

# Problematic Aspects of the Regulation of the Right to Education in the Slovak Republic

## Aspecte problematice cu privire la reglementarea dreptului la educație în Republica Slovacia

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### Abstract

*The right to education is a fundamental human right. The authors decided to analyse concept of a „right to education” in the Slovak republic through the lenses of constitutional and legal analysis. The article provides readers with the grounds for a deeper understanding of how the right to education and its aspects in a democratic society should be conceived. The authors focus on the idea of what it means to grant each person the opportunity to be adequately educated for a productive life as a citizen in a democratic society. At the outset, the analysis is attached with the central questions, underlying both the access to education and exercise of constitutionally admitted right from different legal point of views.*

**Keywords:** *the right to education; constitutional right; withdrawal of academic degrees.*

### Rezumat

*Dreptul la educație este un drept fundamental al omului. Autoarele au decis să analizeze conceptul de „drept la educație” în Republica Slovacia prin prisma unei analize constituționale și juridice. Articolul oferă cititorilor bazele pentru o înțelegere mai profundă a modului în care trebuie concepute dreptul la educație, precum și diferitele sale aspecte, într-o societate democratică. Autoarele se concentrează pe ce anume înseamnă să oferi fiecărei persoane oportunitatea de a fi educată adecvat pentru o viață productivă ca cetățean într-o societate democratică. Analiza este atașată întrebărilor centrale, care stau la baza atât accesului la educație, cât și exercitării dreptului recunoscut constituțional, din diferite perspective juridice.*

**Cuvinte-cheie:** *dreptul la educație, drept constituțional, retragerea diplomelor academice.*

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## 1. The constitutional regulation of the right to education in the Slovak Republic

The right to education is internationally recognized as a fundamental right. At the national level, a constitutional commitment to education matters both symbolically and practically.

In the words of researcher Michael S. Katz „*The ideal of universal education is integrally connected to the kind of democratic ideal in which people can aspire to think and act intelligently for themselves and can continue to develop their own potentialities through creative effort. Such an ideal needs to be reinvigorated and given new substance as a guiding ideal of educational policy, broadly conceived as that which affects educational opportunities, not merely schooling opportunities. To those who would dismiss this invitation to idealism as a fanciful dream, it is useful to remember the lines from Thoreau: “If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them*”<sup>1</sup>.

The constitutionalisation of the right to education in the legal order has been very important in many different ways. Education of the population of each state co-creates its spiritual wealth and is an expression of its maturity and cultural level. Therefore, it is necessary to distinguish the right to education and its regulation on international level and on national level. The right to education in the Slovak Republic is regulated in Article 42 of the Constitution of the Slovak Republic (published under No. 460/1992 Coll. as amended). The reason for enshrining the right to education into Art. 42 of the Constitution of the Slovak Republic was need to emphasise that constitution delineates country's fundamental values and commitments as well as its economic and political organization. The Constitution also provides citizens with a tool to claim its constitutionally guaranteed right in relation to the state. The right to education in the Slovak Republic belongs to every natural person, regardless of citizenship. Article 42 of the Constitution stipulates „(1) *Everyone has the right to education. School attendance is compulsory. Its period and age limit shall be laid down by law. (2) Citizens have the right to free education at primary and secondary schools and, depending on their abilities and society's resources, also at higher educational establishments. (3) Schools other than state schools may be established, and teaching in them provided, only under conditions laid down by law; education in such schools may be provided for a payment*”.

However, the Constitution of the Slovak Republic does not directly guarantee the right to education for foreigners, this is guaranteed in Act No. 245/2008 on Education and Training (Education Act) as amended. This Act is to guarantee this right to the children of foreigners with a residence permit in the Slovak Republic and to the children of asylum seekers and Slovaks living abroad. Education and training, accommodation and meals at schools are provided to them under the same conditions as to the citizens of the Slovak Republic.

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<sup>1</sup> As quoted M. S. Katz, (1982). Critical literacy: A conception of Education as a moral right and a social ideal. In R. Everhart (ed.), *The public school monopoly: A critical analysis of education and the states in American society*. Cambridge: MA: Ballinger Books, p. 274.

