The Justifiability of Higher Education Reforms by Belgium's French Community

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Keywords

Belgium; Freedom of Education; Higher Education Mobility; Bologna Process; Proportionality; Limitation of Fundamental Rights

Excerpts from Belgian Constitutional Court Judgment

Arrêt n° 167/2005

Du 23 novembre 2005

ARRET

(...)

Quant à la recevabilité des recours

B.5.l. Les requérants, qui sont tous professeurs, chargés de cours, assistants ou chercheurs à l'Université de Liège, invoquent à la fois un intérêt personnel et un intérêt fonctionnel à agir en annulation devant la Cour.

B.5.2. Le Gouvernement de la Communauté française conteste l'intérêt à agIr des requérants.

B.6. La Constitution et la loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage imposent à toute personne physique ou morale qui introduit un recours en annulation de justifier d'un intérêt. Ne justifient de l'intérêt requis que les personnes dont la situation pourrait être affectée directement et défavorablement par la norme entreprise.

B. 7. Le décret de la Communauté française du 31 mars 2004 VIse à faire évoluer l'enseignement supérieur vers une plus grande cohérence globale :

«Il s'agit de baliser des évolutions très naturelles, inscrites dans l'accroissement du volume des connaissances et l'émergence de méthodes actives dans l'enseignement, d'une part, influencées par la démocratisation de cet enseignement, de l'autre. Il s'agit aussi de poser les bases des collaborations entre établissements, singulièrement entre établissements universitaires, toujours dépendants des structures arrêtées dans les lois de 1911 et 1971.

Ce faisant, il s'agit aussi de participer de manière positive à l'ouverture (ou la réouverture) d'un Espace européen de l'enseignement supérieur, dont les objectifs communs sont élaborés au gré des déclarations successives d'Etats européens désireux de s'associer pour construire cet espace, promouvoir la reconnaissance mutuelle et la mobilité académique, faire de la diversité culturelle caractéristique de l'Europe un atout supplémentaire au bénéfice des étudiants» (Dac. par/., Parlement de la Communauté française, 2003-2004, nO 498/1, p. 2).

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Cette ouverture de l'Espace européen de l'enseignement supérieur est communément appelée «processus de Bologne».

B. 8.1. Les dispositions entreprises prévoient, d'une part, que sont accordées aux établissements universitaires des habilitations à organiser des cycles d'études universitaires par «site », à savoir une localisation géographique d'infrastructures affectées par les établissements d'enseignement supérieur à leurs activités (article 37, § 1er), ces habilitations étant définies dans l'annexe III du décret du 31 mars 2004 (article 38, alinéa 5).

B.8.2. Elles prévoient, d'autre part, dans un titre IV dénommé «Rapprochements universités », la création d'académies universitaires (articles 90 à 106), ainsi que la possibilité de fusions d'universités (articles 107 à 110) ou de partenariats avec d'autres établissements (articles 111 et 112).

B.8.3. Elles définissent, enfin, la liberté académique de tout responsable d'un enseignement (article 67) et modifient la loi du 28 avril 1953 «sur l'organisation de l'enseignement universitaire par l'Etat» en ce qui concerne le mode de nomination (articles 139 et 141) et en prévoyant le principe de l'attribution temporaire du contenu des charges de cours – ou principe de «détitularisation» – (article 138), seul l'avis de l'intéressé étant sollicité en cas de modification de sa charge (article 142). Le principe de «détitularisation» s'applique aux membres du personnel enseignant nommés à la date d'entrée en vigueur du décret du 31 mars 2004, le contenu de la charge existant à la veille de cette date étant confirmé pour une période d'au moins trois ans et d'au plus cinq ans (article 161).

B. 9.1. S'estimant directement et défavorablement atteints par les dispositions entreprises, les requérants font valoir, à l'appui de leur intérêt personnel, que le décret attaqué modifie leur situation de façon substantielle en raison, d'une part, d'un risque de modification de la structure de l'enseignement, les académies universitaires ne disposant pas de personnel propre, et d'autre part, du découplage entre la fonction d'enseignant et la charge de cours attribuée.

