Artur Bilgorajski¹

Constitutional Freedom of Scientific Research. Contribution to the Discussion

Keywords: science; freedom of scientific research; Constitution of the Republic of Poland

Słowa kluczowe: nauka; wolność badań naukowych; Konstytucja Rzeczypospolitej Polskiej

Abstract

The reform of higher education in the Republic of Poland, which was introduced by the Act of 20 July 2018 Law on higher education and science (Dz.U. 2018, item 1668, as amended; hereinafter: Law on higher education and science), revitalized interests in the freedom of scientific research, optimal ways of its implementation and the role of the state in the support of scientific and research activities. For this reason providing an answer to questions concerning the genesis of regulation of the freedom of scientific research in the Constitution of the Republic of Poland of 2nd April, 1997 (Dz.U. 1997, No. 78, item 483, as amended; hereinafter: the Constitution of the Republic of Poland), specifically in relation to its recognition and position in the Polish constitution, the normative content of the freedom, the beneficiaries and entities obliged to comply with it, appears appropriate. These issues seem to be of particular importance. First of all, the freedom of scientific research shall be one of the crucial elements of a knowledge-based economy, with a significant role of higher educational institutions. Secondly, the proper functioning of universities indicates a broader establishment of human rights. What is more, the hitherto undertaken attempts to define the freedom of scientific research seem not to be incisive enough. The aim of this article, therefore, is to draw attention to the issues and

¹ ORCID ID: 0000-0002-1389-4520, Ph.D., D.Sc., Institute of Law, Faculty of Law and Administration, the University of Silesia in Katowice, Poland. E-mail: artur.bilgorajski@us.edu.pl.

difficulties associated with the freedom of scientific research. The answers given to the aforementioned questions, however, having regard to the limited scope of the publication, cannot be deemed definitive.

Streszczenie

Konstytucyjna wolność badań naukowych. Przyczynek do dyskusji

Reforma szkolnictwa wyższego w Rzeczypospolitej Polskiej, której emanacją jest ustawa z 20 lipca 2018 r. Prawo o szkolnictwie wyższym i nauce (Dz.U. 2018 r., poz. 1668 ze zm.; dalej: Prawo o szkolnictwie wyższym i nauce) przyniosła renesans zainteresowania wolnością badań naukowych, optymalnymi sposobami jej realizacji oraz rolą państwa we wspieraniu działalności naukowo-badawczej. Stąd celowe wydaje się udzielenie odpowiedzi na pytania o genezę regulacji wolności badań naukowych w Konstytucji RP z 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 ze zm.; dalej: Konstytucja Rzeczypospolitej Polskiej), miejsce wolności badań naukowych i sposób jej ujęcia w systematyce w ustawie zasadniczej; treść normatywną wolności badań naukowych, a także podmioty wolności badań naukowych i adresatów tej ostatniej. Kwestie te mają – z kilku względów – znaczenie szczególne. Po pierwsze, wolność badań naukowych powinna być jednym z kluczowych elementów gospodarki opartej na wiedzy, w której uczelnie wyższe odgrywają doniosłą rolę. Po drugie, prawidłowe funkcjonowanie uniwersytetów jest jednym z mierników szerszych praw człowieka. Po trzecie, wolność badań naukowych jest zagadnieniem dość słabo poznanym. Owe odpowiedzi, ze względu na ograniczone ramy niniejszego opracowania, nie pretendują do miana wyczerpujących. Celem niniejszego artykułu jest jedynie zarysowanie tematu i związanych z nim problemów.

I.

The essential political breakthrough, which took place in 1989, opened the way for the establishment of constitutional foundations for the freedom of scientific research, based on the standards of a democratic state ruled by law. This task was entrusted to members of the Constitutional Committee of the National Assembly (hereinafter: KKZN), who analysed two conceptions and, within their framework, different options for the normative grasp of the di-

scussed freedom, as proposed at specific stages of KKZN's works. The first conception assumed that the freedom of scientific research would be governed by a provision on the freedom of speech. The added fragment was to read as follows: "The state shall guarantee the freedom of science, art and scientific research as well as dissemination of its fruits. Exercise of such freedoms may not be restricted by prior censorship. An act may envisage a need to obtain consent for the operation of radio or television stations"². The second conception assumed that the freedom of scientific research would be regulated independently of freedom of speech, in a separate constitutional norm. Wiktor Osiatyński proposed the following wording of such a provision: "(1) The freedom of artistic creation and scientific research as well as of dissemination of its fruits shall be guaranteed. An act may introduce restrictions for the protection of human rights or public interest. (2) Autonomy of higher education institutions shall be guaranteed on the terms set out in statutory provisions"³. The proposal by Leszek Wiśniewski read: "(1) The freedom of artistic creation, freedom of scientific research as well as freedom to disseminate its fruits shall be guaranteed. (2) Everyone may freely participate in cultural life and enjoy access to national cultural objects. (3) Protection of the value of national cultural objects shall be the responsibility of public authorities. (4) Every author and inventor shall have the right to protection of their copyrights and inventive rights"⁴. Piotr Andrzejewski proposed the following version of the discussed provision: "(1) Creative freedom shall be guaranteed. It shall cover both the freedom of scientific research and intellectual and artistic pursuits. It shall be inadmissible to exercise such freedom in violation of human rights, state security or the common good. (2) Everyone shall have the right to freely participate in cultural life and enjoy access to national cultural objects. (3) Every author shall have the right to protect their tangible and intangible interests deriving from scientific, literary or artistic creation. (4) The state shall also preserve and protect the value of cultural and

