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Analysis of the Causes of Conflicts at Universities and Alternative Methods of Resolving Them. Part II: Academic Ombudsman and Adjudicative Methods

Analiza przyczyn konfliktów na uczelniach wyższych i alternatywne sposoby ich rozwiązywania. Część II. Ombudsman/rzecznik akademicki i metody adjukacyjne

ABSTRACT

This study is the second part of the article entitled: *Analysis of the Causes of Conflicts at Universities and Alternative Methods of Resolving Them. Part I: Mediation in Academic Disputes*. The first part analyzes the causes of conflicts at universities and the basic alternative method of solving them – mediation. The second part focuses on the issue of academic disputes in the context of the court proceeding, and discusses the institutions of the academic ombudsman, arbitration in academic disputes and mixed methods, in particular the Office of Independent Adjudicator. Due to the changing expectations of students towards universities, contractual nature of these relations, increased number of court proceedings brought against universities or anticipation of such an increase, as well as the development of ADR methods in various fields, universities around the world started to look for new ways of solving academic disputes that would protect the independence of universities and at the same time fulfill an educational function. ADR methods such as mediation, ombudsman or arbitration may effectively replace or supplement insufficient internal procedures, as well as court proceedings characterized by high costs, lengthy procedures and formalism. These methods are better adapted to the nature of the academic community, take into account the voice of the participants, give them the opportunity to influence the proceeding and outcome of the dispute, ensure the equality of the parties. They also fulfill educational purposes, especially in disputes involving students, as they give the possibility of ending the dispute through dialogue and taking into account the point of view of the other party.

Keywords: academic disputes; ombudsman; academic ombudsman; arbitration; mediation

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INTRODUCTION

This study is the second part of the article entitled: *Analysis of the Causes of Conflicts at Universities and Alternative Methods of Resolving Them*. The first part analyzes the causes of conflicts at modern universities, as well as mediation as the basic method of resolving disputes in academia.[1] The first part of the study concludes that an increasing number of conflicts can be observed at universities. The changing role of universities, the complexity of the academic community, as well as global crises and challenges in the 21st century make universities the "conflict laboratories". The growing number of conflicts and, as a consequence, the increasing number of complaints and litigation against universities have caused universities all over the world to seek new ways of resolving disputes that would protect their independence from court interference and introduce the procedures that are consistent with the mission of universities and their educational function.

The most frequently used alternative methods of solving and settling disputes at universities are mediation and the institution of ombudsman. Analysis of mediation, discussed in the first part of the article, shows that this method brings many benefits to both the university and members of its community, as well as fulfilling the university's mission to educate a future generation of professionals in tolerance, to teach dialogue and respect for the views of others. Observation of the application of mediation at universities also leads to the conclusion that it is no uniform method, it is applied randomly, and that systemic approaches to conflict resolution are used only at some universities in selected countries. The prevalence of the use of mediation in an academic context depends on such factors as: the level of development and popularity of mediation in a given country; convincing the university administration of the effectiveness and legitimacy of using this method in university disputes; involvement of members of the academic community in promoting mediation at the university; and formal factors such as laws, statutes or regulations that regulate the use of mediation at universities.

The second part of the article analyzes the reasons for judicial deference from academic disputes, as well as other alternative dispute resolution methods applicable to academic disputes, including academic ombudsman, arbitration and mixed forms, of which the Office of Independent Adjudicator in England and Wales is the most prominent example. Due to the scope of the study, it is not possible to discuss in detail all alternative dispute resolution mechanisms at universities, therefore, the selection criterion for the analysis was the universality of the ADR method, as well as its innovability and applicability in different countries notwithstanding the

[1] E. Gmurzyńska, *Analysis of the Causes of Conflicts at Universities and Alternative Methods of Resolving Them. Part I: Mediation in Academic Disputes*, „Studia Iuridica Lublinensia" 2021, vol. 30(1).

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legal system. The extensive issue of the disciplinary and grievance proceedings at the universities was omitted since this topic may be the subject of separate studies and analyzes.