B.9.2. Ils font également valoir, à l'appui de leur intérêt fonctionnel, que le confinement géographique de l'Université de Liège ou les contraintes apportées à la liberté d'association des universités par la création des académies universitaires sont de nature à porter atteinte aux prérogatives liées à leurs fonctions de professeur, de chargé de cours, d'assistant ou de chercheur à l'Université de Liège. Par ailleurs, en imposant l'exercice de la liberté académique «dans le respect des dispositions de ce décret », l'article 67 du décret créerait un lien direct entre la situation des requérants et la totalité des dispositions visées par les recours.

(...)

B.10.2. Par contre, en tant qu'ils agissent en qualité de professeur, chargé de cours, assistant ou chercheur ainsi qu'à titre personnel, les requérants ne sont pas affectés directement et défavorablement par des dispositions qui confèrent des habilitations géographiques aux établissements d'enseignement supérieur ou qui prévoient des modes de rapprochements entre universités. S'il est vrai que de telles dispositions pourraient avoir des répercussions indirectes sur leur situation, il n'en demeure pas moins que c'est l'université elle-même qui est directement atteinte par ces dispositions.

Ils ne justifient donc pas de l'intérêt requis en droit à l'égard de ces dispositions.

(...)

B.10.3.

(...)

Par conséquent, les premier et deuxième moyens ne peuvent être examinés.

(...)

Quant au fond

En ce qui concerne le troisième moyen

B.15. Le troisième moyen est pris de la violation de la liberté académique garantie par les articles 19 et 24 de la Constitution, lus isolément ou en combinaison avec l'article 13 de la Charte des droits fondamentaux de l'Union européenne, incorporée dans le titre II de la Constitution pour l'Europe, et les articles 9 et 10 de la Convention européenne des droits de l'homme, ainsi que de la violation de l'interdiction de délégation en matière d'organisation de l'enseignement, prévue par l'article 24, § 5, de la Constitution, et du principe d'égalité et de non-discrimination garanti par les articles 10, Il et 24, § 4, de la Constitution.

(...)

En ce qui concerne la liberté académique

B.18.l. La liberté académique traduit le principe selon lequel les enseignants et les chercheurs doivent jouir, dans l'intérêt même du développement du savoir et du pluralisme des opinions, d'une très grande liberté pour mener des recherches et exprimer leurs opinions dans l'exercice de leurs fonctions.

La liberté académique constitue donc un aspect de la liberté d'expression, garantie tant par l'article 19 de la Constitution que par l'article IOde la Convention européenne des droits de l'homme; elle participe de la liberté d'enseignement garantie par l'article 24, § 1er, de la Constitution.

(...)

B.19.1. La liberté académique n'est pas illimitée puisqu'elle s'exerce dans le même cadre normatif que la liberté d'expression et la liberté d'enseignement. Les restrictions apportées à la liberté académique doivent donc être examinées en fonction des restrictions admises pour ces deux libertés.

(...)

B.20.3. En subordonnant l'exercice de la liberté académique au «respect des dispositions de ce décret », l'article 67 du décret ne peut créer une restriction supplémentaire à celles admises pour la liberté d'expression et la liberté d'enseignement.

Il ne pourrait ainsi aboutir à supprimer le droit de critique ou de remise en cause des dispositions du décret attaqué, sous peine de restreindre de manière disproportionnée et sans justification raisonnable la liberté d'expression des responsables d'un enseignement.

B.20.4. L'article 67 du décret attaqué doit donc s'interpréter comme se limitant à réaffirmer le principe de la liberté académique, issu des libertés d'expression et d'enseignement, en l'inscrivant expressément dans le cadre de la restructuration de l'enseignement supérieur organisée par ce décret.

Ainsi interprété, l'article 67 ne viole pas les articles 19 et 24, § 1er, de la Constitution, lus isolément ou en combinaison avec les dispositions citées au moyen.

En ce qui concerne le principe de « détitularisation »

B.21. La liberté académique requiert que l'indépendance des enseignants à l'égard de l'institution universitaire soit garantie par les dispositions qui leur sont applicables.