² Quote after: M. Królikowski, K. Szczucki, *Komentarz do art. 73 Konstytucji RP*, [in:] *Konstytucja RP. Vol. I. Komentarz. Art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 1672, side No. 6.

³ Ibidem.

⁴ Ibidem.

national heritage objects abroad”⁵. Jerzy Ciemniewski was of the opinion that the provision should read as follows: “(1) Everyone shall be guaranteed the freedom of artistic creation and enjoyment of cultural objects. (2) Everyone shall be guaranteed the freedom of scientific research, teaching and disseminating fruits of scientific research. Human dignity shall be the boundary of scientific experiments”⁶.

In the end, on 1 October 1996, KKZN decided that the freedom of scientific research would be governed by a separate constitutional provision reading as follows: “The freedom of artistic creation and scientific research as well as the dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone”⁷.

II.

The current Constitution of the Republic of Poland guarantees the freedom of scientific research in Art. 73. The cited provision was included in chapter II subchapter IV of the Constitution, entitled: “Economic social and cultural rights and freedoms”. The placement of the discussed provision was received in legal circles with two types of objections. First, it was argued that the freedoms of artistic creation, scientific research and teaching are personal freedoms and, as such, should have been included in chapter II subchapter II of the Constitution, entitled: “Personal freedoms and rights”⁸. Second, attention was drawn to the fact that, the existing location of the provision guaranteeing the freedom of scientific research within the scheme of the Constitution proved that the legislature did not pay much attention to such freedom⁹.

⁵ Ibidem.

⁶ Ibidem.

⁷ Art. 73 of the Constitution of the Republic of Poland.

⁸ L. Bosek, M. Wild, *Kontrola konstytucyjności prawa. Zagadnienia ustrojowe, procesowe i materialnoprawne. Komentarz praktyczny dla sędziów i pełnomocników procesowych. Wzory pism procesowych*, Warszawa 2014, p. 274. C.f. W. Brzozowski, *Konstytucyjna wolność badań naukowych i ogłaszania ich wyników*, [in:] *Prawo nauki. Wybrane zagadnienia*, eds. A. Wiktorowska, A. Jakubowski, Warszawa 2014, p. 29.

⁹ See J. Sobczak, *Wolność badań naukowych – standardy europejskie i rzeczywistość polska*, „Nauka i Szkolnictwo Wyższe” 2007, No. 2/30, pp. 53–54; S. Jarosz-Żukowska, Ł. Żukowski,

It is difficult to agree with these objections. The current Constitution of the Republic of Poland expressly guarantees the freedom of scientific research, which is sufficient proof that the legislature recognized its vital significance. Since Art. 73 guarantees that freedom separately, it bestows special meaning on such freedom and introduces a requirement of its particularly strong protection¹⁰. The mere fact of this placement and the absence of clauses pertaining to the freedom of scientific research outside of the scheme of chapter II of the Constitution does not reduce its practical significance. The freedom of academic research, just as other freedoms mentioned in Art. 73 of the Constitution of the Republic of Poland, is a subjective right, which opens – in case of its violation – the possibility to file a constitutional complaint. Moreover, the scope of the possible pursuit of protection of those freedoms was not limited by the provisions of Art. 81 of the Constitution. It is also worth mentioning that the qualification of the freedom of scientific research as one of economic, social and cultural rights corresponds to the scheme of the International Covenants on Human Rights.

Considering the criterion of subject matter of the freedoms under Art. 73 of the Constitution, five freedoms can be derived from that provision, namely:

1. freedom of artistic creation,
2. freedom of scientific research,
3. freedom to disseminate the fruits of scientific and creative activities,
4. freedom of teaching,
5. freedom to enjoy cultural objects;

While the first four freedoms are active and consist in creation, dissemination and teaching, the final one serves as a guarantee of access to what has been achieved as a result of exercise of the initial four¹¹. In this context, it is worth noting that the freedom of scientific research, together with the freedom to disseminate its fruit and the freedom of teaching, forms a more general category of the freedom of science¹².

Wolność badań naukowych i nauczania, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 714.

¹⁰ L. Garlicki, *Note 3 to Art. 73 of the Constitution of the Republic of Poland*, [in:] *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku. Komentarz*, vol. III, ed. L. Garlicki, Warszawa 2003, p. 2.

