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# Shaping the higher education system in Poland by way of executive and internal acts – the permissible regulation scope

## Abstract

The article discusses the issue of the possibility of regulating matters concerning higher education and its institutions in executive and internal acts. It presents the acceptable limits of delegating matters relating to higher education to regulations, as well as internal acts of higher education institutions. These limits are described taking into account the principle of autonomy of higher education institutions, as well as the rules on the creation of law, in particular the rules for issuing regulations. It was also pointed out that the incorrect division of matter between act of parliament (statute) and a regulation violates constitutional rules of law creation. It is also contrary to the protection of entities' trust in the state and law and the principle of division and balance of power.

Faulty formation of the higher education system is not good to the quality of education and conducting scientific research. It hinders the implementation of the freedom of science.

**Keywords:** higher education, autonomy of university, Constitution, system of sources of law, delegated legislation

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## Introduction

The shape of the higher education system undoubtedly affects the implementation of the basic tasks entrusted to higher education institutions, namely education and research. Since 2005, higher education has been governed by an act of parliament the title of which – according to Article 19(2) of the Annex to the Regulation of the Prime Minister of 20 June 2002 on the "Rules of Legislative Technique"[2] – is the "Law". It is pointed out in the literature that: "this title is appropriate when a given act of parliament regulates a comprehensive field of affairs in a comprehensive manner, but it does so by means of regulations belonging to various areas of law. Such an act of parliament may, like a code, fulfil the basic function in a given area of social relations, but because of the use of solutions appropriate for various areas of law, it will not be able to play a unifying and integrating role for such an area of law – the rules included in its general part will apply in cases governed by other acts in this field only if reference is made to these provisions in these acts of parliament".[3]

The decision of the legislator to create an act of parliament that comprehensively regulates issues related to higher education causes that all the more it should be considered to what extent it is possible in such legal solutions to delegate certain matters to be regulated in secondary legislation (substatutory acts), including regulations and internal acts. As part of the ongoing debate on the reform of higher education, it is advisable to define a constitutional framework for admissibility of the legislator's intervention in the shape of the higher education system. This article attempts to define appropriate limits on the basis of constitutional rules on the functioning of higher education institutions and for the rules of law-making, in particular the division of the matter of a normative act between an act of parliament and secondary legislation.

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2 Journal of Laws of 2016, item 283.

3 G. Wierczyński, *Komentarz do Rozporządzenia Prezesa Rady Ministrów z dnia 20 czerwca 2002 r. w sprawie „Zasad techniki prawodawczej"*, [in:] idem, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa 2016, pp. 19–37.

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## The constitutional principle of autonomy of higher education institutions

The starting point for considerations is represented by the constitutional principle of autonomy of higher education institutions resulting from Article 70(5) of the Constitution of the Republic of Poland of 2 April 1997.[4] The indicated provision stipulates that: "The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute". The commentators of this regulation emphasise that the Constitution of the Republic of Poland, while ensuring the autonomy of higher education institutions, does not define the concept of "autonomy" or determine its scope. This means that these issues are left to the legislator's discretion. This does not mean, however, that it is impossible to reconstruct the constitutional concept of autonomy of higher education. Decoding its understanding is possible when the basic goals and functions of higher education institutions, as well as freedoms and rights that can be implemented as part of such institutions in the institutionalised form are taken into consideration.[5] Furthermore, it is also stressed that the essence of autonomy can be understood as the right to individual settlement of internal affairs of a given community.[6]

The definition of autonomy of higher education institutions in Article 70(5) of the Constitution of the Republic of Poland was formulated in the grounds of the judgements of the Constitutional Tribunal. It is stated therein that: "The autonomy of higher education institutions should be understood as the constitutionally protected sphere of conducting scientific research and education within the framework of the binding legal order".[7]

The Constitutional Tribunal indicated the elements that make up the autonomy of higher education institutions and considered them to be: 1) the right of the school authorities to determine the content and forms of teaching, subjects and methods of research and study regulations that determine their course; 2) the right – of academic teachers, students and non-academic staff – to choose the executive and non – executive authorities of the university; 3) the right to take up and pursue a gainful

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4 Journal of Laws of 78, item 483, as amended; hereinafter referred to as: the Constitution of the Republic of Poland.

5 See: W. Borysiak, M. Królikowski, K. Szczucki, *Komentarz do art. 70 Konstytucji*, [in:] L. Bosek, M. Safjan (eds.), *Konstytucja RP. Vol. I. Komentarz do art. 1–86*, Warszawa 2016, Margin No. 121.