C'est à la lumière de cette exigence d'indépendance des responsables d'un enseignement que la Cour devra examiner les règles relatives à l'attribution, au renouvellement ou à la modification des charges d'enseignement dans l'enseignement universitaire organisé par la Communauté.

(...)

B.23.2. Contrairement à ce que les parties requérantes allèguent, le pnnClpe de « détitularisation» établi par l'article 138 du décret du 31 mars 2004 ne peut conduire à une suppression de la charge, mais uniquement à une modification éventuelle du contenu de la charge, à savoir «les cours attribués, les activités de recherche et de service à la communauté» (article 21, § 8, de la loi du 28 avril 1953, remplacé par l'article 138 du décret du 31 mars 2004).

Une modification éventuelle de la charge, comme le précise l'exposé des motifs cité en B.22.2, n'a donc pas d'effet sur la nomination ou les droits de l'enseignant, puisque l'article 32, § 3, de la loi du 28 avril 1953, non modifié par le décret du 31 mars 2004, dispose :

«Aucune modification de la charge ne peut avoir pour effet de modifier, sans l'assentiment des intéressés, les titres et les droits dont ils sont titulaires ».

(...)

B.25.1. L'article 24, § 5, de la Constitution reflète la volonté du Constituant de réserver au législateur compétent le soin d'adopter une réglementation pour les aspects essentiels de l'enseignement, en ce qui concerne son organisation, sa reconnaissance ou son subventionnement, mais il n'interdit pas que des missions soient confiées à d'autres autorités à certaines conditions.

Cette disposition constitutionnelle exige que les délégations données par le législateur décrétal ne portent que sur la mise en œuvre des principes qu'il a lui-même adoptés. A travers elles, le gouvernement de communauté ou une autre autorité ne saurait combler l'imprécision de ces principes ou affiner des options insuffisamment détaillées.

B.25.2. En prévoyant que la révision et la modification éventuelle du contenu de la charge s'opèrent « selon un règlement général établi par le conseil d'administration et adopté à la majorité des deux tiers des membres présents », le législateur décrétal ne délègue aucun élément essentiel de l'organisation de l'enseignement, mais confie au contraire le soin de déterminer les conditions du renouvellement et de la modification éventuelle de la charge à l'organe le mieux à même d'apprécier les impératifs de bon fonctionnement de l'institution universitaire.

(...)

B.25.5. L'article 138 du décret prévoit que la révision et l'éventuelle modification de la charge s'effectuent en application d'un règlement général établi par le conseil d'administration et adopté à la majorité des deux tiers des membres présents.

Il est nécessaire, lorsqu'une proposition de modification du contenu de la charge ne recueille pas l'accord de l'intéressé, que ce règlement comporte des garanties procédurales spécifiques qui soient de nature à empêcher que cette modification ne constitue en réalité une menace ou une pression qui entrave la liberté académique et porte atteinte à l'indépendance des enseignants à l'égard de l'institution universitaire.

(...)

B.25.7. Compte tenu de ce qui précède et sous la réserve d'interprétation mentionnée en B.25.5, les conditions d'application du principe de «détitularisation» ne sont contraires ni à l'article 24, § 5, de la Constitution, ni à la liberté académique garantie par les articles 19 et 24, § 1er, de la Constitution.

B.26. Le troisième moyen n'est pas fondé.

Par ces motifs,

la Cour

rejette les recours, sous réserve des interprétations mentionnées en B.20.4. et B.25.5.

(...)

Introduction

The Bologna Declaration of 19 June 1999 set the stage for the creation of a common European area of higher education in order to enhance the mobility and employability of citizens and to increase the competitiveness of European higher education at international level. The Bologna Process relies on the 29 signatories to reform their own systems of higher education to ensure European-wide convergence. In this regard the elimination of constraints to the free mobility of researchers and the enhancement of

quality controls at higher education institutions feature as objectives, among others, of the process. Partly with these objectives in mind Belgium's French Community adopted legislation in order to ensure greater access to and mobility in its higher education environment to integrate more in the European space. Legislation that was eventually challenged before the country's Constitutional Court (*Arbitragehof/Cour d'arbitrage*), a challenge that was decided in its judgment of 23 November 2005.[1] It is the purpose with this contribution to explain the judgment and comment on it. However, before the attention is turned to the judgment a brief explanation is given of Belgium's constitutional background in order to situate the discussion to follow.

