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SELECTED PROBLEMS OF EDUCATION IN EUROPE AT THE TURN OF XX AND XXI CENTURY IN THE CASE LAW OF EUROPEAN TRIBUNALS

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Abstract

The aim of this article is to analyze which issues, and why, influenced the systems of education at the turn of XX and XXI century to the extent that led to the need of resolving them at the level of international tribunals in Europe - the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Within the case law of the CJEU, the analysis was based on the cases concerning the right to education of migrant children and the right of the holder of a secondary education diploma awarded in a Member State to access the higher education institution in another Member State. As far as the case law of the ECtHR is concerned, the author considers the cases dealing with the issue of wearing headscarves and displaying crucifixes in educational institutions in the context of the freedom of religion, the case with a problem of an alternative for religious education in public school and the cases on the discrimination in education. The conclusion is that the systems of education are vulnerable to challenges faced by the entire society and reflect the changes undergoing within it.

In the 21st cent. not only is education the matter regulated by state law of particular states but also, due to its fundamental significance, it has become internationalised. In Europe the situation resulted from, on the one hand, one of the most advanced international systems of protecting human rights based on European Convention on Human Rights and Fundamental Freedoms from 1950 that functions under the auspices of the Council of Europe, and on the other hand, the integration of the continent within the European Union. Therefore, the problems associated with the sphere of education that appear in various countries are brought before international tribunals, i.e. the European Court of Human Rights in Strasbourg (ECtHR) and the

Court of Justice of the European Union in Luxembourg (CJEU). Henceforth, the case law of the above mentioned tribunals has significant influence on the legal practice of the member states and actually shapes the reality there. Due to this the analysis of case law might be useful in anticipating particular phenomena also in Polish law, and furthermore, in formulating adequate responses to matters or challenges that emerge.

Firstly, one ought to take into account the case law of the European Court of Human Rights, whose jurisdiction is obligatory for all the 47 states-sides of the European Convention of Human Rights, including Poland.

The right to education itself was not included in the primary text of the Convention, however as soon as in

1952 Protocol 1 was enclosed, which complemented the convention catalogue of human rights. Art.2 of the Protocol 1 states, "No person shall be denied the right to education. in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Even if we merely scan the above regulation it is clear that the right to education does not exist in the void, and the issues concerning the granting of this right come into existence on the boundaries of other spheres of life and the state functioning.

The first of the spheres to be mentioned in connection with the right is the freedom of thought, conscience and religion guaranteed in art.9 of the Convention, which states:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The freedom of thought, conscience and religion determined in such a manner is of an absolute character and one of the regulations included in so called limitation clause. The regulation included in art.2 allows some limitations of the freedom provided the conditions of three-level test are fulfilled (legality, necessity, purposefulness). Thus, one might ponder on the practical dimension of the interaction between the right to education and the freedom of conscience and religion, and whether and to what extent it is the case when the limitation clause is applicable.

The first group of actual situations the European Court of Human Rights referred to in subjective scope were the ones concerning the introduction of regulations prohibiting headscarves in public educational institutions in some states. The most significant judgments in this matter are: *Karduman vs. Turkey* (1993), *Lucia Dahlab vs. Switzerland* (2001), *Leyla Sahin vs. Turkey* (2005) and *Dogru vs. France* (2008). In case *Karduman* the plaintiff was a pharmaceuticals student who was refused a diploma with a photo in which she

was wearing a headscarf. Lucia Dahlab was a pre-school teacher who started to wear a headscarf at work after having married a Muslim and converted to Islam. The case of Leyla Sahin regarded a medical studies student, who was denied the right to take exams and received a disciplinary penalty, when against the university authorities' resolution attended university wearing a headscarf. Whereas in *Dogru* case a student was expelled from a public middle school when she refused to take off her headscarf in a PE class.

In each of the above mentioned cases the ECtHR decided that the states might introduce the prohibition of wearing religious symbols in public educational institutions if it results from the world view neutrality of the state and such an understanding of the secular character of the school system. At the same time these prohibitions were considered as not violating the right to education. What is of significance, in each of the cases the prohibitions regarded always the headscarf as a religious symbol and were not justified with any other, even seemingly not related to religion matters, for instance: order, security or hygiene. In case of Lucia Dahlab the Court did not take into consideration the fact that the pupils' parents had not raised objections to the teacher wearing a headscarf. The Court qualified a headscarf as so called, "meaningful external symbol" of beliefs, which in no way can be reconciled with the rules of equality between sexes and non-discrimination accepted in a democratic state. As for now the above presented standpoint of the Court is adopted in its case law.

