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Onderwijsovereenkomst : contractenrechtelijke leerstukken toegepast op de rechtsverhouding tussen school, leerling en ouders in het primair en voortgezet bekostigd onderwijs

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Summary

EDUCATION CONTRACTS

Contract law doctrines applied to the legal relationship between schools, pupils and parents in primary and secondary, state-funded education.

1 A ROLE FOR CONTRACT IN EDUCATION

In this thesis I start from the assumption that the legal relationship between schools, pupils and possibly their parents qualifies as a contract – as a basis for the mutual obligations of the parties – in order then to illustrate what a contractual perspective offers and entails for this relationship in primary and secondary education.

In this summary I would like to consider the value of the application of contract law in education. To this end, I will briefly present the findings arising from chapters 2 to 5 (section 2). I will then look in more detail at the objections against the adoption of a contract in education raised in the literature (section 3), followed by a number of additional observations regarding the application of contract law in education (section 4). Furthermore, I will explore whether it is advisable to include a regulation in Book 7 of the Dutch Civil Code (DCC) (section 5). I will conclude with a few recommendations for both the legislator and for those who study education law (section 6).

2 THE APPLICATION OF CONTRACT LAW IN PRIMARY AND SECONDARY EDUCATION

Formation

It follows from chapter 2 that the framework in respect of the formation of a contract can be used in the context of education without any problems arising. The process of registration and admission can be seen in terms of offer and acceptance in conformity with articles 6:217 and 3:33 (in conjunction with 3:35) DCC. Schools invite parents and children to consider registration by means of open days and by elaborating their educational vision in school plans and school guides. If they so wish, parents and/or pupils then proceed to make an offer by registering and the school may or indeed must accept this offer by admitting the child.

Obviously, parents and schools do not communicate in terms of offer and acceptance. Nevertheless, the model of offer and acceptance corresponds with the registration and admission of a child such that registration and admission can be properly translated in terms of offer and acceptance. Viewed in this way, the framework of contract law relating to formation is not really novel and may be of little assistance.

The limited freedom of contract experienced by parents and children as a result of the requirement for a child to attend school and experienced by some schools due to the limited right to refuse children as pupils, does not obstruct the formation of an education contract. A contractual obligation, also in the form of a possible obligation to accept, affects neither the creation of a contract nor the application of contract law. Moreover, some degree of contractual constraint is more common, such as, in relation to goods and services that are essential in society.

Chapter 2 has shown that the framework of contract law relating to formation has indeed something to offer. It may help to determine who the parties concerned are and, in particular, whether the parents are acting on their own behalf, as legal representatives of their child or in both capacities simultaneously. Beyond contract law, there is no such framework to be found.

On the basis of the general rules relating to the formation of contracts (articles 3:33, 3:35 and 6:217 DCC), this determination is founded on, firstly, the parties' statements and conduct and secondly, on the way they interpreted and reasonably could interpret their statements and conduct reciprocally, taking into account all facts and circumstances. This applies not only to the question of whether a valid contract exists but also to the question of who the parties to the contract are. Insofar as the parties have not expressed themselves in respect of the capacity of the parents (pro se, on behalf of another or both at the same time) when entering into an education contract, the line taken by the Supreme Court in the *Baby Joost* judgment, may be followed, namely, that in such cases, the school may proceed on the basis that parents act as legal representatives on behalf of their child. The result of this is that the child becomes a party and (in principle) the parents do not. If the parents and the school seek that the parents do indeed become parties, it is recommended that this be explicitly expressed and agreed upon.

In considering the question of who constitutes a party, it is also important that the contract law framework allows for the circumstances of the particular case to be taken into account. This means that justice can be done in respect of what has been done between the parties involved and their expectations. Following this framework is also in line with the development of children's rights. The child has his or her own legal position. The legal representation enables parents to conclude the contract in the name of the increasingly independent child.

