

Regulating Experiments in Education: A Matter of the Executive Power or the Parliament?

The Case of Temporary Projects in Primary and Secondary Education in Flanders (Belgium)

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I. Introduction

In Flanders the government will introduce new educational policies in education by means of experiments. The question is, whether the decretal legislator itself has to create this opportunity in the educational legislation, or if he can delegate this power to the executive power. In other words, does the Flemish Parliament have to take a regulatory initiative or can the Flemish Government do so? One assumes that the government is best armed to create this opportunity, because it can act with more flexibility. But is this idea, juridical acceptable?

The Council of State, legislative section and the Court of Arbitration has recognized the possibility for the legislator tot delegate to the executive the power to innovate by experiments. However, both institutions have pointed out that this way of acting can interfere with the so-called principle of legality in education (Article 24 § 5 of the Constitution). In several judgements and advises, they have indicated the limits of such a delegation.

In Flanders, the question of the constitutionality of such a delegation recently became acute, because the new Minister of Education announced in his policy-declaration of September 2004, that he would use the so-called 'proeftuinen', which can be described as experiments, as an instrument of his policy in primary en secondary education.

This text will draw the lines of the division of powers between the parliament and the government in developing regulation on experiments. It starts with some general aspects of the principle of legality (II) and continues with a description of the guidelines which are given by the Council of State and the Court of Arbitration on experiments in primary and secondary education (III). Finally, a synthetic overview is given of the possible ways that the parliament and the government can follow to regulate experiments (IV).

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II. Article 24 § 5 of the Belgian Constitution: The principle of legality in Educational Matters¹

Article 24 § 5 of the Constitution says that '(t)he organization, the recognition and the subsidizing of education by the Community are regulated by law or decree'. The Court of Arbitration gives a large interpretation of these notions, especially of the notion 'organisation'. As a result of this interpretation, the concept of legality is also applicable on experiments.²

The Court of Arbitration, followed by the Council of State, reads the principle of legality as follows. It is the concern of the decretal legislator to regulate the essential aspects of the organization, the recognition and the subsidizing of education. According to the Court, the constitutional legislator wanted only democratic elected people to regulate these educational aspects. However, the principle does not prevent the decretal legislator to give some orders or delegations, under some conditions, to other authorities (government, public authorities).³ These orders can only refer to the execution of the principles established by the decretal legislator. This delegation cannot cover the inaccuracy of the decretal principles or cannot refine choices of policy which are not detailed enough.⁴ In other words: a delegation to the executive cannot bear on essential regulations in education.⁵

Article 24 § 5 of the Constitution is an example of the so-called by the Constitution to the legislator reserved matters ('matières réservées'); other examples are the legality principle in penal affairs (Articles 12 and 14 of the Constitution) and the legality principle in fiscal affairs (Articles 170 and 172 of the Constitution).

In reserved matters, even though as in residual matters, the legislator has to regulate himself the essential aspects of the regulation and can leave some regulatory power to the executive, but this power is just the power to make logic deductions out of the general economy of the legislative act.⁶ In other words: the government cannot regulate essential elements. This is the so-called normal regulatory power of the executive (Article 108 of the Constitution; Article 20 of the Special Law of August 8th 1980). Both Articles prevent also that the executive itself can decide to deviate from a legislative act.⁷

In so-called residual matters, the legislator can delegate additional regulatory power to the executive (Article 105 of the Constitution; Article 78 of the Special Law of 1980). So, he can delegate some essential aspects of a regulation to the executive. In reserved matters, this is excluded. However the Court of Arbitration and the legislative section of the Council of State accept in reserved matters such a wide delegation, on condition that 1. this delegation is explicit and unambiguous and 2. afterwards, the executive decree is as soon as possible confirmed by legislative decree. Without conformation in time, the governmental decree becomes unlawful and unconstitutional.⁸

The impression exists that the highest courts give a strict interpretation of the principle of legality in educational matters. Indeed, it is not allowed to replace the requirement of a legislative decree or a decretal confirmation with a procedure of reporting to the parliament or with a so-called conditional delegation.⁹

However, some legal doctrine nuances this impression.¹⁰ Whereas the Council of State, in his function of preventive controller, seems severe,¹¹ several judgements of the Court of Arbitration, however, indicate a flexible vision on and a nuanced application of the principle of legality, among others because the

¹ See in general Delgrange, X. and Nikis, C. (2001), 'L'exigence de légalité en matière de l'enseignement: la jurisprudence de la Cour d'Arbitrage et du Conseil d'Etat relative à l'article 24, § 5, de la Constitution', *A.P.T.*, 203-235; Steen, B. (2000-01), 'Het legaliteitsbeginsel in onderwijsaangelegenheden (art. 24 § 5 G.W.): een stand van zaken', *T.O.R.B.*, 347-382. With regard to experiments, see Steen, B. (2004-05), 'Experimenten in het onderwijs: een zaak van de regering of van het parlement', *T.O.R.B.*, 279-292.