6 See: A. Krzywoń, *Konstytucyjne aspekty autonomii szkoły wyższej*, [in:] A. Wiktorowska, A. Jakubowski (eds.), *Prawo nauki. Zagadnienia wybrane*, Warszawa 2014, p. 49.

7 See Judgement of the Constitutional Tribunal of 8 November 2000, Ref. No. SK 18/99, OTK ZU No. 7/2000, item 258. Similarly in the Judgement of the Constitutional Tribunal of 7 February 2006, Ref. No. SK 45/04, OTK ZU No. 2/A/2006, item 15.

activity whose purpose is to cover university expenses; 4) the right to establish institutions and organisations representing the university interests towards public authorities; 5) system of disciplinary responsibility of employees and students before the authorities of their own university.[8]

The autonomy indicated above is not self-existent. It sets the organisational framework for the exercise of the right to education, freedom of teaching, conducting scientific research and artistic creation in an institutionalised formula. This means that Article 70(5) of the Constitution of the Republic of Poland with reference to higher education institutions is the starting point for defining the conditions for the operation of higher education institutions so that they can effectively carry out the tasks entrusted to them.[9] In other words, the shape of the system of higher education institutions should enable an individual to benefit from the constitutional freedom of science and art, as well as the freedom of teaching, whereas the guarantee of autonomy of universities is to facilitate the exercise of these freedoms by persons participating in their activities.[10]

Article 70(5) of the Constitution of the Republic of Poland stipulates that a certain scope of freedom is granted to higher education institutions. However, this freedom is not absolute because the authors of the political system clearly indicated that the autonomy is ensured on the rules specified in an act of parliament. Since issues related to the constitutional autonomy of higher education institutions are to be developed in an act of parliament, this act must take into account constitutional rules and values that will make it possible to properly determine the regulatory freedom of the legislator. The role of this legislator is to determine the detailed shape and scope of autonomy.[11]

Therefore, because the authors of the political system indicated an act of parliament as the basic normative act on ensuring the autonomy of higher education institutions, such an act is to determine issues related to higher education. When looking at the issue in question in a systemic way, it should be concluded that the legislator's activities in this respect are limited by constitutional values and rules, which are primarily related to the construction of the system of sources of law and the implementation of constitutional freedoms and individual rights.

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8 See Judgement of the Constitutional Tribunal of 5 October 2005, Ref. No. SK 39/05, OTK ZU No. 9/A/2005, item 99. Similarly in the classification presented [in:] W. Borysiak, M. Królikowski, K. Szczucki, op. cit., Margin No. 175.

9 See: A. Krzywoń, op. cit., p. 49; A. Kiebała, *Autonomia szkół wyższych (Chapter 4)*, [in:] S. Waltoś, A. Rozmus (eds.), *Szkolnictwo wyższe w Polsce. Ustrój – prawo – organizacja*, Rzeszów 2008, p. 119.

10 See M. Stachowiak-Kudła, *Autonomia szkół wyższych a instytucjonalne mechanizmy zapewnienia jakości w Polsce i wybranych państwach europejskich*, Warszawa 2012, p. 25.

11 See L. Garlicki, *Uwagi do art. 70*, [in:] idem (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warszawa 2003, p. 11–12; W. Borysiak, M. Królikowski, K. Szczucki, op. cit., Margin No. 169.

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## An act of parliament as a basic act regulating the higher education system

The authors of the political system clearly entrusted the development of the issue of autonomy of higher education to the legislator. Therefore, an act of parliament will be the basic act in which the shape of higher education will be defined. This is a natural consequence of the position of this act in the system of sources of law. The concept of law is established both in case law and in jurisprudence, and there is no need to change this approach for the purposes of this study. Therefore, the Constitution of the Republic of Poland, by referring to the regulation of the given matter in an act of parliament, understands it as a normative act (containing general and abstract norms) passed by Parliament in a special procedure regulated in the Constitution and ranked highest in the system of national law, with the exception of the Constitution, as a rule with unlimited material field of application.[12]

Undoubtedly, the content regarding the shape of higher education can be regulated in an act of parliament. However, the question arises whether it is possible to transfer certain contents from this field to other legal acts, and if so, on what principles and how widely other acts can regulate issues related to higher education. In other words, it is a question whether currently all the issues to be governed with an act of parliament to which reference is made by a constitutional provision must be specified in an act referred to as an "act of parliament".

