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*Comparing Constitutional
Adjudication*



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CONSTITUTIONAL ADJUDICATION IN EDUCATION LAW:
A COMPARATIVE APPROACH WITHIN THE COUNCIL OF EUROPE

The status of University Students in Polish Constitutional Case-Law

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1. Introduction

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Although over 100 cases brought before the Constitutional Court of Poland since 1985 concerned the right to education *sensu largo*, the Constitutional Court of Poland has dealt with the status of university students in only a few cases, relating to the constitutional guarantees of the right to education¹, namely the principle of universal and equal access to education, the principle of gratuitousness of education in public universities and the principle of public authorities' support for university students. After a brief presentation of how the Constitutional Court understands those guarantees, examples of their application shall be given, along with other significant cases relating to the status of university students.

2. Constitutional guarantees of the right to education.

The Constitutional Court of Poland does not consider the right to education as a privilege, but rather as a necessary condition of the development of society and at the same time a necessary condition of participation of the individual in social life. Universal education has become the most important engine of economic and civilizational growth in contemporary world. The right to education which finds its corollary in the appropriate duties of public authorities, in essence constitutes a guarantee of the availability and universality of education, as opposed to the free of charge nature thereof (judgment of 8 November 2000, Ref. No. SK 18/99 [Tuition Fees for Studies]).

¹ Cf. L. Garlicki: *Komentarz do art. 70 Konstytucji RP*, [in:] L. Garlicki (red.): *Konstytucja RP. Komentarz. Tom III*. Kancelaria Sejmu, Warszawa 2003, p. 5.

The guarantees of the right to education (that is to say, the principle of universal and equal access to education, the principle of gratuitousness of education and the principle of public authorities' support for students) should be interpreted in such a way as to ensure their mutual conformity, and account must be taken of their secondary character *vis-à-vis* the constitutional right to education. Consequently, the said guarantees are not absolute and unrestricted. An interpretation leading to a conclusion that they enjoy a primary character would inevitably lead to a collision with other constitutional guarantees, linked with the obligation of the public authorities to create adequate conditions to satisfy the demand for access to higher education and an infringement of the right to education would follow (judgment of 8 November 2000, Ref. No. SK 18/99 [Tuition Fees for Studies]). The instrumental character of the said guarantees has been reiterated recently (judgment of 5 June 2014, Ref. No. K 35/11 [Tuition Fee for a Second Degree in a Public University]).

3. The status of university students in Polish constitutional case-law.

Despite the ambitious wording of the bold promises made by the constitutional lawmaker, the abovementioned guarantees of the right to education granted to university students by the 1997 Constitution proved to be only relatively effective, as exemplified in the following jurisprudence of the Constitutional Court.

3.1. The right to judicial relief.

A good example of a ruling which re-established the constitutional standard – in this case, in the context of the constitutional right to judicial relief under Article 45(1) of

the Constitution, was the judgment concerning judicial control of decisions issued in disciplinary proceedings initiated against a university student. The Constitutional Court quashed intertemporal statutory norms which postponed judicial control of certain categories of disciplinary rulings after the day of entry into force of the 1997 Constitution. It is particularly noteworthy that this regulation also infringed on the principle of equality before the law, since it made admissibility of judicial control of disciplinary rulings dependent on whether cassatory appeal was lodged in a given case, granting legal standing in cassatory proceedings exclusively to the authorities conducting disciplinary proceedings against a student (judgment of 10 May 2004, Ref. No. SK 39/03 [University Disciplinary Proceedings]).

3.2. The principle of gratuitousness.

The acceptance of assigning a secondary and instrumental character to the constitutional guarantees of the right to education was seen by many as a particular deception in case of the principle of gratuitousness of education in public schools under Article 70(2) first sentence of the Constitution. The Constitutional Court argued that the introduction of tuition fees charged by public universities in case of the so-called external and evening studies had the objective of ensuring access to education to the greatest number of students, provided that the public university does not transform itself into a commercial institution and that each category of students receives an equal standard and an equal diploma; under no circumstances may fees apply to that sphere of didactic activities of a public university which is fully covered by public funds. Quantitatively, education without payment in public universities must

remain the dominant form of education, and qualitatively, tuition fees may not be introduced in all types of studies, albeit in the form of an evenly distributed quota. Depriving young people who did not pass entry examinations to study full-time could lead, according to the Court, to a lowering of the net scholarisation coefficient to its pre-1989 low level, which ranked among the lowest in Europe, and consequently to an infringement of the right to education and to an infringement of the principle of universal access to education (judgment of 8 November 2000, Ref. No. SK 18/99 [Tuition Fees for Studies]), always provided that even students of evening studies must fulfil some sort of entry requirements.

