

SELF-GOVERNANCE, AUTONOMY, AND FREEDOM OF SCIENCE

On how the norms arising from the provisions of Poland's Constitution on the freedom of scientific research and the publication of its results, and on the autonomy of higher education institutions, compare with the legal provisions currently in force, in particular those of the Act of 20 July 2018 – the Higher Education and Science Law



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Article 73 of Poland's Constitution guarantees everyone the freedom to pursue scientific research and to publish its results. Similarly worded provisions can be found in many other constitutions. The most comprehensive such provisions can be found in the Constitution of Portugal – it not only declares the freedom of scientific creation, which includes the right to create, produce, and disseminate scientific works along with the statutory protection of copyright, but also requires the state to promote and support scientific research and technological innovation in such a way as to ensure their freedom and autonomy and to enable cooperation between scientific institutions and businesses.

Provisions corresponding to Article 73 of Poland's Constitution can be found in Article 13 of the Charter of Fundamental Rights of the European Union, which is worded in a very general way: "scientific research shall be free of constraint. Academic freedom shall be respected." Here, academic freedom also comprises the traditional autonomy of universities. Although seldom declared in constitutions, this autonomy of higher education institutions is enshrined in Article 70(5) of the Constitution of the Republic of Poland – the first Polish constitution to address this subject.

In the Charter of Fundamental Rights, academic freedom is understood in the same way as it is in a certain international instrument of "soft law" relevant from this point of view – namely the Recommendation concerning the Status of Higher-Education Teaching Personnel, adopted in 1997 by the UNESCO General Conference. In it, academic freedom is defined as the right of higher-education teachers, "without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies." The institutional form of academic freedom identified in the recommendation is called institutional autonomy and defined as "that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities."

Article 73 of the Polish Constitution mentions the freedom of scientific research. The Polish Higher Education and Science Law does not contain a regular definition of scientific research, let alone science. Likewise, no such definitions were to be found in previous laws, including an act that included the very word "science" in its title – the Act on the Principles for Financing Science.

Object of the freedom being exercised: scientific research and science

In keeping with the latter regulation, however, definitions by division were adopted in Article 4 of the Higher Education and Science Law (definitions of this type were once typical in both law and jurisprudence, but only until the 17th century): scientific activity is defined as comprising scientific research, development, and – odd as this may appear – artistic creation. Scientific research, in turn, comprises basic research and applied research, with the common element of their definitions being work aimed at acquiring new knowledge. The preamble to the Higher Education and Science Law begins with a reference to the pursuit of truth and the passing on of knowledge from generation to generation. This indicates that science is linked to the search for truth – irrespective of how it is understood, and this understanding, as we know, may vary in science studies (unless we agree on the existence of something that may be called "safe truth").

For reasons related to the intrinsic complexity of science and related differences in the understanding of truth, defining science or scientific research for the purposes of law is difficult, but attempts to formulate such definitions have nonetheless been made. One such attempt was made in the aforementioned UNESCO recommendation, where research is defined as "original scientific, technological and engineering,



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Pursuit of science also involves publishing research results.

Photo shows Dr. Marta Pachocka delivering a paper on the direction of the EU's migration policy at the conference "Poland in Tomorrow's Europe" in November 2021

medical, cultural, social and human science or educational research which implies careful, critical, disciplined inquiry, varying in technique and method according to the nature and conditions of the problems identified, directed towards the clarification and/or resolution of the problems, and when within an institutional framework, supported by an appropriate infrastructure." In this definition, what distinguishes science from other manifestations of knowledge is the element of relevant methodology together with the ethos of the researcher, expressed in particular in the norms identified by the sociologist Robert Merton and referred to as CUDOS (in its current form, short for communalism, universalism, disinterestedness, originality, and skepticism). Emphasizing the importance of the ethos is likewise important for reasons related to a certain special feature of science (or at least for "true" science, as we might be tempted to say) that has been pointed out by the two-time winner of the Nobel Prize Linus Pauling: "Science is the search for the truth—it is not a game in which one tries to beat his opponent, to do harm to others." It should be added here that the Recommendation on Science and Scientific Researchers, adopted by the UNESCO

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General Conference in 2017, also contains a definition of science, and a rather complicated one at that.

All difficulties with the formulation of an operational definition of scientific research, not to mention science (in the sociological, including institutional, as well as methodological sense), may not diminish the importance of what constitutes the point of departure for this article: without the freedom of scientific research and the freedom of scientific expression, including the publication of research results, and without an institutional guarantee in the form of the autonomy of higher education institutions, science would cease to be science, and its pursuit would become a fiction obscuring the fact of pursuing activity of a completely different nature, be it journalistic, moralistic, religious, propagandistic, or openly political action. At the same time, researchers not only can, but also should, feel obliged to exercise the freedom of scientific expression: on the one hand, by publicly presenting the results of their research, thus subjecting



them to scientific debate, and – when they consider this necessary – by stating still unverified hypotheses that they are working on, but with the clear stipulation that these are hypotheses, not research findings, and, on the other hand, by participating in the debate and speaking out in accordance with their scientific competence and the standards of research ethics.