This question is related to the issues of the principle of exclusivity of an act of parliament, which had a different dimension before 17 October 1997 than today. Under the rule of previously applicable constitutional provisions, there were doubts about the legislation of public administration bodies because executive regulations and orders or resolutions were issued on the basis of the given authorisations. Due to the uncertainty about the nature of these acts and their effectiveness towards units (external entities towards administrative bodies), the exclusivity principle was formulated, which consisted in the fact that issues were indicated that should be regulated by an act of parliament, thus defining the statutory matter. It was decided this way that certain issues had to be regulated in an act of parliament, so that there

[12] See for instance S. Rozmaryn, *Ustawa w Polskiej Rzeczypospolitej Ludowej*, Warszawa 1964, pp. 136–137; A. Gwiżdż, *Ustawa i materia ustawodawcza*, [in:] A. Patrzałek (ed.), *Problemy prawodawstwa w nowej Konstytucji PRL*, Wrocław 1988, pp. 85 et seq; idem, *Struktura wewnętrzna ustawy*, [in:] J. Trzciński (ed.), *Postępowanie ustawodawcze w polskim prawie konstytucyjnym*, Warszawa 1994, p. 105–115; K. Działocha, *Konstytucyjne cechy ustawy* [in:] ibidem, pp. 23–39; K. Działocha, *Ustawa a inne akty normatywne oraz ustawodawstwo delegowane*, [in:] ibidem, pp. 60–75 and pp. 39–60; M. Fedorowicz, *Ustawa po akcesji Polski do Unii Europejskiej (Zagadnienia wybrane)*, "Kwartalnik Prawa Publicznego" 2004, 2, p. 71–73.

would be no abuses in public administration in the sphere of law-making, in particular when issuing independent law-making acts.

In the Constitution of the Republic of Poland of 1997, the authors of the political system created a clear division in the system of sources into the universally and internally applicable law.[13] This resulted in a departure from the previous understanding of the exclusivity principle understood as an obligation to preserve the statutory form of normalisation of specific issues. As stated by the Constitutional Tribunal: "Conjunction of the provisions of Article 87(1) and Article 92 of the Constitution with the general consequences of the democratic rule of law (Article 2 of the Constitution) leads to the conclusion that in the system of universally applicable law it is currently not possible for secondary legislation to appear that is not directly supported by an act of parliament and does not serve its implementation, as defined in the model referred to in Article 92(1). In this sense, the exclusivity of an act of parliament has acquired a complete character because there are no such matters in which secondary legislation could be laid down (the ones of a universally binding nature) without prior statutory regulation of such matters".[14]

The foregoing means that currently there is no need to decide whether a given matter must be regulated by law because whenever there is a will that national laws should be universally binding, they must have their base in the Constitution or in an act of parliament. It is now more important to resolve the level of detail of the statutory provisions and the possibility of delegating certain issues to be defined by way of regulation.

It was assumed in the jurisprudence of the Constitutional Tribunal that the answer to this question depends on the matter that we want to normalise. Classically, it is assumed that in the case of repression[15] and levy[16] provisions, as well as the ones on freedom and personal rights, the requirement to include provisions in an act of parliament is more rigorous than in other areas of law. The general prin-

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13 See Articles 87 and 93 of the Constitution of the Republic of Poland.

14 See Judgement of the Constitutional Tribunal of 9 November 1999, Ref. No. K 28/98. OTK ZU No. 7/1999, item 156; See also: J. Oniszczuk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI w.*, Kraków 2004, p. 796.

15 See Judgements of the Constitutional Tribunal of 20 February 2001 according to the approach to the exclusivity of the act of parliament after the entry into force of the Constitutional Tribunal., Ref. No. P 2/00, OTK ZU No. 2/2001, item 32; 8 July 2003, P 10/02, OTK ZU No. 6/A/2003, item 62; 26 November 2003, SK 22/02; OTK ZU No. 9/A/2003, item 97; 21 July 2006, Ref. No. P 33/05, OTK ZU No. 7A/2006, item 83.

16 See for instance Judgements of the Constitutional Tribunal of: 6 March 2002, Ref. No. P 7/00, OTK ZU No. 2/A/2002, item 13; 20 June 2002, Ref. No. K 33/01, OTK ZU No. 4/A/2002, item 44; 7 September 2010, OTK ZU No. 7A/2010, item 67.