¹¹ S. Jarosz-Żukowska, Ł. Żukowski, *op.cit.*, p. 714.

¹² L. Garlicki, *Note 3 to Art. 73 of the Constitution of the Republic of Poland...*, p. 2.

On the other hand, using the subjective criterion, that is having regard to beneficiaries of the freedoms guaranteed under Art. 73 of the Constitution of the Republic of Poland, two types of freedom can be distinguished:

1. freedom of creators (of scientific and artistic works, teachers),
2. freedom of recipients (of cultural goods, education)¹³.

Therefore, it should be noted that beneficiaries of the freedom of artistic creation and freedom of scientific research are predominantly creators (originators) – artists, scientists. Only the existence of such freedoms allows others to enjoy the effects of both artistic creation and scientific research¹⁴.

The provisions of Art. 73 of the Constitution may be contested for several reasons. First, criticism may relate to the fact that the freedom of scientific research, which currently has an especially vital practical significance, was not granted a separate constitutional provision, but was addressed together with several other freedoms. Second, it may be objectionable that the freedoms mentioned in Art. 73 of the Constitution of the Republic of Poland were regulated jointly, although they differ both in terms of nature and scope. Third, doubts may also be generated by the order of the specific freedoms in Art. 73 of the Constitution, which suggests that the legislature gave priority to the freedom of artistic creation over the freedom of scientific research and the freedom of teaching. Fourth, it may be surprising that the analysed provision does not mention any limitations to the freedoms listed therein. Fifth, it may also be argued that Art. 73 of the Constitution does not include any guarantees of those freedoms. Sixth, it may seem unclear why the legislature listed the freedom to disseminate the fruits of scientific research separately since such freedom is implicitly covered by the freedom of scientific research and enjoys the guarantee of the freedom to disseminate information, as specified in Art. 54(1) of the Constitution of the Republic of Poland. The same is true of the freedom to disseminate artistic creation, which also may be considered a constitutional redundancy.

In reference to the two first objections, it must be pointed out that the joint grasp of the freedom of scientific research and other creative freedoms is a typical approach in contemporary constitutionalism, which was shown

¹³ S. Jarosz-Żukowska, Ł. Żukowski, *op.cit.*, p. 714.

¹⁴ J. Sobczak, *op.cit.*, pp. 53–54.

in section I. As far as the third issue raised is concerned, one should note that the connection between scientific activities, artistic creation and enjoyment of cultural objects is rather loose. As a result, we have to do with freedoms belonging to different spheres of social life, which means that it would be difficult to give priority to any such freedom, since they have different points of reference. In response to the fourth objection, it should be remembered that the absence of any express restriction on the freedoms in the discussed provision does not mean that they are absolute. This is not the case in the light of the restrictive clause under Art. 31(3) of the Constitution of the Republic of Poland, as will be discussed in more detail in a later part of this section. The fifth objection is indeed legitimate, and in respect to the freedom of artistic creation and scientific research, the shortage of guarantees in relation to copyright and inventive rights is particularly glaring. In consequence, the protection of creator's rights must be derived from other constitutional provisions. When it comes to the sixth remark, it should be concluded that since the legislature distinguished separately, in Art. 73 of the Constitution of the Republic of Poland, the freedom to disseminate fruit of scientific research, which could as well be included in the provision of Art. 54, this means that the legislature attached special significance to such freedom, by attempting to provide it with the most strong protection. This is justified insofar as the possibility of public presentation of the fruits of scientific research (or artistic creation) conditions, in most cases, the sense of such activities.

III.

The Constitution of the Republic of Poland does not indicate expressly how to understand the freedom of scientific research. Therefore, it seems legitimate to discuss the concepts of "freedom," "science" and "scientific research".

At the initial phase of works on the current Constitution of the Republic of Poland¹⁵, there was a vivid discussion of the question of how to under-

¹⁵ It is noteworthy that the Constitution uses at the same time four designations of freedom: 1. by pointing to the one and independent value: "freedom of the person" (Art. 31(1)); 2. in general reference to all "freedoms" (in the title of chapter II – next to "rights and obligations

stand individual freedom. There was even an expert proposal to provide the following definition of the said phenomenon: “Freedom means that one may do anything which does not harm others; therefore, enjoyment of natural freedoms by each individual has no boundaries besides those that ensure to other members of the society enjoyment of the same freedoms. Such boundaries may be specified by an act”¹⁶. At first glance, the cited definition may be associated with the provisions of Art. IV and Art. V of the Declaration of the Rights of Man and of the Citizen, adopted on 26 August 1789, and presently treated as an integral component of the Constitution of the V French Republic. In the end, however – which is unfortunate in my opinion – the legislature did not include a definition of freedom in the Constitution, limiting itself to the inclusion of the following in its provisions: “Freedom of the person shall receive legal protection. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law”¹⁷. This definition may also be traced to the provisions on freedom of the French Declaration of Rights, although it is no longer as obvious or clear as in the case of the cited expert definition.