The second issue on the borderline of the right to education and the freedom of mind, conscience and religion is the one of the presence of the crucifix in a public educational institution. A fierce discussion regarding this matter arose in Europe with the case *Lautisi and the others vs. Italy* (2011), which was eventually adjudicated by the Grand Chamber of the Court only in consequence of an appeal. The argument was began in the following circumstances. Solie Lautisi a member of an Italian Union of Atheists, Agnostics and Rationalists initiated a law suit in which she demanded removing crucifixes from classrooms of the school her sons attended. The plaintiff claimed that the presence of this religious symbol violates her right to raise her sons according to the rule of secularity of the state. It ought to be remarked in this place that the presence of crucifixes in Italian schools was regulated directly in decrees from 1924 and 1928.

Italian courts did not share Mrs Lautisi's view, whereas the ECtHR in the judgement of the court of first resort in 2009, agreed with the plaintiff and pointed out that the presence of crucifixes violates her right to raise the children according to her world view. Italian state appealed against the verdict, and was supported by Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, San Marino, Russia and Romania. In the court of second resort the Grand Chamber rejected the charge 15 to 2 votes, and did not state the violation of art.2 of the First Protocol of art.9 of the Convention. In the justification the Grand Chamber remarked that unlike the Muslim headscarf the crucifix ought to be considered as a passive symbol which does not mean the obligatory Christian teaching. Thus, the Tribunal rejected Sole Lautisi's demand, referred to as the "white wall demand" (Szczech, 2011, p. 391), which can be summarised as the demand towards public institutions to promote the lack of morality as well as any values.

The analysis of ECtHR case law regarding the two above mentioned range of issues might lead to a conclusion that there exists some kind of inconsistency, since eventually the Tribunal did not support the possibility of introducing a general prohibition of the presence of any religious symbols in public educational institutions. This seeming discrepancy might be explained with the fact that in cases regarding the freedom of conscience and religion on the border of public schooling system the Tribunal grants the states with wide margin of appreciation, whereas the current practice concerning the permission to wear a headscarf or expose a crucifix at schools in particular states reflects the variety of relations between a state and church, as well as systems of education in Europe.

The third area of argument stemming from art.2 of the First Protocol and art.9 was the teaching of religion at public schools. In case *Grzelak vs. Poland* (2010) the plaintiff accused the state of violating his rights by not providing him with lessons of ethics instead of religion he resigned from due to his world view. The plaintiff pointed out that since one of the subjects is obligatory in the curriculum he was disfavoured not only because he was not able to develop according to his world view but also in his school report there was a dash instead of a mark for RE/Ethics. The Tribunal shared the plaintiff's opinion pointing out that the existing practice was putting him in an unfavourable position in relation to his peers, stigmatising him and endangering him with

discrimination both in the school environment and other situations.

The world view argument regarding the contents of curriculum at a public school was also the basis in *Folgero and the others vs. Norway* case (2007). The plaintiffs advanced in this case the breach of art.2 of the First Protocol and art.9 of the Convention by refusing to release from attending the obligatory school subject "Christianity, religion and philosophy". This subject included both the content regarding the Bible and the teaching of the Lutheran Church as Norwegian state church, as well as other Christian religions, other religions and philosophies of the world, ethics and philosophy. As the plaintiffs pointed out the relief was possible only from the part regarding the Lutheran religion, however not in case of teaching religion as such. Furthermore, the teaching regarding Christianity made the prevailing part of the subject content. This last issue was not considered by the Tribunal as the violation in itself due to the historical and cultural conditioning in Norway. However, against the guidelines of the subject, the teaching of Christianity did not exist in relation to other religions and philosophies, and additionally the rank of the position assumed for it differed significantly from the one assumed for other components of the subject content. All of the above, combined with the lack of possibility to be relieved from attending the disputable subject, was decided to be the violation of the plaintiffs' rights.

Another group in the European Court of Human Rights case law referring to educational issues are cases based on the charge of discrimination, thus violation of art.14 of the Convention, which states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Cases *D.H. and the others vs. the Czech Republic* (2007) and *Oršuš and the others vs. Croatia* (2010) regarded the charges of racial discrimination against the Romanic Gypsies connected with their access to education. In *D.H.* case the competence test was conducted of the children who were to be placed at a special school. The test checked the level of intelligence and the general adaptation to standard education. It was created taking into account average predispositions of children from the main population of the Czech Republic with no regard to the specifics and lifestyle of Romanic

Gypsies. As a result, circ. 80-90% of Romanic Gypsy children were educated in special schools, outside the mainstream education, with limited curriculum and no opportunities to integrate with the children from the main population. The Tribunal shared the view of the plaintiffs and stated the violation of art.14 of the Convention and art. 2 of the First Protocol. Whereas in *Oršuš* case, despite similarities regarding placing Romanic Gypsy children in special classes, the discrimination stemmed from applying a seeming homogenous criterion of the Croatian language command. Nevertheless, as an effect of this a significant part (in each school different percentage) Romanic Gypsy children attended separate classes. As the court proceedings proved, it was Romanic Gypsy children to whom the negative consequences of not knowing the language were applied and not the children of other nationalities. The Tribunal decided it to be the example of an indirect discrimination, and in this case as well confirmed the existence of the violation raised by the plaintiffs.