Background

It is important to note that Belgium is a federal kingdom.[2] The federation is based on a territorial distinction and a person-bound distinction. Federal territories are referred to as 'regions', of which there are three, namely the Flemish, Walloon and Brussels-Capital Regions. While federal person-bound authorities are referred to as 'communities', of which there are also three, namely the Flemish, French and German Communities. The regions and communities have far-reaching powers, including their own legislatures, governments, budgets and spheres of competence – such as education for example. The Belgian Constitution (Constitution) provides the possibility for the regions' authority to be exercised by the communities, the regions then legally exist, but their organs are not constituted. This option was exercised by the Flemish Community. A distinction is then usually not made between the Flemish Region and the Flemish Community, but one simply refers to Flanders as such. This option was not exercised by the French Community, hence the distinction between the Walloon Region and the French Community.

Facts

The applicants before the Constitutional Court were professors, lecturers, assistants and researchers from the University of Liège.[3] Their challenge related to a number of sections in the French Community's Decree (Law) of 31 March 2004. Their challenge was opposed by the Government of the French Community.

The Decree was aimed at facilitating 'natural development' in higher education.[4] In other words, the French Community decided to recognise evolution in higher education brought about by the democratisation of such education. The need was also felt to provide a new base for cooperation between institutions, as cooperation was still subject to outdated laws from 1911 and 1971. The opportunity was also seen to participate in the creation of an open European space of higher education in the spirit of the Bologna Process. However, a number of sections faced contestation.

Section 37(1) was challenged that allocates universities geographical areas within which to provide tuition.[5] A geographical area amounts to an area that includes infrastructure and which is used by a university for its activities – Brussels and each voting canton of the Walloon Region were recognised as constituting such locations.[6] Universities may only conduct tuition outside of their designated areas where such tuition does not exceed 15 study credits and does not result in the splitting of a course.[7]

Chapter IV, which spans *sections 90 to 112*, foresees the creation of 'university academies' between universities and polytechnics,[8] the possibility of university mergers and partnerships between institutions, was also complained of.[9]

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1 Judgment of the Constitutional Court of Belgium, no. 167/2005 of 23 November 2005.

2 *Cf.* Craenen, G. (2001), 'Belgium, general background and legal characteristics', in: Craenen, G. (ed.), *The Institutions of Federal Belgium: An Introduction to Belgian Public Law*, 2 ed., Acco, Leuven/Leusden, pp. 23-24.

3 B.5.1. of the judgment.

4 B.7. Proceedings of the Parliament of the French Community, 2003-2004, no. 498/1.

5 B.1.1.

6 B.1.3.

7 The section is not applicable to doctoral studies, in other words the pursuit of a doctorate at a university is not subject to territorial restrictions.

8 Of which the Académie universitaire Wallonie-Bruxelles is an example, the academy was formed by the Université libre de Bruxelles, Université de Mons-Hainaut and the Faculté polytechnique de Mons. The academy enjoys legal personality and has the right to organise courses and award qualifications.

9 B.3.1.

Complaints were also made about *sections 138, 139, 141* that provide for the appointment of academic staff, as well as regulate their academic duties.[10] Section 138 amended the Act of 28 April 1953. The amendment held in that, among other things, a university's executive council determines the nature and contents of the lecturing duties, research activities and community service to be performed by professors and lecturers. Any such determination may not exceed a period of five years. The scope of the duties is to be determined immediately after the appointment of someone to the academic staff and must be revised after the end of each period. Revision and evaluation must be conducted according to a code that is to be drawn up by each university's executive council, and which is to be accepted by a two thirds majority of the members present in the council. Section 138 also stipulates that the provisions of section 32 of the Act of 28 April 1953 may not be prejudiced. Section 32 namely states that a change in the duties of a member of the academic staff may not affect the entitlements and rights of the person concerned, unless they consent.