In such a situation, most constitutional law scholars assume that the framers of the Constitution of the Republic of Poland – trying to transplant the most valuable principles of European and American constitutional law, as well as international standards in the area of human rights – found that the definition of freedom as expressed in the French Declaration of Rights was up-to-date¹⁸. In consequence, by human freedom, one should understand hu-

of persons and citizens”; in Art. 31(2) sentence 1); 3. in the form of prohibition “no freedom to” (Art. 31(2) sentence 2); 4. when designating the inadmissible antithesis of freedom: “not free to compel” (Art. 31(2) sentence 2). See *Zasady ustroju III Rzeczypospolitej Polskiej*, ed. D. Dudek, Warszawa 2009, footnote 243, p. 104.

¹⁶ Constitutional Committee of the National Assembly, *Biuletyn X*, Warszawa 1995, pp. 123–124.

¹⁷ See Art. 31(1) (2) of the Constitution of the Republic of Poland.

¹⁸ L. Wiśniewski, *Wolność prasy w świetle Konstytucji RP, ustaw oraz wiążącego Polskę prawa międzynarodowego. Problemy podstawowe*, [in:] *Wolność słowa w mediach*, ed. D. Górecki, Łódź 2003, p. 24; idem, *Zakres ochrony prawnej wolności człowieka i warunki jej dopuszczalnych ograniczeń w praktyce*, [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, ed. L. Wiśniewski, Warszawa 2006, p. 21; idem, *Zasady normatywnej regulacji wolności i praw człowieka*, [in:] *Konstytucja i władza we współczesnym świecie. Doktryna – Prawo – Praktyka*, ed. J. Wawrzyniak, Warszawa 2002, p. 113. The same opinion is voiced by Anna Łabno. According

man natural ability to perform acts of will (take decisions) and implement them, which, in the conditions of an individual operating within a society, is subject to restrictions for the sake of ensuring to others the same possibilities to enjoy their freedom¹⁹.

In such understanding of the concept of individual freedom, one may distinguish two aspects: positive and negative. The positive aspect is that an individual may freely shape their behaviour in a given sphere, by choosing such forms of activity as the individual finds most fit, or refrain from taking any action²⁰. The decision-making freedom of an individual has a universal nature. This relates to all spheres of social or personal life and covers actions of any kind or type²¹. On the other hand, the negative aspect of individual freedom is a legal duty to refrain – instituted predominantly by public authorities – from interference in a sphere restricted for an individual²². In this understanding, freedom may be approached both as “freedom from prohibitions” (when public authorities specify actions or decisions which an individual must not take) and as “freedom from commands” (when public authorities specify actions which an individual must take)²³. As a consequence, individual freedom relates, on one hand, to the sphere of external activity (everyone may decide about their behaviour and, by doing so, delimit their impact on the external world), and, on the other one, to the sphere of personal security and integrity (which delimits the boundaries of the external world’s impact on an individual’s situation)²⁴.

to that author: “The provisions adopted in Poland clearly refer to the experiences of other democratic states and, in particular, to the solutions adopted in the European Convention on Human Rights and Fundamental Freedoms of 1950”. See also: idem, *Ograniczenia wolności i praw człowieka w polskiej konstytucji i w prawie europejskim*, „Zeszyty Naukowe Beskidzkiej Wyższej Szkoły Turystyki w Żywcu”, No. 3, vol. I, Żywiec 2004, p. 68.

¹⁹ L. Wiśniewski, *Zakres ochrony prawnej...*, p. 22. See also: W. Sokolewicz, *Prasa i konstytucja*, Warszawa 2011, p. 62.

²⁰ Judgment of the CT of 18 February 2004, P 21/02, OTK ZU 2004/2A/9, III.4.

²¹ L. Garlicki, *Note 9 to Art. 31 of the Constitution of the Republic of Poland*, [in:] *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku. Komentarz*, vol. III, ed. L. Garlicki, Warszawa 2003, p. 9.

²² Judgment of the CT of 18 February 2004, P 21/02, III.4.

²³ L. Garlicki, *Note 9 to Art. 31 of the Constitution of the Republic of Poland...*, p. 8.

²⁴ Ibidem.

It would be impossible to come up with a single, universal definition of “science” since the term is used in different, often substantially dissimilar contexts and meanings. According to the definition provided in the Universal Dictionary of Polish Language, science is “the entirety of human knowledge arranged into a system of problems and expressed in true judgments and assumptions”²⁵. The cited source indicates, at the same time, that the term “science” may also refer to:

- a research discipline covering a given field of reality;
- a set of views forming a systematized whole and covered by a specific research discipline (science as theory, doctrine);
- educating oneself or other persons²⁶.