FACTORS WHICH INFLUENCE THE APPROACH OF COURTS TO THE ACADEMIC DISPUTE

In order to consider the application of various alternative methods of conflict resolution in academic disputes, it is important to analyze the relationship between universities and the judiciary in the context of resolving these disputes by the courts. Universities have always been characterized by autonomy, freedom of expression and academic independence. While these principles mainly concern the freedom of academics and students to teach, study, acquire and expand knowledge, conduct research without undue interference or restrictions by restrictions imposed by law, institutional regulations or public pressure, they also shall be viewed as the freedom to organize universities' own faculties, control admissions and set graduation standards.[2] The autonomy of universities in this sense is also expressed in relations with the judiciary, which has traditionally rarely controlled and interfered in university decisions, especially those concerning academic freedom and independence.[3]

1. *In loco parentis* doctrine

For many centuries, the relationship between universities and the administration of justice has been influenced by the doctrine of *in loco parentis*, which means precisely "in the place of the parent". This doctrine concerns the legal responsibility of a person or an organization for another person.[4] The principle of *in loco parentis* was established in English common law, although its traces can be found in Roman law. It was applied at the oldest universities in Europe and the United States, and from this principle the right of the university to act in the interest of students was

[2] *Academic freedom*, [in:] *Encyclopedia Britannica*, www.britannica.com/topic/academic-freedom [access: 9.02.2021].

[3] About definition and discussion on academic freedom see generally *Academic Freedom*, ed. J. Lacky, Oxford 2018; The Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, Lima, 10 September 1988, http://ace.ucv.ro/pdf/lima.pdf [access: 10.03.2021]; *Wolność akademicka. Materiały Poznańskiego Centrum Praw Człowieka*, ed. M. Piechowiak, no. 3, Poznań 1993.

[4] T. Stoehr, *Letting the Legislature Decide: Why the Court's Use of in Loco Parentis Ought to Be Praised, Not Condemned*, "Brigham Young University Law Review" 2011, no. 5, p. 1698 ff. Describing the origin of this principle, the author notes that "[the father] may also delegate part of his parental authority, during his life, to the tutor or the school master of his child: who is then in *loco parentis* and has such a portion of the power of the parent committed to his charge" (*ibidem*).

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derived, but also the introduction of rules, principles or penalties against them.[5] Although, as T. Stoehr points out, at European universities, this rule was mainly used to "limit and correct" certain unwanted student behaviors, in the United States it was used much more widely by universities.[6]

Because of the nature of this doctrine, it was applied at universities, which had practically unlimited powers to handle and deal with most of the matters including conflicts at their *Alma Mater*. Thus, outside control by courts was virtually excluded. Before the student movement in the 1960s, which, among other things, postulated an increase in the rights of students, many restrictions on the personal lives of students derived from this principle, e.g., women had to be in dormitories before 10 p.m., the dormitories were divided into male and female, some students, although this mainly concerned female students, could be expelled from the university for immoral behavior. On the basis of the *in loco parentis* doctrine freedom of speech, demonstrations, criticism of the university or other campus activities were restricted, and penalties were imposed in the form of expulsion from the university, submission of the student to military service or other less severe penalties.[7]

This doctrine, the resulting restrictions and lack of outside control were heavily criticized and, as a result, limited after the protests. In Europe, the newly established public and private universities in the 1970s no longer applied this doctrine. In the United States, on the other hand, the 1961 case of *Dixon v. Alabama* was the beginning of the end of this doctrine at American universities. The United States Court of Appeal, in this case, stated that a student cannot be removed from the university without a proper trial.[8] As the analysis of the first part of this study points out, for a long period up until the mid-20th century, universities, based their relations with students on a power-based strategy, and this approach resulted, among others, from the doctrine *in loco parentis*.[9]

[5] R.C. Conrath, *In Loco Parentis: Recent Developments in this Legal Doctrine as Applied to the University-Student Relationship in the United States of America 1965–75*, Dissertation submitted to the Kent State University Graduate School of Education, June 1996, p. 11.

[6] T. Stoehr, *Letting the Legislature Decide…*, p. 1695.

[7] *European Schools Enforce Loco Parentis' Doctrine*, 21 September 1968, https://idnc.library.illinois.edu/?a=d&d=DIL19680921.2.19&e=-------en-20--1--img-txIN---------9 [access: 10.01.2021].