Contents

Contract law provides a specific framework for the determination of the content of the legal relationship. Chapter 3 sets out the context in which the mutual rights and obligations of the parties are determined. Such a framework does not apply to an extra-contractual approach. The contractual legal framework provides a basis, in the form of assessment criteria and sources to refer to and rely on. It brings a systematic approach, given the triad of interpretation, addition and limitation.

Article 6:248 paragraph 1 DCC stipulates that the legal consequences of a contract arise from what has been agreed upon by the parties, as well as from the law, from custom and from the requirements of reasonableness and fairness, taken into account the nature of the contract.

What the parties have agreed upon is determined by an interpretation of their agreements, in accordance with the *Haviltex formula*. An important role is played herein by, *inter alia*, the legitimate expectations of the parties and the standards of reasonableness and fairness. Accordingly, for the interpretation of the legal consequences of agreements between the pupil and the school, a flexible and subtle measure applies in which the circumstances of the particular case, the context of education and the interests of the pupil and those of other pupils, teachers or the school, may be taken into account. These interests add colour to the expectations of the parties. The possibility of 'dynamic interpretation' provides scope for the contract to develop contemporaneously where the relationship between the child and the school develops.

Article 6:248 paragraph 1 DCC also establishes a link between the contract and the law. The extent to which legislation pertaining to education completes or supplements the contract and thus the rights and obligations of both parties, depends on the wording and the scope of the relevant provision. In the event that a provision of education legislation lends itself to the legal relationship between the pupil and the school, then, provided the parties have not agreed otherwise, it can supplement the contract. Alternatively, if the parties have agreed something that deviates from the provisions of education legislation, the question arises whether and to what extent the law is regulatory or mandatory. If a statutory provision is mandatory, it cannot be deviated from. In this respect, education legislation is far from being tailored to the eventual consequences for the contractual relationship. It does not make clear whether an infringement of the law results in a term of the contract or indeed, the entire contract being null and void or voidable, or whether the infringement of the law is otherwise sanctioned. The validity of contract terms will require to be assessed according to article 3:40 DCC. It is therefore advisable that the legislator considers the possible consequences of breaches of education legislation that may arise under private law.

The contract may also be supplemented by custom or the requirements of reasonableness and fairness. In particular, this allows for the interests of the parties involved, the pupil, the other pupils, the teachers and the competent

authority of a school to be taken into account (article 3:12 DCC). Supplementing by means of reasonableness and fairness is close to providing an interpretation, however, the additional effect of reasonableness and fairness may also play an independent role, for instance, where interpretation does not provide clarity or, following an interpretation, there is a gap in the contract, which requires to be filled.

Finally, article 6:248 paragraph 2 DCC offers the possibility to limit the legal consequences set forth in the contract. A rule that applies as a result of an education contract between the parties is not applicable insofar as this would be unacceptable according to the standards of reasonableness and fairness in the particular circumstances. In this way, action may be taken where unacceptable terms in an education contract arise or may arise therefrom.

In short, the framework, firstly, helps to determine what parties have agreed upon and may expect. Secondly, it supplements, where required, what parties have left unregulated and lastly, it provides for the possibility of intervening, if necessary.

The framework of contract law for the determination of the content of a legal relationship is both flexible and subtle. Given that interpretation is based on the legitimate expectations of the parties, it is possible to take into account the educational context, the circumstances of the particular case and thereby, facts relative to the education system. There is ample opportunity to take the interests of the pupil into account. In addition, the interests of other parties involved, such as fellow pupils, teachers and the competent authority are not overlooked. After all, the standards of reasonableness and fairness have a role to play in any interpretation, wherein account is taken of the societal and personal interests relevant to the case in question. It is also possible to do justice to the freedom of education, especially the integral aspect of the freedom to organise teaching to which a school is entitled, namely, its pedagogical autonomy. In the first instance, schools and pupils are free to determine the content of an education contract themselves, albeit within certain limitations. At the same time, considerable account can be taken of public law standards within the framework of contract law. This means that there is clearly a place for supplementing on the basis of the law, including legislation pertaining to education. However, education legislation may also have its validity and influence through other routes, given that it adds to and supplements the rights and obligations of the parties. This may be achieved by means of interpretation but also by either the supplementary or the restrictive effect of reasonableness and fairness.

