

# EDUCATION IN THE EUROPEAN UNION: BUILDING A SYSTEM OUTSIDE AND WITHIN THE SYSTEM\*

Flora Goudappel

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## RESUMO

Demonstra como a educação se desenvolveu na União Européia, apesar do fato de que não caracteriza diretamente as principais atividades da Comunidade Européia, e quais as áreas que sofreram maior influência dentro da política e do Direito da Educação.

Considera que, em geral, a educação tornou-se o foco das atenções na Europa a partir do desenvolvimento do mercado interno e do conseqüente trânsito livre de pessoas, o que levou à formação de um tipo especial de política e Direito educacional, por meio de legislações primárias (por exemplo, tratados), secundárias (regulamentos e diretivas) e da jurisprudência da Corte de Justiça da Comunidade Européia.

Menciona a criação de vários programas educacionais, como aqueles voltados ao reconhecimento dos diplomas, ao intercâmbio e à concessão de bolsas a estudantes originários de outros Estados-membros, e conclui que a cooperação existente entre estes não se deu de forma forçada, mas sim natural, com o passar dos anos.

## PALAVRAS-CHAVE

Direito da Educação; União Européia; política educacional; Erasmus; Socrates; Tratado de Amsterdã; Tratado de Roma; Corte de Justiça da Comunidade Européia.

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## 1 INTRODUCTION

In the European Union, education law and policy do not play any strong role. A system which is built around an economic structure, an internal market, does not put any emphasis on developing or even harmonizing education since it does not directly represent the key activities of an organisation like the European Union or, more specifically, the European Community. Yet, it cannot be denied that education plays some kind of role in European law and policy, a role which has become stronger over the years. Prime examples are the European credit transfer system (ects), the Bologna Declaration, the Erasmus and Socrates scholarships, and the system of diploma recognition.

This paper is meant to explore how this development took place and became possible: How did education law develop in the European Union despite the fact that it never was part of the aims of the European Union's development? How did a more advanced form of cooperation take shape and which areas of education law and policy were influenced the most? In order to discuss this issue, I will first discuss the place of education in European law in general, to be followed by a study of supporting processes for education inside and outside the EU. Finally, examples will be discussed in which it is shown that, despite the lack of EU legislation on education, the European legal system cannot avoid influencing education law and policy in its Member States.

## 2 EDUCATION IN THE EUROPEAN UNION SYSTEM

As stated above, education law and education policy have never been a natural part of the European Community<sup>1</sup> or European Union. In a system which began life as an economic community, a customs union, education as such was not mentioned in the Treaty of Rome in 1957<sup>2</sup>. The only reference was in concern with diploma recognition as an integral part of the possibility for workers to move to another Member State and have a job at the same level as they would have had in their Member State of origin.

In general, it can be said that education came only into the European limelight in an indirect manner: as a result of the development of the

internal market, most notably of the free movement of persons, education issues had to be taken into account by the European Community.<sup>3</sup> Only in the Treaty of Amsterdam<sup>4</sup> did education obtain a place in the European structure; in what is now the Arts. 149 and 150 EC, education and vocational training have been formulated as a supportive competence of the European Community, which means that the European Community cannot adopt measures which would amend the national legal systems on these subjects like in the case of a regular competence; the European Community can only adopt measures which stimulate the transboundary contacts on education. This position was most recently enhanced in the European Constitution<sup>5</sup>.

It means that education powers have always remained in the hands of the Member States while the European Community is only allowed to stimulate transboundary cooperation between them. Yet, the internal market between the Member States also has effects on education systems in order for the European Community to be able to organize the free movement of workers and services in particular. As a result, a special type of European education law as well as education policy have been formed through European primary (*i.e.* the Treaties) and secondary (regulations and directives) legislation as well as through the case law of the Court of Justice of the European Communities.

European education law is therefore at present an interesting mixture which shows that the European Community does not have a regulating or harmonizing power in the field of education but that the European Community's impact on national education has been large and is ever increasing. In the first half of July 2005 alone, for example, the Court of Justice of the European Community delivered four judgements<sup>6</sup> concerning aspects of education. This mixture of powers has many sources. Firstly, the EC Treaty itself is a primary source. Apart from the supportive competence of Art. 149 and 150 EC, the prohibition of discrimination (nationality and otherwise) in Art. 12 and 13 EC, as well as the free movement of persons in Art. 39 ff EC, have influenced education in the Member States. The position of nationals of other Member States concerning diploma recognition, the

rights of children of migrant workers and free movement for students have all given rise to secondary European legislation and to European case law. Secondly, many European action programmes based on Artt. 149 and 150 EC have had a profound impact in the Member States. Examples are the Erasmus and Socrates programmes for student exchange. Thirdly, the European Community has adopted developments which have begun outside the umbrella of the European Community, like the Bologna Declaration and the changes in higher education which have sprung from it.