Slovak constitutional regulation does not contain a definition of the term „education“. The term used is relatively general, because this generally formulated right is associated with countless social aspects and purposes of many different social quality and social impact.

Slovak constitutional regulations have been subject to judicial interpretation that is up to regulation of Article 2 of Protocol No. 1 to the European Convention on Human Rights (hereafter „the Convention“) and case-law on it by the Strasbourg Court (European Court of Human Rights) and Article 14 Charter of fundamental rights of the European Union.

The fundamental right to education combines the subjective side of the right with an institutional side. The content of the right to education guaranteed by the Constitution and the reference international documents has two aspects: free access to education for any person interested in education, as well as the right to a certain level and quality of education. The right to education is among the priority of the state. National constitutions reflect particular social, political and economic circumstances that existed in a country at the time a constitution was drafted. The right to education as the subject of Article 42 para. 1 of our Constitution applies to basic, secondary, vocational and higher education.

Confirmation that constitution stipulates the guarantee of the right to education even in the case of higher (including university) education was given by the Constitutional Court of the Slovak republic in decision IV.ÚS 63/2014 of 30 January 2014 „*The right to education within the meaning of Art. 42 par. 1 of the Constitution does not contain an unrestricted subjective right to study at a university of its choice associated with the obligation of the state to provide such education to everyone, but only the right to apply for university studies under the conditions established by law and this university, as the criteria for admission are within the scope of self-governance of universities. The content of the fundamental right to education does not include the right to succeed in the admission procedure for doctoral studies*“<sup>2</sup>. Here is visible the link between constitutional commitment to different levels of education and educational policies.

The right to education, which includes the right of access to education, does not have the character of an absolute right, the legislator may restrict it, but only respecting condition that restriction respects essence and meaning of the right and is applied only to the established (legitimate) purpose. Cultural rights, which also include the right to education, are second-generation rights, the form and content of which depend to a large extent on the economic and social possibilities of the state. The right to education is a fundamental right falling under the regime of Art. 51 par. 1 of the Constitution. It is up to the legislator to determine its real content through adopting relevant legislation. The right to education can be claimed only within the limits of the laws that exercise it. It is therefore not a law applicable directly on the basis of the Constitution, but a law whose application is possible only in accordance with ordinary law.

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<sup>2</sup> Resolution file no. IV.ÚS 63/2014 of 30 January 2014.

Likewise, the state does not have a positive obligation to provide the entitled subject (student) with a specific type of education in facilities for serving the prison sentence<sup>3</sup>. According to the legal opinion of the Constitutional Court expressed in the resolution of file no. IV. ÚS 387/2018 of 20 June 2018 *„From the right to education according to Art. 42 of the Constitution of the Slovak Republic, it is not possible to deduce the obligation of the state to provide higher education in institutions for the execution of a custodial sentence. The state is not obliged to organize in the institution for the execution of a custodial sentence a specific type of education or training beyond those already available there”*.

The opportunity to complete secondary school and pursue post-secondary studies is particularly important in today's skills and knowledge-based economy. School fees represent one of the main obstacles to enrolment and persistence, especially for children from low-income households. That is the reason why the Slovak Republic has decided to undertake positive obligation to guarantee free education at primary and secondary schools. This positive obligation of the state is in accordance to the Universal Declaration of Human Rights (1948) which guarantees the right to education and specifies that schooling should be free and compulsory at the primary level (in Article 26). It also corresponds to commitment expressed in the International Covenant on Economic, Social and Cultural Rights (1966), which reaffirmed this commitment and pledged to make secondary and higher education accessible to all and progressively free (Article 13). The Constitution of the Slovak Republic provides all citizens with free constitutional rights to primary, secondary education. Ensuring this right is implemented through a system of primary and secondary schools. In the words of the Constitutional Court in the judgment file no. PL. ÚS 7/2013 of 25 June 2014 *„A positive obligation for the state to guarantee citizens the right to free education in primary and secondary schools is consequential from Art. 42 par. 2 of the Constitution”*. Therefore, in our country, compulsory school attendance lasts for ten years or until the end of the school year in which the pupil reaches the age of sixteen, with some exceptions. What are the consequences of breaching the compulsory school attendance? If the child does not fulfill the compulsory school attendance, then it regarded as an offense, in accordance with § 37 of Act No. 596/2003 Coll. on State Administration in the Educational System and the School Self-Government. A parent or other legal guardian may pay a fine of up to 331.50 euro. However, in comparison it is relatively common abroad that this is not offense but it can lead to removal of children from parental care.

