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DOUBTS AS TO THE CONSTITUTIONALITY OF ARTICLE 66(1)(5)(B) OF THE LAW ON THE BAR ACT – OUTLINE OF THE PROBLEMS

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Abstract. The purpose of this paper is to draw attention to the doubts concerning the constitutionality of Article 66(1)(5) of the Law on the Bar Act to the extent to which it requires a total of 3 years of professional experience from persons holding the academic degree of doctor of juridical sciences (social sciences in the discipline of juridical sciences) with Article 2, Article 32(1) and (2), Article 65(1) of the Constitution of the Republic of Poland, in a situation where it does not require any practical experience from persons holding the academic degree of post-doctoral degree (*doktor habilitowany*) and the title of professor. The research problem described in the article was presented in a historical perspective. The inconsistency of the Act with the legal system concerning the analysed issue was also pointed out. In conclusion, the powers of the administrative court to consider the potential unconstitutionality of the indicated provision in a specific case were indicated. It was also reminded of the possibility of filing a constitutional complaint by citizens who believe that their constitutional freedoms or rights have been violated. Attention was also drawn to the possibility of submitting a request to the Commissioner for Human Rights who can use his powers, such as a general speech to the Minister of Justice.

Keywords: the Law on Bar Act; legal professions; advocates; advocate trainee.

INTRODUCTION

Due to the lack of a statutory definition of equivalence of practical experience acquired as part of the performance of activities directly related to the provision of legal assistance and practical experience acquired during the professional training of an advocate, a research problem emerges that has not yet been addressed in the literature on the subject,[1] leading to the question whether obtaining the scientific degree of a doctor of social sciences in the discipline of legal science and completion of the professional

[1] See for example Bucholski and Nowak 2015, 54-68; Gawryluk 2012 *passim*; Kruszyński 2015, 123-28; Piesiewicz 2023, 330-33.

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training confirmed by the relevant certificate constitutes fulfillment of the statutory requirement described in Article 66(1)(5b) of the Law on the Bar Act[2]?

The purpose of this paper is to draw attention to doubts about the constitutionality of Article 66(1)(5)(b) of the Act to the extent that it requires doctors of juridical sciences (social sciences in the discipline of juridical sciences) to have a total of 3 years of professional experience, in particular to perform activities requiring legal knowledge which are directly related to the provision of legal assistance by an advocate or an attorney-at-law under an employment contract or a civil law contract in an advocate's office, an advocacy team, a general partnership, a registered partnership, a limited liability partnership, a limited partnership or a partnership limited by shares referred to in Article 4a(1) or the law firm carried on by an attorney-at-law, a general partnership, a registered partnership, a limited liability partnership, a limited partnership or a partnership limited by shares referred to in Article 8(1) of the Act of 6 July 1982 on attorneys-at-law with Article 2, Article 32(1) and (2), Article 65(1) of the Constitution of the Republic of Poland of 2 April 1997[3] and with the principle of subsidiarity expressed in the preamble to the Constitution, in a situation where no practical experience is required of persons holding the academic degrees of post-doctoral degree (*doktor habilitowany*) and professor. There is no relevant distinctive feature on the basis of which holders of the academic degree of post-doctoral degree and the title of professor may be treated differently from holders of the academic degree of doctor with regard to their possession of specific practical experience in the performance of activities requiring legal knowledge which are directly related to the provision of legal assistance (there are no grounds for differentiating the possibility of entry into the register of advocates for holders of the academic degree of post-doctoral degree and the title of professor).

The requirement of three years of professional experience only in relation to persons holding the academic degree of doctor of juridical sciences and the lack of relevant professional experience for holders of the academic degree of post-doctoral degree and the title of professor, as set out in Article 66(1)(5)(b) of the Act, violates the principle of equality in access to the profession, results in discrimination against persons holding the academic degree of doctor and contradicts the principle of a democratic state respecting the rule of law and the directive of reliable legislation contained therein. The relationship between Article 65(1) and Article 2 of the Constitution in the scope under study is that the requirements of decent legislation, which are imposed on the legislator, are here additionally supplemented by certain substantive legal

[2] Act of 26 May 1982, the Law on the Bar, Journal of Laws of 2023, item 1860 as amended [hereinafter: the Act].