The rights and obligations of both parties will be determined in accordance with article 6:248 paragraph 1 DCC. These are therefore also dependent on what the parties intended in a specific case and what their assertions were with regard to this. Consequently, it is not possible to specify 'the' content of the education contract in a general sense and I did not give myself the task of identifying 'the' content of the education contract. I have however made an

inventory of the principal rights and obligations that are likely to result, in many cases, from an education contract in primary and secondary education. I have also investigated the legal nature of these and explored the remaining characteristics of an education contract. Insight into the principal obligations and characteristics of the contract is necessary to be able to examine, primarily, the application of remedies under contract law. For instance, in relation to the question of how the right to withhold performance or the power of termination for breach may be applied, it is necessary to know whether the rights and duties may be regarded as 'obligations' and whether the education contract constitutes a 'reciprocal agreement'.

The legal relationship has at its core three principal duties for the school. These are closely linked to each other. Firstly, to provide education, secondly, to ensure that this is of sufficient quality and that this takes place in a safe and healthy environment and thirdly, to allow the pupil to participate in education and examinations. These principal duties can be regarded as obligations. Alongside these obligations there are corresponding pupil's rights.

The pupil also has three principal duties. It is compulsory for him or her to participate in education, lessons and examinations; to behave in a proper way and to refrain from disruptive behaviour and finally, to make an effort whilst attending school. These duties can also be characterised as obligations.

The pupil may seek to enforce the obligations imposed on the school in legal proceedings. The school may also, in principle, seek enforcement in legal proceedings of the pupil's obligations. Little importance is attached to this however since, in practice, schools are more likely to use other means to ensure pupils fulfil their obligations.

Although the other characteristics of the contract are indeed dependent on the interpretation of the contract in the specific circumstances of the case, generally speaking, the obligations that I have already outlined can be regarded as obligations to make best efforts, rather than obligations to achieve certain results. Furthermore, an education contract can generally be construed as a reciprocal agreement: both the school and the pupil are mutually obliged to perform. An education contract also concerns a continuing performance agreement. This is consistent with common practice in education whereby the legal relationship is, in principle, entered into for a longer period of time and revolves around the continuing performance of both parties. Although qualification as a contract for services is not excluded, in my view it is not compatible with the context of primary and secondary education.

Withholding performance of an obligation

Chapter 4 illustrates that the right to withhold performance of an obligation under an education contract can be invoked and outlines how this can be invoked. In practice, it is self-evident that only a school can invoke this power not the pupil. If a pupil 'misbehaves', the obligation to allow the pupil to participate in education may be withheld. Education legislation has a similar

instrument, the possibility to suspend a pupil: the suspension regulation. This begs the question: how do these two instruments relate to each other?

A comparison between the two shows that there are significant similarities between the right to withhold performance and suspension. For instance, neither has a specific field of application, in respect of both, the school has discretion as to whether or not to proceed, both deny access to regular lessons and are temporary in nature. There are also differences. The educational suspension regulation prescribes that notification of a suspension must be given in writing. This is not normally required in the context of the right to withhold performance. Nevertheless, reasonableness and fairness in the context of education may change this. A school, for example, will only be permitted to suspend if the pupil or his parent has been informed of this and the reasons for it. Further, suspension regulation limits suspension to five days whereas the right to withhold performance does not have such a prescribed restriction. When the relationship between the two is examined, it seems to be the case that the differences, which appear to exist at first glance, are addressed by private law, without prejudice to possible safeguards contained in the suspension regulation. Correspondingly, in the event of withholding performance, the maximum period of five days, applicable to suspension as regulated in accordance with education law, will require to be taken into account. This can be achieved by means of the doctrine of concurrence and further, article 3:14 DCC, and the standards of reasonableness and fairness to which withholding performance is subject.