² C.A. nr. 19/99, February, 17th, 1999, B.6.2. The judgments of the Court of Arbitration can be found on www.arbitrage.be.

³ E.g. C.A. nr. 30/96, May 15th, 1996, B.5.5.; C.A. nr. 76/96, December 18th, 1996, B.3.3.; C.A. nr. 80/97, December 18th, 1997, B.9.2. For an overview, Steen, B. (2000-01), *l.c.*, 363-364.

⁴ E.g. C.A. nr. 30/96, May 15th, 1996, B.5.7.; C.A. nr. 76/96, December 18th, 1996, B.3.3.

⁵ C.A. nr. 11/96, February 8th, 1996, B.5.; C.A. nr. 43/96, July 2nd, 1996, B.6.; C.A. nr. 80/96, December 18th, 1996, B.3.3.

⁶ Court of cassation, November 18th, 1924, *Pas.* 1925, I, 25; Cass. February 27th, 1990, *Arr. Cass.* 1989-90, 848.

⁷ See e.g. *Pas, W., Seutin, B. et al. (2002), De Grondwet, Die Keure, Brugge, 241; Vande Lanotte, J. and Goedertier, G. (2003), Inleiding tot het publiekrecht, II, Overzicht van het publiekrecht, Brugge, Die Keure, Brugge; Popelier, P. (2001), Democratisch regelgeven, Intersentia, Antwerpen, p. 156.*

⁸ For an example in education: CA, nr. 76/96, December 18th, 1996, B.3.4.

⁹ Steen, B. (2004-05), *l.c.*, 282.

¹⁰ Steen, B. (2000-01), *l.c.*, 364-367. See also Popelier, P. (2001), *o.c.*, p. 172, fn. 116.

¹¹ Steen, B. (2000-01), *l.c.*, 382, fn. 399.

Court several times, has looked at the total set of decretal norms and has stressed that, afterwards, the administrative and civil courts will control if the executive has used the delegated powers in a right way.¹² Further more, the legality principle does not prevent that the legislator creates a norm-free regulation zone. It only prevents that the executive power fills up this zone. In fact, the principle only focuses on the relation between the (decretal) legislator and the executive power.¹³

III. Experiments (Temporary Projects) in Primary and Secondary Education: A Short Overview of the Case Law of the Court of Arbitration and the Advisory-practice of the Council of State

A. The decretal legislator can delegate to the executive the power to organise temporary projects

In several decrees, the decretal legislator has delegated the power to the executive to organise experiments¹⁴. Since 1997 this experiments are called temporary projects.

In the Decree of of 31 July 1990, the delegation was rather general, and there were no criteria that limit the competence of the executive. The legislative branch of the Council of State has pointed out several times that such a general delegation was not in conformity with the legality principle. The decretal legislator himself had to regulate this matter or at least had to give some criteria to the executive.¹⁵ The decretal legislator has not followed this advice.

In an important judgement of 17 February, 1999, the Court of Arbitration has confirmed this legislative practice of the Council of State and has drawn the lines wherein the decretal legislator can delegate the power to the government to organise and regulate experiments.

The leads to this case were the Articles 168-172 of the Decree *Basisonderwijs*. These Articles delegated to the executive the possibility to organise temporary projects and also the opportunity to deviate from the so called norms of rationalisation and programming and from the so-called number of teaching periods, on condition that the government gave report to the parliament. The Council of State had during the making of the decree, asked questions about the conformity of this broad delegation to the government with Article 24 paragraph 5 of the Constitution.¹⁶

The Court of Arbitration, after having stressed that the principle of legality is applicable on experiments, concludes that the delegation to organise temporary projects was not too broad, because the decree has described the area of practice, the duration of the projects en the way of evaluating them. The temporary character of the projects shows that the decretal legislator has limited the regulatory power of the government, because this means that the government only can act to cope with urgent or unexpected problems or to test experiments without changing the organisation of the education.¹⁷ On one point, the Court finds that the regulation contravenes the principle of legality, because the decretal legislator leaves it to the free assessment of the government to deviate from the norms of programming and rationalisation and from the number of teaching periods, without establishing by itself the essential elements or the limits of these deviation. So, the Court annulled this small aspect of the legislative decree.

The conclusion is that, if the decretal legislator has regulated the essential aspects of the experiments, even though if they can deviate from the legislation, temporary projects are not contrary to the principle of legality.

