it employs teachers, when it decides to buy logistic materials, such as a building for the school or implementing new extra-curricular programs. Discretion means that the power of the agency is based upon the statute. If the statute is silent on a certain issue, courts have held that the agency could make final binding decisions, but the agency cannot act *ultra vires*.[127]

The board's executive actions can be classified as either discretionary or ministerial.[128] A discretionary act requires judgment, while a ministerial act refers to a duty performed by an administrator, for which no judgment is required.[129] The distinction is important in disputes concerning personnel, especially in dismissal cases.[130]

1. Employment Contract

Public school teachers have a number of rights guaranteed either through statutory provisions or through case law. For instance, tenured teachers enjoy more protection particularly against dismissal than non-tenured teachers or private school teachers.[131] Also, public school teachers, since they are public employees, can rely on rights provided by the federal Constitution.

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[125] *See* Lee v. Weisman, 505 U.S. 577 (1992).
[126] BLACK'S LAW DICTIONARY 323 (6th ed. 1990).
[127] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 74 (West 3rd Ed.).
[128] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 63 (The Michie Company 3 rd Ed.).
[129] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 63 (The Michie Company 3 rd Ed.).
[130] *See* KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 76 (West 3rd Ed.).
[131] Yet some private school teachers can rely on contractual guarantees that are similar to the status of tenure.

Yet before a public school teacher can become tenured, he must fulfill certain conditions. The first prerequisite is that a teacher, in order to be allowed to work in a public school must posses a valid certificate. A certificate means a license to teach.[132] Since public education is a matter of the states, it will vary from state to state what the requirements for qualification and certification will be. Such a statute can order a detailed set of requirements, related to education, major field of study, scores and experience, as well as a certain age and a good medical condition.

But teachers not only need to satisfy educational and pedagogical requirements; they will also have to prove that they are persons of good moral character. When they succeed in presenting all the requirements, they will obtain a certificate. This allows them to teach, but it is not a guarantee of a job or of job security.[133] In the United States, local school boards have discretion in personnel affairs. Therefore, as long as it falls within statutory limits, schools can require additional qualifications.[134] States often place time limits on the validity of the license. After a period of time, the teacher must renew the license, which is often coupled with additional courses or a year of study. It is imperative that a teacher be certificated, otherwise, he cannot be a professional teacher. The certifications are not issued by the school, but usually by the state.[135] As a result, the revocation of the license is separate from the non-renewal and the dismissal of the teacher, which is determined by the school.

The local boards of education make the selection of the teacher, after recommendation of the principal. The teacher enters in an employment contract with the

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[132] Green v. Bay Educ. Assoc. v. State Dept. of Pub. Instruction, 154 Wis.2d 655 (1990).
[133] KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 559 (West 3rd Ed.).
[134] Harrah Independent School District v. Martin, 440 U.S. 194 (1979).
[135] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 169 (The Michie Company 3 rd Ed.).

school, and the local boards have the authority to enter into contract with the teacher.[136] In hiring, the school boards, like any private employer, must comply with state and federal statutes such as Title VII.

State law provides job security protection to teachers, by according them the status of tenure. Teachers who have not acquired tenure statutes, have far less job security. Before obtaining tenure, teachers will be employed on a year-to-year basis, and after a period of years of employment, which varies from state to state, they will be eligible for tenure. Although tenure confers job security, it also derogates the rule of the at will employment, because the teacher's protection for the continuing employment is not absolute.[137] Instead, tenure guarantees that the school board cannot dismiss a teacher without cause.[138] These causes are usually related to substantial unfitness[139], immorality, and incompetence.[140] There must be a just cause available to terminate the contract, which "requires that [the] decision to terminate … must be reasonable".[141]

Tenure is determined under state law. Some states do not recognize tenure as such. However, if a teacher obtains continuing employment, he must be accorded some elementary rights, such as notice, or a hearing before he can be disciplined or terminated. If there is no tenure, it will be a question of fact whether the teacher had a reasonable expectation for continued employment.[142] A tenured teacher cannot invoke his tenure status in a different school system within the same state, nor can he automatically claim his status when he moves to another state.

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[136] Marsh v. Birmingham Bd. of Educ. 349 So.2d 34 (1977).
[137] Harrah Independent School Distr. V. Martin, 440 U.S. 194 (1979).
[138] Simmons v. Drew, 716 F.2d 1160 (1983).
[139] Baldridge v. Board of Trustees, Rosebud County Schools, 287 Mont. 53 (1998); Hall v. Board of Trustees of Sumter County School Dist. No. 2, 330 S.C. 402 (1998).
[140] PA STAT. ANN Tit. 24, § 11-1102 (1962).
[141] Doschadis v. Anamosa Community School Dist., 13 F. Supp. 2d 945, 950 (N.D. Iowa 1998).
[142] Perry v. Sindermann, 408 U.S. 593 (1972).

2. Duties on the Job

An other important issue concerning the public school teachers is the right of freedom of expression. Until *Pickering v. Board of Education of Township High School District 205*[143], teachers were allowed only a limited freedom of expression. In the wake of this judgment, courts have developed a two-prong test to determine the teacher's rights.[144] The first prong consists of determining whether the speech concerns an issue of concern to the public. The second prong consists of determining the balance between harmony in the workplace and the need for a close working relationship between the teacher and his coworkers. In this second prong, the judge must determine whether this speech undermines the relationship. In making this determination, there must be a balancing of the time, the place and the manner of the speech. The judge must also determine the context in which this speech was made and he must measure the degree of public interest. Finally the judge must determine whether this speech hinders the teacher from performing his actual job duties.[145] Non-tenured teachers enjoy the First Amendment Rights along with tenured teachers.

Freedom of expression, whether inside or outside the classroom is closely related to the constitutional right of privacy which is not explicit in the Constitution, but is implicitly derived from the 14th Amendment.[146] Teachers serve as role models. Their private lives are affected by this role. The cases establish the fact that a teacher basically surrenders his private life for this role. For instance, it has been held that schools can

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[143] 205, 391 U.S. 563 (1968).
[144] Roberts v. Van Buren Public Schools, 773 F.2d 949(8th Cir. 1985); Cox v. Dardanelle Public School District, 790 F.2d 668 (8th Cir. 1986).
[145] Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968).
[146] MARTHA MCCARTHEY & NELDA H. CAMBRON-MCCABE, PUBLIC SCHOOL LAW, TEACHER'S AND STUDENTS' RIGHTS 301 (Allyn and Bacon 3rd ed.) (1992).

prescribe dress codes[147], or that teachers may not divorce.[148] School boards have justified these strict rules on the grounds that teachers serve as role models and therefore should conform strictly to community norms. Thus there has been a tension between the school and school boards on the one hand and the teacher on the other.

3. Duties of the Job

Judges have often been called upon to balance the school's disapproval of a teacher's conduct and the right of the teacher to enjoy a life outside the school gate. It is clear that the law has evolved from the rigid standards applied in the beginning of this century to the current balancing of interests. For example, a teacher's conduct that is not detrimental to his class performance, but yet is not approved by the school district, can no longer be a cause for dismissal. One of the most illustrative cases is *Morrison v. State Board of Education.*[149] In this case, the teacher engaged in homosexual conduct outside the school, which resulted in a revocation of his certificate by the local school board. The California Supreme Court reversed the revocation. The decision presents a series of questions that are relevant to any determination whether a dismissal is justified. The relevant inquiries under *Morrison* are whether the conduct adversely affects either the students or the teacher's colleagues, or both; what is the age of the students; to what extent may disciplinary action limit the rights of the teacher.[150]

Today most courts reason that teachers have a right to engage in sexual conduct, be it marital or not.[151] Since *Morrison*, courts are likely to decide that a teacher may be

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[147] Miller v. School District No. 167, 495 F.2d 658 (7th Cir. 1974); Tardiff v. Quin, 545 F.2d 761 (1st Cir. 1996).
[148] Gosche v. Calvert High School, 997 F.Supp. 867 (1998).
[149] 1 Cal. 3d 214 (1969).
[150] *Id.* at 229 (1969).
[151] Erb v. Iowa State Board of Public Education, 216 N.W.2d 339 (1974).

dismissed if his conduct appears to make him unfit as a teacher.[152] But the conduct must represent a danger; in particular to students, before it can constitute a valid reason for termination.[153] The *Morrison* ruling has established the test that there must be a nexus between the teacher's off-duty conduct and his job performance.[154] Clearly, teachers enjoy a greater degree of privacy than they did decades ago. But whether this degree of privacy extends to a homosexual relationship remains questionable. Often, the outcome will depend upon the state's general tolerance of homosexual conduct. In Georgia for instance, there is apparently less tolerance than in California.[155] In a 1986 decision, *Bowers v. Hardwick*[156], the U.S. Supreme Court upheld a Georgia criminal law penalizing private, consensual sodomy. The Court examined the case almost solely under the angle from homosexuality. Prior to this decision, there was no general rule as to how far the right to off-duty conduct in sexual orientation extended. Some courts considered the fact that the school board, the students, or the parents had mere knowledge of homosexual orientation of a teacher a sufficient cause for dismissal.[157] Although public school teachers do not have to adhere to a philosophical or religiously inspired school policy, nevertheless they are not entirely free to claim that their private lives cannot be separated from their job performance, because since some facets of their private life may have a bearing on their job performance. The notion of the teacher as a role model may be not as vivid as it was formerly, but it has not been completely abandoned, either. When a dismissal or disciplinary act is challenged, courts will often decide that under the

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[152] LaSota v. Town of Topsfield, 979 F. Supp. 45 (D. Mass.1997); Collins v. Faith School District No. 46-2, 574 N.W.2d 889 (S.D.1998).
[153] Thompson v. Southwest School Distr., 483 F. Supp. 1170 (1980); Sherburne v. School Board of Suwannee County, 455 So.2d 1057 (1984).
[154] Todd A. DeMitchell, *Commentary, Private Lives: Community Control vs. Professional Autonomy* 78 ED. LAW REP. 187, 194 (1993).
[155] *See* Board of Education of Long Beach Unified School District v. Jack M, 19 Cal.3d 691 (1977).
[156] 478 U.S. 186 (1986).

nexus between off-duty conduct and classroom teaching versus potential harm to the students the teacher's conduct was of such a nature that it would affect job performance. But whatever test courts may develop, the ultimate judgment of a teacher's conduct will remain an elastic concept, since it will have to be judged from a perspective of the community norm.

4. Collective Bargaining

Collective bargaining is not a constitutional right for public school teachers, just as it is not for their private school counterparts. Instead, the right is determined under the discretion of each individual state. Not all states allow their public employees to enter into collective bargaining agreements and others allow it only to a limited extent. But, some type of collective bargaining right exists in almost every state.[158] Thus, since public schools are supported by public funds, in weaker economic times, the right to unionize and bargain collectively will probably be more strictly construed.[159] One argument often raised against the right is that a teacher has a role too important to unionize (which applies to ability to strike as well).

In states where there is no legislation allowing collective bargaining for teachers, it is questionable whether the school board can enter into collective bargaining at all. Courts have accepted the possibility, since school boards are vested with the power to hire, to terminate, and to fix terms and conditions of employment. As a consequence, school boards can do this not only on an individual scale with one teacher, but also on the collective scale, which results in collective bargaining. But, it will often depend on a school board, whether a school can enter into collective bargaining with the teachers. A

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[157] Gaylord v. Tacoma School District No. 10, 559 P.2d 1340 (1977).
[158] HUGH D. JASCOURT, COLLECTIVE BARGAINING ISSUES IN PUBLIC SCHOOL EMPLOYMENT in LEGAL ISSUES IN PUBLIC SCHOOL EMPLOYMENT (Phi Delta Kappa Indiana) (1983).

Florida case demonstrates the reluctance of courts to enforce the agreements.[160] The difference between the collective bargaining of a private employer and a public employer lies in the fact that the public employer is binding the government. This raises issues of interference by the executive branch with the legislative branch.[161]

Unless there is a legislative guarantee of the right to unionize, any such right can be easily denigrated. But the ideas developed under the so-called "Reagan-era" - - the right for parents to chose between a public and a private high school, the resistance of imposing taxes in order to fund a public school and the idea that a public service should function as a private company, do not enhance the relations among the unions and the school boards and the public.[162] The system of vouchers, where public funding is used even in the context of private schools, the system of merit-based compensation of teachers, and the abolition of the tenure status seem not to match with existence of collective bargaining at all.[163] Such an individually orientated system goes against the philosophy of collective bargaining, where the teachers will be treated similar. Instead, classic bargaining issues include wages, the length of a school day, the class size, the financial benefits such as health insurance, dental plans and sick leave insurance. These subjects also fall within the realm of state law. Thus what will be regarded, as a bargainable item in one state does not necessarily mean that it will be a bargainable item in another state.[164]

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[159] *See* Donald D. Slesnick II & Jennifer K. Poltrock, *Public Sector Bargaining in the Mid-90S (the 1980S Were Challenging, But This Is Ridiculous) – A Union Perspective* 25 J.L. & Educ. 661 (1996).
[160] State v. Florida Police Benevolent Association, 613 So.2d 415 (1992); Chiles v. United Faculty of Florida, 615 So.2d 671 (1993).
[161] 613 So.2d 415 (1992).
[162] *See also* Leslie R. Stellman, *Coping with School Public Employee Labor Relations in the Tax-Conscious '90S: an Employer's Perspective* 25 J.L. & EDUC. 673 (1996).
[163] Donald D. Slesnick II & Jennifer K. Poltrock, *Public Sector Bargaining in the Mid-90S (the 1980S Were Challenging, But This Is Ridiculous) – A Union Perspective* 25 J.L. & Educ. 661, 670 (1996).
[164] H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 118 - 122 (The Michie Company 3 rd Ed.) and Leslie R. Stellman, *Coping with School*

A major problem for teachers lies with the cutback of funding by the state government so that the school board can no longer assure the performance of the negotiated agreements.[165] Teachers and their unions cannot sue the school board, because the non-fulfillment of the agreement with the union by the school board is usually not a breach of contract. Repeatedly, courts have decided that whenever a compelling state interest is involved and the school board, due to governmental actions beyond its control cannot fulfill its obligations, this breach of contract is justified.[166] So, collective bargaining agreements may not be subject to general contract law.