The right to withhold performance (sections 6:262 and 6:52 DCC) offers a more intricate legal framework than the suspension regulation in education legislation (article 40c of the Wpo (Primary Education Act) and article 13 of the Inrichtingsbesluit Wvo (Secondary Education Act Implementation Decree)), wherein the interests of the school and pupil can be weighed, in the event of non-compliance with the obligations arising from the education contract. The right is enshrined in reasonableness and fairness and subject to the criterion that the failure to perform must justify the withholding of performance. The proportionality of the measure is paramount. It also reflects more objectively what the school essentially does, namely, withhold the duty of providing access to school and of giving pupils education within the school. The regulation of withholding performance impresses on parties that not being admitted into lessons is only a temporary measure, which does not go beyond what is necessary and it provides a clear basis for the obligation to provide guidance even if the pupil is not physically present at school. It only concerns withholding performance of the obligation to allow participation in education and thus admission to the regular lessons; the underlying obligations such as giving homework and instruction require to continue to be met. It is inherent in withholding performance of this sort that the legal relationship remains intact for the time being. There is plenty of scope in the context of the right to withhold performance, for taking into account specific aspects of education

legislation, such as procedural safeguards and the maximum period of five days.

Ending the contract

Chapter 5 considers the possibilities for bringing the education contract to an end by termination for breach (*'ontbinding'*) in terms of private law (article 6:265 DCC) and by termination (*'opzegging'* for which no breach has to be present, this power is not codified as a general power in the Dutch Civil Code). These may serve as a supplement or as an alternative to the removal of a pupil (article 40 of the Wpo (Primary Education Act) and article 27 paragraph 1 in conjunction with article 14 of the Inrichtingsbesluit Wvo (Secondary Education Act Implementation Decree)) at least insofar as the removal implies the termination of the contract.

Removal, by its very nature, is only a matter for the competent authority whereas termination for breach and termination accrue to both parties, in principle also the pupil. Removal, termination for breach and termination by the school are all far-reaching, rather drastic measures, because the relationship will be terminated definitively. The school has the opportunity to decide to invoke these measures. All three powers have a threshold that requires to be met before the measure can come into play. In the event of termination for breach, this is clearly reflected in the exception clause. In the case of termination, this consists of the requirement for 'important reasons'. However, for removal, no threshold is to be found in the regulation itself. Due to the far-reaching nature of the measure, it is not possible to proceed with removal just like that. A school will, for instance, have to respect the principle of proportionality.

Education legislation contains several procedural rules to safeguard the interests of the pupil. Removal cannot, for example, take place before the pupil and the parents have been heard and before another school that is willing to admit the pupil has been found. Although these are, of course, not mentioned in respect of the power to terminate for breach (*'ontbinden'*) or terminate (*'opzeggen'*), they will however be reflected in the exercise of these contractual powers in education and are, as it were, inherent in the practice of ending a contract in the context of education. As such, the mandatory hearing of the teacher and the pupil and/or the parents, the compulsory search for another school and not being permitted to terminate due to insufficient progress during the year, are already included in the question of whether there has been 'a failure to perform an obligation under contract' or 'important reasons', in the investigation that is necessary in this context and in the question of whether there will be 'serious consequences' that should stand in the way of termination for breach or termination, respectively.

Education legislation also contains rules that apply after the decision to remove a pupil has been taken. These too cannot be overlooked when a termination for breach or termination is being carried out. As an illustration,

the possibility of raising an objection after a removal has occurred will, in the event of termination for breach or termination, be seen as the possibility to request a review. Although this possibility is not inherent in the power to terminate for breach (*'ontbinden'*) or terminate (*'opzeggen'*), it will apply on the basis of the effect of education legislation on the contract. This result may be achieved by means of the doctrine of concurrence, in accordance with article 3:14 DCC. Also, the additional application of the law or the standards of reasonableness and fairness result in a pupil being entitled to object in the form of a request for a review.