The tertiary education is guaranteed with reference to individual abilities (skills) of the citizen and resources of the society and the state. The Slovakia can be assigned to a minority of states which grants secondary and higher education<sup>4</sup>. The right to education is an

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<sup>3</sup> Resolution file no. IV. ÚS 387/2018 of 20 June 2018.

<sup>4</sup> The authors note: We took into account the statistics of the older date, as we did not find a publicly available newer one. As of 2011, 81% of constitutions protected primary education universally and 53% designated it as free. A minority granted secondary (37%) and higher (35%) education or explicitly protected specific groups. Constitutions adopted after 1990, which belong predominantly to low – and middle-income countries, were more likely to protect education rights. Countries that constitutionally protected free education were more likely to have corresponding national policies. Those that constitutionally guaranteed primary and secondary education had significantly higher net enrolment, independent of GDP and urbanization. According to

important aspect of the freedom to study; it is not only important for students themselves, but also for educational institutions, such as universities, since few if any individuals are able to rise to the level of academic researcher in the absence of systematic and intensive supervision and guidance by others<sup>5</sup>.

From the point of view of access to education and the possibility of education, the approach of the state and its setting of educational policy in this area is eminently important. Constitutionally, preconditions are created for equality of educational opportunities and for the removal of obstacles that would prevent this. There are also projections on respect for the educational needs of individuals in education, the quality of the educational process and the possibility of education.

The costs associated with providing of education in primary and secondary schools are not borne by the state in the case of a foreigner or stateless persons. Citizens of the Slovak Republic have the right to be educated within the system of primary and secondary schools without any fees, regardless of their designation (tuition, enrolment fee etc.). Free education at primary and secondary schools cannot affect the level and quality of education provided by an educational institution. Fees that could be considered as a violation of free education in all types of schools, are those that underlie the access to education itself, as well as the level and quality of education provided. In the context of the existing case law of the Constitutional Court, textbooks cannot be considered as part of the regime of free education in primary schools. The imposition of fees for textbooks does not disrupt the free nature of education or access to education (*primary school enrollment*) and does not „charge“ the level and quality of education provided (for example in the form of tuition fees). The implementation of the payment of the fee for textbooks does not predestinate the level and quality of education, nor does it affect the retribution (payback) of education<sup>6</sup>.

The Constitutional Court of the Slovak republic indirectly subscribed to the doctrine of a positive commitment (obligation) of the state in relation to access to higher education. In his view, the fundamental right to education applies equally to students of public universities, state universities and private universities. The same right to education implies the obligation of the state to create equal opportunities through material support, which does not make higher education a „privilege“<sup>7</sup>.

Slovak Constitution set the constitutional limits to guarantee of free higher education, expressed by the wording „according to the abilities of the citizen and the possibilities of society“. The subjective condition according to the abilities of the citizen, the ability must be interpreted as the ability of the citizen to succeed in testing basic *knowledge* by university

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Heymann, J., Raub, A., Cassola, A.: Constitutional rights to education and their relationship to national policy and school enrolment. In *International Journal of Educational Development Journal* 39 (2014) p. 131-141, available: [www.elsevier.com/locate/jjedudevhttp://dx.doi.org/10.1016/j.jjedudev.2014.08.0050738-0593/B2014](http://www.elsevier.com/locate/jjedudevhttp://dx.doi.org/10.1016/j.jjedudev.2014.08.0050738-0593/B2014).

