

## **APEL's position statement - Consultation on the partial revision of the ordinance of the ETH Board for Professors**

EPFL, Oct 4, 2021,

Dear Colleagues,

An email was sent to all professors and MER with the request for comments. This is an extremely important consultation and APEL believes that it has not received the attention it deserves. We have received 8 answers (see below) and none of them appears to be in favor of the proposed changes. APEL has come to the conclusion that the text is trying to fundamentally alter the nature of employment for professors, with far reaching consequences that do not seem to be properly worked out. In particular, the following two points are critical:

- Art 6.1 uses a very broad and unrealistic definition of external activities. This poses a significant legal risk to professors. Art 6.1 needs to be reformulated to give a more precise definition of which external activities are reasonably of interest to the EPFL president (e.g., as in the current formulation of Art 6.1).
- Art 25.4 needs to be reformulated to better reflect the reality of the work of a professor at EPFL.

The answers by the professors below contain further valuable remarks on the other proposed changes, which should be taken into account.

Best regards on behalf of APEL

The APEL committee, A. Boghossian, A. Kis, D. Kressner, G. Fantner, M. Picasso

----- Comments received

Art.6 is going too far in the mandatory declaration of the external activity. The explanation says it covers any activity generating an income or not. This means we shall declare any activity in a religious or local organization.

Art.14a-b suggesting that some professors \*can\* continue their work beyond the normal age of retirement is not really an offer to the professors but rather an offer to the management board to favor some colleagues. There will be some to whom they say "yes" and some to whom they say "no". Based on the current project, we can anticipate a lack of transparency. This is a dangerous instrument to dig a divide between professors.

-----  
My remark is the following, regarding Art. 14 paragraph 4 of the revision.

I would therefore like to propose this modified text:

"... should request an extension of employment under public law from the ETH President for the attention of the ETH Board, at the earliest 2 years, and at the latest six months before reaching the age of 64. The ETH board will then prolong the contract of the female professor accordingly."

-----  
The new Article 14 gives yet more power to the president and his inner circle. Prolongation beyond retirement age should be merit-based: any professor should be allowed to continue after retirement age as long as he/she has enough third-party funding to sustain research activities. There should be no dotation to ensure that young faculty gets recruited. % Salary could be fixed according to the amount of funding procured on an annual or bi-annual basis. No need to go by 5 year terms.

Also, re PATT: 4&4 should remain. As it is, pressure is very high. If on top you do not know for how long you'll be renewed after only 4 years there will be extra stress.

-----  
As in LEX 4.1.1, art.6 al. 1 is too vague "all ancillary activities". Do I have to declare that I am in the finance commission of my hometown? Or my football club? Or my Church? More importantly, what about external committees and reviews. We cannot accept this. "b. there is, by nature of the activity, a potential conflict of interest" again the notion of conflict of interest is too vague, interest of who? EPFL? The direction?

Art 14 al. 4: HR should ask the female professor.

Art 14a: no information about the dotation here, will this be included in the private law contract?

Art. 15a: while going through the various rules and lex, I found nothing about Adjunct Professors becoming Honorary Professors, which has always been the case.

Art. 25: we are all doing more hours than what is expected. Implementing this article will be negative for the eth domain and a nightmare for us and the administration.

-----

Art 6 General comments: The new formulation of this paragraph is in a very different spirit. While the initial paragraph was formulated in terms of that professors were allowed to engage in other professional activities, the new formulation is based on that professors must inform (and in case necessary ask permission) to perform activities. This type of change in the spirit of regulations are unfortunately present in many of the revisions. They convey a reduced level of trust of the ETH as employer towards professors as their employees.

para 1: This article is formulated much too broadly involving all aspects of life of Professors even outside of their working relationship. In some aspects it even requires additional disclosure of activities that professors are required to do based on article 4 of this same ordinance. For example “participation in SNSF, Innosuisse or Scientific committees” is part of the requirement to participate in academic self-management of article 4 para 5. In the old ordinance this was limited to “professional activities”. This focus on professional activities should be maintained.