A school has the option of terminating a contract (*'opzeggen'*), however, it is appropriate and necessary to restrict this option to cases where there are 'important reasons' for doing so. These important reasons may be found in the behaviour of the pupil but they may also lie entirely with the school itself. For termination for breach (*'ontbinden'*) by the school, a pupil needs to have failed to perform his obligations satisfactorily. This failure to perform requires to justify the termination for breach. Clearly in this context, it cannot be assumed too quickly that there has been 'a failure of performance' which can lead to a breach of contract, as the pupil should be allowed the space to develop and grow. Additionally, the 'minor significance of the failure to perform', 'the nature of the failure to perform', 'the far-reaching consequences' and more generally, 'all of the circumstances of the case' including 'the nature of the agreement', provide meaningful tools to prevent that a school opts for termination for breach too quickly or too easily, since this concerns young pupils who are required to follow education. In the context of education, termination for breach may only relate to termination for breach in the future. The obligations that relate to the past remain intact and no obligations to reverse are created.

The possibilities for termination can be moulded or formed according to the special educational relationship. In principle, contract law is flexible enough to enable both termination for breach and termination in education. The question arises as to what the possibilities to terminate in private law have to offer the relationship in education. All in all, termination for breach with its exception clause that provides starting points and weighting factors to assess whether the failure to perform justifies termination for breach, may compensate for the lack of such tools in education legislation, without unduly restricting the freedom of a school and with due regard for the interests of the pupil. With regard to the pupil, termination 'at all times' would allow the 'gap' to be filled that currently, in principle, exists when a pupil 'quits'.

3 REFLECTION: THE DEBATE IN LITERATURE

In the introductory chapter of this thesis, I considered the debate in the education law literature in respect of the qualification of the legal relationship in

education and the objections stated therein to the assumption of the existence of a contract. The question is whether the analysis of the application of contract law in primary and secondary education enables these objections to be seen in a different light.¹

For both denominational and public education, the *far-reaching public law standards* are cited as objections to the qualification of the legal relationship as a contract. Based on the application of all the doctrines considered, it appears that there is ample scope in contract law for taking these public law standards into account. For instance, when entering into the contract, public law regulations can have effect on the model of offer and acceptance. Parents have to register their school-age children and some schools have to accept a child. It therefore concerns legal duties to enter into a contract. When determining the content of the contract, the education legislation comes into its own because the Dutch Civil Code itself provides for supplementing what the parties have agreed by the law (article 6:248 paragraph 1 DCC). Also the doctrines for interpreting, supplementing and limiting what has been agreed on the basis of what is reasonable and fair may serve as a conduit of public law, whereby provisions from education legislation can be reflected in the agreement. Furthermore, the powers conferred by contract law will be exercised with due regard to the rules of education law. As such, in the case of withholding performance of an obligation, for example, account has to be taken of the safeguards provided by public law suspension requirements, such as the maximum suspension period of five days. Further, in the event of termination for breach (*'ontbinding'*) and termination (*'opzegging'*), the possibility of objection and review as regulated by public law requires, for example, will be taken into account. The influence that may be exerted by public law need not therefore prevent the qualification from being classified as a contract.

The lack of *consensus* is also cited as an objection to the qualification as a contract. The lack of consensus would therefore arise because parents are obliged to register their child at a school and state schools should, in principle, accept every pupil. Additionally, denominational schools sometimes have no possibility of refusing a pupil. Nevertheless, this limited freedom of contract or contractual coercion experienced by the parties does not preclude the adoption of a contract. The outline relating to the formation shows that a valid legal act may also be concluded even if the will is directed or is motivated by the need to comply with the coercion. After all, the will and the declaration correspond (in accordance with articles 6:217 and 3:33, in conjunction with 3:35, DCC). It is only required that a person makes a declaration as he intended.