Some states take a blatant stand against collective bargaining. Such is the case in North Carolina and Texas, where such bargaining is prohibited by statute. Georgia does not favor collective bargaining, either, at least not as far as the right to strike is concerned. This is true under statute and under case law.[167]

While it is a constitutional right for every person to join a union[168], bargaining and strike are not a necessary consequence of this right. There is no constitutional duty for a school board to bargain collectively with one (exclusive) union. Some states have statutes that regulate collective bargaining for the public schools, but it does not always follow that teachers have the right to strike to enforce the process. In these states, school boards and unions must bargain in good faith under applicable state statutes. Unions have tried to secure their position through the establishment of an agency shop.[169] This is

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Public Employee Labor Relations in the Tax-Conscious '90S: an Employer's Perspective 25 J.L. & EDUC. 673, 677 (1996).

[165] *See* Baltimore Teachers Union v. Mayorand City Council of Baltimore, 6 F.3d 1012 (1993).

[166] State v. Florida Police Benevolent Association, 613 So.2d 415 (1992); Chiles v. United Faculty of Florida, 615 So.2d 671 (1993).

[167] MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 252 (Allyn and Bacon ed. 6th ed.) (1998) and International Longshoremen's Association AFL-CIO v. Georgia Ports Authority, 217 Ga. 712 (1962).

[168] AFSCME v. Woodward, 406 F.2d 137 (1969).

[169] *See* Board of School Directors of the City of Milwaukee v. Wisconsin Employment Relations Commission, 42 Wis.2d 637 (1969).

situation in which unions are able to charge a fee to all employees, without regard to whether or not they are union members.[170] This position has been upheld in *Abood v. Detroit Board of Education.*[171] The *Abood* court decided that the threshold question is whether the union engages in political activities that are objectionable to the employee.

In states where no law regulates the process of collective bargaining, such bargaining is in the mere discretion of the school board. Teachers in such states are in a weaker position, since the reached agreements may not be binding, since tax and governmental constraints can erode the process. Thus, a school board could be compelled to breach the agreements. In fact, it is a delicate question whether teachers are bound by the collective agreements at all. If disregard of such agreements by the school board becomes pervasive, the whole purpose of collective bargaining would become useless. It seems that when the school board and the union reach an agreement, both have an obligation to execute the agreement in good faith. So long as conditions of the agreement remain unchanged and there are no legislative constraints, the agreement must be adhered to. This means that teachers must stick to their agreement as well. If the school board no longer adheres to the agreement, what right do teachers have? Usually, when legal enforcement is not possible, teachers may strike, although some states prohibit this by statute. Usually, teachers are not in a position of strength. Instead, the school board holds the cards because it determines the renewal of the teacher's contracts, decides about eligibility for tenure and has the ultimate power of termination.

Just as the privacy rights for teachers have changed, so too has protection against dismissal because of gender, including pregnancy, childbirth and maternity. This

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[170] *See* KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 754 (West 3rd Ed.).
[171] 431 U.S. 209 (1977).

discriminatory practice has been invalidated under the 14th Amendment.[172] The statutory basis for the protection for public school teachers is the same as for the teachers in the private school, i.e., Title VII and PDA. With respect to leave policies, the school has greater latitude. In general, the leave policy will be upheld by the courts if the school can establish a valid business reason for the policy.[173] As long as there is no discriminatory motive in the school board's action, the policy will be upheld.

F. Tort Liability

As in the case of private school teachers, public school teachers may also be held liable for certain torts, such as assault and battery, and negligence. The criteria for liability do not differ from those applicable to private school teachers. However, the fact that the public school teacher can be held liable is not self-evident. Since teachers are public employees, one might think that they enjoy qualified immunity. Instead the opposite is true. Immunity enjoyed by the public school itself has never been extended to its teachers. When a teacher intentionally inflicts injury upon a student, the teacher may be held liable for an intentional tort. When the teacher's actions fall below a standard of reasonable care, when he fails to foresee a hazardous condition, and when he does not take the necessary actions to avoid the danger, he may be liable for negligence.

1. Employer Liability

Traditionally, school districts have been considered agents of the state. The state enjoys governmental immunity under the doctrine of sovereign immunity, that "the King can do no wrong".[174] Courts cannot order the state to pay for damages, since that would result in an invasion of the separation of powers. Only the state legislature can make this

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[172] Cleveland Board of Education v. LaFleur, 414 U.S. 792 (1973).
[173] DeLaurier v. San Diego Unified School District, 588 F.2d 674 (9th Cir. 1978).
[174] MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 385 (Allyn and Bacon ed. 6th ed.) (1998).

decision. This means, in general, that school districts themselves cannot be sued for tort actions. But because the doctrine of unqualified sovereign immunity has been eroded, some states now allow school districts to be held liable. In those states, it is possible for the individual claimant to sue the school district.[175] Other states adhere to the doctrine of immunity, but allow the school district to be sued in a limited capacity such as liability for school bus accidents.[176] Still, other states consider the purchase of an insurance policy to be a waiver of immunity within the boundaries of the policy.[177] There are some states, however, that do not consider such a purchase to be a waiver of immunity. Immunity from suit does not mean that the state agency cannot commit a wrongful act, it merely means that it cannot be held liable for it. But it does mean that the agency cannot be held liable for the acts of its employees, even when they are acting within the scope of their employment.

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[175] In *Davis v. DeKalb County School*, 996 F.Supp. 1478 (N.D.Ga. 1998) the court held that the school district is immune, unless the immunity is waived. In *Malik v. Greater Johnstown Enlarged School Dist.*, 248 A.D.2d 774 (1998) the court held that although "[f]undamentally, a school is not an insurer of safety of its students; it is nonetheless, obligated to adequately supervise the activities of the students under its care and will be held liable for foreseeable injuries which ... are related to the absence of supervision". *Id.* at 775. *See also* Reed v. Pawling Cent. School Dist. 245 A.D.2d 281 (1997); Etheredge v. Richland School Dist. I., 116 N.C.App. 715 (S.C.App 1997); Doe v. New Philadephia public Schools Bd. Of Educ. 996 F.Supp. 741 (1998); Williams v. Central Consol. School Dist. 124 N.M. 488 (1998); Ortega v. Pajaro Valley Unified School Dist., 64 Cal. App. 4th 1023, 75 Cal. Rptr.2d 777 (1998). The latter case is a good example that a waiver of immunity may only be done within certain limits. The school district may be liable for its own negligence, but "[t]he district may not, however, be held vicariously liable...". *Id.* at 1057, at798. *But see* Cook v. Hubbard Exempted Village Bd. of Educ. 116 Ohio App. 3d 564 (1996); ALA. CONST. Art. 1, § 14; Godby v. Montgomery County Bd. of Educ. 996 F.Supp. 1390 (1998); Nelson v.Almont Community Schools, 931F.Supp. 1345 (1996).

[176] Womack v. Duvernay 229 A.D.2d 488 (1996); Brown v. Egan Consol. School Dist. No. 50, 449 N.W.2d 259 (1989).

[177] Example of the fact that purchase of insurance affects immunity: Thomas v. Broadlands Community Consol. School Distr. No. 201, 348 Ill. App. 567 (1953); Molitor v. Kaneland Community District No. 302, 18 Ill. 2d 11 (1959); Rogers v. Butler, 92 S.W.2d 414 (1936). In general, the immunity is supported by the idea that governmental activities are undertaken for the benefit of the public (Bolster v. City of Lawrence, 225 Mass. 387 (1917)). These activities are funded through taxes, therefore it would be an unreasonable burden on the public funds to use them for damages. *See* Wilson v. Stark City Dept. of Human Serv., 70 Ohio St. 3d 450 (1994). It does not mean that the district is not capable of committing a tort, but rather that it is not able to pay for the damages. Inasmuch that a school purchases an insurance policy, it recognizes its ability not only to commit the wrongful conduct, but also to pay for the damages within the scope of the policy. *See* James for James v. Charlotte-Mecklenburg Bd. of Educ., 60 N.C. App. 642 (1983). The purchase of the policy affects only to a limited amount the "public purse". The damages are paid by the

Even if school districts are not liable because of the immunity they enjoy a victim could try to recover damages under the respondeat superior doctrine. Several claims have been rejected by the courts in this matter, because the school cannot be held liable for actions of the teacher that are outside the scope of his employment. The courts in at least one state recognize the liability under this doctrine for law enforcement agencies and health care providers, but remain reluctant to accept liability under respondeat superior for schools.[178] Although a valid argument can be that assaults by a teacher can be foreseen and that the teacher is acting on behalf of the school in committing the assault, courts seem unwilling to accept this theory. Since the school cannot pay a tort recovery with public funds, the school district may not be held liable for the teacher`s actions under any theory. Thus victims are left out in the cold. But in selecting and employing a teacher, a school, just as any other employer, should proceed with a duty of care. Although the teacher is responsible for his or her own acts, the injustice against the victim is evident and courts are still split on the basic question.[179]

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insurance company. Therefore, the purchase of an insurance means a waiver of immunity, but only to the extent of the police.

[178] Richard Fossey and Todd A. DeMitchell, "*Let the master answer": Holding Schools Vicarously Liable When Employees Sexually Abuse Children* 25 J. L. & EDUC. 575, 579 – 580 (1996).

[179] There is a substantial difference between the funds of the public and the private school. This difference, and the purpose of it has been clearly described in Gebsen v. Lago Vista Independent School Dist, 118 S.Ct. 1989 (1998). In this case, a high school student had a sexual relationship with a teacher. The school terminated the teacher. The school had not yet distributed an official grievance procedure for lodging sexual harassment complaints, required by statute. The student filed suit for damages against the school. The Federal District Court granted the school summary judgment, which was affirmed by the Fifth Circuit, which held that school districts are not liable under Title IX, the basis for the student's claim, unless an employee with supervisory power knew of the abuse, had the power to end it and failed to do so. The Supreme Court was called upon to address the issue. It held that Congress did not intend liability in damages when the school is unaware of a Title IX violation. One of the reasons is, that this statute does not provide an express claim for damages. But, more important, another reason is that the award of damages in such a case might exceed the level of funding. Examples of cases where schools have immunity under respondeat superior: Shirkey v. Keokuk County, 281 N.W. 837 (1938); Reed v. Rhea County, 189 Tenn. 247 (1949). Cases that allow respondeat superior: Smith v. Board of Educ. Of Kanawha County, 170 W.Va. 481 (1982); Claymont School Dist. V. Beck, 424 A.2d 662 (1980); Tutusville Iron Co. v. City of New York, 207 N.Y. 203 (1912); Wilder v. Thrower, App. 337 So.2d 304 (1976); Prewitt v. Parkway School Dist. 557 S.W.2d 232 (1977); Carbone v. Wverfield, 6 Ohio St.3d 212 (1983), Lovell v. School Distr. No. 13 Coos County, 170 Or. 500 (1943); Rhea v. Grandview School Distr. No. 1& 2, 763 P. 2d 1263 (1988).

In some states, teachers may face a qualified immunity; in other states public school teachers are subject to tort claims just as any other private school teacher.[180] Still other states provide a complete immunity for its teachers. The recent trend is for states to reconsider the immunity of the principals, and even the classroom teachers. The state of Georgia considers its teachers and principals to be immune, because it is believed that they are otherwise likely to be treated hostile by juries.[181] Whether the liability of the teacher will be recognized by a court is a matter of state law. Some states provide that while the teacher can be held liable, the school board must indemnify the teacher, except for willful and wanton acts.[182]

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[180] Basically, the same categories of tort claims for the teacher in the private school apply to the teacher in the public school, and the same defenses apply as well. *See* Chapter I, section D of this paper.
[181] Hennessy v. Webb, 245 Ga. 329 (1980); Truelove v. Wilson, 159 Ga.App. 906 (1981). MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS 385 (Allyn and Bacon ed. 6th ed.) (1998).
[182] Ohio Rev. Code Ann., § 2744.07 (1990).