Para 2b: The new regulation stipulates that Professors need to obtain prior approval “there is, by nature of the activity, a potential conflict of interest with the ETH or a significant reputational risk for the ETH, which is foreseeable or established”. Who decides if there is a potential conflict of interest or reputation risk, and on what basis? This uncertainty puts Professors in the uncomfortable situation that any activity they do might be considered by somebody a conflict of interest. In the old formulation it is described that “ *Permission is granted if there are no interests of the ETH that prevent it.*” This type of regulation for what requests must be granted is missing in the new regulation. Such regulation should be re-introduced in the new version, otherwise the Professor is at the sole mercy of the ETH president.

Art 6a para 2: This is very similar to paragraph 53b in PVO-ETH. Also there it states that the mere appearance of bias is sufficient for recusal. However, it is nowhere stated who decides that there is an “appearance” and based on what?

Art 13, para 2: What are the important causes for the immediate termination? How will this affect the protections in place that protect the employee (professor) against dismissal due to false accusations?

Art 14, para 4: The responsibility for requesting an extension should be with the HR department of the respective ETH. Female professors should be contacted in time to ask if they wish to continue until 65. The current formulation puts female professors at a disadvantage.

Art 15: The title honorary professor internationally means something different. Retired professors are generally referred to as Professors Emeritus. Why is this internationally accepted nomenclature not applied here?

Art 25: paras 3 and 4: This paragraph fundamentally changes the working relationship between professors and the ETH. While in the past the duty of professors to perform their lecturing and research duties (hence the old paragraph 26 regulating absences during the semester), it now regulates working weeks and vacation weeks. This changes the contract from being based on “delivering a certain performance” to the basis of “delivering a set number of hours worked”. This is in strong contradiction with article 4 which defines the duties to deliver certain outcomes and not a certain work time. ETH Professors used to have an all-in contract (like is customary in most European universities as well as in companies above a certain payscale), where there was no need to count work-weeks and vacation weeks, but also not overtime and other issues normally regulated in other types of employment contracts. This fundamental change in the employment relationship can not be unilaterally imposed by the employer. By the nature of the work, professors often have times of intense work efforts and many overtime hours (exam preparation and corrections, grant deadlines, massive number of consultations, business travel, etc). This is acceptable because in the current employment contract the professor could at her/his discretion decide over her/his time. With the new regulation, Professors have the same employment regulations as EPFL secretaries or technicians, who’s work circumstances are significantly different.

What will be the outcome of this change? Professors will need to start to report their hours like other EPFL employees, with their supervisor being responsible for checking that these hours are correct. Who will be the supervisor/line manager? The deans? The

provost? According to the chronos rules, validation of hours can not be delegated to assistants. Does that mean that the provost will personally validate all the chronos entries of all EPFL professors?

With the new regulations that entitle professors to 5 to 6 weeks of holiday (and in turn mandates them to be present all other times), professors must also be given the same labor protections as other employees (overtime pay/compensation, paternity leave, protection against excessive working hours, etc). Will vacation that can not be taken be paid out to professors? This is completely impractical, and is a severe reduction in the autonomy of professors. It is well known that EPFL professors work much more than 41.5h/week and do not take an equivalent number of weeks of vacation; this was compensated by the freedom to schedule their own working hours, as long as they fulfill their teaching and research duties set out in article 4. This new regulation removes this freedom and is therefore to the detriment of professors. If professors are forced to fulfill their duties within the 41.5 h/week (which is simply not possible) it will only lead to false declaration of work hours or a massive build up of overtime and subsequent vacation hours. That would not help anybody. I strongly request that the old regulation be kept.

-----

1. Ne serait-ce pas l'occasion de prendre en compte et de définir clairement le congé parental au delà du congé paternité. Un congé parental est-il possible pour un PATT (pour le père ou la mère) de 3 mois? de 6 mois? qui pourrait arrêter la tenure clock comme un congé maternité.

On parle beaucoup de féminisme au sein de l'EPFL, mais on oublie de dire que les hommes de l'EPFL peuvent soutenir les femmes en dehors de l'EPFL et en particulier leur épouse.

Le congé parental, pratiqué dans de nombreux autres pays, est une manière d'équilibrer les charges dans le couple et donc d'encourager toutes les carrières féminines.

2. Je suis fortement opposé aux dual careers appointments- qui créent un biais et une grande inéquité vis-à-vis des couples non académiques.

Ils manquent totalement de transparence et devraient être exclus à mon avis.