[8] See generally W. Van Alstyne, *The Student as University Resident*, "Denver Law Journal" 1968, vol. 45(591).

[9] E. Gmurzyńska, *op. cit.*, pp. 71–72.

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2. Non-interference of courts in academic freedom

2.1. Judicial deference doctrine

Another doctrine which influenced the relations between the academy and the judiciary is the principle of non-interference in academic affairs and conflicts, which in common law countries is referred to as the doctrine of judicial deference. Judicial deference refers to the situations when the courts have the authority to make a decision but they choose not to and transfer their competence to deal with certain maters to another body, which is according to courts more appropriate.[10] Courts can defer to the executive, legislative or other bodies when they are convinced that the decision of other institutions is more competent.

Supporters of application of that doctrine express the opinion that the tradition of refraining from interfering in academic disputes is not only centuries-old, thus strongly rooted in academic freedom and autonomy, but also is an expression of respect for the independence to manage a university and the unique role of universities in carrying out a research and educational mission. Additionally, they claim that judges lack expertise to rule on academic matters, which the judges themselves confirmed.[11] The doctrine of judicial deference in practice means that courts traditionally exercise caution when asked to intervene in the internal affairs of higher education institutions.[12] Some authors take a different view, however, believing that refraining from interfering in academic affairs had a strong justification a few decades ago, when lawsuits against universities were rare and universities were treated like ivory towers, but nowadays, in the era of protecting individual rights derived from human rights and constitutions, such an approach must be consigned to the past.[13]

2.2. Evolution of the judicial deference doctrine in the United States

The changing attitude of courts to academic disputes can be illustrated by the approach of the courts in the United States toward academic disputes. The courts, recognizing and reaffirming the principle of university freedom and independence, have consequently decided that the university itself will best pursue the principle of

[10] See generally A. Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, "Yale Law Journal" 2016–2017, vol. 126(4).

[11] R.M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept*, "Journal of College and University Law" 2010, vol. 36(727), p. 730.

[12] T. Leas, *Academic abstention*, [in:] *Encyclopedia of Law and Higher Education*, ed. Ch.J. Russo, Los Angeles 2010, p. 1.

[13] R.M. O'Neil, *op. cit.*, p. 730.

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"getting to the truth" in employment and student disputes.[14] The courts rule that the knowledge and skills of staff working at universities are particularly predisposed to solving academic disputes.[15] Applying the judicial deference doctrine in academic settings that particularly encroach on academic discretion resulted in the application by courts of the principle described as the "academic absence".[16] It means that the court shall refrain from interfering in the decisions of the university administration, councils or senates unless their decision constitutes an abuse of law, is irrational or violates the constitutional or fundamental rights.[17] The courts have found that they lack the competence to monitor the behavior of academic bodies and should therefore refrain from ruling. This direction was confirmed by the Chief Justice of the Supreme Court W.H. Rehnquist in 1978, who stated that "courts are particularly ill-equipped to evaluate academic performance".[18]

In the 1970s, there was a partial retreat from the courts' restraint in interfering with academic independence. In many cases, particularly those concerning fundamental rights, sexual harassment or discrimination, courts found out that their interference was justified. However, there was an unfounded doubt that once the judiciary was allowed to become involved in the affairs of the university, it would extend to other areas of academic life, including typically academic matters such as the awarding of degrees, the evaluation of academics or students.[19] This concern led

[14] *Ibidem*.

[15] T. Leas, *Higher Education, the Courts and the 'Doctrine' of Academic Abstention*, "Journal of Law and Education" 1991, vol. 20(2), p. 135 ff.; D.L. Dagley, C.A. Veir, *Subverting the Academic Abstention Doctrine in Teacher Evaluation: How School Reform Legislation Defeats Itself*, "Brigham Young University Education and Law Journal" 2002, no. 1, pp. 1–3.

[16] W.P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, "Northwestern University School" 2013, vol. 107(2), p. 882. The doctrine of academic abstention derives from the doctrine of abstention used by federal courts that refrain from or delay such a decision with respect to states or state law until the matter is resolved in the state courts.