The heart of what science is can be expressed in the word “knowledge”. This is the case since the purpose of science is to obtain knowledge by learning about logical and mutual relations between natural and social phenomena, as well as about epistemology²⁷. However, science cannot be narrowed down to mere possession of knowledge. Such possession is necessary for doing science, but is only a starting point²⁸. Jacek Sobczak illustrates the difference: “by strongly simplifying the matter, one could venture to say that knowledge is a collection of structured information. However, a scholar may not be reduced to a custodian – ordering, cataloguing and dusting resources of information”²⁹.

It is not disputed that science has a social dimension. Without its existence and progress, one could not think of social development³⁰. Therefore, the legislature, in the preamble to the Law on higher education and science noticed “a fundamental role of science in the creation of civilization” and the fact that “higher education institutions and other research centres carry out a mission of particular significance to the state and the nation: they make a key contribution to innovation in economy and development of culture, and co-deter-

²⁵ *Uniwersalny słownik języka polskiego*, vol. 2: k-ó, ed. S. Dubisz, Warszawa 2006, p. 862.

²⁶ *Ibidem*.

²⁷ Ch. Starck, *Wolność badań naukowych i jej granice*, „Przegląd Sejmowy” 2007, No. 3(80), p. 46.

²⁸ J. Sobczak, *Wolność badań naukowych...*, p. 61.

²⁹ *Ibidem*.

³⁰ *Ibidem*, p. 62.

mine the moral standards which apply in public life”. Then, in Art. 4(1) of the previously mentioned Act, the legislature included scientific research, development works and artistic creation as scientific activities.

The progress of science would be impossible without legal guarantees to the unfettered conduct of scientific research³¹. In this context, scientific research appears to be an essential element of civilizational progress.

From the methodological point of view, by scientific research one can understand a process starting with the determination of the research problem and the indication of research hypotheses, then moving on to the analysis of available literature of the subject (enquiry), observation of practice, choice of research methods and techniques, and carrying out the research process in the strict sense, involving measurements, collection of data, data analysis and generalization³². The indicated activities are intended to develop a theory³³.

The research process proceeds according to patterns adjusted to the specificity of individual scientific disciplines. In consequence, scientific research is conducted by different research methods, however, it always boils down to empirical research, conducted using ever more refined instruments, apparatus and tools, or theoretical considerations based on inductive and deductive reasoning³⁴. The constitutive features of scientific research are the formulation of hypotheses and their verification, justification of theorems and attempting to construct scientific theories³⁵. Quite importantly, different methods and other elements of scientific research mutually interrelate in a research procedure, forming a historically variable and constantly progressing system of knowledge³⁶.

The term “scientific research” usually refers to activities of specialized employees (scholars and auxiliary staff) within scientific institutions and organizations, conducted methodically, according to the procedures of arriving at theorems, discoveries and invention³⁷. However, it should be noted that sci-

³¹ W. Brzozowski, *op.cit.*, p. 25.

³² M. Królikowski, K. Szczucki, *op.cit.*, p. 1683, side No. 30.

³³ *Ibidem*.

³⁴ J. Sobczak, *op.cit.*, p. 62.

³⁵ *Ibidem*.

³⁶ *Ibidem*.

³⁷ *Ibidem*.

entific cognition, in the subjective sense, may not be reduced to only professionals, and in the objective sense, only to rational methods. Humanity credits its multiple scientific advances to chance, intuition or even irrationalism³⁸. However, regardless of how knowledge has been obtained, the mission of science is rational confirmation and mapping within a greater whole, whose legitimacy must be verified by new scientific advances³⁹.

Undoubtedly, the concept of “scientific research” also covers the collection and systematization of research outcomes by passing on such outcomes to other individuals. This takes place, among others, in a teaching process, through scientific publications, as a part of an exchange of experiences at conferences and through widely understood scientific information⁴⁰.

As noted by Christian Starck, “the concept of scientific research requires that such research is not closed and, consequently, cannot be rendered by simple definitions. This is why the nature of scientific research may not relate to any specific form or be defined formally. Also, the autonomy of scientific research, enshrined constitutionally by the freedom of science, does not permit any formal, substantive or value-related divisions”⁴¹.

On the other hand, scientific nature may be attributed only to such research that meets the criteria of generality, originality, objectiveness, legitimacy, exactness, comprehensibility, systematization and utility⁴².

According to Bogdan Klepacki, one may numerate the following features of truly scientific research:

1. a precisely defined and specified research subject, with clear purposes and a research hypothesis;
2. strictly defined terms;
3. application of the current state of knowledge to the research, including consideration of both foreign and domestic literature;

³⁸ Ch. Starck, *op.cit.*, p. 46.

³⁹ *Ibidem*.

⁴⁰ J. Sobczak, *op.cit.*, p. 62.

⁴¹ Ch. Starck, *op.cit.*, p. 46.