3. Enfin la "cause", dans "immediate termination for cause"

doit être impérativement définie. Les motifs de licenciement sans constitution d'une commission doivent être listés, et ce de manière très précise. En particulier, la situation des plaintes pour harcèlement doit être clarifiée dans ce contexte. Le niveau de

harcèlement menant au licenciement doit être défini et la procédure juridique menant à cette qualification pour harcèlement aussi.

Si la situation semble nécessiter une décision rapide, **seule la suspension devrait pouvoir être prononcée sans avis de la commission.**

Les universités de doivent en aucun cas céder à la pression de mettre en place des mécanismes de décisions unilatérales. Les avis collégiaux et les avis des pairs ne peuvent en aucun cas être bypassés.

-----

Attempt to abolish academic tenure

**Summary:** The seemingly minor revision of Art 13 reveals the attempt to both legally and practically abolish academic tenure.

**Background – Importance of academic tenure for EPFL:** The meteoric rise of EPFL in the international context has been connected to the introduction of organizational structures and procedures developed within successful US research universities. Most impactful is probably the imported tenure-track system aligned with the best international institutions. The notion that our tenure criteria are equivalent to the ones of leading institutions allowed us to become part of an elite 'club' of research institutions and makes it possible to hire the best minds both at the tenure-track and tenured faculty level. Without tenure, EPFL could not be seen as a viable alternative to top US institutions. Consequently, EPFL's success would not be possible without academic tenure. Within the international context, academic tenure has to be understood as equivalent to tenure granted at US institutions.

**Defining aspects of tenure:** Tenure is a secure employment of college professors that guarantees academic freedom. What tenure means and specific defining principles have been first formalized in the 1940 “*Statement of Principles on Academic Freedom and Tenure*” [1] formulated by the American Association of University Professors (AAUP) jointly with Association of American Colleges and Universities (AAC&U). Rules and recommendations have been updated and further specified in the the 1970 “*Statement on Procedural Standards in Faculty Dismissal Proceedings*” [2] and the “*Recommended Institutional Regulations on Academic Freedom and Tenure (Status 2018)*” [3]. Most leading institutions including the Ivy Leagues formally declare their adherence to these principles. Implementation specifics are regulated In each institution’s internal rules, such as for example Princeton University’s “*Princeton Faculty Rules and Procedures*” [4].

Regarding termination of tenured faculty, tenure implies two key principles

1. Termination only for a specific cause (specified in a concrete and complete list – e.g. [4] Chap IV.N.1)
2. The decision has to solely rest in the hands of peers (other professors) represented by an elected faculty committee.

**Violation of these key principles within the ETH domain:** The suggested rules fundamentally violate both core principles and thereby de-facto abolish tenure.

Re (1): The formulation states 'for cause' in the legal sense of 'for a cause' as opposed to no cause. However, there is no specified list and it is left to the governing body to determine if some issue constitutes an important cause. This should be compared to a list aligned with the principles underlying tenure such as Princeton's regulation:

*"...wishes to reaffirm its long-standing policy of upholding academic freedom and security of academic tenure, and to declare that: A member of the Faculty maybe suspended, dismissed, or be subjected to reduction of salary or other workplace restrictions for cause only on the basis of (a) substantial and manifest incompetence, (b) substantial and manifest neglect of duty, or (c) substantial and material misrepresentations in dealings with University officials, including during the appointment process, (d) conduct which is shown to violate the University rules and procedures applicable to a member of the Faculty, or (e) conduct which is shown to substantially impair the individual's performance of the full range of his or her responsibilities as a member of the Faculty" (from [4] Chap IV.N.1)*

Re (2): More important is that the sovereign of termination decisions are not the peers but the direction and ETH board. While a faculty committee can be convened, it is appointed by the direction and - most importantly - has no decision power but only advises. In fundamental opposition to the concept of tenure, the decision is NOT in the hands of peers but the presidency and the ETH council. A famous recent case demonstrated that indeed tenured professors can be terminated against the explicit recommendation of the faculty committee. This is already the situation today. With the suggested revision, tenure is even further undermined as the aim is to give the direction / ETH council the right to not even convene an advising faculty committee. The explanation of the ETH board regarding revision of Art. 13, para. 2 states

*Para. 2 specifies that the committee in charge of issuing a recommendation regarding the merits of termination of the working relationship with a professor by the ETH Board should only be set up in the event of ordinary termination and not in case of immediate termination for important cause.*

Tenure requires that termination is only (!) possible for an important cause and in this case requires the faculty committee to take the decision. <sup>1</sup>The principles of tenure forbid that there is any situation where faculty committees are not involved, and a termination without specific cause (defined in a concrete and complete list) must be impossible. Consequently, the modifications reveal that both defining principles underlying tenure are violated within the ETH domain rules. Formally, EPFL does not have tenure and therefore also no tenure-track.