[17] *Wynne v. Tufts U. Sch. of Med*., 932 F.2d 19 (1st Cir.), 1991. See an overview of all court cases concerning the doctrine of academic abstention in R.B. Standler, *Academic Abstention in the USA – List of Casusy*, 25 April 2011, www.rbs2.com/AcadAbst2.pdf [access: 10.01.2021]. For a wider discussion on the academic doctrine of abstention, see T. Leas, Leas, *Evolution of the Doctrine of Academic Abstention in American Jurisprudence*, Paper presented at the Annual Meeting of the American Educational Research Association, Chicago, 6 April 1991, https://files.eric.ed.gov/fulltext/ED330280.pdf [access: 10.01.2021].

[18] *Board of Curators, Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978).

[19] M. Hutter, *Conflict Resolution and Litigation Rising in Higher Education: What Gives?*, November 2000, www.mediate.com/articles/hutter.cfm [access: 10.01.2021]; A. Keshner, *At least 100 lawsuits have been filed by students seeking college refunds – and they open some thorny questions*, 22 May 2020, www.marketwatch.com/story/unprecedented-lawsuits-from-students-suing-colleges-amid-the-coronavirus-outbreak-raise-3-thorny-questions-for-higher-education-2020-05-21 [access: 10.01.2021]. The lawsuits concerning the tuition refund in connection with the deterioration of the quality of education due to the pandemic are now being brought before the courts. At the moment, it is not yet clear whether the courts will consider these disputes, as they have historically been reluctant to enter into the sphere

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the Supreme Court in the 2003 case *Grutter v. Bollinger*, to uphold the principle of "academic absence" by a 5:4 vote and to rule that considering, among many other factors, the race of the applicant in the admission process is an acceptable practice of the University of Michigan Law School. Justice S. Day O'Connor, writing on behalf of the majority, argued that the "educational autonomy" and the "compelling interest in attaining a diverse student body" is a sufficient counterbalance to the simple prohibition of the use of race to distribute remuneration to public institutions.[20]

2.3. Judicial deference from academic matters in Poland

For comparison, the analysis of judgements of courts in Poland, which interestingly quite rarely adjudicate in cases in which a university is a party, illustrates in those few cases submitted, the respect for academic autonomy and respect for a judicial non-interference in academic matters. Such cases concerned, e.g., the organization of elections at the university,[21] candidates for new positions at the university,[22] as well as conducting examinations and evaluation.[23]

In one of the controversies, a candidate for the rector of a tech university claimed that his right to equal and lawful treatment had been violated. The plaintiff argued that the current rector had used his position to secure more favorable conditions in order to win the election and violated the applicable regulations. The Court of Appeal in Szczecin, in its judgement of 15 May 2018 (III APa 25/17), did not interfere in the election process at the university and ruled that the organization of elections at the university falls within the scope of the university's autonomy guaranteed by the Constitution.

In another case, the claimant filed a lawsuit against the university, in which she alleged that the university had wrongly failed to consider her for a tenure position because she had not submitted the documents required by the university, as a result of which the university did not consider her candidacy. The Court of Appeal overruled the judgement of the District Court which agreed with the claimant, on the ground that imposing requirements for candidates for new positions is within the autonomy of the university. The Supreme Court, in its judgement of 10 May 2012

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of university decisions. See W.C. Warters, *The History of Campus Mediation Systems: Research and Practice*, "Georgia State University College of Law Reading Room" 1999, p. 9.

[20] S. Fish, *The Rise and Fall of Academic Abstention*, "New York Times" 2009 (12 October), https://opinionator.blogs.nytimes.com/2009/10/12/the-rise-and-fall-of-academic-abstinence [access: 10.01.2021].

[21] Judgement of the Court of Appeal in Szczecin of 15 May 2018, III APa 25/17, LEX no. 2531861.

[22] Judgement of the Supreme Court of 10 May 2012, II PK 199/11, LEX no. 1226834.

[23] Decision of the Voivodeship Administrative Court in Gliwice of 11 March 2019, IV SA/Gl 129/19.

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(II PK 199/11), shared the view of the Court of Appeal, stating that in its opinion the defendant was entitled to impose upon the applicant the requirements specified in the statutory provisions.