[3] Journal of Laws No. 78, item 483 as amended [hereinafter: Constitution].

requirements, and it is therefore not only a matter of transparency and certainty and predictability of requirements from the point of view of candidates to the profession, but also the adequacy of these requirements.

1. EVOLUTION OF THE PROVISIONS OF THE ACT OF 26 MAY 1982 – LAW ON THE BAR ACT IN A HISTORICAL PERSPECTIVE

The legislator, from the very beginning of the Act of 26 May 1982 – Law on the Bar Act and without any indication of *ratio legis*, has determined that only persons holding the academic degree of post-doctoral degree and the title of professor (and excluding persons holding the academic degree of doctor) are exempted from the obligation to undergo advocate's training and to take the advocate's examination. This assumption, however, has no rational justification, as will be shown below and, as it turns out, constitutes only historical reminiscences. When amending Article 66 of the Act by virtue of the Act of 30 June 2005 amending the Act – the Law on Bar Act and certain other acts,[4] the legislator allowed persons holding the academic degree of doctor of juridical sciences to take the advocate's examination before an examination board, without being required to complete an advocate's training. It should be noted that, in accordance with the parliamentary bill on the amendment of the Act – the Law on the Bar Act and on the amendment of certain other acts of 6 March 2003 (Sejm paper No. 1694), the proposers postulated the recognition of qualifications possessed by persons holding the academic degree of doctor of juridical sciences and employed as assistant professors as equivalent to those obtained as a result of passing the professional examination. Already at that time, it was rightly argued that in the majority of faculties conducting law studies in Poland, doctors perform similar scientific and teaching tasks as persons holding the academic degree of post-doctoral degree or the title of professor in terms of lectures and examinations. In view of this, the solution of the current Act providing for exemption from the obligation to undergo the training and take the examination only for persons holding the academic degree of post-doctoral degree and professor is inconsistent with the facts. This construction was based on an unreasonable and socially unjustified conviction that among lawyers, only those holding the academic degree of post-doctoral degree and the title of professor are qualified to be granted the right to be entered into the register of advocates. *De lege lata*, the current state of the law opens up the possibility to be entered into the register of advocates to persons holding the academic degree of post-doctoral degree

[4] Journal of Laws 2005, No. 163, item1361.

and the title of professor, which also means that the legislator does not require practical experience to properly practice the profession of advocate.

In this context, it should be noted that over the last decade – both during successive amendments of previous normative acts in the field of higher education and science, as well as during the work on the currently binding Constitution for Science – the demand to abolish the academic degree of post-doctoral degree has been put forward many times. Following the recent reform of the law on higher education, the current Act of 20 July 2018 – Law on Higher Education and Science[5] essentially equates the legal position of a doctor and a post-doctoral degree. By way of example only, it should be pointed out that the l.h.e.s. allows a person holding both a doctoral degree and a post-doctoral degree degree to hold the position of professor at a university (Article 116(2)(2) l.h.e.s.). The Act ensures that the lack of a post-doctoral degree cannot be an obstacle to the position of professor at a university, opening up this possibility to persons holding a doctoral degree (Article 116(4)(2)). Moreover, pursuant to Article 227(2) l.h.e.s., habilitation is no longer a *sine qua non* condition for the title of professor, as it may be conferred on a person holding the academic degree of a doctor. This is a further step in largely equating the position of the doctor and post-doctoral degree. A certain complement to these regulations is the regulation of the teaching load for doctors, person holding the academic degree of post-doctoral degree and professors employed in a research and teaching position, which is now equalised and amounts, under Article 127(2)(1), to 240 teaching hours.