<sup>5</sup> J. Vrieling, J., P. Lemmens, S. Parmentier and the LERU Working Group on Human Rights: Academic Freedom as a Fundamental Right. ADVICE PAPER No. 6 – December 2010, p. 9, available: <https://www.leru.org/files/Academic-Freedom-as-a-Fundamental-Right-Full-paper.pdf>.

<sup>6</sup> Resolution file no. PL.ÚS 5/93 of 18 May 1994.

<sup>7</sup> Decision file no. PL.ÚS 3/08 of 26 May 2010.

admissions, as well as to be able to successfully complete the study. In the extensive interpretation of this term in connection with Art. 42 par. 2 of the Constitution, it is possible to understand those characteristics of a citizen that enable him to secure financial resources for education and to satisfy the needs related to education. Fulfillment of both of these conditions is a prerequisite for the granting of the right to higher education. The possibilities of society as a determining factor for the granting of a free higher education right to education are related to the necessary and desirable regulation of a particular society in relation to its social, societal and economic needs. The better the economic result of the state, the more likely it is that the availability of the right to education at universities will also improve, which is caused by better economic indicators and the associated possibilities of the state.

While compulsory and free education are typically governed by policy, having these commitments entrenched constitutionally assigns clear responsibility to the state for their provision and gives citizens a tool to hold governments accountable. Concerning conditionally granted tertiary right to education it is not possible to derive from Art 42 par. 2 of the Constitution a constitutional guarantee or the existence of a basic constitutional right to a generally guaranteed free university studies, not even at public universities. The Constitutional Court stated *„The requirement to pay tuition fees for university studies is constitutionally acceptable and does not in itself constitute a constitutionally inconsistent restriction of the fundamental right to education. The manner in which this requirement has been incorporated into the legal order is proportionate to the objective pursued, in fact clarifies it and defines it in a form corresponding to the original intentions of the legislature”*<sup>8</sup>. The legislator constructs and accepts the possibility of completing one free university study, which is in line with the possibilities of society. The conditions are established by Law on Higher Education and on Changes and Supplements to Some Laws (published under no. 131/2002 Coll.) guarantee. By its very nature, the fundamental right to education encourages legislation, but its regulation must not affect the very essence of this right or affect other rights enshrined in the Constitution and the Convention.

Educational, research, development or artistic and other creative activity itself, which characterizes the mission of universities, does not represent business activity, respectively. This activity itself does not fall within the scope of the business activity. Nevertheless, public university may conduct business by carrying out an activity for remuneration which follows on from its educational, resp. further creative activity. The scope of business activity also includes activity serving for more efficient use of human resources and property of the university. The fundamental right to education applies equally to students of public universities, state universities and private universities. The Constitutional Court confirmed *„public university that has the opportunity to provide a study program of external study (after the government has determined these study programs by regulation), it may introduce fees for a certain study program (within the determination of the limits of financial resources by the Ministry), but on the other hand, it does not have to introduce fees (the question is*

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<sup>8</sup> Finding file no. PL. ÚS 19/08 of 18 May 2010.

*whether universities do not get under this economic pressure to introduce charges in any case)*<sup>9</sup>. Financing of the universities themselves can be seen as a very serious problem. Particularly the problem is with the private universities. The private universities can receive funding from the state as well as from private payments.

## **2. Withdrawal of academic degrees**

In connection with the right to education, the issue academic fraud relating to withdrawing of academic titles (degrees) and education seems to be interesting. The idea of deriving responsibility towards persons who cheat when writing the final thesis, copied it or in the case of persons who obtain an academic degree in this subtle and fraudulent way, it is the result of political scandals concerning degrees of Slovak politicians (from Speaker of Parliament to Ministers and Prime Minister) and influenced by fake degrees and copied dissertations of world leaders.