However, the freedom of scientific research (or, more broadly, the freedom of science or academic freedom) pertains to the sphere of science and academic teaching, and not other activities, including the activity of research personnel. All this might seem obvious, but the recent introduction into legislation of what is called the "Academic Freedom Package," essentially intended to give legal protection in Poland to non-scientific claims, demand that emphasis be placed on the substantively limited scope of the freedoms being discussed. Although they are a specific expression of the general freedom to express opinions and disseminate information (Article 54(1) of the Polish Constitution), it is no coincidence that they are the subject of a separate constitutional norm, and – having a specific, qualified form – they cannot be equated in their scope with the general freedom defined as the freedom of expression in the Charter of Fundamental Rights of the European Union (Article 11), and as the freedom of speech in everyday language in keeping with specific solutions in place in the United States.

Constraints placed on the freedom of scientific research

The period from the end of antiquity until the Enlightenment was characterized by the assumption of a general prohibition against the study of three particularly "high" spheres, namely the cosmic, religious, and political sphere (*arcana naturae, Dei, and imperii*,

respectively), or at least a principle of restraint in the desire to know them. Since the Enlightenment-age return to the ancient slogan *sapere aude* (Latin for “dare to know”), limitations on the subject and methods of scientific research have been considered exceptions, something that requires the existence of a special justification and by the same token a legal basis (except for totalitarian regimes). This is because the freedoms set forth in Article 73 of the Polish Constitution are not absolute in their nature, and the same holds true for other freedoms and rights declared in the Constitution, except for the right to personal dignity.

The freedoms being discussed here may be restricted in Poland, but only strictly within the limits set forth in the Polish Constitution. These are generally defined in Article 31(3): constitutional freedoms and rights can only be limited by statutory laws, enacted by parliament (or by an international agreement ratified, with prior consent expressed in such statutory law). If so, then this may not be done in a lower-level act of law issued based on statute, in particular in a regulation. Also, such limitations may only be imposed when they are necessary in a democratic state (which is a reference to the principle of proportionality) for the protection of its security or public order, or for the protection of the environment, health, and public morality, or for the freedoms and rights of others without violating the essence of those freedoms and rights. However, we should also remember Article 39 of the Constitution, which stipulates that no one may be subjected to scientific experimentation (not only in medicine and biology, but also in the humanities

and social sciences) without his or her freely given consent. Consequently, permissible constitutional restrictions may result in the existence of “forbidden knowledge,” for example the penalization of Holocaust denial and prohibitions against experiments on humans and, increasingly, *in vivo* experiments on animals (the 3Rs Principle, where the Rs stand for replacement, reduction, and refinement – concerning the use of live animals for scientific and educational purposes and the marketing authorization for such products as medicines and cosmetics).

“Self-forbidden knowledge,” resulting from self-regulation as an expression of the self-governance of the scientific community, may have a different nature, but not necessarily different effects. An important example of self-regulation is the Code of Ethics for Researchers, developed by the Science Ethics Commission and adopted in its current wording by the General Assembly of the Polish Academy of Sciences on 25 June 2020. Chapter 3 of the Code, which is entitled *Good practices in research*, includes the following provision: “All research in natural and engineering sciences should be preceded by an analysis of the associated risks and the impact that the research results may have on society and the environment.”

Formal restrictions on the freedoms being discussed here may be accompanied by various factual restrictions. Those resulting from direct external interventions, in particular the political ones, especially those that include elements of censorship, can be identified and therefore examined for their compatibility with law. However, it is more difficult to assess the



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legal consequences of the systemic conditions adopted in the Higher Education and Science Law (in keeping with the legislation from 2011). The principles behind them are not an exception – despite growing criticism, they could be found, and to a large extent still can be found, in other countries.

What is meant here is a new model of a higher education institution imported from the United States, where such an institution is traditionally the main place of scientific creation and referred to as “entrepreneurial university.” It is characterized by what was previously unknown in continental Europe for reasons related to the Humboldtian tradition of public funding of “universities of culture,” namely diversification of the sources of funding along with a new model of the allocation of public funds with a focus on external funding (including from non-public sources), as well as the resulting rivalry both among and

Bologna in 1988 by the European Conference of Rectors (which states that: “The university is an autonomous institution at the heart of societies differently organised because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power”); the Erfurt Declaration on University Autonomy (*Towards the Responsible University of the Twenty-first Century*), adopted at the Erfurt University Colloquium in 1996; the Lisbon Declaration (*Europe’s Universities beyond 2010: Diversity with a Common Purpose*), adopted in 2007 by the European University Association; and Recommendation 1792 (2006): Academic freedom and university autonomy, adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006.