In one case concerning the autonomy of the university, the court dealt with the issue of the jurisdiction of administrative courts with regard to the complaint brought by a student against the decision of the university chancellor informing the student about the lack of irregularities in the retake examination and failing the course because of obtaining an insufficient number of points in order to pass. The Voivodeship Administrative Court in Gliwice, in its decision of 11 March 2019 (IV SA/Gl 129/19), dismissed the complaint and stated that issues related to the autonomy of universities, which does not fall within the jurisdiction of administrative courts.

However, the Polish courts decided also about the limits of university autonomy. In a case in which the university introduced requirements for admission, the Supreme Administrative Court decided that the autonomy of the university does not mean complete freedom in shaping the rights and obligations of the applicants for admission to the university.[24] The university is autonomous in its activities, but on the terms specified in the law. The university may not introduce in its internal regulations the requirements which are not provided for in the law.

3. Internal university procedures to resolve conflicts – the institution of visitor

Unlike the United States, where the departure from the *in loco parentis* doctrine and judicial deference doctrine resulted recently in many lawsuits being brought in the courts, there are examples of universities in different countries where, even until very recently, it was uncommon for students to bring cases to courts against their universities, especially in cases involving academic discretion and evaluation. The reasons for this situation are varied and they include: low interference of universities in the private life and behavior of students; treating the university as a community and not as a service provider; the belief that since education is free, students do not have the right to make too high demands from universities; the consistent refraining of courts from interfering in academic freedom. In addition, an important reason for the limited number of cases in the courts in some countries was also the tradition of resolving academic disputes within university internal structures, which was also an expression of the autonomy of universities.

In England, at the universities of Oxford and Cambridge, and, following their example, in Ireland, Canada, Australia, and New Zealand, a "visitor" institution

[24] See judgement of the Supreme Administrative Court of 19 October 2016, I OSK 302/163.

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developed.[25] The visitor traditionally handled resolution of most disputes at the universities. The visitor was a neutral third party that came from outside of the university structures and settled disputes instead of the courts.[26] Already in medieval England, the visitor was the external supervisor of many autonomous institutions, including universities, most often appointed on behalf of a church or other charitable institution. Historically, he had the exclusive right to settle all internal disputes at universities with the participation of academic staff and students. His right derived from the fact that he was appointed by the founder of the university, who created its charter and had the right to interpret the charter and resolve disputes without any outside interference of the courts. The visitor could also control the university as an outside and neutral person and check whether the university adhered to these rules. In many institutions, such as hospitals or churches the role of the visitors was ceremonial, although they could be asked for advice by the supervised institution. At the universities, however, the visitor had a very real and practical function and was responsible for resolving disputes between the institution and its members as a substitute for the courts. This was one of the reasons why the courts limited their powers to interfere in academic disputes.

In England, the competence of a visitor to settle university disputes has been confirmed in numerous court cases since *Philips v. Bury* in 1694. In addition, in the *Varma v. HRH Duke of Kent* case, a rule has been established that visitors are not obliged to accept a certain form of procedure and their decisions are final. This confirmed their broad legitimacy for both the resolution of academic disputes and the choice of procedures used.[27] Currently, in England and Wales, academic disputes are resolved by the Office of Independent Adjudicator (OIA), which was established in 2004 at a central level. The OIA resolve complaints and disputes brought by students from all universities in England and Wales. The OIA has replaced the

[25] F.N. Dutile, *Law, Governance, and Academic and Disciplinary Decisions in Australian Universities: An American Perspective*, "Arizona Journal of International and Comparative Law" 1996, vol. 13(69), p. 42.

[26] *Ibidem*.