⁴² B. Klepacki, *Wybrane zagadnienia związane z metodologią badań naukowych*, „Roczniki Nauk Rolniczych”, Series G, vol. 96, 2009, No. 2, p. 39; quoted after M. Królikowski, K. Szczucki, *op.cit.*, p. 1683, side No. 30.

4. precise definition of the presented theorems, evidence, final opinions and conclusions;
5. use in the research of modern methods and models, which are useful in problem solving;
6. presentation of an original solution to the scientific problem;
7. contents presented in a manner that is linguistically correct clear, lucid and concise⁴³.

At this point, it is worth reminding the legal definition of the discussed concept, as provided in Art. 4(2) of the Law on higher education and science: “Scientific research means activities covering: 1) basic research understood as empirical or theoretical works intended primarily to bring new knowledge about the foundations of phenomena and facts observed without any direct commercial application in mind; 2) applicational research understood as works intended to bring new knowledge and skills, carried out having regard to the development of new products, processes or services or introduction of considerable improvements to such products, processes or services”.

The freedom of scientific research refers to the concept of truth, aimed to achieve an objectively verifiable description of reality. Attention was drawn to that fact by the legislature in the preamble to the Law on higher education and science, “recognizing that the pursuit of truth and passing knowledge from one generation to another are particularly worthwhile human activities” and pointing out that “each scholar is responsible for the quality and reliability of the conducted research and for the education of the young generation”. However, the said freedom is also enjoyed by such research activities which – although in line with the above criteria – result in development of false scientific theories. As argued by Ch. Starck, “individual errors, one-sidedness or gaps do not, by themselves, put in question the scientific nature of a given research. A given work does not fail to belong to the realm of science because it falls short of its claim to scientific nature or falls short according to definitions of certain schools of research, but only because it does so systematically, so that due to its substance and form one may not speak of any serious attempt to learn the truth”⁴⁴.

⁴³ Ibidem, p. 41.

⁴⁴ Ch. Starck, op.cit., p. 49.

However, it is beyond any question that – as with regard to other freedoms – the discussed freedom points to a negative nature of the obligations of the state, whose task is to refrain from activities, also normative ones, which might impede or restrict the freedom to conduct scientific research⁴⁵. As concluded by the Constitutional Tribunal, “the freedoms guaranteed in Art. 73 protect the individual and other legal subjects from unjustified intervention of the state into the subject matter and methods of scientific research and in the contents and methods of teaching”⁴⁶.

The freedom of scientific research may be defined positively (by providing examples of elements within its scope) or negatively (by providing examples of elements which do not fit into that scope).

In order to establish positive characteristics of the said freedom, it is worth referring to the findings of Mariusz Jabłoński, who points out that the freedom of scientific research includes several partial freedoms⁴⁷. In particular, apart from the obvious possibility of taking on various thinking processes in pursuit of scientific knowledge, the discussed freedom assumes: freedom to conduct and undertake research in any discipline; freedom to choose the place of conducting scientific research; freedom to specify and adopt methods of operation; freedom to disseminate the fruits achieved; freedom to disseminate the information and knowledge obtained during research in any form whatsoever; freedom to cooperate with many partners⁴⁸.

These findings are in line with the set of principles and guidelines entitled “Good Manners in Science”, published by the Ethics Committee of the Polish Academy of Sciences. In the light of the cited document, the freedom of science boils down to “the freedom to choose problems, freedom to elect the method of arriving at the solution and, first and foremost, the freedom of thought and freedom of expression”⁴⁹.

Leszek Garlicki notes that the freedom of scientific research includes also the right to make errors, and that falsity of a scientific theory may not be a rea-

⁴⁵ M. Królikowski, K. Szczucki, op.cit., pp. 1684–1685, side No. 35.

⁴⁶ Judgment of 7 February 2006, SK 45/04, OTK-A 2006/2/15.

⁴⁷ M. Jabłoński, *Wolności z art. 73 Konstytucji RP*, [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, ed. B. Banaszak, A. Preisner, Warszawa 2002, p. 562.

⁴⁸ Ibidem.

⁴⁹ M. Królikowski, K. Szczucki, op.cit., p. 1685, side No. 35.

son for its exclusion from the scope of the protection guaranteed under Art. 73 of the Constitution of the Republic of Poland⁵⁰. Moreover, W. Brzozowski points out that public opinion is an insufficient basis to refuse protections to a given research project, even if research is widely considered to be controversial and its results may prove appalling or disturbing⁵¹.

On the other hand, when seeking to determine the elements that do not fit into the scope of the freedom of scientific research, it is worth referring to the case-law of courts and the Constitutional Tribunal, the analysis of which was carried out by W. Brzozowski.

The courts denied that the refusal to provide the researcher with processed public information could be considered a restriction on the freedom of scientific research. This was justified by the argument that the freedom of scientific research should not shift the burden of research to public authorities, by requesting that they conduct analytical research based on the information held; the access to public information is one thing and provision of source materials for investigation is yet another⁵².

