

Jan de Groof

Abstract: European Higher Education in Search of a New Legal Order

Most large-scale changes in higher education were initiated through the legislator, the government, the international community or the socio-economic environment but not mainly by universities themselves.

Furthermore, few major decisions are made without considering the legal consequences. The Law on Higher Education deals with all relevant aspects of university life.

Legislation should clarify rights, freedoms and responsibilities and specify the functions and values of the university. The '*juridification*' and '*judicialisation*' of higher education involves changing patterns of legislation and influences the steering role of governments. The large degree of autonomy which is offered to institutions goes hand in hand with innumerable and detailed State prescriptions.

Moreover, the *market culture* of higher education institutions involves the applicability of competition law and of free trade rules, which may stimulate cooperation between institutions. The non-discrimination principle and the international norms effect the agenda of legal issues as well. In many perspectives, international law overrules national legislation. Several legal paradoxes must be discerned.

Traditional as well as new legal principles of European Law, among them the principle of *trust, loyalty, convergence, subsidiarity,...*, make 'soft law' rather hard. The convergence between the *Bologna (and Lisbon)* process and the competences granted to the Community under the EC Treaty lead to next step in international lawmaking. Higher education is living in the '*post article 149-150*' era. The explicit harmonisation on a European level of national legislation must lead to coordination, rather than unification.

A legal approach of the changes which are to be introduced in the higher education system takes into account the continuities and diversities in the national systems, as well as the international legal standards, such as the recognition of degrees and diplomas. European Law takes precedence over a national law that hinders the free movement of persons and workers, non-discrimination, the freedom of establishment, ... The notion of 'European citizenship' is introduced in the sphere of (higher) education. Higher education is considered as a prominent cultural value but could also be seen as a 'service' according to the EC Treaties.

The automatic recognition of the equivalence of diplomas throughout the European Higher Education Area is not yet a part of the formal, international legal system. It could produce opportunities for transnational cooperation and mobility of students within the 'transnational education space'. But transnational education and research has a more borderless purpose, which challenges the national legislator.

There is the need for redefining the sacredness of autonomy in the domain of higher education, and what may be grounds for state involvement and participation through legislation. Leaving this shifting terrain undefined is to court political and legal dangers in the short term, as well as institutional damage and demoralisation in the long term. The new generation of higher education law should draft general 'framework' law, respect the principles of 'good legislation' and enhance the responsabilisation of the university rather than promote bureaucratisation.