Chapter II. Belgium

The law of education in Belgium has undergone major changes. First of all, because of two systems, a private school and a public school system, the law in this matter was complicated. One had to look in different statutes, some of general order and others specific for school law.[183] About twenty years ago, law of education gained more interest. Official and semi-official codifications were published. Case law developed and in the wake of that, law review articles increased.[184] All this contributed to an easier accessibility and understanding of the law. The latest achievement, are new statutes[185], that will become effective on January 1, 1998, regulating both private and public schools. These new statutes are a systematic codification of the existing law. However, there exists still no general work for education law. Each article or paper deals with only fragments of the matter. This does not contribute to the accessibility of the law.

A. General principles of the Belgian legal system

In order to have a better understanding of the Belgian school system, it is important to provide a brief introduction to the various existing legal systems of the

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[183] For the private schools, there was a specific statute about the organization of the private system, but the rules for the rules related to the employment contracts were also to be found in the general statute on employment contracts. For the public schools, not only there was a statute about the organization of the system and the rights and duties of the teachers, but also each year, the Minister of Education promulgated so called circulars. A cartload of rules existed, not even coordinated officially by the government. *See also* R. VERSTEGEN, DE ONDERWIJSWETGEVING IN VLAANDEREN. EEN OVERZICHT. [THE EDUCATION LAW IN FLANDERS. AN OVERVIEW] 1 (Kluwer Rechtswetenschappen 1997) [hereinafter The Education Law in Flanders. An Overview].

[184] JOHAN HEYVAERT AND GUY JANSSENS, ONDERWIJSZAKBOEKJE [Education Pocket] 7 (Kluwer Editorial 1998) [hereinafter Education Pocket].

[185] DECREET VAN 27 MAART 1991 BETREFFENDE DE RECHTSPOSITIE VAN BEPAALDE PERSONEELSLEDEN VAN HET GEMEENSCHAPSONDERWIJS [DECREE CONCERNING THE LEGAL STATUS OF SOME EMPLOYEES OF EDUCATION OF THE COMMUNITY of March 27, 1991] [hereinafter the Decree of the Public Schools] and DECREET VAN 27 MAART 1991 BETREFFENDE DE RECHTSPOSITIE VAN BEPAALDE PERSONEELSLEDEN VAN

western world. The Belgian legal system belongs to what is traditionally seen as the civil law system. Often for purposes of comparison the legal systems are divided into two groups: the civil law system and the common law system.[186] Within the civil law system another subdivision exists between the French law and the German law. The French law characterizes the Romanistic legal family, to which the Belgian law belongs.[187]

In the civil law countries, most of the laws are codified. This codification not only exists for public law, but also for private law. This is due to historic reasons that go back to the Roman Law.[188] Today the heart of private law in the Romanistic law lies in the Code Civil of 1804. This Code was promulgated after the French revolution and placed highly considered values as freedom of contract, property and family in the foreground. The Code was in use in several countries on the European continent. But this Code does not only come forward with completely new ideas. It is more a synthesis of the different legal institutions that existed at that time.[189] A major aim of this codification of the legal institutions was that the code had to be in concise style.[190] At that time, the task of the legislature was seen as to build a framework, to be filled in by the contracting parties. The legislature had to foresee everything by using simple and general language. The result of this point of view is that the Civil Code contents very general and compact rules. A major example of such rules is to be found in the articles 1382 to 1386, the articles that deal with tort law. Those articles are today very important

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HET GESUBSIDIEERD ONDERWIJS [DECREE CONCERNING THE LEGAL STATUS OF SOME EMPLOYEES OF SUBSIDIZED EDUCATION of March 27, 1991] [hereinafter the Decree of the Private Schools].

[186] ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW, THE CIVIL LAW SYSTEM 3 (Little, Brown and Company 2d ed. 1977).

[187] 1 KONRAD ZWEIGERT AND HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 68 (North Holland 1977).

[188] *See* ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW, THE CIVIL LAW SYSTEM 4 (Little, Brown and Company 2d ed. 1977).

[189] 1 KONRAD ZWEIGERT AND HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 68 (North Holland 1977).

for schools. Because of the general and concise language in the Civil Code, courts had to interpret these rules. In fact, it is not enough to consult the Civil Code. In order to have a correct application of a rule; a lawyer must look at case law and literature.[191]

Belgium still uses the Civil Code today, as it was enacted in France.[192] However, the case law in Belgium developed separately from the case law in France. This means that a provision in the Civil Code can have a different meaning in the two countries. Yet the Code does not live two separate lives. Even today a strong interaction exists between the two countries. Belgian courts, interpreting civil law, still look to how certain articles are interpreted by French case law.

Primarily the law in Belgium is enacted, so law can be found in statutes. Yet case law is also very important. Because of the doctrine of separation of powers, the legislative, the executive and judiciary power do not interfere. Thus, the judge cannot challenge a statute, because he is considered as "the mouth of the legislature".[193] But when the statute is very general, it is important, even mandatory to look at the case law. Often the statute is refined or even changed by the case law.[194]

Traditionally the areas of law are divided into public and private law. The private law is that area of law where private parties can rule. The legislature is absent, except for protective clauses or clauses to inhibit any violation of public order. The area of private law consists of contracts, torts, commercial law and employment law. The other area of

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[190] *See also* ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW, THE CIVIL LAW SYSTEM 54 (Little, Brown and Company 2d ed. 1977).
[191] 1 KONRAD ZWEIGERT AND HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 82 (North Holland 1977) citing the example that the French civil code spends 5 articles on the law of delict, whereas the German civil code spends 31 articles on the same are of law.
[192] *See* JACQUES HERBOTS, CONTRACT LAW IN BELGIUM 30 (Kluwer 1995).
[193] *Id* at 31.
[194] A change or a broad interpretation however is not possible in criminal law. No penalty can be ordered without a beforehand existing rule. This principle is embodied in the Belgian Constitution.

law, the public law, covers constitutional law, administrative law, employment law of public employees, tax law and criminal law.

B. Features of the Belgian State

The Belgian State was a centralistic state until 1970.[195] Several constitutional reforms divided the state into regions, following the language parts. Now the Belgian State has become a complex regional and communautaral state, with the Region standing for an economic entity and the Community standing for a linguistic entity. The Communities and the Regions fall more or less together. These entities might best be compared to the member States of the United States of America. Each Community or Region in Belgium has a parliament and a government, which has exclusive authority granted through the Constitution to enact its own laws. Therefore each Region and Community enacts its own statutes, which have "the same legal standing as the laws of the national parliament".[196] There is no supremacy between the law of the different bodies. There is almost no overlap of these laws, since the law of each Region or Community should be enacted within the scope of its powers. These powers are well defined. However, sometimes conflicts occur and in order to solve them, an Arbitration Court was created. This young court, only created in 1983, carefully supervises if any of the statutes exceeds the scope of granted powers. The composition of the Court mirrors the political situation in Belgium: there is an equal number of French speaking and Dutch speaking judges present, and judges are also chosen according to their adherence to a political party. The judiciary powers remained federal. There are five Courts of Appeal, with chambers that deal with civil, commercial, employment, criminal and youth

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[195] JACQUES HERBOTS, CONTRACT LAW IN BELGIUM 31 (Kluwer 1995).
[196] *Id.*

cases on appeal. Just below are Tribunals of First Instance, who also have the same divisions as the Court of Appeal. Finally on the lowest level are the Justices of Appeal.

The highest court in Belgium is the Cour de Cassation. It controls the decisions of the lower courts by controlling whether these lower courts respected the law. It does not look at the facts of a case, but only at the legal issue. Because of the distinction between public and private law, a special court was created only to deal with administrative law, the Conseil d'État. A public employee must go to an administrative court for every issue that relates to his status as public employee, whereas a private employee must go to other courts. All cases, except for some criminal cases, are decided without jury trial. It is only the judge that will give an appreciation to the facts at stake and to the related law.

The major sources of the law in Belgium are statutes, and contracts, but the importance of the judicial decisions must not be underestimated. In Belgium, the principle of the binding precedent does not exist, but uniformity in the judgments does exist. Courts generally follow previous decisions, and lower courts generally follow the decisions of the higher courts. Although not compelled to follow the decision of the highest courts, let alone each other's decisions, judges tend to apply similar solutions to similar settings.[197] The practical explanation is that lower courts do not wish to have their decisions reversed on appeal by the higher courts. The result is the legal certainty and predictability for the parties. Case law is not considered in the Constitution as a source of law, but it is an actual source of law. This is especially true in the field of public and employment law. Public employees are not engaged by an employment

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[197] LUDO CORNELIS, PRINCIPES DU DROIT BELGE DE LA RESPONSABILITÉ EXTRA-CONTRACTUELLE [PRINCIPLES OF BELGIAN TORT LAW] 8 (Bruylant Maklu ed.) (1990) [hereinafter PRINCIPLES OF BELGIAN TORT LAW].

contract, but appointed. Although the government tends to engage more on a contractual basis, the rules are different from mere contract law, since the government is involved. For example, in the field of disciplinary sanction, which is basically not regulated in detail, case law clarified and determined a lot of rules. These rules, such as the right to be heard, or to have a fair treatment, cannot be infringed anymore. In Belgium, a person who works under an employment contract is either a private worker, or a public employee.[198] In case of litigation, it is therefore important under what kind of relation a worker falls. If he is a person under an employment contract, the civil employment court has jurisdiction over him. A public employee has to turn to the administrative court in case of a dispute with his employer.[199]

C. School system in Belgium

The Belgian Constitution provides freedom of education.[200] This article exists since the beginning of the existence of the Belgian State. It has historic reasons: since before 1830 the legislature interfered exhaustively with education. Every party, present at the creation of the Belgian state wanted to dispose of this. Therefore the article was inserted in the Constitution. The principle of it was never questioned, but an overview of the Belgian history makes clear, that its interpretation has been subject of vehement

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[198] Independent workers are not considered for the purpose of this thesis.

[199] In fact, the legal system in Belgium recognizes two kinds of employees: the employee, working under a contract and the public employee, working under a regulation. A regulation or statute is a special statute, enacted by the government that regulates unilateral and in a general and impersonal way the duties and the rights of the public employee. In contrast to a contract, it provides rigid rules and cannot be changed, unless all parties – the government, the service and the unions – meet. An employment contract in the private context, apart from some mandatory statutory requirements, is usually flexible. It has as major characteristic that the employee obligates himself to work, the employer in return pays a wage, under the authority of the employer. Hierarchy or authority is a major element in the employment relationship. The employment contract has to be in writing and it is basically at will, with the exception that a teacher cannot be dismissed for marriage, or pregnancy.

[200] BELG. CONST., art. 24. For a thorough explanation, See Chapter II, Section E and note 205.

discussions.[201] As in the United States, the organization of an educational system goes back to the end of the 18th and 19th century.[202] More and more a professional school system replaced a school system traditionally organized and provided by the Church.[203] The provision in the Constitution was a compromise between those who wanted to create a secular education system and those who advocated a religiously inspired school system. In fact, the reasons why Belgium separated from the Netherlands are not only related to linguistic and economical reasons, but also to religious reasons. By avoiding any inference of the state, catholic forces as well as secular parties saw their chance to shape an educational system according to their conviction or opinion.[204] Although this is not an exclusive Belgian phenomenon, it might be typical for the Belgian situation that the discussions still continue.

Freedom of education in Belgium has two meanings. According to the Constitution, every person has a fundamental right to organize education. It also embraces the freedom of a parent to send his or her children to a school of his or her choice. It is the state, not the community that must guarantee that every parent has indeed a free choice of school. The same article of the Constitution provides that every person has indeed a right to education.[205] Therefore the State has to organize neutral public schools.[206] The public school must respect the philosophical, ideological and

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[201] *See* notes 207 and 217. The School Pact Law was in fact a statute that was the result of several government changes, due to the fact that the different political parties could not agree on the school system in Belgium.

[202] *See* KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW, 19-41 (West 3rd Ed.).

[203] Jeffrey Tyssens, *Vrijheid van onderwijs, schoolconflict en pacificatie in België* [Freedom of Education, Schoolconflict and Pacification in Belgium] 2 TIJDSCHRIFT VOOR ONDERWIJSRECHT EN ONDERWIJSBELEID [T.O.R.B.] 91 (1994-95) [hereinafter Freedom of Education].

[204] *Id.*

[205] BELG. CONST., art. 24. *See also* R. VERSTEGEN, THE EDUCATION LAW IN FLANDERS, AN OVERVIEW (Kluwer Rechtswetenschappen 1997).

[206] BELG. CONST., art. 24.

religious convictions of its pupils and parents.[207] Thus the school and its teachers have at all times to remain neutral. Not one single reference to a philosophical, ideological or religious orientation is allowed.