Since the Constitutional Court quashed statutory norms permitting public universities to charge tuition fees from full-time students enrolled simultaneously in two or more fields of study, except for the top 10% of students (judgment of 5 June 2014, Ref. No. K 35/11 [Tuition Fee for a Second Degree in a Public University]), it is now easier to trace the margin of appreciation of the ordinary legislator in this domain. Although the higher-level norm for the review was the principle of correct legislation², Article 70 of the Constitution being applied only in conjunction with the principle of proportionality, nevertheless the ruling did include abstract arguments relating to constitutional guarantees of the right to education. The Court fully accepted the general conclusions

² The principle of correct legislation finds its normative basis in Article 2 of the Constitution, according to which the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. The said principle is treated by the Constitutional Court as an independent higher-level norm in constitutional review proceedings, as it includes a set of indications which must be respected by the legislator while taking legislative action, otherwise the enacted norm is considered unconstitutional. Those indications include, *inter alia*, the principle of protection of confidence (*Vertrauensschutz*), the principle of protection of acquired rights, the principle of adequate *vacatio legis* or the general prohibition of retroactivity. Cf. S. Wronkowska: *Zasady przyzwoitej legislacji w orzecznictwie Trybunału Konstytucyjnego*, [in:] K. Budziło, M. Zubik (red.): *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*. Wydawnictwa Trybunału Konstytucyjnego, Warszawa 2006, pp. 671-693 (671-672).

reached in the earlier case on admissibility of charging tuition fees (judgment of 8 November 2000, Ref. No. SK 18/99 [Tuition Fees for Studies]), with the important reservation that the principle of gratuitousness applies irrespectively from whether the chosen field of study at a public university is considered “first” or “second”, etc. The legislator is constitutionally prohibited to introduce tuition fees for full-time studies at public universities, with the exception for above-standard services (such as studies in a foreign language), with the exception for supplementary services (such as extracurricular classes), as well as with the exception for fees attributable to the student due to his or her fault. The introduction of the fees does not exclude generating a certain profit by the public university, although it must not provide services on a commercial basis. Consequently, the margin of appreciation of the legislator is relatively wide, as one might imagine situations, where tuition fees for full-time studies at public universities are charged in a constitutionally admissible way.

Catching up with the West is a national sport in Poland, but in the case of higher education, the official statistics blur the quality of didactics and, above all, research. It is true that in 2011 the net scholarisation coefficient was astonishingly high, reaching 40,6% compared with only 9,8% in 1990³. Unfortunately, the nation’s best university was placed only in the 301-400 interval of the Shanghai 2013 ranking list⁴, and of the

³ Ministry of Science and Higher Education: *Higher Education in Poland 2013*, p. 5, www.nauka.gov.pl/g2/oryginal/2013_07/0695136d37bd577c8ab03acc5c59a1f6.pdf (last opened on 2 October 2014).

⁴ Centre for World-Class Universities, Shanghai Jiao Tong University: *Academic Ranking of World Universities 2013*, www.shanghairanking.com/ARWU2013.html (last opened on 2 October 2014).

Times Higher Education World University Ranking list 2013-2014⁵. Concerning the constitutional, qualitative criterion of admissibility of charging tuition fees by public universities, it should be noted furthermore that in case of the best Faculty of Law in Poland⁶, namely the Faculty of Law and Administration of the University of Warsaw, which still is a public university, in 2013 only 1992 full-time students were enrolled, compared with 2695 students of law enrolled in external and evening studies⁷.

3.3. The principle of public authorities' support.

Under communism, the People's Republic of Poland, as well as other states of the so called "popular democracy" introduced class-based affirmative action schemes⁸, consisting of granting extra points in the university recruitment process of working class candidates (in Polish: *punkty za pochodzenie*). There is hardly any affirmative action of that kind in Polish universities today⁹, and maybe that is why unlike many other states, there were no big constitutional disputes in the context of the principle of public authorities' assistance to students under Article 70(4) second sentence of the Constitution. The Court only stated in passing that the fulfilment of the constitutional

⁵ Times Higher Education: *World University Rankings 2013-2014*, www.timeshighereducation.co.uk/world-university-rankings/2013-14/world-ranking/range/301-350 (last opened on 2 October 2014).