After the judgement of the Court of Arbitration, the decretal legislator has adopted a new decree (Onderwijsdecreet XII-Ensor)¹⁸, in which he describes more detailed the nature of the projects and in which

¹² C.A. nr. 130/98, December 9th, 1998, B.2.4.; C.A. nr. 19/99, February 17th, 1999, B.5.2.3., C.A. nr. 38/99, March 30th, 1999, B.5.; C.A. nr. 56/2003, May 14th, 2003, B.5.3.-B.5.4. and especially C.A. nr. 41/2004, March 17th, 2004, B.5.1.-B.5.6. See also Steen, B. (2000-01), *l.c.*, 379-380.

¹³ See Steen, B. (2000-01), *l.c.*, 364. See also Charlier, F. (2005), 'Mag het ietsje minder zijn? Dereguleringsbeleid in het hoger onderwijs', *Delta*, 4 13.

¹⁴ Article 46, § 1 of the Decree of July 31st, 1990 'betreffende het onderwijs-II', *Mon.* August 18th, 1990; Arts 168 to 172 of the Decree of February 25th, 1997 'Basisonderwijs', *Mon.* April 17th, 1997.

¹⁵ C.E. (adv.) nr. L. 19.946/1, May 31st, 1990, *Parl. St. VI. R.*, 1989-90, nr. 165/1, 124. See also e.g. C.E. (Adv.) nr. L. 29.142/1; C.E. (Adv.) nr. 29.272/1, July 1st, 1999, not published.

¹⁶ C.E. (Adv.) nr. 25.538/1, September 18th, 1996, *Parl. St. VI. Parl.* 1996-97, nr. 451/1, 302.

¹⁷ C.A. nr. 19/99, February 17th, 1999, B.6.2.

¹⁸ Decree of October 20th, 2000 'betreffende het onderwijs XII-Ensor', *Mon.* 16 December 2000.

he explicitly has mentioned that temporary projects could not deviate from existing legislation. This has caused a few problems on starting new projects, in particular the so-called projects ‘Accent op Talent’.

Recently the Flemish Parliament has adopted a new decree¹⁹ in which the government is empowered to organise temporary projects which can deviate from existing legislation. The decretal legislator has laid down a lot of conditions including a confirmation afterwards by the Flemish parliament. The Council of State has judged that there was no problem concerning to article 24 paragraph 5 of the Constitution.²⁰

B. The temporary projects established by the executive and the critical advises of the Council of state

Above, I have described the possibility for the decretal legislator to delegate to the government the power to organise educational experiments. The government has used this delegations to set up several temporary projects, for instance on.²¹

In this section will be discussed in which way the executive can use this delegation. The legislative section of the Council of State has in several, not published, advises build up a theory.²² This theory consists of four elements:

1. No experiments, if there is only a general delegation

Above is mentioned that the decretal legislator cannot give a general delegation, without criteria or limits, to organise or regulate experiments. If he has done so, the council of state says that the executive cannot use such a general delegation to organise or regulate these experiments. In one advice, the Council has interpreted the delegation conform the constitution, which meant that the delegation only allows a small space for the executive to act.

2. No deviation of decretal norms, without explicit decretal delegation

Above is mentioned that the decretal legislator can authorise the executive explicitly to deviate from existing legislation, but only under some conditions. The government cannot do it by itself. In several advises the legislative section of the Council of State has said this. It has also said this concerning the projects ‘accent op talent’, which caused a political problem for the Minister of Education, who attaches great importance to these projects.

In a recent judgement the administrative section of the Council of State has confirmed the viewpoint of legislative section, in relation to the projects ‘accent op talent’, and has annulled one specific aspect of these projects.²³

3. A temporary project is a temporary governmental decree of the central government

The temporary projects which the government can organise, are to be regarded as temporary projects on central policy level. It is the government that is steering the projects by means of a governmental decree. The more detailed content of the project is established in this governmental decree, and on basis of this governmental decree the schools can act. The temporary projects are not projects on the individual or local school level. A regulation that makes it possible that the central government (parliament or executive) can implement on a permanent basis individual or local school projects is not a temporary deviation of the educational legislation. Therefore is needed a structural regulation of which the principles are established by decree.²⁴

4. A temporary project is temporary

In several advises the Council of State has said that a temporary project has to be temporary in both ways. First of all, such a project has to be temporary in, what I should call, a formal way, which means that the regulation itself is temporary. It does not mean that a temporary project cannot be extended.

¹⁹ This decree is adopted by the Flemish Parliament on November 23rd, 2005 and not yet published in the *Moniteur*. Decree ‘betreffende de organisatie van tijdelijke projecten in het onderwijs’, *Parl. St. Vl. Parl.* 2004-05, nr. 472/3.