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ciple of exclusivity of an act of parliament to normalise the legal situation of individuals is a classic element of the idea of a state of law.[17]

Nonetheless, it is permissible to leave more freedom in delegating specific matters to the secondary legislation (sub-statutory acts), but this can never lead to giving statutory regulation blank nature, i.e. to "leave the authorised body the possibility to regulate the entirety of issues for which there is no direct regulation or guidelines in the text of the act of parliament".[18]

Assessment of which matter concerning the higher education system can be regulated in an regulation or other legal acts requires the use of constitutional solutions for the separation of the subject of a normative act between an act of parliament and such other acts. The possibility of specifying matters in accordance with Article 92(1) of the Constitution of the Republic of Poland and Article 70(5) of the Constitution of the Republic of Poland should be considered in particular.

## The scope of matter on higher education that may be pass to an executive regulation

The basic constitutional provision pertaining to the relationship between an act of parliament and a regulation, and thus the boundary for division of matter between these acts, is Article 92 of the Constitution of the Republic of Poland. This provision stipulates that "regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act. An organ authorized to issue a regulation shall not delegate its competence, referred to in para. 1 above, to another organ".

This regulation emphasises the close relationship between a regulation and an act of parliament, which is of a competence-related (a regulation is issued under a detailed statutory authorisation) and functional dimension (the purpose of a regulation is to implement an act of parliament).[19]

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17 See for instance Judgement of the Constitutional Tribunal of 12 January 2000, Ref. No. P 11/98, OTK ZU No. 1/2000, item 3.

18 See for instance Judgement of the Constitutional Tribunal of 24 March 1998, Ref. No. K 40/97, OTK ZU No. 2/1998, item 12, whose grounds for the division of matter between an act of parliament and a regulation are still topical.

19 See for instance Judgements of the Constitutional Tribunal of: 16 February 1999, Ref. No. SK 11/98, OTK ZU No. 2/1999, item 22; 9 April 2001, Ref. No. U 10/00, OTK ZU No. 3/2001, item 55; 31 August 2006, Ref. No. K 25/06, OTK ZU No. 8/A/2006, item 96; 16 January 2007, Ref. No. U 5/06, OTK ZU

The implementing provisions must be connected with statutory solutions in substantive and functional terms because only this way limits can be set within which the regulation contained in the implementing provisions should fall. This means that the legislator determines the scope and content of a regulation, and an authority authorised to issue it must only perform what results from the statutory authorisation. However, to make this possible, the material and content-related details of the authorising provision is necessary. Otherwise, the body implementing the authorisation is given a broad legislative power, thanks to which it can independently determine matters regardless of the legislator's intention, and this leads to the risk of the takeover of the legislative function by executive bodies, which contradicts not only the constitutional system of sources of law, but above all, the competence-based division of power under Article 10 of the Constitution of the Republic of Poland. It is because this way there may be a disturbance of the systemic roles of individual bodies of public authority.

Therefore, the basic issue from the point of view of determining the proper and Constitution-compliant relations between an act of parliament and a regulation is the correct formulation of the statutory authorisation. Article 92(1) of the Constitution of the Republic of Poland alone indicates the form of such an authorisation. As a result of the interpretation of this provision, the case law and the jurisprudence adopts its three criteria, which must exist together, i.e.: 1) personal details, which involves indicating the body competent to issue a regulation; 2) material details, which determine the scope of matters to be registered in a regulation; 3) content-related details, expressed in the guidelines on the content of the regulation.[20]

The first element does not raise any doubts because the entities that may be authorised to issue a regulation are listed exhaustively in the Constitution of the Republic of Poland and this catalogue must not be modified by subconstitutional acts, yet the remaining two criteria leave a margin of regulatory freedom.

In the case of the material criterion, it should be kept in mind that the purpose of a regulation is to implement an act of parliament. Therefore, in order to achieve it, all the essential elements of a given legal regulation must be included directly in an act of parliament itself. The authorisation must be formulated in such a way that "only the matters that are already generally regulated in the act of parliament

No. 1/A/2007, item 3; 27 November 2012, Ref. No. U 4/12; 4 November 2014, Ref. No. U 4/14 OTK ZU No. 10/A/2014, item 110; 14 July 2015, Ref. No. K 2/13, OTK ZU No. 7A/2015, item 100.