## 3 SUPPORT AND COORDINATION

As Art. 149 EC only allows supportive action by the EC, it has most prominently taken the form of mobility programmes. The most important student mobility programmes are the Erasmus programme<sup>7</sup> and the Socrates programme<sup>8</sup>. Both programmes, developed in the nineties of the twentieth century, aim at an exchange of students for one or two semesters between universities in different Member States. The newer Socrates programme is an umbrella programme for Comenius (school education), Erasmus (higher education), Gruntvig (adult education), Lingua (language teaching and learning), and Minerva (Information and communication technologies in education). Apart from a limited scholarship, the participating student does not have to pay any tuition fee at the receiving university. In this way, it was possible to take away financial boundaries for a free movement of students, as future workers. In addition, the European Credit Transfer System (ECTS) was set up to facilitate recognition for academic purposes of periods of study completed abroad. It is based on cooperation of the universities which do so on their own responsibility in order to facilitate the academic recognition of periods of study in universities in other Member States<sup>9</sup>.

One of the most important recent developments concerning (higher) education in Europe did not take place within the framework of the European Union. The so-called "Bologna declaration of 1999"<sup>10</sup> has had a profound impact on higher education in many European countries. Yet, it was a statement signed by many European education

ministers, also of non-member States. Although not created within the framework of the European Union, the Bologna process was later on adopted by the European Union as part of the so-called "Lisbon process"<sup>11</sup>.

The European education ministers signed this joint declaration on 19 June 1999 in Bologna: "The Open European Education Area"<sup>12</sup>. In the Bologna Declaration they formulated two important objectives. On the one hand, they indicate the need to increase the comparison of the systems of higher education in Europe and, on the other hand, the ministers urge the strengthening of the competitive strength of the systems. The most important intention in the Bologna Declaration is the intention of the education ministers to re-arrange the national higher education systems in the coming decade into a *system essentially based on two cycles, undergraduate and graduate. Access to the second cycle shall require successful completion of first cycle's studies, lasting a minimum of three years. The degree awarded after the first cycle shall also be relevant to the European labour market as an appropriate level of qualification. The second cycle should lead to the master's and/or doctorate degree as in many European countries.* The majority of EU countries already offered two cycles of undergraduate and graduate higher education but not similar ones. At present, many European states have adopted the Bologna system or are preparing a similar scheme. According to a study carried out in preparation of the Bologna Declaration it appears that *only a few countries in the EU/EEA area do not seem to have, or do not seem to be experimenting with two-tier curricula in at least part of their higher education system (Greece, The Netherlands and to a certain extent also Spain)*<sup>13</sup>.

#### 4 INDIRECT INFLUENCE: THE INTERNAL MARKET

The free movement of persons, one of the key elements of the internal market of the EC, consists of two groups: the free movement of workers (Art. 39 ff EC) and the freedom of establishment (Art. 43 ff EC). At first glance, neither of these touch upon education law. However, in two ways European legislation and case law in this field have moved into education issues. In the first place, both the free movement of workers and the freedom

of establishment can only be achieved by means of diploma recognition. Secondly, workers have the right to bring their family along and to have their family members exercise the same rights as the nationals of the receiving Member State. These rights include the access to all levels of education for the workers' children. In addition, attention needs to be paid to the notion of European Union citizenship (Art. 17 ff EC), which was introduced into the system in the Treaty of Maastricht in 1992.

The free movement of students is part of the free movement of persons in the European Union in general. A striking fact is that students were not the aim of the internal market, but workers were<sup>14</sup>. All non-economically active persons gained additional rights through secondary European legislation: relatives of workers, retired persons, and students in their role of future workers<sup>15</sup>. In this way, several measures were taken which affected education while not being aimed at doing so. In the meantime, the role of the European Union concerning education was laid down in the EC Treaty in Art. 149 EC through the Treaty of Maastricht<sup>16</sup> as being subsidiary and supporting. This development occurred side by side with the development concerning the

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In the *Bernini*<sup>17</sup> case, the Court decided and confirmed that *the student grant awarded by a Member State to the children of workers forms a social benefit for a migrant worker in the sense of Article 7, paragraph 2, of Regulation 1612/68, when the worker continues to provide for the support of his child. Under such circumstances, the child can call upon Article 7, paragraph 2, to obtain a student grant under the same conditions as those which apply to children of national workers, and in particular without that a further condition as to his residence can be set.* Mrs Bernini, of Italian nationality, completed primary and secondary education in the Netherlands. She then had professional training in the context of which she had a period of paid training in the 'design and preparation' division of a furniture factory in Haarlem. She subsequently began architectural studies in Naples, in Italy. She requested a student grant from the Dutch government based on the Dutch law on student grants. This request was denied because she was not resident in the Netherlands but in Italy. Had Mrs Bernini had Dutch nationality, she would have qualified. With this decision came to an end the "domicile requirement" which had been put forward in the *Carmina Di Leo* case.