In the same article, the Constitution guarantees that the access to education is free. Interpreted by the Court of Arbitration, it means that the elementary school – the private and the public – has to be free. For high schools there exists a distinction: private schools may charge a tuition. Yet this tuition may not rise quicker than the cost of living.[208]

Since the creation of the Belgian state, two education systems exist: a public school system and a private school system. Although regulated by similar statutes, each system has its own particularities. The most striking difference is that teachers who work in the public school are public employees, whereas teachers in a private school work under a private employment agreement. This difference is significant for the teachers. The acquisition of certain rights, such as tenure, the tort liability and the authority of the courts are different.

D. Sources of law

Just as for other areas of the law, the number of statutes and regulations with respect to education increases and becomes more specific. The Reform of the State contributed to the complexity of the education law. Today each Community promulgates its own rules in educational matters. This leads to growing case law and related jurisprudence.

It is indeed since 1988 that education itself is no longer a federal matter, but a matter of the Communities. But until January 1st of 1989, education was a national matter. Education was, as in France organized in centralistic way. This no longer met

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[207] SCHOOLPACTWET [SCHOOL PACT LAW] of May 29, 1959.

the needs of the real situation, because of the differences between the Northern and the Southern part of Belgium. Long before the Reform of the State, the legislature already created two Ministers of Education in one national Department.[209] As the Reform of the State was achieved, more authority was given to the Communities.[210] In the present situation every community can promulgate every statute related to education, except for the beginning and the end of the compulsory school attendance, minimum requirements for obtaining degrees and pensions.[211] The law of private employment contracts also remains in the realm of the federal legislature.

Thus the federal Statute of June 29, 1983 fixes the beginning and the end of the compulsory attendance. The minimum requirements for obtaining a degree are also subject of a federal statute. But the federal statute only provides a framework, in order to maintain some uniformity in the country. It means that the duration of the schools in Flanders or Walloon cannot be changed, unless the federal legislature decides to. Every school level is in accordance to a certain period of time. Elementary school and high school take each six years. The substantive requirements, such as subject matters and course credits, are a community matter. Although the subject matter may vary from community to community, the Belgian State opted for equivalence of degrees. The degree of the Northern part is equal to the degree of the Southern part.[212]

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[208] Trib. Arbitrage, May 7, 1992, no. 33/92.
[209] R. VERSTEGEN, L. VENY, W. RAUWS AND D. DELI, ACTUELE VRAAGSTUKKEN VAN ONDERWIJSRECHT [CURRENT QUESTIONS OF EDUCATION LAW] 8 (Kluwer Rechtswetenschappen 1997) [hereinafter Current Questions of Education Law].
[210] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 7 (Kluwer Editorial 1998).
[211] BELG. CONST., art 127. *See also* Koen Brynaert, *De minimale rechten van het overheidspersoneel [The Minimal Rights of Public Employees]* 4 TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEK RECHT [T.B.P.] 782 (1998) [hereinafter The Minimal Rights of Public Employees].
[212] RAF VERSTEGEN, THE EDUCATION LAW IN FLANDERS. AN OVERVIEW 15 (Kluwer Rechtswetenschappen 1997).

Matters related to retirement remain federal. On this issue the Constitution is not very clear, because only one general phrase states that regulations of retirement remain federal. However, all the rest of the legislative power in employment issues are no longer federal.[213] It means that the Flemish Community has the authority to regulate the statute of its employees.[214] This has been confirmed by the constitutional Court, the Cour d'Arbitrage.[215] The result is contradictory, on the one hand the Flemish Community is competent for employee regulations, on the other hand, the federal state takes care of retirement issues.

The federal state is no longer competent to enact statutes or regulations determining the status of teachers. It leads to a complex situation: private school teachers are private employees and the rules controlling their employment contracts remain federal. Yet, the law applicable to the public schools belongs to the competency of the Flemish Community. This as explained previously, is only partially true.

The substantive rules for the organization of the schools and the content of the matters are in two statutes with almost the same title: the Decree of March 27, 1991 regulating the position of the members of the staff of the schools of the state and the Decree of March 27, 1991 regulating the position of the members of the staff of the subsidized schools.[216] The statutes have a general part and define what a teacher is, fix the content of the task of a teacher, as well as the conditions to obtain a teaching position and tenure. For the public school teachers, the statute also regulates the disciplinary

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[213] This is valid except for the statute of June 14, 1978 which regulates employee contracts.
[214] Koen Brynaert, *The Minimal Rights of Public Employees* 4 T.B.P. 782 (1998).
[215] Trib. Arbitrage, January 27, 1993, no. 6/93.
[216] DECREET VAN 27 MAART 1991 BETREFFENDE DE RECHTSPOSITIE VAN BEPAALDE PERSONEELSLEDEN VAN HET GEMEENSCHAPSONDERWIJS [DECREE CONCERNING THE LEGAL STATUS OF SOME EMPLOYEES OF EDUCATION OF THE COMMUNITY of March 27, 1991] [hereinafter the Decree of the Public Schools] and DECREET VAN 27 MAART 1991 BETREFFENDE DE RECHTSPOSITIE VAN BEPAALDE PERSONEELSLEDEN VAN

rules. In the more specific part the statute defines the structure of the public education. The Decrees contain more than 200 articles and provide a drastic change in the organization of education. The major reason was to abandon the rigid procedures laid down until then in the previous statutes. Now the focus is more on the organizing authorities, which are local bodies, in contrast to the uniform rules emanating from one secretary of state. The purpose both for private and public schools consisted of procuring more autonomy to the school boards.

E. Private schools

The Belgian Constitution guarantees that every person is entitled to organize education according to his views. Every person has the right to choose a school to attend. The state has the obligation to guarantee a free choice of school for the parents. This guarantee means that the state organizes its own system and that the state subsidizes a private organized school.[217] According to the Cour d'Arbitrage, this is necessary since the legislature wants to preserve control over essential aspects of the education, such as

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HET GESUBSIDIEERD ONDERWIJS [DECREE CONCERNING THE LEGAL STATUS OF SOME EMPLOYEES OF SUBSIDIZED EDUCATION of March 27, 1991] [hereinafter the Decree of the Private Schools]

[217] In fact this article of the Constitution is rewritten. Belgium has a long history of regularly returning clashes between those groups who want a secular and neutral state organized education system and those who advocate a religious inspired school system. This tension assumed such vast dimensions that historians, politicians or lawyers refer to it as the school war. The school war arrived at a peak in the fifties. With the "Schoolpeace statute" of May 29, 1959 the legislature tried to elaborate a compromise. This statute foresaw that parents should have the absolute guarantee that they could send their children to any school, either public or private. Since the state had to provide the existence of this right, this freedom of choice of school implied that the state had to subsidize private organized schools. This vision was of course one of the components of the so called school war. The statute recognized the right of private initiative to organize a school. The state has then the obligation to realize this private initiative. The right to receive a subsidy was seen as a task of public interest. This statute has been superceded by the Reform of the State, the rewriting of the Constitution and the promulgation of the Decree. However, the principles of the School peace statute remain good law, because they were reproduced in the Constitution. Case law explaining these principles are therefore not overruled. Matters are not settled yet, because the private schools claim a complete equal treatment for the subsidizing of their schools. Not only have the teachers to be paid by the state, but also the buildings and more general the operation costs. *See* Jeffrey Tyssens, *Freedom of Education* 2 T.O.R.B. 91 (1994-95) and RAF VERSTEGEN, The Education Law in Flanders. An Overview 20 (Kluwer Rechtswetenschappen 1997).

organizing, recognition and subsidizing over the two systems.[218] Therefore, when the State imposes a form of quality control, this same state must provide for the private school some sort of funding in order to meet the standards. This ruling is once again inspired by the constitutional freedom of education.

Private schools are governed by the authority of a board of trustees. The majority of the private schools are catholic, although a few other religions created their schools also. However, those protestant, Islamic, Israeli and non-confessional schools form a minority.[219] As a rule of thumb, private schools are catholic schools and they are governed by diocesan authorities, orders of priesthood and congregations, local school committees or other associations. They all fall under the coordination of Secretariat of the Catholic Education. This Secretariat sets the policies to be followed by all the catholic schools, represents all the local private schools[220] at the level of the Minister of Education. The unions and all other groups involved in the catholic schools, the representatives of parents, catholic authorities and the teachers, meet at the behest of the Secretariat.[221]

Since the Decree of 1997, the private schools are under the authority of the administration of the school or organizing body. Such an administration can be a natural person (which is not often the case), or more likely, an organization. Because of the responsibilities involved, the organization has to be a fully legal, recognized organization. A school in Belgium is a pedagogical unit, under the authority of a principal. When several schools are under the authority of one organization, the statute

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[218] Trib. Arbitrage May 7, 1992, nr. 33/92.
[219] It is about only one school per other religion for the whole Belgian country.
[220] DECREE of 25 February 1997.
[221] Those other groups can be: after school sports clubs, cultural organizations and youth clubs.

speaks of a school community.[222] The organizing authority of such a community is not the same as a principal. Remaining under the same authority, each school will have its own principal.

1. Employment Contract

There is still no unanimity about the kind of relationship a teacher in a private school has with his employer. The task description will mostly be in general terms. And since it is the contract that rules the relationship, parties are free to interpret it during the execution of it. Within the context of a private school there is a special situation – the parties may decide what will be included in the contract. The employer in general has to follow the requirements stipulated in the statute that deal with the employment relationship in the private school. But because of the existence of this Decree, which provides the substantial part of the contract from qualification of the teacher to disciplinary actions, much confusion about the status of the private school teacher exists. Since the courts did not seem to agree upon whether teachers fell under a mere employment contract or not, the cases suggested several solutions. First, some authors suggested that the way of regulating the situation of the private school teachers was so similar to that of public school teachers, that private school teachers should be treated as public employees.[223] They arrived at this result because on the one hand, the rights and the duties of teachers in a private school are very similar to those of teachers in public schools. Moreover, they suggest, that because the government subsidizes the private schools through direct payment of the wages of the teachers that teachers are therefore

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[222] DECREE of February 25, 1997.

[223] LUDO VENY, DE RECHTSPOSITIEREGELING VAN HET PERSONEEL IN HET GESUBSIDIEERD VRIJ ONDERWIJS: NAAR RECHTSONZEKERHEID? [THE LEGAL POSITION OF THE STAFF MEMBERS IN THE SUBSIDIZED PRIVATE SCHOOLS] 83 (MAKLU ed.) (1994) [hereinafter THE LEGAL POSITION IN SUBSIDIZED PRIVATE SCHOOLS].

public employees.[224] As a matter of fact, since the private schools provide a public service, private schools are to be considered corporations of functional public service.[225] But these arguments have never been adopted by the lower courts. The higher courts seem now willing to see private school teachers as private employees. Private schools are indeed quasi public corporations. But there is a separation between what the school provides, and in how the school deals with other parties.[226] In dealing with third parties, the corporation remains entirely private. The formal contract with a teacher therefore is in all material respects a private employment contract.

Still other authors make mention of a semi-public employee character of the relationship,[227] and a third proposal is to look only at the form of this relationship, not at the content. The relationship between a teacher and the organizing authority for whom he works is a contractual one. Since the organizing authority of a private school is a person of private law, there are no governing regulations because only state bodies have the power to enact regulations. A private person can only enter a contractual relationship. The legislative history reveals that the constitutional legislature wanted public and private schools to be similar, but differences between the two school systems must remain. The Belgian French Community clearly opted for a contractual relationship

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[224] RAF VERSTEGEN, HET STATUUT VAN HET PERSONEEL IN HET VRIJ ONDERWIJS [THE REGULATIONS OF THE STAFF IN THE PRIVATE SCHOOLS] 9 (Maarten Kluwer ed.) (1980) [hereinafter The Regulations of the Staff in the Private Schools].

[225] In Belgium, a public service is created by the state and provides some sort of public service. The corporations created by the state follow specific rules, the most striking one being that they can be change or even abolished at all times. Some corporations are not created by the state, yet they provide a public service. For the service they offer, they do follow the rules valid for a pure public service. However in all their other dealings, they fall under private law. These corporations are called functional public services. *See* BLACK'S LAW DICTIONARY 895 (6th ed. 1990) (In the United States these corporations are called quasi public corporations).

[226] Conseil d'Etat, March, 17, 1992, no. 39.024.

[227] *See* RAF VERSTEGEN, THE REGULATIONS OF THE STAFF IN THE PRIVATE SCHOOLS 8 (Maarten Kluwer ed.) (1980).

between teacher and private school.[228] This solution is in accord what the lower courts always have decided and what has been followed by the Cour de Cassation.[229] In a decision of 1993 the Cour de Cassation stated that " although the teachers are under regulations, their relationship is not created by these regulations, since it was created by an employment contract".[230] The term "regulation" can have two meanings. One meaning is the unilateral, general and impersonal rules that regulate the relationship between public employees and public authority. The other is a set of rules that differ from the normal employment contract, and that are fixed by a private corporation.[231]

This question is not purely philosophical, since according to one's status different courts have different jurisdiction. Also, different statutes regulate the employment relationship. For example, disciplinary rules differ: a public school can transfer its employees as a disciplinary measure, whereas a private school cannot. But the most important difference between a private and a public school teacher is the applicability of the tort liability rules.