[27] The exclusive jurisdiction of visitors, and not of the courts, to make such internal arrangements has been established by a consistent jurisprudence in the following cases: *Philips v. Bury* (1694); *Shower PC 35*, (1694) 1 ER 24, [1694] EngR 11 (1 January 1694); *Bracken v. Visitors of the College of William & Mary*, 3 Call (7 Va) 573 (1790); *Thomas v. University of Bradford*, [1987] AC 795 (HL); *R v. Visitor of the University of Hull*, *ex p Page* [1993], AC 682, [1992] UKHL 12 (3 December 1992); *R (Varma) v. HRH Duke of Kent*, [2004] EWHC 1705 (Admin) (16 July 2004). See E. O'Dell, *Judicial review and exclusive jurisdiction of Visitors*, 9 June 2015, www.cearta.ie/2015/06/judicial-review-and-the-exclusive-jurisdiction-of-university-visitors [access: 10.01.2021]. Moreover, this institution operates in Ireland, Australia and Canada. For example, in Ireland visitors are the appellate bodies from the internal decisions of the university administration. In such cases, visitors consider the case from the beginning and formulate their own decisions (see *R v. Visitors to the Inns of Court, ex p Calder & Persaud* [1994]; QB 1, [1993] 2 All ER 876).

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historic institution of visitor operating at the universities and resolving the cases against the universities and even nowadays very rarely brought before the courts.

Until recently, in Scotland, the number of cases brought to courts by students from all Scottish universities did not exceed just a few over several years. As such, these universities did not even employ full-time lawyers.[28] F.N. Dutile gives many reasons why there is little judicial interference at Scottish universities.[29] According to this author, universities do not interfere in the moral sphere of student life, as well in their behavior off-campus. For this reason, there are not many cases concerning private life of students. In addition, there is a strong tradition at the Scottish universities to resolve the disputes internally, e.g. through university court, rectorial court (although no English visitor institution has been established in Scotland), as well as deference by courts from the academic matters.[30] Students also believe that since education is free, they should not speak out against universities, but accept what is given to them.[31]

For similar reasons, in Australia, students bring cases to court extremely rarely. For example, in the last decade of the 20th century, only five cases from all Australian universities were brought to the courts.[32] As in many countries, this situation results from various factors, such as: the use of internal processes to resolve disputes, the tendency to settle matters within the community, the judicial respect for the decisions of universities or comprehending the university as a community.[33] At Australian universities, the role of visitors should be particularly emphasized, whose jurisdiction to settle disputes was practically exclusive and they could resolve and adjudicate any matters relating to the university, including the award of compensation or costs reimbursement.[34] Visitors replaced the courts almost entirely, however they have an obligation to act "in accordance with their historic mandate and to balance the interests of the individual with the interests of the university".[35] From the end of the

[28] F.N. Dutile, *Law and Governance Affecting the Resolution of Academic and Disciplinary Disputes at Scottish Universities: An American Perspective*, "Arizona Journal of International and Comparative Law" 1997, vol. 14(1), p. 38. As the author reports, since 1950 only seven cases related to students and disciplinary proceedings were brought before the courts, and only in four cases the students disagreed with the decision of the university administration. The author also cites statistics from the University of Aberdeen in Scotland, where only one civil case has recently been brought to court. At the universities of Edinburgh and Glasgow, there is basically no case brought by the student against the university.

[29] *Ibidem*, p. 48.

[30] *Ibidem*, p. 57.

[31] *Ibidem*, p. 59.

[32] *Ibidem*, p. 99.

[33] *Ibidem*, p. 116.

[34] *Ibidem*, p. 82.

[35] R.J. Sadler, *The University Visitor: Visitorial Precedent and Procedure in Australia*, "University of Tasmania Law Review" 1981, vol. 7(2–3), p. 19. Visitors, consistent with their historic mandate, have attempted to balance the interests of the individuals against the welfare of the university.

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1980s, their jurisdiction was limited, e.g. cases concerning contractual relations between students and universities were excluded from the scope of their involvement. Although at some universities visitors still play an important role in resolving disputes and issue binding decisions, their role is now more problematic and unclear, and they have been replaced partially by the institution of academic ombudsman.[36]

In Ireland, under the 1997 University Act, the visitor is appointed by a higher education institution and if such institution does not appoint him, then he is appointed by the competent minister from among the higher courts judges or from retired Supreme Court judges. In addition, under Article 20 of the Act, the minister in charge may, if he considers that the actions of the university are contrary to the law, require the visitor to clarify the matter, and the visitor has the authority to conduct an investigation, and may request the university to clarify and present documents and report to the minister.[37]