Section 67 was also taken to task before the Court.[11] Section 67 namely states that academic freedom is to be exercised within the provisions of the Decree.

The question may now be put as to on which grounds these provisions were contested, and what did the defence amount to? The applicants advanced three main pleas.

First, the applicants averred that by not including Brussels as part of the geographical area of the University of Liège, it was treated unequally when compared to the Université libre de Bruxelles and the Université catholique de Louvain who had access to Brussels. This, it was alleged, violated the rights to equality and non-discrimination as contained in sections 10, 11, and 24(4) of the Constitution.[12]

To this the Government of the French Community replied in chief that the applicants did not enjoy standing before the Court.[13]

Second, the applicants averred that the rights to freedom of association in section 27 and freedom of education in section 24 of the Constitution were violated.[14] It was argued that the issue of 'university academies' had to be regulated in a Special Decree, something which would have required a two-thirds majority. It was also argued that as such academies brought large financial benefits for the institutions involved, those institutions that chose not to participate were penalised disproportionally, thereby infringing their rights to *freely* choose whether to participate and how to exercise their academic freedom.

To this the Government of the French Community also replied in chief that the applicants did not enjoy standing before the Court.[15]

Third, the applicants pleaded that the decree violated the rights to academic freedom to be deduced from sections 19 and 24 of the Constitution, in addition or in the alternative to article 13 of the Charter of Fundamental Rights of the European Union – contained in the Draft European Constitutional Treaty – which guarantees the right to freedom of arts and sciences.[16] As well as articles 9 and 10 of the European Convention on Human Rights that guarantee the rights to freedom of thought and expression.[17]

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10 B.4.1.; B.4.2.; B.4.3.

11 B.2.

12 A.9.1. Sec. 10 of the Constitution reads: '(1) There are no class distinctions in the State. (2) Belgians are equal before the law; they are the only ones eligible for civil and military service, but for the exceptions that could be made by law for special cases'; sec. 11 of the Constitution reads: 'Enjoyment of the rights and freedoms recognized for Belgians should be ensured without discrimination. To this end, laws and decrees guarantee notably the rights and freedoms of ideological and philosophical minorities'; sec. 24(4) of the Constitution reads: 'All pupils or students, parents, teaching staff, or institutions are equal before the law or decree. The law and decree take into account objective differences, notably the characteristics of each organising authority, that justify appropriate treatment.'

13 A.12.1.

14 A.10.1.; A.10.2.; A.10.3. Sec. 27 of the Constitution reads: 'Belgians have the right to enter into association or partnership; this right cannot be liable to any preventative measures.'

15 A.13.1.

16 A.11.1. Art. 13 of the EU Charter of Fundamental Rights reads: 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected.'

17 Art. 9 of the European Convention on Human Rights reads: '(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others'; Art. 10 of the European Convention on Human Rights reads: '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be sub-

Furthermore, it was also pleaded that the rights to equality and non-discrimination in sections 10, 11, and 24(4) of the Constitution were violated. As a cursory remark, it is to be noted that although the pleading of international law is not possible in many jurisdictions, it is a distinct possibility in Belgian courts.

First Part of Third Plea: It was argued that section 67 of the Decree violated academic freedom, as it stated that academic freedom had to be exercised in accordance with the Decree, which, it was alleged, was in itself a violation of the right to academic freedom.[18] It was also alleged that the effect of the Decree was to turn the assignment of *permanent* academies duties into *temporary* academic duties by allowing for the evaluation and revision of such duties in section 138.

To this the Government of the French Community replied that the Court could not implement the Charter of Fundamental Rights of the European Union, as it was not legally binding. Neither did the Constitution guarantee 'academic freedom' as such, nor could it be deduced from the European Convention on Human Rights.[19] It was pleaded in the alternative that an interference with the right to 'academic freedom', if it could be deduced, was limited in a justifiable manner, as it intended to increase academic mobility and promote integration in a common European higher education space. The claim that the Decree turned permanent duties into temporary duties was also denied – it was argued that the Decree only made the *content* of someone's duties temporary, and not the duties as such.