1 I do not go into the objections relating to the question of qualification, namely, the objection relating to the 'if such' action by a state school and the objection that admission and removal to or from a state school are powers under public law and lead to decisions in terms of the General Administrative Law Act (Awb) so that a legal relationship under public law results therefrom.

Hence, even if a person is obliged to make an offer or is obliged to accept an offer, these legal acts can be validly concluded. Thus, a valid education contract may also be entered into and the element of consensus is not affected by contractual obligations.²

In the literature it is pointed out that the advantage of the contract is that 'it is crystal clear which agreements apply between the parties and what they can (and cannot) expect from each other.'³ Making agreements can indeed provide clarity however, the basic principle is that the legal consequences agreed between the parties require to be further determined by means of interpretation. One argument put forward against the contract is that it is never possible to regulate everything and now that it is 'virtually impossible to draw up a written agreement which comprehensively sets out all the rights and obligations of, on the one hand, the school and on the other hand, the pupil and the parents'.⁴ This objection applies to all agreements, whatever the context. At the same time, it is a reassuring thought that not everything needs to be put into words. Civil law is specifically aimed at supplementing what parties leave unregulated.

In the context of the standards of public law, it is further stated that the centre of gravity of the legal relationship is formed by a legally determined standard regime and as such an education contract is no more than an entry into 'a standard regime of direct and indirect legal rights and obligations'.⁵ Even where education legislation plays an important role in determining the content of a contract, the system prescribed by 6:248 paragraph 1 DCC provides room for the parties themselves and for reasonableness and fairness to add substance to the legal relationship, within the limits of mandatory legal provisions.⁶

Finally, the concept of *obligation* is said to be problematic due to the patrimonial nature of this concept, which would be absent in the educational relationship. Although the hesitation is understandable, a patrimonial character can be attributed to the legal relationship. This patrimonial character may be recognised, for instance, in the obligation to provide education of sufficient quality and the corresponding right to receive it. Furthermore, remuneration is given for this, albeit not by the pupil who receives the education but rather by the State. The fact that this remuneration does not come from the pupil does not detract from the proprietary character. Additionally, the giving and receiving of education represents a certain asset value and it is possible the pupil may suffer a loss, for instance, should they receive improper or in-

2 Reference is made to Para. 2.2-2.4.

3 Huisman (red.) 2017, p. 106 in the context of the education contract in vocational education. Reference is made to Para. 3.2.7.

4 Huisman (red.) 2017, p. 106, in the context of the education contract in vocational education.

5 Vermeulen & Zootjens 2000, p. 111 in respect of special needs education.

6 Reference is made to Para. 3.2.7.

adequate education. Although the occurrence of asset value is not necessary for the assumption of an obligation, it does give an indication that a legal relationship exists under contract law and as such, there may be a contract that creates obligations. The other principal duties and corresponding rights outlined above may also be regarded as obligations arising from an education contract.⁷

The objections raised in the literature with regard to the application of contract law do not, in my opinion, stand up to scrutiny. Further, I would also add that the range of instruments has something to offer and indeed lends itself to application to the legal relationship in education, as will be illustrated in the following section.

4 ADDITIONAL OBSERVATIONS

As may be deduced from the doctrines considered, contract law provides frameworks for the assessment of the legal relationship between the school and the pupil and possibly also the parents. Outside of contract law, these frameworks do not exist. They relate to the entire lifecycle of the contract, from entering into a contract to termination.⁸ They also provide guidance and direction in the form of a system of substantive assessment criteria and perspectives on the basis of which questions concerning the parties to an education contract, the content of the education contract and the exercise of powers can be answered.