[20] See Judgement of the Constitutional Tribunal of 26 October 1999, Ref. No. K 12/99, OTK ZU No. 7/1999, item 120; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2011, p. 136; B. Banaszak, *Komentarz do art.* 92, [in:] *Konstytucja RP*, Warszawa 2012; M. Wiącek, *Komentarz do art. 92 Konstytucji*, [in:] ibidem, Margin No. 24.

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are passed to a regulation.[21] The authorisation must not leave the authorised body the possibility to regulate the entirety of issues for which there is no direct provision or guidelines in the text of the act of parliament.[22] Besides, no authorisation should be granted to specify detailed rules for certain activities in an act of parliament if the act of parliament does not specify the content of such a reference.[23]

This means that matters to be regulated in an executive act should not be of fundamental importance from the point of view of the construction of the whole act.[24] Therefore, a regulation should specify the technical, organisational and procedural issues that are necessary for the correct application of statutory standards, as well as those matters which are characterised by low stability. It is aimed at avoiding too frequent amendments to an act of parliament.[25]

The right shape to a statutory authorisation, and thus the support the proper transfer of legislative competence, should be ensured by the guidelines on the content of a regulation. The term "guidelines" includes substantive instructions about the content of standards to be included in an act of parliament.[26]

The degree of required detail of the guidelines depends on the matter of the regulation. The Constitutional Tribunal indicates that the more statutory provision pertains to issues fundamental for the position of an individual, the more complete the statutory regulation must be and the less space remains for references to executive acts. There is no permanent required minimum content of the guidelines. It must be determined on a case-by-case basis, taking into account the features of the matter to be regulated and its relation to the situation of the individual. The Tribunal also points out that guidelines must not be blank or quasi-blank (for example, confined to a general statement that "general rules" will be defined in a regulation).[27]

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21 See Judgement of the Constitutional Tribunal of 18 September 2006, Ref. No. K 27/05, OTK ZU No. 8A/2006, No. 8, item 105.

22 See for instance Judgement of the Constitutional Tribunal of 16 January 2007, Ref. No. U 5/06, OTK ZU nr1A/2007, item 3.

23 See Judgement of the Constitutional Tribunal of 30 July 2013, Ref. No. U 5/12, OTK ZU No. 6A/2013, item 88.

24 See Judgement of the Constitutional Tribunal of 12 July 2007, Ref. No. U 7/06, OTK ZU No. 7A/2007item 76.

25 See: K. Działocha, *Komentarz do artykułu 92*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 2, Warszawa 2016, p. 33.

26 See for instance Judgements of the Constitutional Tribunal of: 26 October 1999, Ref. No. K 12/99, OTK No. 6/1999, item 120; 3 April 2012, Ref. No. K 12/11, OTK ZU No. 4A/2012, item 37.

27 See Judgement of the Constitutional Tribunal of 16 January 2007, Ref. No. U 5/06, OTK ZU No. 1A/2007, item 3.

Referring to the above-mentioned constitutional requirements for the division of content between an act of parliament and a regulation in provisions concerning higher education, the following issues should be noted.

Firstly, if we assume that a regulation is a normative act in the system of sources of law, it should not include individual and specific norms.[28] This means that the legislator shaping the system of higher education should not authorise executive bodies to issue regulations that will not be normative. Such an action not only violates the rules resulting from the constitutional shape of the system of sources of law, but also hinders the control of the issued act because it will not necessarily be accepted for examination by the Constitutional Tribunal if it fails to comply with the "legal regulations issued by central state authorities".[29] Therefore, these statutory authorisations that pertain to the law on higher education and require the creation of regulations as individual and concrete acts should be assessed negatively.

Secondly, since executive regulations are to regulate only the issues that are covered by the subject of the authorising act, it is not permissible to entrust a regulation to specify/contain the issues concerning higher education the essence of which is not specified in the act of parliament. A general indication that the rules governing a given institution are to be laid down in a regulation when the institution itself and its components are not regulated in an act of parliament is a circumvention of the provisions on the legislative initiative. In such a case, a blank referral occurs, which results in a violation of the division of competences between state bodies. In the perspective of higher education, it is at least debatable to entrust a regulation to cover issues such as defining the rules for the evaluation of a scientific unit or the rules of financing a unit by the state budget (subsidy algorithm), although it must be rather said that it violates Article 92(1) of the Constitution of the Republic of Poland. Although the rules in question are not generally outlined in an act of parliament, referring them to a regulation causes a clear violation of the division of statutory matter. It should be stated that neither issues related to evaluation

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28 See Judgement of the Constitutional Tribunal of 20 June 2002, Ref. No. K 33/01, OTK ZU No. 4A/2002, item 44.