**Significance of the suggested modifications and required action:** It is not sufficient to reject the proposed modification. Already today, legally at EPFL, academic tenure has been redefined as a CDI. However, the assumption always was that this issue is an artefact stemming from introducing tenure-track within the framework of Swiss work contracts and considering tenured faculty as employees. It has been assumed that despite absence of a proper legal framework for tenure, institutions would practically uphold international standards ensuring academic freedom and tenure. The suggested modification (and recent cases in Zurich) however demonstrate that the direction & governing body indeed want to use their power and have the option of terminating tenured professors even without the noise that might be generated by overruling the nonbinding (!) recommendation of a non-elected but appointed committee. EPFL, and with it the ETH domain, are thus at a crossroads: Either a proper legal framework for tenure will be established or we can no longer claim that tenure and tenure-track exist. Given the current status where legally tenure at EPFL is redefined as having a standard CDI, any opening of a PATT position with which we compete with our US peer institutions is at least misleading and ethically fraudulent. We give the impression that we provide the same framework as in other institutions, but effectively there is no tenure to be granted.

We should thus push for a legal framework formalizing tenure to be developed. In addition I propose to define precise conditions under which tenured faculty can be terminated and make those binding. These conditions may be developed within a working group involving professors from both EPFL and ETHZ, provosts and ETH council members, and – if possible – conditions should be ratified by the vote of all tenured and tenure-track faculty members.

[1]

<https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

[2]

<https://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings>

[3]

<https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>

[4]<https://dof.princeton.edu/sites/dof/files/Princeton%20Faculty%20Rules%20and%20Procedures%20-%202018-11-21.pdf>

-----

The revision requires women professors to request an extension for this retirement age, whereas this request is automatically granted to male professors. The revision should instead consider an arrangement where the women professors are automatically granted the extension, just like their male peers, and instead contacted by the administration if they want to opt out. This will promote a more equal treatment of the professors.

Art. 6 stipulates that all professors must notify the President of all ancillary activities outside their employment performed under their own name, for their own account and under their own responsibility. As written, this seems to suggest that even activities concerning personal matters that may not even be relevant to their activities at the institution/employment must be reported, which would be extremely invasive, if not a violation, of their personal rights.

Art. 6, 2b indicates that activities that could lead to a conflict of interest or reputational risk of the school must be approved. So long as there is no exhaustive list available to specify which activities this includes, nor even a list of where the interest of the institution lies on every matter (or who even decides where these interests lie), such a rule is would be impossible to implement. This liability must lie on the shoulder of the institution to define, rather than on the shoulders of professors who must at best speculate on the institution's interests. If the liability lies on the professors' speculation, then it must be acknowledged that such an assessment can only be done in the limits of the professor's understanding and own interpretation.

Art. a states that professors should perform tasks assigned to them regardless of their personal interests and they are responsible for avoiding conflicts between their personal interests and those of the two ETHs. As mentioned above, the interests of the schools is nowhere indicated and therefore not possible for a professor to assess.

Female professors should be automatically contacted by the president for retirement, rather than initiating the procedure.

There needs to be rules for transparency on extensions granted for "remarkable performance", particularly in light of growing concerns of unconscious bias.

Art 25 para 3 and 4 indicates that vacations older than 12 months that have not been taken cannot be compensated in cash. This rule selectively deprives professors of a right that is otherwise granted to post docs and students, who are otherwise able to request missed vacation days in cash at the end of their termination. Professors were informed that any such restrictions on missed vacations for their employees were prohibited, and they have been consequently forced to pay unexpected, sometimes substantial, costs from their operating budgets at the conclusion of an employee's contract without reimbursement from the administration. Whereas this rule protects the Direction from incurring these costs, the professors, which have substantially lower budgets than the Direction, are not provided any protection and are instead faced with restrictions on their rights to decide to take vacation.