In a normal employee – employer setting, the employee knows the description of the task because it is spelled out under the employment agreement. But as long as the employer does not change the essential functions of the job, it can require the employee to change some task descriptions.[232] In the education sector, the teacher will indeed receive a brief job description in his contract, and every year these job descriptions will

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[228] W. RAUWS, DE RECHTSPOSITIE VAN HET PERSONEEL VAN HET VRIJE ONDERWIJS IN BEWEGING [THE LEGAL POSITION OF THE STAFF OF THE PRIVATE SCHOOLS IN MOTION] 94 (Kluwer ed.) (1997) [hereinafter THE LEGAL POSITION IN MOTION].

[229] Cass. June 25, 1979.

[230] The exact text goes as following: "... hoewel die personeelsleden aldus onder statuut zijn geplaatst, hun dienstbetrekking niet statutair geregeld is, nu zij uit een arbeidsovereenkomst is ontstaan". Cass. October 4, 1993.

[231] Cass. November 30, 1992.

[232] A change of the conditions so important as to alter the job function as a whole is according to Belgian law an implied declaration of discharge. *See* WILLY VAN EECKHOUTTE, SOCIAL COMPENDIUM EMPLOYMENT LAW, 1282 (Kluwer Rechtswetenschappen Belgie) (1998).

be fixed by the school board, in consultation with the teacher.[233] The changes, however, are not so substantial as to alter the terms of the contract. The changes of description generally relate to the teacher's tasks and duties and the way they have to be performed. They may also contain specific goals related to the teacher, such as the obligation of the teacher to obtain additional training.[234] These descriptions have to be approved by the teacher.

It might seem redundant to mention that a teacher must have the appropriate degree in order to be able to work as such. Before the first statute[235] regulated the necessary requirements to be met for all private and public schools, private schools often considered the freedom of education a proxy to hire to their discretion any person, whether or not certified.[236] A condition for the teacher's salary is a proof of capability.[237] This proof of capability consists of a basic degree, and if necessary it can be completed with a certificate of pedagogical ability or with a number of years of experience. The basic degree must be in a field in which the teacher teaches. Therefore the degree can be specific or general.[238] Holders of such proofs of capability are eligible for appointment, or in American terms, eligible for tenure. If for some reason, the organizing authority finds a teacher does not have the required degree, it is allowed to hire someone who has a similar degree. This could be a teacher, without the required degree, but presenting a sufficient number of years of experience. But the organizing authority must first declare that no eligible teacher was available. Hiring is limited to one school year and this

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[233] DECREE OF THE PRIVATE SCHOOLS.
[234] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 91 (Kluwer Editorial) (1998).
[235] The first statute dates from March 20, 1959.
[236] RAF VERSTEGEN, THE REGULATIONS OF THE STAFF IN THE PRIVATE SCHOOLS 12 (Maarten Kluwer ed.) (1980).
[237] DECREE OF THE PRIVATE SCHOOLS.

teacher can never obtain tenure. If for some reason a school hires a teacher without the appropriate certificate and another candidate with a certificate applied for the job, the latter has a right of redress.[239]

The salary for all private and public school teachers is fixed by statute, and it increases with seniority. Every two years a teacher can obtain a raise of salary, according to the age and the seniority of the teacher.[240] Seniority is determined by the respective school system. Seniority obtained within different private schools is cumulative but a teacher switching from private to public school or vice versa will have to begin anew building up seniority.[241] Moreover, seniority while in temporarily status will not count toward seniority while working under tenure.[242] The statute also distinguishes between a teacher that has a full school year of service and one that has an incomplete year. But as long as the incomplete performance does not extend for more than half of a complete year of service, it will count as a full year for purposes of seniority.[243]

Since 1991, the statute regulates the career of the private school teacher.[244] A teacher will first be appointed temporarily. The teacher has to be a subject of one of the member states of the European Union, he must enjoy full civil and political rights[245],

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[238] A person that has a degree in mathematics will be allowed to teach physics, this is a sufficient degree. A person that wants to teach French must have a degree in French, this is a required degree. *See* JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 44 (Kluwer Editorial) (1998).
[239] *Id.* at 45.
[240] *Id.* at 47.
[241] *Id.* at 49.
[242] Decree of March 27, 1991. Decreten 27 maart 1991 rechtspositie personeelsleden gemeenschapsonderwijs en rechtspositie personeelsleden in het gesubsidieerd onderwijs.
[243] At a certain moment, there were more teachers applying for a job than places were available. These persons had first to fill in the gaps, replacing teachers that were on leave. The days or months achieved were counted, until a full service year was accomplished.
[244] DECREE OF THE PRIVATE SCHOOLS.
[245] To enjoy full political and civil rights in Belgium means that a person does not have a criminal record. It is possible in Belgium to take away those as part of the penalty. The political rights consist of the right to vote and the right to pay taxes. The civil rights consist of the right to contract, inherit, and to wear all titles born with or gathered during live.

he must be a holder of the required degree, he must meet the linguistic standards[246] and he must comply with the draft.

A person cannot commence employment without procuring a medical certificate. The school may refuse to hire someone who is not fit to teach. This means that the teacher has to be able to perform the job. It also implies that the school may refuse someone whose health condition would represent a danger to the health of the students.[247] The school is not allowed to appoint someone who does not meet these minimum requirements.

There is no central, organized form of application. A candidate must seek employment at each particular school. Yet, the school must always first offer the vacant positions to the teachers who have acquired tenure, but who are currently not teaching because of a shortage of positions.[248]

All the candidates for a teaching position, teachers without seniority or tenured teachers are classified into two groups. The group of tenured teachers has priority over the other. Within a group however there is no rule of priority; the school board has discretion to hire a particular candidate. A teacher who has already taught in the school with the vacant position also has priority to obtain an open position at this same school over someone who comes in from the outside. A candidate, who is not able to accept the position because of illness, work accident, maternity leave, or nursing leave, guards her priority rights.[249] The replacement of a teacher on leave does not follow these rules, however the statute did not foresee damages in a case where the authorizing authority

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[246] Since Belgium consists of three different language groups, each person from the other part must pass an official language test in order to be accepted to the other language group. This is even valid for a someone who teaches French or German.
[247] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 59 (Kluwer Editorial) (1998).
[248] Decree of March 27, 1991.
[249] Decree of March 27, 1991. *See* Marafino v. St. Louis County Circuit Court, 707 F.2d 1005 (1983).

ignores a teacher's right of priority. In general employment law, reinstatement is no sanction. Not hiring implies that the employer did not want to hire this particular teacher, thus the school cannot be compelled to hire against its will.[250] More likely, the damages will be in the form of payment. The courts have confirmed this.[251]

The school board has the obligation to inform the members of the staff who are eligible for a tenured teaching position, of all the available positions. The teacher then must apply for every single vacant position.[252]

The Decree of March 27, 1991 regulating the position of teachers in the private school specifies the duties of a teacher, such as to promote at all times the private school system or to adhere to a religious conviction. The school board may specify the obligations emanating from the religious character of the private school.[253] Such obligations have to be communicated in writing before commencement of employment. To comply with this requirement, the school has the choice of writing the obligations in each contract or in a manual.

2. Duties on the Job

Basically the task of a teacher consists of the following duties: to defend the interests of the school, the school board, the Secretariat and the students; to perform the job personally and punctually; display impeccable behavior, not only in the classroom, but also when dealing with parents or in public; to avoid anything that could damage the public's confidence or hurt the honor or dignity of the profession.[254] A teacher also cannot accept gifts, donations, rewards or any other advantage, nor can he divert his

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[250] WILLY VAN EECKHOUTTE, SOCIAL COMPENDIUM EMPLOYMENT LAW, 1027 (Kluwer Rechtswetenschappen Belgie) (1998).
[251] W. RAUWS, THE LEGAL POSITION IN MOTION 102 (Kluwer ed.) (1997).
[252] Decree of the Private Schools.
[253] A major example of such an incompatibility is a private school teacher who sends his children to a public school.

authority for commercial or political aims. He also has the obligation of official secrecy. But it is unclear whether this obligation also contains a prohibition against whistle-blowing. Probably internal reporting is required before a teacher could start blowing the whistle publicly. Even if whistle-blowing is acceptable, the teacher has to be cautious not to violate the obligation of secrecy. This is fine line to walk.

A private school has a religious orientation, and may ask its teachers to support this. Thus, the school could require that the teacher's conduct be irreproachable both, in the classroom and in private life. It may impose certain duties and obligations to support its orientation. Such an incompatibility does not have to be unlawful. Some perfectly lawful activities may be prohibited in a particular school.[255] For instance, in the fifties, contracts often had a dissolving condition in case of marriage or pregnancy, especially for female teachers.[256] After this had been declared illegal by the Cour de Cassation, private schools could no longer require this. But often, the school boards require a teacher's private life to conform to with the Roman Catholic orientation. The private schools generally do not welcome divorce, extramarital relations, extra-marital households, homosexuality or abortion. In most cases, teachers have to comply with the policy of the private schools at all times. If they do not, they are either not hired or asked to resign or even discharged. But since the Decree of 1997, the statute now explicitly provides that facts from private life that have no incidence on the relationship of teacher to pupil or to the life of the school may not be taken into account by the school board. Thus, they cannot be a reason for disciplining a teacher. This is, of course, a fine balance, since the statute talks about the relationship between a teacher and a pupil. This

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[254] DECREE OF THE PRIVATE SCHOOLS.
[255] W. RAUWS, THE LEGAL POSITION IN MOTION 104 (Kluwer ed.) (1997).

relationship refers to the role with which the teacher must comply. He has at all times to be an example, which stands for a conduct that is without any reproach. The role encompasses more than the quality of education. As in the United States, the life of the teacher beyond the school gate affects his ability to teaching. Since the regulation in the statue is vague, it will inevitably lead to discussion and perhaps controversy.

Since the teacher has to prove his loyalty to the school, the question arises whether he may send his children to a school of another conviction or to a public school. It is not clear where to draw the line between facets of his life that are entirely private and facets that are not. On the one hand, requiring the teacher to send his children to a certain school would be contrary to the Constitution, on the other hand, it would fall into the contractual obligation of loyalty.

3. Duties of the Job

How far can the school authority go in asking a teacher to adhere to a certain way of life? Requiring loyalty to a school and its support for religious orientation could conflict with the right to be a member of a political party, or a religious, philosophical or ideological group. Since the aim of some groups is to attract the public's attention the school may have an interest in the teacher's private life. But these rights are fundamental rights, embodied in the Belgian Constitution. When voting the Decree, the Court advice wrote: "The obligations or prohibitions have to be related to the activities of the teachers at school. No way of life, no engagement, no adherence to any political, ideological,

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[256] WILLY VAN EECKHOUTTE, SOCIAL COMPENDIUM EMPLOYMENT LAW 1042 (Kluwer Rechtswetenschappen Belgie) (1998).

religious or philosophical may be prohibited".[257] The problem is that the court did not come to this decision in a judgment, but in mere advice to the legislature.

A new dimension of the discussion has recently emerged.[258] Given the specific orientation of the private schools, can they refuse to hire non-Catholic teachers? At the moment, in Belgium the citizens of Islam are a seizable group. In addition there are immigrants from Northern Africa or Turkey. Projects of have been set up to accelerate the integration of these groups into the Belgian society. One of these projects is that persons may work for a period. This includes teaching in the public schools and in the private schools. For this project, all schools received a substantial amount of financing. However, most of the teachers employed temporarily under the project were not of the same conviction of the private schools, so the schools did not renew the contracts of the Islamics after the subsidies were over. The Minister of Education then threatened to withdraw all subsidies from the private schools. The statute was subsequently amended to provide that from now on, private schools could not exclude candidates of another religion, such as the Muslim religion. Under this amendment, most private schools renewed the contracts of the Muslim teachers. Some private schools, though, thought this amendment unconstitutional, since it conflicted with freedom of religion clause. They then brought suit under this theory and contrary to ruling that the Freedom of Education clause would allow the schools to hire whom they like, the Court focused the discussion on privacy. It is reasoned that religion is a matter of privacy and the schools

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[257] The exact text goes as following: "[D]eze verplichtingen betrekking moeten hebben op de activiteiten van de personeelsleden in de onderwijsinrichting. Geen enkele leefwijze, geen enkel engagement of politieke, ideologische, religieuze of filosofische aanhorigheid, [...] kan hen verboden worden". Conseil d'Etat, Printed Pieces, nr. 61/1, 1992. *See* W. RAUWS, THE LEGAL POSITION IN MOTION 104 (Kluwer ed.) (1997).