29 See Article 188(3) of the Constitution of the Republic of Poland and: Judgement of the Constitutional Tribunal 5 November 2009, Ref. No. S 6/09, OTK ZU No. 10A/2009, item 153, as well as Judgement of the Constitutional Tribunal of 8 February 2017, Ref. No. U 2/16, OTK ZU No. A/2017, item 5 and arguments on the normativity of regulations. See also: B. Skwara, *Problem normatywności rozporządzeń w świetle orzecznictwa Trybunału Konstytucyjnego*, "Przegląd Legislacyjny" 2007, 1, p. 73–74; W. Federczyk, A. Syryt, *Kognicja TK do badania aktów normatywnych niebędących źródłami prawa powszechnie obowiązującego i innych aktów prawnych – wybrane zagadnienia z orzecznictwa*, [in:] J. Podkowik, J. Sułkowski (eds.), *Kontrola konstytucyjności prawa a stosowanie prawa w orzecznictwie Trybunału Konstytucyjnego, Sądu Najwyższego i Naczelnego Sądu Administracyjnego*, Warszawa 2017, p. 67–97.

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nor the ones concerning the financing of higher education institutions are of a secondary or technical nature that would justify the issue of an executive act. Entrusting the legislative competence in this area to the executive authorities hollows the content from the act of parliament, and at the same time entails a risk that the solutions will not be stable because it is easier to change them than if they were in an act of parliament.

In particular, it should be noted that evaluation rules should be specified in an act of parliament and should be permanent, otherwise research activities will not be possible to plan research in the long-term. The transfer of a given matter for regulation in a regulation strengthens the incorrect legislative practice known from the hitherto acts of parliament regulating the higher education system, namely that evaluation rules for a given settlement period are determined when this period has passed. This way, criteria are assigned that must be fulfilled retroactively, and this violates Article 2 of the Constitution and the rules of correct legislation derived from it. It also violates the principle of trust in the state and the laws passed by it.

Thirdly, if a regulation is used to refer matters to it that are not of primary importance for a given act of parliament, but only facilitate its implementation, it is not allowed to divide the matter of the acts of parliament related to shaping the higher education system so that the requirements defined in the regulation partially or comprehensively determine the implementation of rights and obligations under the act of parliament. The point is that the prerequisites for the exercise of given rights should not be dispersed because otherwise the state of uncertainty about their stability may arise again. If a part of the prerequisites is to be determined by the executive authorities, the rules for acquisition of statutory rights may change dynamically as the government administration bodies change. Therefore, the situation should be assessed negatively when matters such as scientific and artistic areas and disciplines are to be set by way of regulation. If these areas and disciplines are to influence the position of individuals and are a condition for running a higher education institution, and hence a condition of its existence or a condition for conducting education in a given major, they must be defined in a statutory act and protected against the possibility of frequent changes.

Similar objections can be raised for a situation in which scientific promotions depend, on the one hand, on statutory requirements, and on the other hand on the fulfilment of the requirements that will be defined in a regulation. If the right to obtain a degree is regulated at the statutory level, the person conducting research must not be left in uncertainty about which will be used for assessment when applying for a scientific promotion. Passing it on to the regulation is an unauthorised violation of the division of matter between an act of parliament and a regulation, because it leads to a situation where some of the conditions for the acquisition of the right

are in an act of parliament and some of them in an executive act, the content of which may be more flexibly changed.

Regardless of the foregoing, in the context of the constitutional freedom of scientific research, there is no justification for limiting the places and manner of scientific presentation or publication and for making scientific promotion conditional on it, and what is more, by way of regulation, when Article 31(3) of the Constitution of the Republic of Poland stipulates that limiting the exercise of constitutional freedoms and rights may be established only in an act of parliament. This means that the legislator's action to transfer a given matter for regulation by way of a regulation additionally constitutes a disproportionate restriction of the freedom of scientific research,[30] which is not justified by any convincing arguments.