The frameworks are flexible and subtle. The open standards leave room to take account of the particular context of education and there is scope to assign meaning to the circumstances of the particular case, whether these relate to the development process pupils undergo or the specific interests of an individual pupil, fellow pupils, parents, the school and its teachers. The freedom a school has to determine policy, the pedagogical and organisational autonomy for state schools and, for denominational education, the freedom of education, including the freedom to organise teaching can all be respected.

Given the scope offered by contract law to take into account both the context of primary and secondary education and the specific circumstances of the case, it is logical to conclude that contract law lends itself to application to the legal relationships in education. Where case law leaves the qualification of the legal relationship open, the contract could be chosen, without prejudice to the interests at stake.

Admittedly, I have not measured the effectiveness or the efficiency of any education contract. I have not carried out an empirical study of the actual consequences of working with a contract, such as, for instance, the level of

⁷ Reference is made to Para. 3.3.3. and further.

⁸ It regulates the entire relationship between the parties. Vgl. Houben 2005, p. 222.

effort made by the school and the pupil, the learning outcomes or the involvement of the parents. Nevertheless, I would like to take the liberty of making a few observations about what one might expect from a contract.

Drawing attention to the legal relationship between the school, the pupil and possibly also the parents, may possibly bring the relationship to a head, in a legal sense. This could be counterbalanced by the argument that the relationship has been looked at from a legal perspective more and more, albeit without an explicit choice to have the contract as a basis. It could also be noted that emphasising the reciprocity of the contract brings more balance into the legal relationship: it is not only what the school is expected to do but also what is required of the pupil and possibly also the parents. If the tendency to look at the relationship from a legal perspective already exists, it is then advantageous that contract law provides a flexible framework to cope with this juridification. Finally, the acceptance of a contractual framework would also clarify which legal consequences may be attached to non-performance or failure to perform. Such clarity will, on balance, strengthen the legal position of all those involved.⁹

Questions relating to the role of parents, parental participation, school advice and pressure on education will also arise if contract law is opted for. Contract law does however offer some guidance to answer the question of how to deal with all of this. For instance, the questions regarding who is a party to the contract and what schools may require from parents can be answered on the basis of the legitimate expectations of parties on both sides, in the context of the formation or interpretation of the contract. Questions with regard to the reciprocal treatment of teachers and parents or regarding the behaviour of parents in the school playground could be considered as part of the question as to whether parents are parties to the contract and to what extent their behaviour may be attributed to the pupil. It is precisely on this point that the rights of the child, which emphasise the – increasingly – independent position of the child, could give guidance, with the result that parents and schools have to solve their mutual issues other than on the basis of the contract to which, in principle, only the pupil is a party.

The application of contract law does not always provide greater clarity. Education law is not geared to the existence of an education contract in terms of contract law, even although, for denominational schools, this is assumed to be the case. The result of this is that it is unclear whether or not provisions that deviate from this are valid, and if not, what the consequences are. Another

9 There is hesitation in vocational education in this regard. Within the framework of the evaluation of the MBO in 2001, the Education Advisory Council seems to have concluded that the position of the educational participant has not yet been strengthened, see 'WEB: Werk in Uitvoering. Een voorlopige evaluatie van de Wet educatie en beroepsonderwijs', advice from the Education Advisory Council, September 2001, p. 29. See also the examination of this by Baas and others, 2017.

illustration of this may be the concurrence of powers and authorities such as suspension and removal according to education legislation on the one hand, and the power of withholding performance of an obligation, termination for breach and termination of a contract on the other hand. Although, as shown, the law of obligations has the potential to regulate all of these private and public powers and authorities, tailored to primary and secondary education, it may be desirable to consider this relationship in more detail in a specific regulation. This raises the question of whether there is a need for separate regulation of the education contract, for instance in Book 7 of the Dutch Civil Code.