⁶ Cf. J. Ojczyk: *Zwyciężył Uniwersytet Warszawski*. Rzeczpospolita, 17 June 2013, prawo.rp.pl/artukul/1020289.html.

⁷ www.bss.uw.edu.pl/aktualnosci/pka2013.pdf (last opened on 2 October 2014).

⁸ Cf. I. Białecki: *Nierówności edukacyjne w PRL i III RP*. Res Publica Nova No. 11/2002, pp. 49-53.

⁹ Even today, under § 3(3) of the Warsaw School of Economics Rules of Admission, the said School's Senate may decide, in a given academic year, to allow the Rector, upon a motion of the Appeals Board, to admit a candidate who did not meet the entry requirements, but was admitted to the Student Labour Corps, akson.sgh.waw.pl/gazeta/other/regulamin.pdf (last opened on 2 October 2014). However, the practice of granting extra points in recruitment proceedings to students originating from miners' families by the Cracow Academy of Mines and Metallurgy was abolished by the resolution of the said Academy's Senate of 26 January 2005, No. 7/2005, amending the first annex to the Senate's resolution of 25 February 2004, No. 52/2004, www.agh.edu.pl (last opened on 2 October 2014).

obligation of public authorities to provide students with financial and organisational support may be ensured by a variety of legal institutions, including student loans and credits. Those institutions are supposed to serve the educational policy of the state in the domain of material support for students, aiming at increasing accessibility to education in higher education institutions (judgment of 14 June 2005, Ref. No. P 18/03 [Administrative Procedure for Remission of Student Credits]).

3.4. Constitutional protection of work.

The understanding of the status of third cycle university students is crucial to a thorough understanding of the formation and reproduction of intellectual elites in Poland. Whereas in certain countries, such as Italy, Ph. D. candidates are not (or at least were not in the past) required to teach as a rule, in other countries, such as the United States of America, whenever Ph. D. candidates are expected to serve as Teaching Assistants for a certain period of time of their residence at the Faculty¹⁰, they receive salaries and are thus considered “hired”.

In Poland, the relation connecting a higher education institution and a Ph. D. candidate has allegedly particular features and is not identical to an employment relation. What is most important, according to the Constitutional Court, the activities pursued by a Ph. D. candidate as part of his or her programme of studies, including the abovementioned “gratuitous teaching activities”, do not constitute work for the purpose of applying the constitutional guarantees concerning remuneration for work, even when these

¹⁰ The Graduate Programme of the Department of Linguistics and Philosophy of the Massachusetts Institute of Technology requires all students to serve as TAs during two semesters of their residence, web.mit.edu/linguistics/graduate/requirements/teaching.html (last opened on 2 October 2014).

activities do not differ from those performed by other persons, within a labour relationship and in exchange for remuneration (judgment of 25 April 2005, Ref. No. SK 51/03 [Gratuitous Teaching Activities of Doctoral Students]). According to the Court, Ph. D. candidates pursue doctoral studies of their own will and initiative and the obligation to perform “gratuitous teaching activities” is supposed to prepare them to conduct teaching activities in future professional life¹¹.

In 2005, when this decision was issued, Ph. D. candidates were required to perform “gratuitous teaching activities” for 120 hours. Today, under Article 197(3) of the Higher Education Act 2005¹², the maximum number of hours has been lowered to 90, but it is not excluded that certain Ph. D. candidates are forced to perform other gratuitous activities in addition to teaching.

In 2013, the number of enrolled students at the Faculty of Law and Administration of the University of Warsaw taken alone, excluding Ph. D. candidates, was 5507¹³. Each year the Faculty recruits 12 full-time Ph. D. candidates, only 6 of which are offered a non-automatically renewable scholarship in the minimal amount of 1347 zł¹⁴, that is approximately 325 euro per month in 2014, which is significantly lower than the

¹¹ One should hope that the same conclusion would not have been reached in the case of a hypothetical obligation of naval engineering students to weld tankers without a salary.

¹² Act of 27 July 2005, Law on Higher Education, Dz. U. – Journal of Laws of 2005, No. 164, item 1365, as amended, available in English at the website of the Ministry of Science and Higher Education of the Republic of Poland, www.nauka.gov.pl/g2/oryginal/2013_05/ff45b4be7d6682f90d4755ddc6373a70.pdf (last opened on 2 October 2014).

¹³ Warsaw University Office for Students’ Affairs: *Information for the University Accreditation Commission 2013*, p. 45 (97), www.bss.uw.edu.pl/aktualnosci/pka2013.pdf (last opened on 2 October 2014).