The main ambition was to introduce such a regulation according to which university can withdraw a degree if the work or the academic records in support of it had been falsified. So the university should have reserved the right to withdrawn a degree even though it has been granted should there be discovery that the work upon which it was based or the academic records in support of it had been falsified. In such a case there will be opportunity to withdraw the degree upon discovery of the falsification.

The analysis is based on the draft amendment to the Law on Higher Education published so far in this matter. At the time of the conference the approved text of the amendment to the law has not yet been published. The issue of title withdrawal is a topic that resonates in the public for a long time. Several issues needed to be addressed in this area, in particular i) what to withdraw, ii) under what circumstances to withdraw, iii) who should decide in the first stage as well as in the second stage, iv) until what time from graduation / degree can be decided on withdrawal, v) what is the result of the decision<sup>10</sup>. The proposal entrusts decision-making to the competence of the university, with regard to the principle of „who grants, that one takes away”, while the rector is to act on behalf of the university on the proposal of the advisory commission. As the result should be law amendment in the part on Declaration of invalidity of the state examination or its part, declaration of invalidity of the rigorous examination („Doctor of Law” / *Juris Utrisque Doctor*) degree with the JUDr. abbreviation before one’s name) or its part, revocation of the scientific-pedagogical title or artistic-pedagogical title (PhD.), proposal for dismissal (recall) of the professor and waiver of the academic title.

At present, the self-governing activity of a public university includes the award of the title of Associate professor (doc.) and prof. The rector is also the one who awards the title of associate professor on the basis of a decision of the scientific council of a university and

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<sup>9</sup> File no. PL. ÚS 3/08 of 26 May 2010.

<sup>10</sup> According to Explanatory Memorandum to the Draft Amendment to Law on Higher Education <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=482357>.

the basis of a decision of the scientific council of the faculty. The rector submits to the Minister of Education proposals for the appointment of professors approved by the scientific council of the public university. However, in accordance with the Constitution of the Slovak Republic and the Act on Higher Education Institutions, future professors are appointed to their office by the President of the Slovak Republic. The authority of the President of the Slovak Republic is the only to appoint professors and not to decide on the fulfillment of the criteria for the award of this title, the university does so within its self-government. Pursuant to the proposed amendment, the rector of a university should act and decide on the submission of a proposal to dismiss the professor to the President of the Slovak Republic, provided that the conditions stipulated by law are met.

After the conference took place the approved text to the amendment to the Education Law was vetoed by the president of the Slovak Republic. The main argument used was the right one. The President is the person who is entitled to grant an academic title professor and should be the one who has the right to withdraw a title. We agree with the President of the Slovak Republic who stated, and at the same time we add that, in our opinion, the decision-making power should be given to the rector of the university, who also awarded the title itself. This therefore applies to the professor's dismissal. While something else applies in the case of proceedings and decisions on the invalidity of the state examination, rigorous examination or their parts and on the withdrawal of the title of „associate professor”, where the approved law gives the rector of the university right to issue a final decision. At the same time, the amendment to Act on Higher Education gives space for a natural person to voluntarily give up an academic degree. We add that the amendment also implies a period until it is possible to withdraw the title in this way, which is five years from the date of the proper completion of studies or the award of the title.

False pretenses of scholastic achievement and learning the education system is associated with illegal and unethical conduct has been strong motivation to change. It can therefore be summarized that the draft amendment to the Law on Higher Education works with the withdrawal of education in the case of bachelor's and master's studies, when a student completed his/her studies on the basis of plagiarism's final work or other unjustified advantage violating the subject of intellectual property rights protection in the final state exam. The amendment therefore distinguishes between the withdrawal of education and the withdrawal of academic, resp. academic-scientific titles such as JUDr., Associate Professor (“docent” in Slovak) or Professor.

In this context, several questions arise. The first question relates to the legal acts of persons. Fortunately, the legislator avoided the retroactive effect of the law, so called retroactivity and determined the withdrawal of education and titles only in relation to those that will be acquired after 1 January 2021. The first question that may arise is how the legal acts of persons performed in the time when they had the necessary university education, after leaving the education of these persons? There are legal acts that are not subject to limitation. This may or may not be a problem in practice. There can also be very negative



legal consequences that could occur in the case of certain professions. We are thinking in particular of the performance of the medical professions.