In turn, by virtue of the Act of 20 February 2009 amending the Act - the Law on Bar Act, the Act on Attorneys-at-law and the Act – the Law on Civil-law Notaries[6] the legislator exempted from the requirement to complete the advocate's training and to take the advocate's examination those doctors of juridical sciences who have three years of experience in the performance of activities requiring legal knowledge directly related to the provision of legal assistance by an advocate or an attorney-at-law, as evidenced by Article 66(1)(5(b)). At the same time, the explanatory memorandum further emphasises that persons holding a doctor degree have a particularly high level of knowledge in legal sciences, which has been verified during the state (doctoral) examination. By the way, it should only be emphasised that the awarding of the degree of doctor of juridical sciences is preceded by the defence of the doctoral dissertation, which confirms both the candidate's theoretical legal knowledge and the ability to conduct scientific research independently.

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[5] Journal of Laws of 2018, item 1668 [hereinafter: l.h.e.s.].

[6] Journal of Laws of 2009, No. 37, item 286.

In the light of subsequent legislative changes, the allegation of unconstitutionality with respect to Article 66(1)(5) of the Act provides the Provincial Administrative Court with grounds for assessing whether the currently binding legal solution is appropriate from the point of view of the constitutional right of equal access to a profession, in the context of the principle of equality of citizens before the law and non-discrimination, stipulated directly in Article 65, paragraph 1 of the Constitution in connection with Article 32(1) and (3) of the Constitution in connection with Article 2 of the Constitution.

2. INCONSISTENCY OF THE ACT OF 26 MAY 1982 – LAW ON THE BAR ACT WITH THE LEGAL SYSTEM

The inconsistency concerning the legal system in the present case consists in the fact that the legislator in one place treats a degree as a substitute for knowledge, while in another place it treats a degree as a substitute for knowledge and three years of professional practice, which results from the normative construction of the provisions of Article 65 of the Act, Article 66(1)(5)(b) of the Act, Article 66(2)(1) of the Act and Article 66(1)(1) of the Act. Pursuant to the wording of Article 65 of the Act, in order to practise the legal profession one must possess the necessary quantum of legal knowledge in the form of graduation from legal studies in the Republic of Poland and obtaining a Master's degree or foreign legal studies recognised in the Republic of Poland and completing an advocate's training in the Republic of Poland. On the other hand, pursuant to Article 66(2)(1) of the Act, obtaining a doctoral degree in juridical sciences exempts one from the obligation to complete an advocate's training while confirming the possession of the required quantum of theoretical knowledge. This therefore means that, in the opinion of the legislator, the doctoral degree is a substitute not only for theoretical knowledge, but also for practical experience, which is acquired during the training. On the other hand, looking at the normative construction of Article 66(1)(5)(b) of the Act, the doctorate is only a substitute for having legal knowledge at a high theoretical level, but nevertheless not a substitute for practical experience. By overlaying the provisions of Article 66(1)(1) of the Act, allowing persons holding the academic degree of post-doctoral degree and professors to be admitted to the bar without the requirement of a training completed, it is clear that this time the degree is again treated not only as a substitute for a high level of legal knowledge, but also for relevant practical experience. In view of the foregoing, in the light of the constitutional provisions analysed above, to the extent that Article 66(1)(5)(b) of the Act still requires additional practical experience from holders of a doctoral degree, it violates the principle of equality before the law and non-discrimination and the freedom of choice

and practice of a profession, established in Articles 32(1) and 65(1) of the Constitution, which is incompatible with the values described in Article 2 of the Constitution.