5 A MOVE TOWARDS REGULATION IN BOOK 7 OF THE DUTCH CIVIL CODE?

Would Book 7 of the Dutch Civil Code be the appropriate context for statutory provisions on an education contract, as stated in the literature? According to the parliamentary history of Book 7 of the Dutch Civil Code, there is reason to regulate a special contract if it concerns a common agreement and the parties can be saved from repeatedly having to determine the content of this contract.¹⁰ The legislator is expected to lay down clear guidelines to supplement what has been agreed. Furthermore, the desire to protect one or other of the parties may lead to the regulation of a special agreement by offering binding legal provisions.¹¹ These reasons are valid for the education contract. Although general contract law offers every opportunity to regulate the legal relationship between schools, pupils and possibly parents, and where necessary, to protect the special interests of the parties, it undeniably concerns a common agreement and it would seem therefore more efficient to ensure that those involved do not always have to 'reinvent the wheel', especially with regard to the influence and impact of specific education legislation on the legal relationship. Finally, regulation could also give certainty that the legal relationship in primary and secondary education is agreed.

I doubt whether the time is right for a regulation in Book 7 of the Dutch Civil Code. In my opinion, it is more important to become acquainted with the effect of contract law on educational relationships first, before resorting to a regulation in Book 7 of the Dutch Civil Code. It would, therefore, be recommendable if the legislator provides clarity in respect of whether and to what extent the specific education legislation affects the legal relationship between schools, pupils and parents, with regard to the content of the contract and the various powers and authorities such as withholding performance and suspension or termination and removal.

10 Parl. Gesch. Book 7 (Inv. 3, 5, en 6 Book 7 titles, 1, 7, 9 en 14, 1991), p. 3, 4.

11 Parl. Gesch. Book 7 (Inv. 3, 5, en 6 Book 7 titles, 1, 7, 9 en 14, 1991), p. 4, 6.

If, in the future, it were to be decided to opt for a regulation in Book 7 of the Dutch Civil Code, the relationship between the powers and authorities mentioned above could be specifically explored. In this context, consideration could also be given to the question whether, if at all, such a choice would imply excluding decisions on admission, suspension and removal by state schools from the scope of administrative law (and the Administrative Law Act (Awb)). Further, what consequences would this have for matters of jurisdiction in the event of disputes relating to this?

Other subjects that could be found in a regulation in Book 7 of the Dutch Civil Code are, for example, provisions relating to the principal obligations of the parties, the termination of the legal relationship and the binding nature of some of the provisions. This would therefore allow the legislator to comment on whether or not provisions of education legislation are mandatory, although this may not be feasible, given the dynamic character of education legislation and the diversity of its provisions. There could perhaps however be consideration in a general sense of the implications of education legislation on the contract. It would also be conceivable however, to designate education legislation itself as the place in which account of this is taken.

6 CONCLUSION AND RECOMMENDATION

The research has shown the way in which key doctrines of contract law may be applied in the context of primary and secondary education and what the instruments entail and offer. Objections related to the interaction between public education legislation and private contract law can be overcome. Moreover, contract law provides clear, structured frameworks that provide guidance for determining the rights and obligations of the parties, from the formation of the legal relationship to its termination. The doctrines offer scope for taking the particular educational context into account.

It is advisable for the legislator to make clear the extent to which education legislation affects the relationship with the pupil and its parents. From my point of view provisions that are clearly directed towards pupils and intended to safeguard (also) their interests, affect the internal relationship between pupil and school and should also become part of the relationship. These are in particular provisions of education law on cognitive aspects, educational views and societal aspects.¹² The legislator is encouraged to express an opinion on the impact of education legislation on the contract between a school, a pupil and possibly the parents, if and to the extent this is used, this could facilitate what happens in practice.

Finally, while this book does not provide a definitive answer to the question of whether the legal relationship in primary and secondary education is a

12 Reference is made to Para. 3.2.6.

contract, it does provide arguments for a choice in favour of the contract. The judiciary and literature could take the next step by elevating the fundamental proposition of this thesis – the assumption that there is an education contract – to be the fundamental proposition underlying the legal relationship between a school, a pupil and possibly the parents.