Study grants, however, is a policy area which has a strong link with a national financial system, like health insurance. This is the main reason why there is no EU legislation concerning harmonization of study grants of any kind:

*It is true that the Court held in Lair and Brown (paragraphs 15 and 18 respectively) that 'at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof [later Article 6 of the EC Treaty, now, after amendment, Art. 12 EC]'. In those judgments, the Court considered that such assistance was, on the one hand, a matter of education policy, which was not as such included in the spheres entrusted to the Community institutions, and, on the other, a matter of social policy, which fell within the competence of the Member States in so far as it was not covered by specific provisions of the EEC Treaty*<sup>18</sup>.

Thus, in addition to the supporting measures to the free movement of students, the free movement of persons has had a direct impact on study financing.

In the Meeusen case,<sup>19</sup> for instance, the Court of Justice ruled that the fact that the mother of a Belgian student worked in another Member State, the Netherlands, for a few hours a week led to a right for the daughter to study financing in the Netherlands. This was constructed through a reference to the free movement of persons: because the mother had always paid taxes in the Netherlands, she had obtained a right to social benefits, including study financing for her children. There was no residency requirement for the daughter attached to this right to study financing.

In a later case on similar problems, the Grzelczyk case<sup>20</sup>, the main question concerned the fact that Mr Grzelczyk, a French national, had worked in Belgium in order to finance his studies but was unable to do while finishing his studies in the last year. When he applied for social benefits, he was refused this based on the fact that he did not possess the Belgian nationality and because he had not resided in Belgium for five years. The Court of Justice decided that this refusal formed discrimination on the basis of nationality, which is not allowed in order to create free movement of persons: The fact that a Union citizen pursues university studies in a Member State other than the one of which he is a national cannot, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on the grounds of nationality laid down in Art. 6 of the Treaty.

An obligation to reside in a member state for at least five years was considered to be indirect discrimination because the nationals of the Member State itself are much more likely to fulfill this requirement than nationals of other Member States.

The latest case concerning the right to study grants is the Bidar case<sup>21</sup>. The French national Bidar had moved to the United Kingdom with his mother, who made use of the free movement of persons. Mr Bidar finished his secondary education in the United Kingdom and wanted to continue his education at a UK university. In order to be able to study, he applied for UK study grants in the same way as a UK national would do. His application was denied

because he had lived in the UK for less than five years, the required period of residence. However, the Court of Justice held that there cannot be a strict time limitation for anyone to be settled in another member state. This conclusion leads to the possibility for Mr Bidar to receive the requested study grants. Following up on this case, several Member States, including the Netherlands, have announced in the press that they are re-considering the limitations to residency requirements for study grants.

In addition to these cases concerning study grants, there is one other European policy field in which education law plays an important part: diploma recognition. This represents a principle which lays at the foundation of a free movement of persons; a system of recognition of diplomas between the member states was necessary in order to allow workers to work in another Member State at the same level and under the same conditions as in the one of origin. This is why recognition of diplomas is laid down in Art. 47 EC as part of the freedom of establishment, and it is why the Commission has set up a system containing lists of diplomas and their equivalents.

Yet, there is one category of diplomas which has caused many problems: law degrees. The first reason for this is that law is nation-bound, which makes it difficult to work as a lawyer in another Member State. The second reason is that the legal profession is traditionally nationally organized and does not allow foreigners to join. This has led to much case law of the Court of Justice. In the Vlassopoulou case,<sup>22</sup> a Greek lawyer with many years of work experience in Germany, wished to start her own office in Germany. She was refused by the German bar because she did not have a German law degree. The Court of Justice decided that this was discrimination on the basis of nationality and that Ms Vlassopoulou had to be given the opportunity to prove that she possessed adequate knowledge of German law. After that, many member states have created such a possibility for foreign lawyers by having special tests. However, Ms Morgenbesser was not allowed to take such a test in Italy<sup>23</sup>. She had a French law degree, and had immediately started working at an Italian law firm. She did not take the French bar exam but had finished her legal education at the university.