The freedom to practice a profession is 'freedom from external interference', so if such interference takes place, such as in the form of determining the conditions on which the practice of a profession depends, it must be justified and deprived of the features of arbitrariness and serve to protect constitutional values.[7] Despite the fact that Article 17(1) of the Constitution grants to professional self-governments for the professions of public trust the privilege of limiting the freedom of pursuing a profession, nevertheless these limitations should meet the premises set out in Article 31(3) of the Basic Law, and thus remain within the limits of the public interest and serve its realisation[8] and statutory limitations on the freedom of pursuing a profession by persons exercising professions of public trust may not go beyond the prohibition of excessive interference and should be justified by constitutional values.[9] The literature sources correctly show that the Constitution, when delegating regulation of the issues of professional self-governments implies certain restrictions to prevent these self-governments from limiting the freedom of practicing a profession and undertaking a business activity [Skrzydło 2013]. In the judgment of 19 October 1999, the Constitutional Court clarified the meaning of Article 65(1) of the Basic Law for the so-called liberal professions. In the justification of this jurisprudence there was a statement that, with regard to these professions, the content of the freedom of pursuing a profession is the creation of a legal situation in which: firstly, everyone will have free access to practise a profession, conditioned only by talents and qualifications; secondly, they will then have a real opportunity to practise their profession; and thirdly, in practising their profession they will not be subjected to the rigours of subordination that characterise the provision of work.

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[7] Judgement of the Constitutional Court of 5 December 2007, ref. no. K 36/06, OTK-A 2007, item 11, p. 154.

[8] Judgement of the Constitutional Court of 18 February 2004, ref. no. P 21/02, OTK-A 2004, item 2, p.9. It should be noted that the provisions of the Constitution or other acts do not define the meaning of a public trust profession nor do they specify any list of professions, which might be considered such professions; the respective decision is left to the discretion of the legislator, which creates numerous practical problems [Smarż 2012, 148]. The Constitutional Court, when making reference to the resources of the legal science doctrine, defines the public trust professions are those, which serve personal needs of humans, are linked with the reception of information about their personal life and are organized in a way that justifies the social belief that the use of this information by service providers is appropriate for the interest of the individual (judgement of the Constitutional Court of 1 December 2009, ref. no. K 4/08, OTK-A 2009, item 11, p. 162).

[9] Judgement of the Constitutional Court of 18 October 2010, ref. no. K 1/09, OTK-A 2010, item 8, p. 76.

The constitutional principle of equality before the law consists in the fact that all subjects of the law (addressees of legal norms), characterised by a given essential (relevant) feature to an equal extent, are to be treated equally. That is, according to the same measure, without any differentiation, either discriminatory or favourable.[10] The Supreme Administrative Court also expressed similar opinions in its resolution of 22 May 2000.[11] When assessing a legal regulation from the point of view of the principle of equality, it should be considered whether it is possible to identify a common essential feature justifying equal treatment of subjects of law, considering the content and purpose of the legal regulation. At the same time, the burden of proof that the introduced differentiation of subjects of law possessing a common essential feature meets the above-mentioned requirements rests on the state authority that established the challenged legislative act.[12] This means that everyone has the right to be treated in the same way as persons in an analogous situation (in terms of the relevant elements), because all subjects of law equally characterised by a given relevant characteristic should be treated equally. The principle of equality thus implies an order to treat all citizens equally within a certain class or category.[13] The point of departure for the adjudication of the principle of equality must therefore always first be to determine whether there is commonality of the relevant characteristic between the situations being compared. In other words, whether there is similarity between the situations. The existence of such similarity is a prerequisite for the application of the constitutional principle of equality. Thus, if it is established that similar situations have been treated differently by the law, this indicates a possible breach of the principle of equality. In the current state of the law, the equality before the law in respect of the regulation of access to the profession of advocate for persons holding the academic degree of doctor, post-doctoral degree and the title of professor has been undermined.