The courts also concluded that the panels competent to assess the quality of scientific projects must be scientific bodies rather than judicial authorities. As a consequence, they did not identify any violation of the freedom of scientific research in situations when the source of the problem in the research was a decision made according to the scientific environment (for example by superiors within an academic setting) which was unfavourable to the claimant⁵³.

Moreover, the Constitutional Tribunal rejected the possibility of claiming violation of Art. 73 of the Constitution of the Republic of Poland by a person who was refused the award of an academic doctoral degree. According to the Tribunal, the preconditions to the award of such a scientific degree by the council of an organizational unit of a higher education institution may not be treated as indirect regulation of the freedoms under Art. 73 of the Constitution, and the fact that the council is given the competences to adopt resolutions awarding the academic degree of doctorate does not violate the freedom to carry out scientific research by persons in respect of whom a negative

⁵⁰ L. Garlicki, *Note 7 to Art. 73 of the Constitution of the Republic of Poland...*, pp. 6–7.

⁵¹ W. Brzozowski, *op.cit.*, pp. 31–32.

⁵² *Ibidem*, p. 31.

⁵³ *Ibidem*, pp. 32–33.

resolution was passed. This is not affected by the fact that an individual holding the academic title or degree has in fact fuller opportunities to conduct scientific research⁵⁴.

Moreover, an opinion has been formulated in the Tribunal's case-law that Art. 73 of the Constitution of the Republic of Poland may not be treated as basis for claims regarding the financial situation of persons employed in higher education institutions and scientific centres, which relates both to the stability of employment in the previously mentioned units and the sphere of social security⁵⁵.

IV.

The freedom of scientific research, just as other freedoms guaranteed under Art. 73 of the Constitution of the Republic of Poland, is not subjectively limited to only Polish citizens. This is clearly evidenced by the following expression in the cited provision: "[...] shall be ensured to everyone". As a consequence, the freedom of scientific research should be regarded as a human right, which the Republic of Poland must guarantee to all individuals within its territory, including foreigners and stateless persons. Naturally, certain subjective restrictions may follow from the specificity of the discussed freedom, but they may not relate to the criterion of citizenship.

The Constitutional Tribunal is of the opinion that "although the legislature has defined the group of persons enjoying such freedom widely, by providing that it shall be ensured to "everyone", it is beyond doubt that the freedom of artistic creation, freedom of scientific research, freedom to disseminate the fruit of scientific research and the freedom of teaching are especially relevant to, *inter alia*, academic fellows/teachers. Enjoyment of those freedoms is connected with a special responsibility for academic teachers and the higher education institutions where they are employed. This is the responsibility to provide education and achieve results of scientific research at the highest possible level". Quite importantly, in the cited judgment, the Tribunal held as well that: "The freedom to teach and the freedom to conduct scientific re-

⁵⁴ Ibidem, p. 32.

⁵⁵ Ibidem, p. 33.

search may be [...] exercised also outside the academic environment, without being employed by any higher education institution”⁵⁶.

Beneficiaries of the freedom of scientific research are natural persons. The discussed freedom may not refer directly to legal persons or organizational units without legal personality to whom statutory provisions grant legal capacity. The intellectual nature of scientific research implies that such research is an accomplishment of an individual (or group of people) rather than institution. However, this does not predetermine that research may not be conducted by any entity other than natural persons. However, in such a situation, one may speak of a formal conduct of research because its substantive part, that is enquiry, experiments and any other component elements of scientific research are realized by natural persons working for a given entity.

Currently, most scientific research is conducted only by human panels and only in institutions undertaking such research and having at their disposal specific financial means. That is why a correlative of the freedom of scientific research is the principle of autonomy of higher education institutions, which guarantees to such schools, among others, the freedom to determine the subject matter and scope of the conducted research and to select persons to conduct such research⁵⁷.

V.

The addressee of the duties deriving from the freedom of scientific research are public authorities. The use in the provision of Art. 73 of the Constitution of the Republic of Poland of the term “freedom” points to a negative character of the previously mentioned duties. Their substance boils down – as already mentioned – to a prohibition to take actions which would preclude or impair the freedom to conduct scientific research or to disseminate its results⁵⁸. On the other hand, as opposed to the previous constitutional provisions, the current Constitution does not express any positive obligation of the public authorities to encourage the development of science. Most researchers are of

⁵⁶ Judgment of 28 April 2009, K 27/07.

⁵⁷ S. Jarosz-Żukowska, Ł. Żukowski, *op.cit.*, pp. 718–719.

⁵⁸ L. Garlicki, *Note 7 to Art. 73 of the Constitution of the Republic of Poland...*, p. 6.

the opinion that such an omission was not random and expressed the legislature's intention not to incur any obligations in this regard⁵⁹.