At Canadian universities, on the other hand, visitors deal with disciplinary matters. To date, the Canadian courts have respected the exclusive jurisdiction of visitors to resolve academic disputes if procedural fairness has been provided in settling or resolving these disputes. For example, students may bring cases to the visitor's attention regarding their grades, and the courts do not interfere in these decisions but merely examine issues of fair procedure.[38] In recent years, Canadian students have started bringing cases in courts based on non-performance or improper performance of various contracts signed by students with universities. So far the courts have consistently ruled that they will refrain from judicial interference to decide on all "academic matters", and the court's consideration of the case is not contingent upon whether or not the decision was justified, but only whether the procedure applied was appropriate.[39] However, in Canada, modern universities are

[36] F.N. Dutile, *Law, Governance and Academic and Disciplinary Decisions…*, p. 80. For example, the visitor at the University of Tasmania has very broad prerogatives and full decision-making and "wields the authority, as he or she thinks fit, to do all things pertaining to that office".

[37] University Act, 1997, www.irishstatutebook.ie/eli/1997/act/24/enacted/en/html [access: 10.01.2021].

[38] C.B. Lewis, *Procedural Fairness and University Students: England and Canada Compared*, "Dalhousie Law Journal" 1985, vol. 9(2). In one frequently cited case, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, the Canadian Supreme Court stated: "The universities are legally autonomous. They are not organs of government even though their scope of action is limited either by regulation or because of their dependence on government funds. Each has its own governing body, manages its own affairs, allocates its funds and pursues its own goals within the legislated limitations of its incorporation. Each is its own master with respect to the employment of professors. The government has no legal power to control them. Their legal autonomy is fully buttressed by their traditional position in society".

[39] For example, a case where a student was insulted by an academic teacher has been found by the court not to belong to "academic issues". In such cases, the court may decide a civil action and will not withhold its decision. See A. Sain, *Court of Queen's Bench Clarifies Law on Academic Disputes in Al-Bakkal V. De Vries, 2016 MBQB 45*, 25 January 2017, www.tdslaw.com/resource/

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moving away from the principle of the visitor's exclusive jurisdiction to resolve university disputes because they are often appointed by the universities themselves, and external scrutiny is therefore necessary.

4. Change in the relationship between higher education institutions and students

As follows from the first part of this study, for a long time, until the mid-20th century, higher education institutions based their relations with members of the academic community, mainly with students on their power and authority (power--based approach) and this approach was coming from the application of *in loco parentis* doctrine.[40] At modern universities, there has been a change in relations between universities and students. Nowadays, the university no longer acts *in loco parentis* in relation to students and their relationship is more similar to those between consumers and service providers, so a dissatisfied student is more inclined to take formal action against his university.[41] For decades or even centuries *in loco parentis* doctrine was applied, which significantly limited students' rights as well as their ability to sue *Alma Mater*. At present, students are not only consumers but are also subjects of constitutional law. This significantly limited the possibility for universities to interfere with their rights, and consequently increased the role of the courts in those cases where universities violate constitutional rights such as discrimination, freedom of speech, the right of assembly or the right to a fair trial.[42]

The increase in the number of grievance or complaint procedures as well as lawsuits against universities, that previously was simply not possible, was caused, among other things, by the activism of students in the 1970s, the increase in awareness of their fundamental rights, the introduction of minority rights and gender equality. This phenomenon was known as the "due process explosion".[43] These changes and the introduction of appropriate procedures also gave students the opportunity to verify and correct the universities' activities by bringing cases to the courts.[44] Moreover, the change of the relationship between universities and students

court-of-queens-bench-clarifies-law-on-academic-disputes-in-al-bakkal-v-de-vries-2016-mbqb-45 [access: 10.01.2021]; C.B. Lewis, *op. cit*.

[40] W.L. Ury, J.M. Brett, S.B. Goldberg, *Getting Disputes Resolved: The Strategic Use of Interests, Rights, and Power to Resolve Disputes*, San Francisco 1993, pp. 8–19.

[41] K.B. Malear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, "Journal of College and University Law" 2003, vol. 30(175), p. 175.