The material (relevant) feature by which the differentiation of the position of doctor from post-doctoral degree and professor in the provisions of the Act must be assessed is the additional requirement only for doctors to have three years of professional experience, which follows from Article 66(1)(5) of the Act. On the other hand, according to Article 66(1)(1) of the Act, the requirement to complete an advocate's training and to pass the advocate's examination does not apply to professors and persons holding the

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10 Ruling of the Constitutional Court of 9 March 1988, ref. no. U 7/87, OTK 1988, item. 1, p. 1.

11 Resolution of the Supreme Administrative Court of 22 May 2000, ref. no. OPK 1/00, ONSA 2000, item 4, p. 133.

12 Judgement of the Constitutional Court of 20 October 1998, ref. no. K 7/98, OTK ZU, No. 6/1998, item 96.

13 Judgement of the Constitutional Court of 5 November 1997, ref. no. K 22/97, Journal of Laws of 1997, No. 941, item 140.

academic degree of post-doctoral degree in juridical sciences, and thus the legislature does not require these subjects of law to have any practical experience on which registration as advocates would be conditional. At this point, it should be noted, following the former Commissioner for Human Rights, Dr. hab., Prof. of the SWPS University A. Bodnar, that the habilitation, which is an academic degree, is only a confirmation of theoretical qualifications, but does not constitute a confirmation of possessed practical skills including application of the law. The habilitation is an academic degree, so it only confirms academic qualifications. Habilitation requirements have nothing to do with drafting a lawsuit, an appeal or other practical skills needed by a lawyer. In addition, many scholars who hold the degree of post-doctoral degree do not specialise in dogmatic legal sciences, but only in issues that constitute ancillary sciences, e.g. sociology of law, history of law or Roman law [Bodnar, Bojarski, and Wejma 2007, 21]. Since, on the one hand, attention is drawn to the obligation for doctors of juridical sciences to have a three-year professional experience, and at the same time persons holding the academic degree of post-doctoral degree and professors of juridical sciences are admitted to practise the profession of advocate without practising it, this indicates a significant inconsistency on the part of the legislator. Indeed, persons possessing only theoretical knowledge, holding the academic degree of post-doctoral degree or the title of professor, without having to demonstrate any practice, are recognised as persons entitled to practise the profession within the path provided for in Article 66(1)(1) of the Act. At the same time, this entitlement is denied to persons who hold a doctoral degree and therefore also have theoretical knowledge as required by law, by imposing an unjustified requirement of three years' professional experience. The provision in question discriminates against doctoral degree holders. There is no relevant distinctive feature on the basis of which doctoral degree holders should be treated differently from holders of the academic degree of post-doctoral degree and the title of professor as regards the requirement of practical experience, since they are not a substitute for experience in the field of law. There are therefore no compelling circumstances to justify the differential treatment in the provisions of the Act between persons holding the title of professor and the academic degree of post-doctoral degree and persons holding the academic degree of doctor, which confirm academic qualifications but do not verify professional experience. The requirement of three years of professional experience is only applied to holders of a doctoral degree and no professional experience (e.g. two years) is required for persons holding the degree of post-doctoral degree and (e.g. one year) for professors, respectively. This kind of discrimination against persons who confirm their extended theoretical knowledge in the form of a doctoral degree is incompatible with the constitutional standard described in Articles 2, 32(1) and (2) and 65 of the Constitution. The norm of the Act set out

in Article 66(1)(5) violates the principle of equality in access to the profession, leads to discrimination against persons holding a doctoral degree and contradicts the principle of a democratic state respecting the rule of law together with the principle of reliable legislation contained therein. The relationship between Article 65(1) and Article 2 of the Constitution in the studied scope lies in the fact that the requirements of legislative decency, which are imposed on the legislature, are here additionally supplemented by certain substantive requirements concerning the transparency and certainty and predictability of requirements from the point of view of candidates to the profession of advocate, but also the adequacy of such requirements. The adequacy of the requirements should be understood as an obligation to refer to the purpose that the legislator had in mind when the profession was subjected to statutory rationing. Derogation of the provision burdening only persons with doctorates with the additional obligation to have three years of practical experience, and thus uniform conditions for all persons with degrees and academic titles in legal sciences to enter the profession of advocate is the only way to ensure equal treatment in the light of the principle of equality before the law and the freedom of choice and pursuit of a profession, established in Articles 32(1) and 65(1) of the Constitution.