²⁰ C.E. (Adv.) nr. 38.717/V, July 26th, 2005, *Parl. St. Vl. Parl.* 2004-05, nr. 472/1, 64-66.

²¹ For an overview, see Verbeeck, B. (2004-05), ‘Onderwijsinnovatie, flexibiliteit en rechtszekerheid: de school als “proeftuin”’, *T.O.R.B.*, 293 ff.

²² For more details, see Steen, B. (2004-05), *l.c.*, 287-290.

²³ C.E. nr. 145.356, June 2nd, 2005. The judgments of the Council of State can be found on www.raadvst-consetat.be.

²⁴ E.g. C.E. (Adv.) nr. 27.788/1, May 28th, C.E. (Adv.) nr. 29.272/1, July 1st, 1999, both unpublished.

In the second place, temporary means that the project has to be temporary, in an intrinsic way. It means that the project has to be temporary in a way that it cope with urgent or unexpected problems or test experiments. In some advises the Council of State has concluded that it was not clear that the project was temporary because it was not sure that they really wanted to test experiments²⁵ or to solve urgent problems.²⁶

IV. The Constitutional limits on the field of division of powers for experiments in education: attempt of synthesis

The general theory of the principle of legality and the judgements and advises of the Court of Arbitration and the Council of State lead tot the following conclusions concerning the division of regulatory power between the decretal legislator and the government to regulate experiments. An initiative of the decretal legislator is always needed. To take this initiative, the decretal legislator has three options (A). In relation with the decretal initiative, the government can regulate the experiments (B).

A. The initiative of the decretal legislator

In the first option, the *option to regulate*, the decretal legislator stipulates himself the space in which educational institutions can develop experiments and initiatives of educational renewal. If he clearly stipulates that these institutions can deviate from existing educational legislation, there is no problem on behalf of the principle of legality.

This is not the option that the decretal legislator has chosen for experiments in primary and secondary education in Flanders. He has chosen to regulate as less as possible, and leave it to the government to regulate the temporary projects.

The second option is the *option to delegate*. It means that the decretal legislator gives a limited delegation to the government to set up experiments. The delegation is limited, which means that the decretal legislator regulate himself the essential aspects of the experiments. If the experiment consists in a deviation of the existing legislation, it is the decretal legislator, who has to mention expressly from which rules the executive can deviate and who has to lay down the essential aspects of this deviation.

It is difficult to say which the essential aspects are that the decretal legislator has to regulate. He can make a list of norms of which the executive can deviate (a positive list) or he can lay down some principles of which never can be deviated (a negative list), he can stipulate a limit of time, he can give a definition of the general goals of the experiments, ... Some procedural conditions such as the duty to justify, ore some consultative procedures are also possible.

For the decretal legislator, it's up to find the right balance between leave a margin of appreciation for the government and to fix by himself the essential aspects.

The third option can be called, the *option to confirm*. It means that the decretal legislator delegates to the government the power to draw the limits of the experiments. The government is authorized to lay down the essential elements of the experiments. This is only allowed if this delegation is specific and if the legislative decree says that the governmental decree has to be confirmed by legislative decree.

In the recent decree on temporary projects, the decretal legislator has opted for a mix between the option to delegate and the option to confirm.

B. The regulatory power left to the government

The way in which the government can set up or regulate experiments, is directly related with the way of interfering of the decretal legislator. How broader, how more detailed the initiative of the decretal legislator is, how more limited is the space for the government to act. The experiments set up or regulated by the government have to respect the limits of the decretal rules.

²⁵ E.g. C.E. (Adv.) nr. 36.964/1, May 6th, 2004 on the projects 'Accent op talent', unpublished. See also, C.E. (Adv.) nr. 32.010/1, September 20th, 2001; C.E. (Adv.) nr. 35.067/1, April 8th, 2003; C.E. (Adv.) nr. 37.306/1, June 17th, 2004, all unpublished.

²⁶ C.E. (Adv.) nr. 36.933/1, April 27th, 2004, unpublished.

If the decretal legislator has chosen for the option to regulate, then the government has only a small regulatory power based on the normal executive power. The government cannot describe the subject of the experiments and certainly not deviate from decretal options. At best, she can only describe some pure procedural or administrative aspects of the projects.

If the decretal legislator has opted for the option to delegate, then the government has to respect the limits of this delegation. The government can only deviate from legislative norms, if the decretal legislator has expressly told so.

If the decretal legislator has chosen the option to confirm, it means that the government has a wide space to regulate this experiments. In that case, the government has also to respect the limits of the delegation, how small they even are, and has to lay down this governmental decree in the parliament for confirmation. If this decree is not confirmed in time, the governmental decree becomes unlawful and unconstitutional.