The foregoing means that since the acts of parliament defining the system of higher education are to enable the exercise of the freedom of education in the individual and institutional dimension, it is unacceptable that many issues that belong to the core of such acts are passed and usually in a blank form to be regulated in a regulation. This way, a situation occurs where higher education, contrary to the requirement under Article 70(5) of the Constitution of the Republic of Poland, is shaped by way of regulations, which means that it is not possible to consider the system stable. Due to the systemic position of regulations, there is a risk of frequent changes that may significantly affect the functioning of higher education institutions. Moreover, this approach of the legislator essentially results in the transfer of some legislative powers concerning higher education to executive authorities, which is doubtful not only from the point of view of the system of sources of law, but, above all, in the context of compliance with the constitutional principle of division and balance of power.

## University's law-making activity as the part of its autonomy

A separate issue involves the ability to regulate specific matters with internal acts of a higher education institution. Therefore, it must be concluded that, since Article 70(5) of the Constitution of the Republic of Poland establishes the autonomy of higher education institutions, and the concept of autonomy should be understood

[30] See Article 73 of the Constitution of the Republic of Poland: "Everyone is guaranteed the freedom of artistic creation, scientific research and the publication of its results, the freedom to teach and the freedom to use cultural goods".

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as the possibility of shaping one's own regulations and norms,[31] universities undoubtedly have the competence to pass legal acts concerning them.

In the jurisprudence of the Constitutional Tribunal, it is assumed that the Constitution of the Republic of Poland presupposes the existence of internal acts of higher education institutions. "The right to such internal regulations is vested in all higher education institutions so that they can fulfil the public purpose of educating students and conducting scientific research (creative artistic work)".[32]

Internal acts of higher education institutions may determine, among other things, issues such as their internal organisational structure, including the appointment of internal bodies, as well as the rights and obligations of members of the academic community, provided that they are compliant with the generally applicable law.

It should be kept in mind that the scope of the law-making activity of a higher education institution is specified in an act of parliament. Every general and abstract act issued by a higher education institution will be an internal act and, thus, will not be able to shape the rights and obligations of entities located outside the structure of a given university. It is not clear among legal writers whether general statements regarding acts of internally binding law will apply to such an act. It is because it is not a normative act established by public authorities.[33] Nonetheless, a university for sure must not constitute a law that will be universally binding.

Furthermore, it must be kept in mind that an act of a university must be compliant with all acts of universally binding law. The autonomy of a higher education institution eliminates neither the constitutional system of sources of law nor, even more so, the principle of supremacy of the Constitution of the Republic of Poland resulting from its Article 8(1).

## Summary

The autonomy of higher education institutions is a constitutional value that is to guarantee the exercise of freedom of education (including the conduct of scientific research and presentation of results, as well as teaching). The authors of the political system entrusted the shaping of the higher education system and the determination of ways to ensure the autonomy to the legislator. An act of parliament must comply

31 See A. Kiebała, op. cit., p. 118; M. Stachowiak-Kudła, op. cit., p. 13.

32 See Judgements of the Constitutional Tribunal of: 8 November 2000, Ref. No. SK 18/99, OTK ZU No. 7/2000, item 258 and 7 February 2006, Ref. No. SK 45/04, OTK ZU No. 2/A/2006, item 15.

33 See legal writers' debate on this subject: M. Wiącek, *Komentarz do art. 93 Konstytucji*, [in:] *Konstytucja RP...*, Margin No. 18–20.

with constitutional rules for the system of sources of law in this area, as well as general political system rules related to the protection of individuals' trust in the state and the laws established by them, as well as the proportionality of interference in freedom and constitutional rights.

For this reason, the legislator's actions transferring, in a blank form, higher education matters that determine the essence of the system of higher education, as well as the university's opportunities to exercise its constitutional rights and freedoms for regulation in secondary legislation, should be assessed negatively.

It is not conducive to the development of science or the quality of education to shape the basic rules for the functioning of the universities by way of executive acts. On the contrary, such an action causes uncertainty and hinders proper planning of scientific research or education. In addition, it interferes in the constitutional system of sources of law and the principle of division and balance of power.

Yet, the current jurisprudence and the established position of legal writers on the division of statutory matter between an act of parliament and other normative acts shows a clear framework of acceptable regulatory freedom. This means that proper application of constitutional requirements in the process of creating acts of parliament related to higher education is possible. It is only this way that a higher education system can be created in which the freedom of education will be exercised. Otherwise, the solutions will be incomplete, even if they are included in a comprehensive act of parliament because most of the matters will be, in fact, included in other normative acts. They will also raise serious doubts about their compliance with constitutional provisions, which may in practice prevent the creation of a proper higher education system in Poland that fulfils its task.

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