The outcomes of the above discussed cases prove that in the light of the European Convention of Human Rights any differences in treating individuals resulting from their ethnic background, or other premises listed in art.14, are unacceptable.

When it comes to the case law of the Court of Justice of the European Union (previously the European Court of Justice) it ought to be noted that it is relatively scarce. It results from the fact that education is an exclusive competence of the Member States, and European Union has but coordinating, complementary and supporting competences in this respect (The Treaty on European Union 2012, p. 1–46; The Treaty on Functioning of the European Union 2012, p. 47–390). Situations in which the jurisdiction of the CJEU may be applied in cases associated with education are on the border of realising other aims and competences of the Union. The example being here the case of *The EU Commission vs. the Kingdom of Belgium* (2004). The Commission was the complainant side, which lodged a complaint regarding the inactivity of Belgium. The state allowed the holders of the Belgian certificates of graduating from high school (*certificat d'enseignement secondaire supérieur* – CESS) to enter universities without having to take any additional entrance exams. Despite the admonitions from the Commission, holders of certificates of graduating from high school issued by other Member States were not granted the same right. The Tribunal stated the violation of community right

by Belgium by not taking any actions necessary to provide holders of the high school certificates from other Member States with the access to Belgian universities in the same way as holders of Belgian certificates did.

Whereas in *Casagrande* case (*Casagrande vs. Landeshauptstadt München*, 1974) the plaintiff was a daughter of an Italian working in Germany who was refused a scholarship aimed at improving school attendance. The plaintiff referred to art.12 of Regulation 1612/68 from 15th October 1968 on the freedom of movement for workers within the Community, according to which: “The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.” (Regulation..., 1968, p. 2). The Tribunal supported the view of the plaintiff, pointing out that all the means aiming at the increase of school attendance are included in the sphere of education, which means that the Member States cannot differentiate the situation of a migrating worker’s child while distributing them.

Summarising, the case law of the European Tribunals reflects the problems and transformations undergoing in states and societies, attempting at the same time to deal with emerging challenges. The part of the issues the Tribunals have to face has not appeared in Poland as yet. However, taking into account the increase of internationalisation in the sphere of education one may expect that the same or analogical issues might potentially emerge in our country soon. This situation could be influenced by such factors as, for instance, migrant workers and their families returning to Poland, the inflow of immigrants (both legal and illegal ones). In consequence, it means the necessity of taking a closer look at the models of broadly comprehended education in other European countries, as well as the issues associated with it, applied solutions and their results.

Bibliography

- Casagrande vs. Landeshauptstadt München* (1974), CJEU, case no 9/74.
D.H. and the others vs. the Czech Republic (2007), ECtHR, case no 57325/00.

- Dogru vs. France* (2008), ECtHR, case no 27058/05.
- Folgero and the others vs. Norway* (2007), ECtHR, case no 15472/02.
- Grzelak vs. Poland* (2010), ECtHR, case no 7710/02.
- Karaduman vs. Turkey* (1993), ECtHR, case no 16278/90.
- The UE Commission vs. the Kingdom of Belgium* (2004), CJEU, case no C-65/03.
- Leyla Şahin vs. Turkey* (2005), ECtHR, case no 42393/98.
- Lucia Dahlab vs. Switzerland* (2001), ECtHR, case no 42393/98.
- Oršuš and the others vs. Croatia* (2010), ECtHR, case no 15766/03.
- Solie Lautsi and the others vs. Italy* (2011), ECtHR, case no 30814/06.
- Szczzech T. (2011). Is the Religious Freedom a Freedom from Religion? Lautisi vs. Italy Case and the Crisis of Religious Freedom in Europe. in: M. Sadowski, P. Szymaniec (ed.), *Studia Erasmi Vratislaviensia. Religion and state and society*. Wrocław.
- Treaty on the Functioning of the European Union (2012), art. 165, Dz. Urz. UE C 326 from 26.10.2012.
- Treaty on European Union (2012), art. 6, Dz. Urz. UE C 326 from 26.10.2012.
- Regulation 1612/68 from 15th October 1968 on the freedom of movement for workers within the Community, (1968), Dz. Urz. WE L 257 from 19.10.1968.