However, at this point, it is worth citing the just opinion of W. Brzozowski that the implementation of the freedom of scientific research requires public authorities to take active action in at least two areas:

1. the removal of barriers impairing scientific research by active prevention of manifestations of scientific unreliability and promotion of so-called good practices in science;
2. the regulation of the criteria and procedures of scientific promotion in a way that minimizes legal uncertainty for persons applying for a degree or title, and ensuring practicability and stability of the requirements set for such individuals⁶⁰.

The above opinions are in line with the preamble of the Law on higher education and science, where it is indicated that an obligation of the public authorities is to establish optimal conditions for the freedom of scientific research and artistic creation, freedom of teaching and autonomy of the academic community.

Most definitely, the provision of Art. 73 is no basis for any claims against the state for the allocation of money, tools, apparatus or assistance in the formation of scientific teams for the implementation of scientific ideas of persons unrelated to any scientific institution or employees of such institutions⁶¹. As a consequence, public authorities enjoy discretion in the establishment of criteria and the volume of financial support for the conduct of scientific research, dissemination (publication) of its results. This discretion is limited only by the prohibition on violating the autonomy of higher education institutions and by the prohibition on applying inadmissible (discriminatory) differentiation criteria⁶².

In the opinion of L. Garlicki, it is also impossible to speak of a horizontal dimension of the discussed freedom. As a consequence, it does not restrict the freedom of non-public entities in the establishment of a hierarchy of research orders or in the selection of scientific works for publication⁶³.

⁵⁹ Ibidem.

⁶⁰ W. Brzozowski, *op.cit.*, pp. 35–36.

⁶¹ S. Jarosz-Żukowska, Ł. Żukowski, *op.cit.*, p. 722.

⁶² Ibidem.

⁶³ L. Garlicki, *Note 7 to Art. 73 of the Constitution of the Republic of Poland...*, p. 6.

Literature

- Bosek L., Wild M., *Kontrola konstytucyjności prawa. Zagadnienia ustrojowe, procesowe i materialnoprawne. Komentarz praktyczny dla sędziów i pełnomocników procesowych. Wzory pism procesowych*, Warszawa 2014.
- Brzozowski W., *Konstytucyjna wolność badań naukowych i ogłaszania ich wyników*, [in:] *Prawo nauki. Wybrane zagadnienia*, eds. A. Wiktorowska, A. Jakubowski, Warszawa 2014.
- Constitutional Committee of the National Assembly, *Biuletyn X*, Warszawa 1995.
- Garlicki L., *Note to Art. 73 of the Constitution of the Republic of Poland*, [in:] *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku. Komentarz*, vol. III, ed. L. Garlicki, Warszawa 2003.
- Garlicki L., *Note to Art. 31 of the Constitution of the Republic of Poland*, [in:] *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku. Komentarz*, vol. III, ed. L. Garlicki, Warszawa 2003.
- Jabłoński M., *Wolności z art. 73 Konstytucji RP*, [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, ed. B. Banaszak, A. Preisner, Warszawa 2002.
- Jarosz-Żukowska S., Żukowski Ł., *Wolność badań naukowych i nauczania*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014.
- Klepacki B., *Wybrane zagadnienia związane z metodologią badań naukowych*, „Roczniki Nauk Rolniczych”, Series G, vol. 96, 2009, No. 2.
- Królikowski M., Szczucki K., *Komentarz do art. 73 Konstytucji RP*, [in:] *Konstytucja RP. Vol. I. Komentarz. Art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016.
- Łabno A., *Ograniczenia wolności i praw człowieka w polskiej konstytucji i w prawie europejskim*, „Zeszyty Naukowe Beskidzkiej Wyższej Szkoły Turystyki w Żywcu”, No 3, vol. I, Żywiec 2004.
- Sokolewicz W., *Prasa i konstytucja*, Warszawa 2011.
- Sobczak J., *Wolność badań naukowych – standardy europejskie i rzeczywistość polska*, „Nauka i Szkolnictwo Wyższe” 2007, No. 2/30.
- Starck Ch., *Wolność badań naukowych i jej granice*, „Przegląd Sejmowy” 2007, No. 3(80).
- Uniwersalny słownik języka polskiego*, vol. 2: k–ó, ed. S. Dubisz, Warszawa 2006.
- Wiśniewski L., *Wolność prasy w świetle Konstytucji RP, ustaw oraz wiążącego Polskę prawa międzynarodowego. Problemy podstawowe*, [in:] *Wolność słowa w mediach*, ed. D. Górecki, Łódź 2003.
- Wiśniewski L., *Zakres ochrony prawnej wolności człowieka i warunki jej dopuszczalnych ograniczeń w praktyce*, [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, ed. L. Wiśniewski, Warszawa 2006.

Wiśniewski L., *Zasady normatywnej regulacji wolności i praw człowieka*, [in:] *Konstytucja i władza we współczesnym świecie. Doktryna – Prawo – Praktyka*, ed. J. Wawrzyński, Warszawa 2002.

Zasady ustroju III Rzeczypospolitej Polskiej, ed. D. Dudek, Warszawa 2009.