Second Part of Third Plea: It was complained that the Decree did not state any substantive requirements regarding the code to be adopted according to which academic staff must be evaluated in deciding whether to revise their duties.[20] This left room for abuse, as a member of staff's philosophical or religious views could be used to their detriment. The omission of any requirements meant that section 24(5) of the Constitution was violated, as the Parliament of the French Community delegated the power regarding such important issues to the Government, instead of stating the requirements in the Decree itself.[21]

The Government of the French Community replied that it did not receive any normative powers by delegation, its duty was amply clear from the Decree itself.[22] It simply had to follow the instructions given to it by the Decree in administering the legislation. It was also added that it would have been unreasonable to expect Parliament to lay down extensive requirements in evaluating and revising lecturing and research duties.

Judgment

The Court considered the applicants standing. It held that the applicants were not *directly* affected by provisions that determined the geographical scope of universities, neither by provisions that catered for cooperation between universities.[23] Universities themselves had a direct interest in such matters, and not their members of staff. The applicants thus did not show sufficient interest in the matters raised in their first and second pleas, thereby leading the Court to dismiss their complaints for lack of standing.

Turning its attention to the third plea the Court considered the scope of the principle of academic freedom.[24] It found that the principle includes a particular broad freedom to enable lecturers and researchers to develop knowledge and to allow a variety of opinions to be aired. In this regard academic freedom overlapped with and could be deduced from the right to freedom of education and the right to freedom of expression. The Court thus had to focus not only on the right to education in the Constitution, contained in section 24; but also on the right to freedom of expression, contained in section 19. This also brings the right to freedom of expression in article 10 of the European Convention on Human Rights

ject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

18 A.11.2.

19 A.14.1.

20 A.11.3.

21 Sec. 25(5) of the Constitution reads: 'The organisation, the recognition and the subsidising of education by the Community are regulated by law or decree.'

22 A.14.3.

23 B.10.2.

24 B.18.1.

into play. Interestingly, although the EU Charter on Fundamental Rights is not legally binding, the principles it espouses, which include respect for 'academic freedom', amount to common principles of the EU.[25] Common principles that the Court must consider in interpreting the Belgian Constitution.

An important caveat was added though, guaranteeing academic freedom, did not mean that it could not be limited.[26] However, the limitation of the freedom must be proportional to the aim it strives to meet in order to be justified.[27] Both the Constitution and the European Convention on Human Rights allow for the rights to freedom of education and freedom of expression to be limited.

In evaluating the *third plea*, namely that section 67 of the Decree violated academic freedom by stating that the freedom had to be exercised within the confines of the Decree, the Court found no violation.[28] This was because section 67 merely restated the principle of academic freedom, the exercise of which the Decree sought to develop and characterise. Thus, section 67 cannot be interpreted as allowing limits to academic freedom that fall outside those permissible under the rights to freedom of education and expression. It then does not violate academic freedom, as it cannot be interpreted as bringing about extra burdens or possibilities of limitations to academic freedom than those already accepted or possible.

Regarding the section of the third plea that dealt with the powers to revise lecturing and research duties of academic staff, the Court noted that academic freedom requires that members' *independence* be guaranteed in exercising their duties.[29] 'Academic independence' is consequently to be used as measure in testing whether any interferences with academic freedom can be allowed or not.

It was accepted that section 138 pursued the aim of increasing internal, European and international mobility, by allowing duties to be revised movement within institutions became easier as well as their overall structuring.[30] The Court saw no problem in the proposed effect of the measure.