[258] *See* Adriaan Overbeeke, *Multi-etnisch schoolteam, vrije personeelskeuze en gelijke behandeling.[Multi Ethnic School Team, Free Choice of Personel and Equal Treatment]* TIJDSCHRIFT VOOR ONDERWIJSRECHT EN ONDERWIJSBELEID [T.O.R.B.], 1 – 20 September 1998-99. [hereinafter Multi Ethnic Schoolteam]

may not treat job candidates unequally. As long as the teacher follows the delineated tasks during school hours, the school cannot interfere with that teacher's private religion.[259]

Each teacher has two persons who evaluate him, one of whom is always the principal. This evaluation follows the job description. At least three times a year, the teacher will be evaluated. The unions and the school board, including the principal of the school where the teacher works, agree upon how the evaluations will be performed. This evaluation is detailed and the teacher receives a grade. Appeal from the grade is not possible, unless the teacher is given a grade of "failed". Failing has severe consequences. For a temporary teacher, it means that he will be discharged. A tenured teacher will be reevaluated the following year. Three failures in a row will lead to dismissal for a tenured teacher.[260]

The only way a tenured teacher can be disciplined is through certain limited measures. After all, the purpose of tenure is that the teacher cannot be discharged easily. The statute provides disciplinary powers, but only for tenured teachers. A temporary teacher enjoys less protection. The statute provides a variety of measures, from simple blame or a reprimand, to suspension with or without salary. The heaviest sanction is the discharge of the teacher. When a disciplinary case is pending, the school board may suspend the teacher provisionally. Disciplinary measures resemble much a criminal trial with some differences. In a criminal case, one has to prove that the defendant is guilty. This is not required in a disciplinary case. Also, the people competent for pronouncing

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[259] Trib. Arbitrage, April 1, 1998, no. 34/98.
[260] DECREE OF THE PRIVATE SCHOOLS.

the measure do not have to be different from those investigating the case.[261] But disciplinary measures also offer a protection, since a tenured teacher cannot be dismissed at the school board's sole discretion. Although the rules are not as stringent as in criminal cases, case law has interpreted how such disciplinary measures can be inflicted. For instance the teacher has the right to be informed before the measure is undertaken, the teacher must be given a right of access and the right to a hearing and a sentencing behind closed doors. The teacher is heard before a decision is reached and the teacher must have the opportunity to answer to all the disciplinary charges. He also has a statutory right of appeal. A counsel of appeal that consists of an independent president, representatives of the employer and the employee hears the case. The representatives have all to be recognized by the government.[262] The representatives of the employees are unions.

When the school, through its principal, who always initiates the disciplinary procedure and the organizing authority, who finally imposes the sanctions, wants to discipline a teacher while a criminal suit is pending against that teacher, they need not await the outcome of the criminal suit.[263]

4. Employee Benefits

It would lead us too far a field to examine the system of social security in Belgium, but it is worth noting that teachers have a right to fully paid sick leave consisting of 30 days per 12 months worked, fully paid by the employer.[264] They also receive a child surcharge, for every biological or adopted child living in their

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[261] *See* INGRID OPDEBEEK, TUCHTRECHT IN LOKALE BESTUREN [DISCIPLINARY MEASURES IN LOCAL AUTHORITIES] 7 (Die Keure ed.) (1993).
[262] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 85 (Kluwer editorial) (1998).
[263] INGRID OPDEBEEK, *Id.* at 21.
[264] ALGEMENE BESLUITWET van 28 december 1944 [GENERAL STATUTE of December 28, 1944].

household.[265] In addition to that, all holidays, up to the amount of 105 days per year, are fully paid by the employer.[266] In case of work accident or accident incurred on the way to or from school, they are integrally covered by their employer. The teacher is entitled to compensation for all medical expenses, an annuity in case of consolidated total or partial incapacity, and to sick leave. A tenured teacher enjoys a sick leave for the period he cannot perform his job, even if this exceeds the period of 30 days to which he is entitled. During this absence, he receives his full last year's salary. A temporary teacher may receive up to 90 % of his last year's salary for one year.[267] Moral and esthetical damages will not be compensated.[268]

A teacher is covered during school time as well for all extra school activity. However, the coverage for accidents in the work place, or on the way to or from the workplace only extents to activities related to the job of the teacher, and the principal must have assigned this outside activity.[269]

5. Pregnancy

There is no such statute as Title VII or the Pregnancy Discrimination Act in Belgium. This does not mean that a female teacher has no protection at all; she enjoys protection that has its basis in statutes.[270] Courts have completed the protection in case law, so that the protection is deep-rooted in the Belgian legal system.[271] In cases of hiring, the school cannot discriminate between male and female candidates, since this

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[265] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 243 (Kluwer Editorial) (1998).
[266] *Id.* at 324.
[267] Of course, if the accident is due to the act of a third party, the employer will reclaim the advanced expenses from this third party.
[268] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 348 (Kluwer Editorial) (1998).
[269] *Id.* at 364.
[270] These protective statutes are the result of a tradition, particular for the European continent, of struggle of employees and unions for more protection of the employee in general dating from the end of the 19th Century. *See* ELS WITTE, POLITIEKE GESCHIEDENIS VAN BELGIE, (VUB Press ed.) (1998) [Political History of Belgium].

would violate the Constitution.[272] Until recently, it has not been the subject of case law. In the past, plaintiffs have claimed that the hiring of another candidate was not founded on objective grounds. It was unlikely that a plaintiff would use the argument of gender-based discrimination. Currently, the statute explicitly provides that female teachers, eligible for hiring or tenure, in the condition of pregnancy or maternity leave preserve all their rights[273], which is in contrast to the law of the United States.[274]

The protection starts as soon as the teacher communicates to the principal the fact of her pregnancy. There is no retroactive protection. This has the consequence that the teacher must communicate her condition has early as possible. The protection is twofold: the teacher cannot be terminated because of pregnancy or any related medical condition, and the teacher has the right to take 15 weeks of maternity leave.[275] The employer must maintain her position; he can only hire an interim replacement.[276]

Yet the protection is not absolute, because under certain circumstances, discharge remains possible. Such was the case when the teacher received severance before she informed the principal of her pregnancy. Thus the discharge remained valid, but the severance was suspended for the time of the maternity leave.[277] Generally, the employer does not have to specify the motives behind the termination, but in this case the employer was to specify the motives. The employer may only terminate for reasons unrelated to the pregnancy. The employer bears the burden of proof.[278] Yet, for a tenured teacher,

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[271] *See supra* WILLY VAN EECKHOUTTE, SOCIAL COMPENDIUM EMPLOYMENT LAW 1042 (Kluwer Rechtswetenschappen Belgie) (1998).
[272] The Belgian Constitution has consecrates one article to equality: all people shall be equal. BELG. CONST., art. 11.
[273] DECREE OF THE PRIVATE SCHOOLS.
[274] Marafino v. St. Louis County Circuit Court, 707 F.2d 1005 (1983).
[275] DECREE OF THE PRIVATE SCHOOLS.
[276] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 310 (Kluwer Editorial) (1998). *See* California Federal Savings & Loan v. Guerra, 479 U.S. 272 (1987).
[277] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 311 (Kluwer Editorial) (1998).
[278] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 310 (Kluwer Editorial) (1998).

there is no dismissal possible without a disciplinary sanction. This means that teachers are fully protected against dismissal.

The second prong of the protection is the maternity leave. Any pregnant teacher has the right to take seven weeks of absence before the childbirth and eight weeks after. The teacher must take at least one week before the childbirth and at least eight weeks after the childbirth. She has a choice for the other six weeks, but she cannot take them at different times. They have to be taken because of the pregnancy and childbirth. It is not possible to renounce to this right.

It is unclear whether abortion generates the same protection as childbirth.[279] Until now, no case dealt with this. However, the statute provides the same protection for miscarriage as for childbirth. During the fifteen weeks of leave, full salary is guaranteed. It is permissible to exceed the statutory fifteen weeks, but the teacher is then not entitled to salary. A new development is the possibility for nursing leave. The mother must take this immediately after the maternity leave and she can take up to three months of unpaid leave.[280]

In the private employment situation, unionization, collective bargaining and strikes have had a long tradition. However, collective bargaining process of the private school is somewhat different from the process in regard to other private employment. Since the government is an important party because its role in funding and controlling the schools, the bargaining takes place at the highest level of the coordinating organization which controls all private, catholic schools. Within this level, the coordinating organization of all the schools is the employer and represents them all. The Minister of Education presides over the bargaining. The unions represent all the private school

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[279] *See* MICHAEL W. LAMORTE, SCHOOL LAW, CASES AND CONCEPTS 238 (Allyn and Bacon) (1998)

teachers (except for the non-Catholic schools). The private schools have not faced as many strikes as the public schools have, but the private school teachers certainly have the right to strike. However, within the private schools, all bargaining parties engage more in consultation. The result of the meetings are binding for all the school employers and employees, regardless of their adherence to a union.

F. Public schools

The flip side of the constitutionally guaranteed freedom of education is that the state provides schools as well. The public school was originally organized by the state, more specifically, the Minister of Education. Since this same Minister had authority over both school systems, it was considered a conflict of interest when dealing with the private school system to be both organizer and promoter of the official school system and its controlling authority.

Because of this perception, in the 1980's, the Minister delegated its power of organization and promotion of the public school system to a board of trustees. This Board of Trustees, the "Autonome Raad van het Gemeenschapsonderwijs (ARGO)" [Autonomous Board of the Education of the Community], consists of a Central Council and the local school boards.[281] Both control the functioning of the schools, but the local school boards have only an advising capacity. Since 1998, the structure and organization has again been modified. Now, the public schools have three levels of administration.[282] At the local level is the individual school, at the intermediate level are a group of schools, called the school community, and at a central level are all the public schools. The

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[280] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 319 (Kluwer Editorial) (1998).
[281] BIJZONDER DECREET OF 19 DECEMBER 1988 [SPECIAL DECREE OF DECEMBER 19, 1988].
[282] BIJZONDER DECREET OF 14 JULI 1998 [SPECIAL DECREE OF JULY 14, 1998].

intermediate level can be as large as a county, while the central level may be as large as the whole region of Flanders.[283]

Unlike the private schools, which are complete functioning entities and have authority to do their own hiring and firing, the public school only has pedagogical functions. The principal has to coach and evaluate his team, define the individual job descriptions and tasks, and make proposals for tenure.[284] He is appointed by the intermediate level, which also considers the proposals of the principal. This intermediate level is responsible for appointment of teachers and principals, as well as for disciplinary issues. The intermediate level is now the most important level and it is in fact the organizing authority of the public school. The central level performs a supervisory task.[285]

The statute became effective officially on April 1, 1999, but it will take until 2003 for every school to be adapted.[286] The statute emphasizes the importance of local involvement, a concept that had never existed before in the Belgian public school tradition.

The public school has to provide religiously and politically neutral education. For its own purpose, the public schools provide an education and vocational training for its teachers. Before 1998, there was an affirmative action policy for teachers who were a product of the public school system. Up to three-fourths could be hired from its of the "own public school system". Thus it was permissible to ask where they had received

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[283] R. VERSTEGEN, L. VENY, W. RAUWS AND D. DELI, CURRENT QUESTIONS OF EDUCATION LAW 10 (Kluwer 1997).
[284] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 17 (Kluwer Editorial) (1998).
[285] *Id.* at 18.
[286] *Id.*

their education. This policy no longer exists. Some authors even that it is against the freedom of education clause to ask whether the future teacher went to a public school.[287]

1. Employment Contract

Generally, in order to teach in the public school system, a person needs the necessary degrees just as for the private school system. The statutes enacted in 1991 equate the requirements for both school types. Since the public school is a public service, it cannot have any preferences in hiring. A person who meets all the requirements cannot be rejected by the public school.

The system of application for a position in the public school system differs from the private school. While candidates for a private school position need to take the step towards applying to each school where they want to work, for the public school, a central call-up is done to all candidates.

But the system is basically the same as in the private school otherwise. First, the teacher will start his career in a temporary status. But when he has acquired enough seniority and positive evaluations, he will acquire tenure.

In fact, public school teachers are public employees, which means that they have to obey a set of rules that do not exist in the private employment relationship. It has been highly debated what kind of relationship the state had with its workers. Some commentators have tried to apply as many elements from private employment as possible, though there are significant differences between a public employee and a private employee. Since public employees are not hired on the basis of a contract, but rather are nominated by the state, it has been impossible to equate them to private employees. The fact that public employers are nominated by the employer was seen as a

[287] R. Verstegen, The Education Law in Flanders. An Overview 21(Kluwer Rechtswetenschappen 1997).

privilege as in the United States.[288] This resulted in a restricted freedom. Issues such as religious accommodation of the employer, freedom of speech, especially whistle-blowing, were not allowed for public employees. In Belgium too, a change in the case law resulted in more rights for public employees, such as the right to unionize and to strike. However, one major difference between the private school teacher and the public school teacher is in the area of tort liability.

2. Unions

The right of public employees to unionize has always been considered a constitutional right. Yet, as in the United States, the right to strike has been non-existent for public employees for a long times, because the right to work as a public employee was considered a privilege. Thus it was impossible for a public employee to strike. This does not comport with the reality. The view of public employment as privilege began to fade because working conditions were not as good as in the private sector and the wages were not as high as in private employment. Public employees began to engage in strikes and were never sanctioned by the courts for this. This precipitated consultations between the Minister of Education and the unions on an informal level. These informal consultations have contributed to the way collective bargaining is conducted today in the public schools.