The Court of Justice ruled that such a view by Italy was not allowed either because it blocked Ms Morgenbesser's rights as an EU citizen.

## 5 CONCLUSION

In conclusion, it is possible to say that education law and policy in the European Union represents an example of building a system outside and within the system. Outside the system because education law is not a key issue in European law. It has therefore formed itself either completely outside the system (the Bologna developments as the strongest example) or partly outside the system (education as a side product of the internal market). Inside the system because all developments in European education law were somehow linked to European Community developments, like diploma recognition, student mobility programs, and student grants for non-nationals. Overall, it can be concluded that, in education law, the European Union has an example of non-harmonization, of cooperation between states, which was not forced but happened naturally in an atmosphere of cooperation and exchange between those states.

## REFERENCE LIST

- 1 The European Community will be the point of reference. In the Common Foreign and Security Policy and in Police and Judicial Cooperation in Criminal Matters, there is hardly any role to play for education law, which technically leaves the European Union as such outside the scope of this study. However, since the European Community is part of the European Union, this latter term will often be used as a more general reference.
- 2 Treaty Establishing the European Economic Community, Rome, 25 March 1957.
- 3 MORTELMANS, K.J.M. & VAN OOIK, R.H. *Europees recht en Nederlandse studiefinanciering*. Deventer 2003, p. 4.
- 4 Treaty of Amsterdam of 2 October 1997, amending the Treaty on the European Union.
- 5 See Art. I-17 of the European Constitution.
- 6 Judgment of the Court of 7 July 2005, Case C-147/03, *Commission v. Austria* [2005] ECR p. 00000; Judgment of the Court of 7 July 2005, Case C-374/03, *Gaye Gürol v. Bezirksregierung Köln* [2005] ECR p. 00000; Judgment of the Court of 14 July 2005, Case C-142/04, *Maria Aslanidou v. Ypourgos Ygeias & Pronoias* [2005] ECR p. 00000; Judgment of the Court of 14 July 2005, Case C-141/04, *Michail Peros v.*

*Techniko Epimelitrio Ellados* [2005] ECR p. 00000.

- 7 Council Decision of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus) (87/327/EEC).
- 8 Decision n. 819/95/EC of the European Parliament and of the Council of 14 March 1995 establishing the Community action programme "Socrates", as amended by Decision n. 576/98/EC of the European Parliament and of the Council of 23 February 1998.
- 9 As described in the Socrates programme, *op.cit.*
- 10 Joint Declaration of the European Ministers of Education, Bologna, 19 June 1999.
- 11 Report from the Education Council to the European Council, *The concrete future objectives of education and training systems*, 14 February 2001, 5980/01.
- 12 See also DE GROOF, J. *Perspectives for the international educational law, loc.cit.*, p. 111.
- 13 VAN STAA, A. The Bologna Declaration: new labels or an Anglo-Saxon education scheme in the Netherlands? *Thema*, 1999, p. 25 e ss.
- 14 See Art. 39 EC for the basis of the free movement of workers.
- 15 Council Directive 93/36/EEC of 29 October 1993 on the right of residence for students.
- 16 1992.
- 17 Judgment of the Court of 26 February 1992, Case C-3/90, *Bernini* [1992] ECR p. I-1071.
- 18 *Bidar* case, *op.cit.*
- 19 Court of Justice of the European Communities, case C-337/97, 8 June 1999, *Meeusen*.
- 20 Court of Justice of the European Communities, case C-184/99, 20 September 2001, *Grzelczyk*.
- 21 *Bidar* case, *op.cit.*
- 22 Judgment of the Court of 7 May 1991, Case C-340/89, *Vlassopoulou* [1991] ECR p. I-2357.
- 23 Judgment of the Court of 13 November 2003, Case C-313/01, *Morgenbesser* [2003] ECR p. I-13467.

was not forced but happened naturally over the years.

KEYWORDS - Education Law; European Union; education policy; Erasmus; Socrates; Treaty of Amsterdam; Treaty of Rome; Court of Justice of the European Communities.

## **ABSTRACT**

The authoress shows how the development of education took place in the European Union, despite the fact that it does not directly represent the key activities of the European Community, and which areas of education law and policy were influenced the most.

She states that, in general, education came to the European limelight as a result of the development of the internal market and the consequent free movement of persons, which have led to the formation of a special type of European education law and policy, through primary (*i.e.* treaties) and secondary legislation (regulations and directives) as well as through the case law of the Court of Justice of the European Communities.

She mentions the creation of several educational programmes, like the ones for diploma recognition, student exchange and student grants for non-nationals, and concludes that cooperation between states

**Flora Goudappel** é Professora da Universidade de Roterdam – Holanda.