As to the argument that the reforms allowed for a member of the academic staff to have their *permanent* academic duties turned into *temporary* academic duties the Court responded that this section of the plea had no merits.[31] Section 138 of the Decree only allows for the content of academic duties to be revised, not terminated. The interference with academic freedom was therefore not as far reaching or serious as the applicants alleged. This was because section 138 of the Decree left intact section 32 of the Act of 28 April 1953, which states that a change in the duties of a member of the academic staff may not affect the entitlements and rights of the person concerned without their consent. In other words, by terminating the content of someone's academic duties, the university's action would amount to more than mere revision, thereby requiring the consent of the person concerned.

In short, the contested sections of the Decree that aimed to introduce more mobility in the French Community's higher education structure by allowing for academic duties to evaluated and revised were proportional to their aims – they did not pursue their aims in a disproportional way.

But what about the complaint that the Decree did not contain any normative guidelines when it came to creating a code according to which academic duties had to be evaluated?

The Court stated that section 24(5) of the Constitution provides that *essential elements* regarding the *structure* and *funding* of education must be decided by the legislature, but this did not preclude that some duties may be entrusted to the executive.[32] But, delegating any such authority still entails that the legislature states the relevant principles, while the executive is called to implement such principles. The executive is *not* allowed to compensate for unclear principles or to refine somewhat rough policies.

The Court proceeded to consider the facts and found that the lack of express guidelines in the Decree constituted no violation.[33] It held that the legislature did not delegate any essential element of its competence regarding education, but simply indicated the most appropriate body, namely university executive

[25] B.18.3.
[26] B.18.2.; B.19.1.
[27] B.19.3.
[28] B.20.1.; B.20.2.; B.20.3.; B.20.4.
[29] B.21.
[30] B.23.3.2.
[31] B.23.2.
[32] B.25.1.
[33] B.25.7.

councils, to draft the required codes – thereby ensuring the best possible care.[34] However, it was added that any code must contain *procedural guarantees* to avoid a situation where the threat of revision is used to abuse someone's academic freedom.[35]

The judgment continued that the decree also provided academic staff members with a number of other guarantees. For example, as explained above, the content and scope of duties may only be evaluated and revised and not simply terminated.

Thus, all three the applicants' pleas were rejected. The first two on procedural grounds and the third on substantive grounds.

Comment

Higher education reforms are easier said than done. Although the general trend, confirmed by the Bologna Process, is to increase mobility and allow for more contact between institutions – tertiary institutions often prove quite slow to accept change and to compromise vested interests. It is, however, a given that globalisation calls for greater openness and interaction. Gone are the days that academics enjoyed near limitless sovereignty when it came to giving shape to their duties. This is not in itself a bad thing, provided that more structural flexibility and increased controls serve to promote academic quality. In other words, increased regulation may limit *individual* freedom, but this does not mean to say that sincere efforts at the creation of flexible academic environments to respond all the quicker to change and societal developments will necessarily also limit *academic* freedom.

Nonetheless, change must also be accompanied by a measure of predictability. By increasing regulation and control, those affected, both individuals and institutions, are more than entitled to call for greater guarantees in steering the process of change and reform. This is, arguably, where the judgment fell short. The Court accepted all too easily the legislature's position that universities have to each draft codes for the evaluation and revision of academic duties, provided that such codes contain procedural guarantees. In this regard the legislature can be accused of abdicating its responsibility by simply stating that universities must be mindful of procedural guarantees without stating any such minimum guarantees or providing guidelines according to which such guarantees are to be drafted. The legislature should have taken more responsibility in ensuring that while allowing each university to draft its own code, as this is simply a matter of academic freedom that also accords institutions, the chance of it manipulating or abusing its power in the setting of its code was properly checked and foreseen. University autonomy should therefore not have been ruled out, but controlled more for the sake of proper guarantees and predictability. Furthermore, more is called for than mere procedural guarantees in protecting the academic freedom of individual members of staff. Not only would some *procedural* guidelines formulated by the legislature have lent the assurance of greater predictability to all those concerned, but the legislature would have served its duty well if it also provided some *substantive* guidelines regarding the codes. In other words, not only legislative provisions as to how codes are to be implemented in ensuring *procedural fairness* were want, but unfortunately also minimum guidelines as to *substantive fairness*.

[34] B.25.2.
[35] B.25.5.