These informal relations are now regulated by statute.[289] Unions must be represented in order to join the bargaining. At the Minister's level, unions and legislature try to enter into collective bargaining. This bargaining can result in statutory amendments, which the Minister is authorized to make. The economic situation, however, resulted in a considerable loss of bargaining power on the part of the unions.

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[288] *See* Justice Holmes in McAuliffe v. Mayor & City of New Bedford, 29 N.E. 517 (1892).

Strikes are no longer a threat to the decision-makers. The primary concern of all the unions became the increase of jobs, since the Belgian State has a high number of unemployed teachers. Today, there is less bargaining, and more consultation between all the involved parties. Any change in the statute regulating the status of the teachers in the public school affects all teachers, whether they are unionized or not.

G. Employee liability

Liability in Belgium has almost the same significance as in the United States: "it is a broad legal term of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely".[290] Civil liability, as opposed to the criminal liability, can be divided into two main parts.[291] There is contractual liability, which is all claims related to the execution of a contract, whether performance of the duties agreed upon or the damages. There is also liability, outside the context of a contract, and outside the scope of criminal law.[292] This liability is called the extra-contractual or quasi-delictual liability. It is a liability that establishes an obligation to do something, to refrain from doing something or to pay, without the existence of a contract. But it creates this obligation only when a number of conditions are satisfied: there must be some wrongful conduct, not necessarily unlawful; there must be some damage, and a causal connection between the damage and the wrongful conduct. The plaintiff bears the burden of proof, and he must establish the three elements. If he fails to do so, no damage will be awarded, because the judge will not infer one of the elements by the existence of the other two.

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[289] WET SYNDICAAL STATUUT [STATUTE REGULATING THE UNIONS] of December 19, 1974.
[290] BLACK'S LAW DICTIONARY 631 (6th ed. 1990).
[291] Criminal liability means all acts that can give rise to a prosecution. LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 8 (Bruylant Maklu ed.) (1990).
[292] II HENRI DE PAGE, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL BELGE [ELEMENTARY TREATY UPON BELGIAN CIVIL LAW](Bruylant ed. 3th ed.)[hereinafter BELGIAN CIVIL LAW].

The basis for extra-contractual damages lies in the Civil Code (C.Civ.). Article 1382 C.Civ. is the general rule pertaining to wrongful conduct and states "[e]very act, committed by a person, that causes damage to someone, obliges the author of this act to repair the damage".[293] This general text provides that active conduct as well as negligence, carelessness, or recklessness may be a basis for an unlawful act.

The basis for every claim, whatever the quality of the wrongdoer, rest on the notion of fault. The concept of fault was developed under case law and it consists of three elements: the wrongdoer must be accountable, he must have broken a general duty of care, and there must be foreseeable damage.[294] The judge must determine whether all these elements are present and proven. The latter element is usually deducted from the existence of the first two elements. To verify the accountability, case law has determined that a person must have the "ability of distinguishment". This means that a person must be able to judge the consequences of his deeds. Accountability, when children are involved, is more difficult to judge. The judge will determine this accountability in his sole discretion. Usually, the age at which children are able to distinguish is set by the courts set at age seven. But this is not a binding rule.[295] Thus, the judge must always test the facts at stake. It is not possible to assume accountability from the mere fact that a wrongful conduct and damage, caused by this conduct exist.[296] The judge must determine where the child is able to foresee the consequences of what he is doing, apart from whether the child has reached the age of ability to distinguish. A totally unforeseen

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[293] Code Civ. [C.Civ.], art. 1382. Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.
[294] L. VENY, ACTUALIA INZAKE ONDERWIJSAANSPRAKELIJKHEID in CURRENT QUESTIONS OF EDUCATION LAW 31 (Kluwer 1997).
[295] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 27 (Bruylant Maklu ed.) (1990).
[296] Cass. October 30, 1980.

incident makes that person lose control of their acts. In such a case, the wrongdoer will not be accountable for his deeds.

The second and most important element of fault is the violation of a general duty of care. Almost all litigation will deal with a discussion of whether the person who caused the damage violated this general duty of care. In order to determine whether a violation exists, the assessment will be abstract.[297] The conduct will be compared to conduct of a reasonable and prudent man, placed in the same circumstances.[298] The notion of a reasonable and prudent man refers to an absolutely neutral notion, neither the personnel qualifications, nor age, gender or experience of the author will play a role.[299] Only one exception is allowed; when the defender's qualifications exceed those of a normally prudent and reasonable person, then the conduct will be compared to that of a normally prudent and reasonably person of that same category.[300]

Every infringement of the general rule of care creates a fault, whatever the gravity of the infringement. It is not enough for the plaintiff to prove that the wrongdoer was accountable and violated the general rule of care. The plaintiff should also prove that at the moment the incident occurred, the violation of the general rule of care made it predictable that damage was bound to occur.[301] This is distinct from the will to inflict damage. Usually a reasonable and prudent person adapts his conduct to the circumstances in order to avoid any damage. But in reality, the question of whether

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[297] Hugo Vandenberghe and Marc Van Quickenborne, *Aansprakelijkheid uit onrechtmatige daad* [*Liability From Wrongful Act*] 4 TIJDSCHRIFT VOOR PRIVAATRECHT [T.P.R.] 1115 (1995) [hereinafter Liability From Wrongful Act].
[298] Cass. June 30, 1983.
[299] Hugo Vandenberghe and Marc Van Quickenborne, *Liability From Wrongful Act* 4 T.P.R. 1115, 1126 (1995).
[300] Cass. April 19, 1976.
[301] Hugo Vandenberghe and Marc Van Quickenborne, *Liability From Wrongful Act* 4 T.P.R. 1115, 1438 (1995).

damage could have been foreseen will often rise when an act causes damage, so that the actor may not have been aware of the likelihood of damage occurring.

Thus, three elements must be present: the fault, the damage, which must be established and proven, and the causality between the damage and the fault.

Tort liability does not have to be based solely on wrongful conduct. There is also liability based on a presumption of liability.[302] This means that the liability of a certain person is presumed, because of his person's status. Such a presumption of liability exists for parents and teachers. This presumption is to give the victim better chances to repair the damage. Yet this presumption of liability is refutable. However, the parent or teacher cannot refute the presumption on the basis that the parent or the teacher committed no wrongful action. Instead, the presumption must be refuted on the basis that the damage was a sudden, unforeseeable event.[303]

Article 1384, section 2 of the Civil Code stipulates that the two parents equally are liable for the damage caused by their minor children. The grounds for the liability of the parents are that the child committed a wrongful action, which caused damage to an innocent third party. Only the father and the mother can be held responsible.[304] Any child who has not reached the age of majority[305] falls under the responsibility of its parents. The parents are liable for the wrongful actions of their children. Once this wrongful conduct is established, the parents are presumed to be liable. They can only refute this liability by invoking the sudden character of what the child did, and which they could not be expected to have prevented.

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[302] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 317 (Bruylant Maklu ed.) (1990).
[303] *Id.* at 318.
[304] Hugo Vandenberghe and Marc Van Quickenborne, *Liability From Wrongful Act* 4 T.P.R. 1115, 1371 (1995).
[305] The age of majority in Belgium is 18.

Since the wrongful conduct of the child is the same as the wrongful conduct under the general rules of liability, the victim must prove that the three elements exist: fault, damage and causal connection between the damage and the wrongful conduct. The assessment of fault consists of the three-prong test, which does not differ from the general rules of liability. Yet the question of accountability is more important in the context of presumed liability. The child must have the ability of distinguishment. If the judge comes to the conclusion, that the child did not reach this ability, the child will not be declared accountable. This leads to the result that there is no fault, and thus, no liability is established. The victim can recover damages from neither the child nor the parents. This seems rather harsh for the victim, and some courts immediately inquire as to whether there has been an infringement of the general rule of care and duty.[306] Only third parties can claim for damages. Parents who are victims of the wrongful conduct of their children fall outside the scope of the application of this rule.[307] The responsibility rests upon the parents' quality as parents, not on the question of whether a parent guards the child.

The presumption of a parent's liability for the child embraces two elements. First, it presumes that the parents committed a fault, either in the surveillance of their child, or in the education of the child. Parents can try to be discharged from the liability by showing that they committed no fault in the surveillance or the education. If they fail to show this, it does not mean that they really made such a mistake, since the mechanism of liability works on the basis of a presumption.[308]

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[306] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 325 (Bruylant Maklu ed.) (1990).
[307] This caused no problem during a long time. However since the increased number of divorces, where a child usually lives with one parent, one might think that the other parent, victim, might recover damages, quod non.
[308] Hugo Vandenberghe and Marc Van Quickenborne, *Liability From Wrongful Act* 4 T.P.R. 1115, 1373 (1995).

It is not only parents who bear this presumption of liability. The same article 1384, section 4 of the Civil Code states that teachers and craftsmen are also responsible for their pupils during the time they are under the surveillance of the teacher or craftsman. This liability is similar to that of the parents. Similarly the teachers and craftsmen can exonerate themselves from liability by proving that they could not avoid the incident.[309] There has to be some wrongful conduct, committed by a pupil, that caused damage to a third party, while the pupil was under the surveillance of the teacher.

This article of the Civil Code, since it was drafted in 1804, especially the section applicable to teachers, is outdated. In Belgium, as well in the Dutch and the French language, an extra term exists to describe an elementary school teacher. The article of the Civil Code uses the word "teacher" (onderwijzer) in the sense of a teacher of an elementary school, instead of the general word (leraar). There is no discussion about whether this article applies to all school teachers, from elementary school to high school.[310] In fact, the entire school staff falls under the term "teacher".[311] Thus a teacher, while not teaching, but at school, apparently is subject to this presumption. Unlike parental presumption of liability, teacher and craftsmen responsibility does not stop once the student reaches the age of the majority. The fact that a person is at school and is receiving an education makes this person a student. This means that the presumption of liability exists not only in the classroom, but also in the hallways, the recreation area, the cafeteria, wherever students are allowed. When a student withdraws

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[309] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 374 (Kluwer Editorial)(1998).
[310] Hugo Vandenberghe and Marc Van Quickenborne, *Liability From Wrongful Act* 4 T.P.R. 1115, 1372 (1995).
[311] Even the principal of a school falls under the notion of teacher. *See* L. VENY, ACTUALIA INZAKE ONDERWIJSAANSPRAKELIJKHEID in CURRENT QUESTIONS OF EDUCATION LAW 71 (Kluwer 1997).

from the premises, there is no further liability on the teacher.[312] It is no defense that the student was not accountable for his acts.

When the victim establishes that the damage was caused by a student under the surveillance of the teacher, the teacher can attempt to refute the presumption of liability. This presumption of liability is often equated with fault, surveillance by the teacher.[313] In reality, however, it means that the burden of proof may be reversed. Indeed, the teacher must establish that his surveillance was sufficient.[314] The surveillance is declared sufficient when the damage occurred while the teacher performed his task amply and it was impossible to prevent the act of the student's actions. This impossibility must relate to the fact that either the teacher could not foresee the act of the student, or that the teacher was not present, and the teacher's absence was legitimate.[315]

For at least for a century, courts had separated the presumption of liability of parents and the teachers.[316] Once under the surveillance of the teacher, the teacher was the sole and only person responsible for the conduct of the child. The parents were not then subject to this presumption of liability. But an argument made by teachers was that students did not tend to listen to them. This argument became more vociferous over the years, and it was even common for reprimanded students to be defended by their parents. Many teachers felt this presumption of liability was a cumbersome and unfair burden. Another argument was that judges did not know what the reality was, and that it was easy to judge *post factem* what a teacher was supposed to do. Judges seemed not to

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[312] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 359 (Bruylant Maklu ed.) (1990).
[313] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 360 (Bruylant Maklu ed.) (1990).
[314] L. VENY, ACTUALIA INZAKE ONDERWIJSAANSPRAKELIJKHEID in CURRENT QUESTIONS OF EDUCATION LAW 73 (Kluwer 1997).
[315] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 374 (Kluwer Editorial) (1998).
[316] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 360 (Bruylant Maklu ed.) (1990).

understand that a teacher did not have one single student under his surveillance, but sometimes thirty, forty or more.

It has only been recently that the Court de Cassation changed its view,[317] although many commentators do not mention this reverse in case law.[318] Until 1989, the courts had stated that in case of presumption of liability, responsibility of one party excludes the responsibility of the other party.[319] Until that time, the lower courts were split. Some courts recognized the possibility of a claim against both parents and teachers, while others recognized only exclusive alternative claims. But no rule in the Civil Code prohibits the joint application of liability. Hence, the presumption of parental liability is based on a fault in the surveillance or a fault in the education. Presumption of teacher liability is based on the presumption that there was an improper surveillance. In 1989, the Cour the Cassation reversed a longstanding tradition in accepting that indeed, one presumption of responsibility does not exclude the other. The court held that the responsibility of the parents is based upon "either a fault in the education or a fault in the surveillance".[320] It deducted from this holding that "the existence of both faults together is not necessary".[321] It means that the Court considers certain deeds of the student while under surveillance of the teacher to be rooted in a lack of education on the part of the parents.