There can therefore be no doubt that the provision of point 5(1) of Article 66 of the Act is inconsistent with the remaining elements of that Article, and thus contrary to the principle of equal access to the profession of advocate arising from Article 65(1) in connection with Article 32(1) of the Constitution. The contested regulation, by introducing an additional requirement of practical experience for doctoral degree holders, constitutes an inexplicable breach of the principle of admission to the profession of advocate in respect of persons who possess a high level of theoretical legal knowledge. The present case demonstrates that he is suitably qualified, possesses the relevant knowledge and, if it were not for the lack of an unambiguous provision in the law, would not have encountered difficulties in being registered as an advocate. At this point, it should also be recalled that the function of the constitutional principle of correct legislation is not only to ensure the correctness of the law regulating the relations between public authorities and citizens, but in general of the law, which is necessary to achieve the objectives set by the given regulation. The need to guarantee legal certainty and security for citizens comes to the fore, which is why this principle prohibits the enactment of laws that give the state authorities too much discretion and allow for arbitrary decisions. A defect in legislation of this kind may constitute a premise for stating that a provision affected by it is unconstitutional [Garlicki and Zubik 2016, *passim*].

CONCLUSIONS

From the point of view of an individual, the solution to the problem outlined in this paper is possible through actions taken by an administrative court in an individual case, as, having regard to Article 8(2) of the Constitution and Article 178(1) of the Constitution, it is entitled to control the constitutionality of legal regulations. There is no doubt in jurisprudence that a judge of an administrative court may, in an individual case, deviate from the application of a statute provision that he or she considers to be contrary to the Constitution and disregard a delegated act that is contrary to the Constitution and the statute.[14] In other words, the court may independently find that a provision of law is unconstitutional and refuse to apply it in a particular case.[15]

The law also provides the possibility to lodge a constitutional complaint, pursuant to Article 79(1) of the Constitution, to anyone whose constitutional freedoms or rights have been violated. A constitutional complaint shall be lodged after the appellant has exhausted the legal path (making use of ordinary means of appeal), within the period of 3 months from the date of delivery to the appellant of a final judgment, final decision or other final ruling. The rules for lodging a constitutional complaint are set out in the Act of 30 November 2016 on the organisation and procedure before the Constitutional Court.[16]

A request to the Commissioner for Human Rights may also be considered. Pursuant to Article 16(2)(1) of the Act of 15 July 1987 on the Commissioner for Human Rights,[17] it is possible for the Commissioner for Human Rights to request the Minister of Justice, by way of a general speech, to analyse the problems raised in this paper and to consider initiating legislative action to amend the provisions on the entry of doctors of social sciences specialised in the discipline of juridical sciences into the register of advocates.

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[14] See judgement of the Supreme Administrative Court in Poznań of 14 February 2002, ref. no. I SA/Po 461/01, Lex no. 74357; judgement of the Supreme Administrative Court of 21 June 2011, ref. no. I OSK 2102/10, Lex no.1082693; judgement of the Supreme Administrative Court of 11 January 2022, ref. no. III OSK 2267/21, Lex no. 3287570.

[15] Judgement Supreme Court of 26 September 2000, ref. no. III CKN 1089/00, Lex no. 44288; decision of the Supreme Court of 26 May 1998, ref. no. III SW 1/98, OSNAPUS 1998, No. 17, item 528; judgement of the Supreme Court of 19 April 2000, ref. no. II CKN 272/2000, not published.

[16] Journal of Laws of 2016, item 2393.

[17] Journal of Laws of 2023, item 1058.

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