The second question has broader context. The Slovak republic is relatively young democracy dating its establishment to 1 January 1993. Before Slovakia became a democratic state, it experienced a communist regime within Czechoslovakia (Czech and Slovak socialist later federal republic) and the associated setting of relations within education and the school system. In the time of socialism applied the principle of appointment when acquiring academic degrees and titles. After the change of the regime and the establishment of an independent state, a wide space was opened for the state in the field of education, its regulation. At present, it turns out that the state has not managed this new role in the field of education regulation. The state distributed licenses and new institution on higher education were established, universities, that were not only public, but especially private ones.

The newly established universities, especially the private ones, did not sufficiently manage the acquired academic self-government, autonomy. Instead of providing quality education, these schools focused their activities on making a profit, they started a business with education. In other words, they were handing out academic degrees and titles for money. We have already encountered this problem with other colleagues from Europe, who nicely described it as a so-called "*shop diploma*" problem. Slovakia has in the past established a special body called the Accreditation Commission, which acted as an advisory body to the government and acted in the field of assessing quality standards of education and had a decisive word in granting licenses for the provision of education. The changes also affected this area and a completely new type of body- the Accreditation Agency- was established as an independent body with nationwide competence, whose members are transparently elected. The creation of such a body is intended to help bring about a positive change in the regulation of the level of education provided, to help to set high standard in quality of education. However, it is questionable how the removal of degrees in practice affects academic self-government. Academic self-government goes hand in hand with higher education. It is guaranteed at the national level in the framework of the regulation of Art. 43 of the Constitution of the Slovak Republic and is an expression of respect for the international commitments of the state expressed in particular in Art. 13 Charter of fundamental rights of the European Union<sup>11</sup>. However, for many years there has been a debate in the Slovak Republic as well as in the Czech Republic about academic self-government as such. One of the authors has already stated that she places university self-government in academic self-government. At the same time, it is true that we subsume academic self-government under interest self-government due to the fact that in our conditions the features of interest self-government prevail, but we are aware of the specifics of academic self-government<sup>12</sup>.

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<sup>11</sup> Charter of fundamental rights of the European Union in Art 13 stipulates „*The arts and scientific research shall be free of constraint. Academic freedom shall be respected*”.

<sup>12</sup> Same as In: M. Vrabko (2018). *Správne právo hmotné* [Substantive administrative law]. Bratislava: C.H. Beck.

The amendment to the Act on Higher Education Institutions on the Withdrawal of Degrees interferes with academic self-government. It is restricted by the state action. The state determines the conditions under which representatives of the universities are to proceed in a predetermined procedure, enabling actions beyond the scope of academic self-government. The state restricts self-government of interest, so called interest democracy at the level of the academic community. The amendment to the Act on Higher Education Institutions on the Withdrawal of Degrees interferes with academic self-government. It is being cut down by the state. The state determines the conditions under which its representatives are to proceed in a predetermined procedure, enabling actions beyond the scope of academic self-government. The state restricts self-government of interest, interest democracy at the level of the academic community.

The third question concerns the problem of degrees obtained abroad, as this law does not apply to them. However, it is quite common today for students to travel around the world as part of cross-border mobility. It is therefore not unusual for them to complete the second degree or the third degree of a field of study abroad and obtain an academic degree there.

At the moment, we cannot predict how this legislation will work in practice, or how the competent authorities will deal with it. It is certain that it will act as a warning sign for those who would like to act in violation of the law during or by completing their studies or scientific work. On the other hand, it does not solve the existing problem of plagiarism theses and university degrees purchased in the past. Politicians are pleased to have formally satisfied the people, but the problem of the past has not been resolved. The state has adopted an amendment which interferes with the powers of academic self-government. We believe that in this respect, the narrowing of powers and further interventions in the autonomy of higher education institutions are not desirable. We will see what the practice in this area will bring and what other questions will arise.