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[317] Cass. February 23, 1989.
[318] *See* JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 375 (Kluwer Editorial) (1998).
[319] Except for the fact that the teacher and the parent are the same person. *See* LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 365 (Bruylant Maklu ed.) (1990).
[320] The original text goes as following: "soit sur une faute dans l'éducation, soit sur une faute dans la surveillance". Cass. February 23, 1989.
[321] The original text goes as following: "que l'existence des deux fautes n'est pas nécessaire". *Id.*

It remains an open question whether this will be a breakthrough in the tort law. Some commentators continue to cite the older case law,[322] while the majority of commentators do not even mention this change in the case law.[323]

Apart from the presumption of liability for the wrongful conduct of the children, teachers have been held liable for their own wrongful personal actions. Both case law and legal commentators consider every omission, every recklessness, every ignorance, every rashness, every omission to take measures, imposed by the circumstances to be a fault of a teacher.[324] The most striking examples are those of a teacher hitting a student, or leaving a student unattended, or even allowing the students to play dangerous games on the playground.[325] The victim must prove a damage, which can consist of material or moral damage. The material damage consists of any damage that either hurts the physical integrity of the person or produces a loss. It includes any damage that is countable and repairable through the payment of money.

Moral damages in Belgium are not awarded as they are in the U.S. and they do not command a high sum.[326] Moral damages are considered a loss of an immaterial thing and not a countable good. It can consist of pain, caused through wounds and injuries, a reduction of work ability, and sometimes injury to the reputation of a person.[327]

H. Employer liability

The Civil Code regulates the general rules for liability. It also establishes a range of duties, either through presumptions attributed to persons or because of an objective

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[322] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 374 (Kluwer Editorial) (1998).
[323] *See* L. VENY, ACTUALIA INZAKE ONDERWIJSAANSPRAKELIJKHEID in CURRENT QUESTIONS OF EDUCATION LAW (Kluwer 1997).
[324] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 370 (Kluwer Editorial) (1998).
[325] *Id.* at 375.
[326] Hugo Vandenberghe and Marc Van Quickenborne, *Liability From Wrongful Act* 4 T.P.R. 1115, 1470 (1995).
[327] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 371 (Kluwer Editorial) (1998).

responsibility, which means that the person to whom the duty will be attributed cannot refute it. Since the creation of the Civil Code, society underwent major changes. This has led to more numerous and complex statutes. Some of these deal with liability. They complement the principles of the Civil Code, but they do not change its basic notions.

The liability of the employer for its employee is a very important concept. It is based upon the principle of hiring someone to do work. The instructor, i.e. the person on whose behalf the hired person works, will be held responsible in case the subordinate commits a wrongful act within the course of employment.[328] The victim does not need to establish the existence of a personnel fault. Since this responsibility is irrefutable, the instructor could not try to reverse the burden of proof by showing that his care or surveillance was sufficient to prevent the damage from happening. This principle is found in the Civil Code and also in the statute that regulates the relationship between the employee and the employer.[329]

It is in this area that the discussion of the characteristics of the relationship between the teacher in a private school and the organizing authority loses its philosophical character. Different solutions to the problem of the character of this relationship would create different regimes of liability, since the public employee follows another rule. In fact, the private school teacher, working under an employment contract, receives greater protection, because his employer is subject to objective liability.

But although the private employee receives a certain protection under the statute, he will not be exonerated completely from any liability. The statute stipulates that the employee, while performing the employment contract, is liable for fraud, a serious fault,

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[328] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORTS LAW 381 (Bruylant Maklu ed.) (1990).
[329] STATUTE REGULATING THE EMPLOYMENT CONTRACTS from June 14, 1978.

or a light fault if it is a habit for the fault to happen.[330] The employee must have committed the act while performing the duties of his employment. According to Belgian law, this means that the employee is under the authority, control and surveillance of his employer. There must exist a relationship of subordination. It is this subordination that constitutes an employee – employer relationship. The coverage of the statute and the criteria for personal responsibility on the basis of this statute are only because the act falls within the scope of the employment. In reality, the judge will look at the opposite: when or what did the employer do to fall outside the range of a normal performance of the employment contract. It will always rest on the facts. Furthermore, the scope of the employment contract is usually rather widely interpreted. Whenever the acts where committed intentionally or with recklessness (which constitutes a major fault) it is likely that the employee will fall outside the scope of the contract. As a consequence, his conduct will not be covered by the statute. Whenever there is no personal liability of the employee, the employer is, by virtue of the statute liable for his employee's acts. This means that third parties can recover from the employer when the employee inflicts damage to the third party. However, this statute will not affect any criminal liability of the employee.

At first sight, there may not appear to be much of a difference between a public school and a private school. Both schools are created, the public school by the legislature, the private school by private persons and exist as distinct corporations, apart from their creators. Those corporations act as every other person, subject to the law. They can enter contracts, buy property, enjoy rights and owe duties as every other person within the state.

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[330] *Id.*, art. 18.

Yet in Belgium, the law has always distinguished between private employees and public employees. Not only is the relationship between a public employee and his employer different from that of a private employee with his employer, the coverage for tort liability is also different. Because public school teachers are considered public employees, they have a different tort liability coverage than their counterparts in the private school.

This difference has its basis in governmental immunity. Courts did not consider themselves competent to condemn the state, because of the separation of powers. It was only in 1920 that the courts recognized a possibility of liability for the state. The court made a distinction between the administration, acting as a public corporation and as a private person. When the corporation acts as a private person, there should be no reason to exonerate any liability.[331] Through the years, the courts went a little further in each case. For instance, one case stipulated that the corporation's decision itself had to be free of any negligence.[332] It is clear now that the state and its agents are no longer immune from tort liability.

Although state agencies, such as a public school board, and its employees can be held liable and are subject to the same general rules of tort liability as private persons, the mechanism works differently than for other corporations or employees. Agencies can only act through the persons that administer them. These persons are the organs of the agency. Organs exist for private as well as for public corporations, and they act on behalf of the corporation. However, the major difference between the private and the public corporation is its mission. Public corporations provide a service to the population. This service can at all times be revoked, changed, enlarged or diminished. This mission can

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[331] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 208 (Bruylant Maklu ed.) (1990).

either be changed by the same legislature that created the corporation, or that legislature may decide to delegate some of its power to the corporation, so that it can decide for itself.

An organ can be held liable, solely or together with its agency. In order to have joint liability, the victim must prove that the person who inflicted the damage was the organ at the moment the damage occurred and that the organ acted within the boundaries of its function.[333] The victim has the choice, and does not have to sue the organ and the agency together. When the victim decides to recover only from the organ, the organ cannot require the agency to appear at the trial. The organ may be held solely responsible, even for the slightest fault.[334]

Public school teachers are considered organs.[335] It is difficult to understand why they are seen as such, because an organ is more than a public employee. An organ usually has the power to bind the agency, something a teacher cannot do. For teachers, the insulation of employer liability is absent. It is difficult to reason why case law developed this distinction between teachers from the private and from the public schools, since the essence of their jobs is similar, if not the same. Also, the general rules and presumption of liability apply to the private school teachers as well as to public school teachers.

Many commentators have criticized the distinction that case law has made, because the teachers' work is the same, regardless of the public or private character of the school.[336] The sole difference is that in one case, the teacher falls under a burdensome

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[332] Cass. April 23, 1971.
[333] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 455 (Bruylant Maklu ed.) (1990).
[334] Contrast this to the employee, whose employer is liable for the slightest fault. The employee is only personal liable for fraud, intent, heavy fault, such as reckless, or a light but habitual fault.
[335] LUDO CORNELIS, PRINCIPLES OF BELGIAN TORT LAW 455 (Bruylant Maklu ed.) (1990).
[336] *Id.* at 461.

regime of liability whereas, in the other case, the teacher is insulated by the employer. In 1998, the Constitutional Court considered this distinction to be unconstitutional under the rationale that the Belgian Constitution guarantees the principle of equality. But it is questionable whether the Cour de Cassation, which is a different court, is willing to accept that its construction is erroneous. In general, it is understandable that such a distinction exists; some organs of corporations have a great deal of delegated power, such as mayors, district attorneys and judges. There must be some sort of ground for the victim to recover for wrongful conduct. However, teachers do not have that extent of delegated power. They can make binding decisions, such as grading, failing a student and holding that student back, or expelling him temporarily from the classroom.[337] Yet, there is no need to equate teachers with high position organs. Case law demonstrates that there is a valid alternative: amend the statute regulating the liability of the public school teacher.

[337] JOHAN HEYVAERT AND GUY JANSSENS, EDUCATION POCKET 371 (Kluwer Editorial) (1998).

Conclusion

At first blush, there appear to be huge differences between the educational systems of the United States and Belgium. The first difference lies in the legal tradition. One might think that therefore, the status of teachers in the two countries would be completely different. However, at second blush, the differences between the two systems are not as great as they first appear.

It is a commonly thought in Europe that the law of the United States is less codified than it is in Belgium. But depending on how one defines the term "codification", this might be incorrect. If one understands the term as the process of enacting a statute where all the aspects of one particular matter are combined, then indeed, there seems to be more codification in Belgium than in the United States. But the term embraces more than that. If instead, codification is the process of collecting and arranging laws in a systematic order, regardless of whether in a statute or in case law then the codification of school law is much more comprehensive in the United States than in Belgium. In Belgium, apart from the statutes, it is hard to find any systematic treatise or any systematic compilation that deals with the issue of school law. Many authors write about the principle of freedom of education, or what the nature of the employment contract is to the teacher in the private school, but until recently, no author has devoted an entire book to the subject.[338]

[338] See *Id.* at 15.

In the United States, the issue seems to have attracted much more attention, since there is not only more case law, but also commentators seem to be more interested in a systematic codification of law addressing the troublesome problems.[339]

The principle of freedom of education is present in both countries to roughly the same extent. Both countries must deal with advocates of a state education and advocates of a private, religiously inspired school system. Both countries allow a co-existence of the two systems. The financing of public schools is somewhat different between the two countries, although it seems that both countries have considered all the possible ideas for financing. In the United States, a controversial system of vouchers for private school education was considered. This has yet to be introduced in Belgium.[340] But both countries adhere strongly to the concept that schools have to be free, especially public schools. In order to guarantee the right of absolute freedom of choice, parents must also be given a choice of sending their children to private schools. In Belgium, the legislature guarantees this freedom of choice through financing of the private school system as well as the public school system. This may give rise to the question of whether this is not an unconstitutional entanglement of state and religion, since the funding for private schools occurs through use of public tax revenue.

Private schools in both countries have more freedom to hire employees, although in both countries, the law seems to require that the schools, in imposing certain philosophical requirements on the teachers, must leave space for the teacher's private life.

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[339] *See* KERN ALEXANDER AND M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW (West 3rd Ed.), H. C. HUDGINGS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, CONTEMPORARY ISSUES AND COURT DECISIONS 163 (The Michie Company 3 rd Ed.), MICHAEL W. LAMORTE, SCHOOL LAW CASES AND CONCEPTS (Allyn and Bacon ed. 6th ed.) (1998).

[340] *Id.*

In Belgium, the official school system appears to have to meet a heavier burden than the private schools, because the official school system must provide a neutral education and thus must restrain from requiring loyalty to its own system. The Belgian private school system, on the other hand, receives strong public subsidies, yet the individual schools can follow their particular ideology. Apparently, the private schools are no longer entitled to ask its future teachers where they received their education.[341] Thus, teachers who are not the product of a particular educational system cannot be discriminated against.

The teacher's employment contracts in the two countries seem to be different on the surface, but after scrutinizing these contracts, more similarities exist than one might first think. Basically, the employment contracts in the private schools of the two countries are similar. For both countries, the employment at-will doctrine controls. In the United States, employment contracts are generally construed through case law, whereas in Belgium it is done through statutory interpretation. The protections for teachers are historically greater in Belgium than in the United States.

Tort liability is also very similar under the two systems. Case law in the United States uses the construction of *in loco parentis*, and in Belgium basically the same exists. It also seems that in both countries there is a trend towards accepting the general feeling that teachers are doing a good job and that although they can make mistakes, they do not have to be super human beings. In earlier times, in Belgium, teachers seemed to be judged harshly, whereas recently, judges seem to accept that being a teacher is an important job. Case law currently seems to favor the teachers.

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[341] R. Verstegen, The Education Law in Flanders. An Overview 21(Kluwer Rechtswetenschappen 1997).

The Belgium school system has undergone major changes in the past few years. It has been assumed was that the Minister of Education admired the American educational system and that this admiration perhaps may have influenced the changes in the Belgium system. Given the similarities between the two systems, this may well be true.

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