Once we move on to the sources of Polish law, we must note that the word “autonomy,” used in Article 70(5) of the Constitution with respect to higher education institutions, is also used in the Constitution only in Article 25(3), in the general definition of the status of churches and religious organizations (the relations between them and the state “shall be based on the principle of respect for their autonomy and their mutual independence, each in its own scope”). Irrespective of the fact that this understanding of autonomy may be somewhat different, it is different from the self-governing nature (*samodzielność*) of local government units ensured in Article 165(2) of the Constitution – autonomy is something more than self-governing nature. Such understanding of the autonomy of higher education institutions also follows from the decisions of the Constitutional Tribunal and administrative courts, which do not apply a literal interpretation of the phrase on ensuring autonomy “in accordance with the principles set forth in statute,” which might have provided the lawmakers with greater leeway. Based on the recognition of the constitutional right of a higher education institution to autonomy, understood as an institutional guarantee of individual freedom of science and education vested in higher education teaching staff, limitations on autonomy are treated as exceptions from the rule and must be grounded upon a legal and factual basis.

At the same time, autonomy may be understood in a narrower way and mean, in accordance with the etymology of the term, the right to regulate matters important for higher education institutions in their internal regulations, starting with bylaws, self-governance in the development of internal structures (described using the term “organizational autonomy”) and autonomy in the recruitment, compensation, and promotion of staff, in particular higher-education teaching academic staff (staff autonomy). Autonomy can also be understood more broadly, including

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within universities and the search for more practical and economically beneficial directions of research and education. The freedom of scientific research largely boils down to the freedom of seeking sources of funding research, as opposed to the traditional choice of its subject and methodology. Here, it is necessary to add globalization, whose impacts on the possibility of publishing research results have been more negative than positive (and this is, again, mostly a matter of money), and, in the context of globalization, the purely commercial operations of primary scientific publishers.

Autonomy of higher education institutions, self-governance in science

The more general processes indicated earlier include changes in the understanding and practical functioning of the autonomy of higher education institutions. The absence of any mention of this autonomy in the acts of European and “hard” international law may be seen as striking. Nonetheless, this autonomy is declared in various documents that can be classified as “soft” law (to a large extent special provisions, created within the framework of community self-regulation). Examples include the Great Charter of European Universities (*Magna Charta Universitatum*), adopted in



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The autonomy of higher education institutions includes the right to self-governance in recruitment and the freedom to determine programs of study and research

the freedom to harness available financial resources and assets (financial autonomy) and the freedom to determine programs of study and research (academic autonomy). Another important proposed classification is based on the division of autonomy into external autonomy (in relations with public authorities and other entities) and internal autonomy (serving directly the exercise of the freedom of science and education within the structure of a higher education institution).

The aforementioned change in how the autonomy of a higher education institution is understood and how it functions in practice results from the shift away from the model of a “Humboldtian university” to an “entrepreneurial university.” While statutory, organizational, staff and, above all, financial autonomy are as a rule expanded, the importance of academic autonomy is diminished, chiefly in the context of research, as mentioned earlier in connection with the factual restrictions imposed on the freedom of science.

These changes also pertain to statutory and organizational autonomy, for reasons related to the statutory preference of the managerial style of the administration of the affairs of a higher education institution at the expense of traditional university self-governance. The preamble to the Higher Education and Science Law mentions the autonomy of the academic community (which is not the same as the autonomy of higher education institutions), but this aspect of autonomy, which can be reduced to special academic self-governance, is not explained explicitly further in the law. Likewise, it contains no provision on the self-governing academic community, known from the Higher Education Act of 1990. Once we examine its content, it will not be easy for us to conclude that the Higher Education and Science Law implements two demands of the UNESCO Recommendation of 1997 mentioned earlier, namely internal self-governance of a higher education institution based on the majority participation of representatives of academic staff in its bodies, and the principle of collegial decision-making.

In 2013, Poland’s Constitutional Tribunal stated that autonomy is vested in higher education institutions, not in the higher education system, and therefore it cannot be invoked in attempts to define the legal situation of the Polish Accreditation Committee, a body responsible for evaluating the quality of education in higher education institutions. At the same time, it is difficult to see the Committee, which is not elected by the community, as an expression of academic self-governance, let alone the self-governance of the entire scholarly community. However, the Higher Education and Science Law includes a category of institutions representing the higher education community vested with the powers of consultancy and initiative: the General Council of Higher Education and Science, elected in a complicated system of representation, the three essentially self-governing Conferences of Rectors (of academic schools, of public higher vocational education institutions, and of vocational schools), and national representations of councils of students and PhD students. Another representative body is the Central Council of Research Institutes. The Council for Scientific Excellence, which is competent for individual cases of scientific promotion, has all the characteristics of a special self-governing body: electability and decision-making powers. Needless to say, it is impossible to talk about self-governance of science in Poland without mentioning the Polish Academy of Sciences.

The scope of this article does not include the question of the extent to which the structure of self-governance of higher education and science designed in this way corresponds, especially in the current situation of the growing statist and centralist tendencies, to the actual impact of its components on public decisions related to science and therefore affects the possibility of exercising the freedom of scientific research and the publication of its results, as guaranteed by the Constitution. I must restrict myself to the charitably formulated statement: this impact is small in scale. ■