¹⁴ University of Warsaw Ph. D. and Postgraduate Studies Bureau: *Ph. D. Scholarships*, www.studiadoktoranckie.uw.edu.pl/pl/doktoranckie/stypendia_doktoranckie/stypendia_doktoranckie (last opened on 2 October 2014).

applicable statutory minimum wage in Poland (approximately 406 euro¹⁵ per month in 2014). The reluctance to pay full-time Ph. D. candidates at least the statutory minimum wage is striking if one takes into account the fact that in 2013 the very same University of Warsaw made a net profit of 15 mln zł (over 3,5 mln euro)¹⁶. It is thus not surprising that most Ph. D. candidates work alongside their studies.

The disappearance, so much deplored by French sociologists¹⁷, of the figure of “bursar”, as traditionally contrasted with the figure of “heir” from the educational landscape, is symptomatic of the erosion of the principle of meritocracy, one of the fundamentals of republicanism.

¹⁵ Regulation of the Council of Ministers of 11 September 2013 on the Minimum Remuneration for Work, Dz. U. – Journal of Laws of 2013, item 1074, isap.sejm.gov.pl/DetailsServlet?id=WDU20130001074 (last opened on 2 October 2014).

¹⁶ Cf. U. Mirowska-Łoskot: *Uniwersytety wychodzą na prostą. Kosztem cięć*. Dziennik Gazeta Prawna, 22 July 2014, serwisy.gazetaprawna.pl/edukacja/artykuly/811378,uniwersytety-wychodza-na-prosta-kosztem-ciec.html (last opened on 2 October 2014).

¹⁷ P. Bourdieu, J.-C. Passeron: *Les héritiers. Les étudiants et la culture*. Éditions de Minuit, Paris 1964; P. Bourdieu: *La Noblesse d'État. Grandes écoles et esprit de corps*. Éditions de Minuit « Le sens commun », Paris 1989.

4. Conclusion

Scrutinising the constitutionality of legal norms related to the right to education is daily bread for Constitutional Courts (or Equivalent Bodies) of Council of Europe Member States. The pan-European phenomenon of “scholar democratisation” makes this task more and more complex, as the Courts are conscious that even developed economies do not possess enough resources to guarantee the right to a free of charge higher education unconditionally, and that an uncontrolled access to higher education bears the risk of lowering the standard of teaching and research.

I personally find it rather odd that the current approach to “scholar democratisation” is criticised both by a professor of physics who is a moderate conservative¹⁸, as well as by a professor of sociology specialising in field research of the French working class, who publishes extensively in *Le Monde Diplomatique*¹⁹.

The example of Poland shows that unless a bold declaration of gratuitousness of higher education is accompanied by a comprehensive support system, operating

¹⁸ Cf. M. Heller: *Śmierć uniwersytetów* (the death of universities). Tygodnik Powszechny nr 28 (3287), 8 July 2012, tygodnik.onet.pl/cywilizacja/smierc-uniwersytetow/ck4vt (last opened on 2 October 2014). (A certain dictator, wanting to improve the level of education in the state, granted a doctorate to all citizens. In our case, after each reform of the education system we keep receiving first year students who are worse and worse prepared to study. Not despite the reforms, but because of them – translated from Polish by the author).

¹⁹ Cf. S. Beaud: *80 % au bac... et après ? Les enfants de la démocratisation scolaire*. La Découverte « Textes à l'appui / Enquêtes de terrain », Paris 2002, pp. 23-25. *C'est en particulier dans les établissements scolaires fréquentés par les élèves de classes populaires que l'espérance de vie scolaire s'est mécaniquement allongée et que les rites de passage de la carrière scolaire (conseils de classe, entrée en seconde) ont perdu de leur force de consécration. Pour les élèves « moyens » (et qui se définissent comme tels), la voie est libre pour une routinisation de leurs carrières scolaires qui, dorénavant, se déroulent sans accroc et sans événements marquants. Processus qui se rejoue au lycée, une fois levé le petit obstacle de la seconde, comme l'illustre de manière symptomatique la suppression du redoublement en classe de première. C'est ce que les enseignants appellent le « passade automatique » en classe de terminale, qui, de fait, les prive de tout pouvoir de sanction et d'une forme d'incitation au travail scolaire.*

nationwide at the earliest possible stage of education, and a fair and meritocratic admissions system, making the candidate's chance of success independent of his or her income, it might lead to nothing more than state subsidies for the rich and to low quality and paid education for the poor.