[42] R.D. Bickel, P.F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risk of College Live*, Durham 1999, p. 105.

[43] W.C. Warters, *The History of Campus Mediation Systems…*, p. 9.

[44] E. Gmurzyńska*, op. cit.*, p. 72.

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to a consumer-supplier-like relationship may result in bringing the matter to the courts by the students who are dissatisfied with the decisions of the university administration. As a consequence, the approach of the university toward members of the academic community changed from power-based to right-based.[45] According to those involved in academic education, this approach changes with the introduction of tuition fees and increasing the cost of education, and students increasingly make demands on universities to provide good-quality educational services.[46] They view relations with universities as contractual and consider themselves as consumers. This approach causes the increase of the expectations of universities and, consequently, bringing cases to court.[47] At the same time, such tendencies are reinforced by strong competition in the labor market. Commenting on the increase in the number of cases against universities, R. Ryor noted that the era of "collegiality" at universities turned into an era of "responsibility".[48]

Although the courts continue to be cautious when interfering with academic decisions concerning in particular "academic matters", which include academic judgements they more often make decisions in cases where constitutional or human rights are involved. In the last few decades, there has been an expansion in the number of lawsuits against universities, which, to counter this trend, started to introduce and apply alternative dispute resolution methods in academic disputes.[49] Due to the fact that students are more aware of their rights and want to enforce them, it can be assumed that the number of disputes with the participation of students, as well as employees, will increase even in those countries where customarily the number of complaints and court cases were very random. Therefore alternative dispute resolution methods, which aim to resolve disputes at an early stage, to prevent and de-escalate conflict are strongly considered as a tool to manage disputes at universities and an alternative to litigation. As a consequence, this direction caused another change in the relation between universities and members of the academic community – to those based on interests (interest-based approach).

[45] A. Gajda, *The Trials of Academe: The New Era of Campus Litigation*, Cambridge–London 2009, p. 53 ff.

[46] F.N. Dutile, *Law, Governance, and Academic and Disciplinary Decisions…*, p. 40.

[47] As W.C. Warters (*The History of Campus Mediation Systems…*, p. 9) notes, both the increase in the number of lawsuits against universities and the legal services widely offered to students on campus, and the introduction of insurance for academics, are evidence of a change in thinking about universities.

[48] R. Ryor, *Who Killed Collegiality*, "Change: The Magazine of Higher Learning" 1978, vol. 10(6).

[49] C.W. Burnett, W.L. Matthews Jr, *The Legalistic Culture in American Higher Education*, "College and University" 1982, vol. 57, pp. 197–207.

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INSTITUTION OF OMBUDSMAN/ACADEMIC OMBUDSMAN

1. Emergence of the ombudsman institution

The institution of the ombudsman was originally developed in the Scandinavian countries. It was first established in the Swedish constitution of 1809 and its main purpose was to control the administration. Originally his duties were aimed to "supervise the observance of laws and statutes" and to investigate allegations towards those who hold official positions and prosecute those who committed unlawful acts or neglected their duties. As time passed the ombudsman became less of an investigator and prosecutor and became more "citizen defender".[50] Following the Swedish institution, the ombudsman was introduced first in other Scandinavian countries and then in other European countries, primarily in the second half of the 20th century.[51] The office of the ombudsman, often referred to as the human rights defender or civil rights ombudsman currently exists in over 110 countries on different continents. In Europe, it has not been created only in Belarus. Within the European Union, there is also a European Ombudsman.[52]

The office of the ombudsman is independent and is clearly separated from the executive and the judiciary, often linked to the parliament by the way it is appointed. The institution of the ombudsman understood in the context of the protection of civil rights, which first developed in Europe and then in other countries such as Canada and Australia, has not found its proper place in the United States, except in five states.[53] Although the institution of a civil rights ombudsman is not a subject of this article it is important to mention his role in academic disputes, having in mind a full picture of the landscape of the diversified processes applied in the university disputes. The civil rights ombudsman deals with a wide range of cases related to the protection of civil and human rights. They sometimes include, if he considers it particularly important, the handling of university cases as a "last resort" especially in situations when the solution proposed by the university is not satisfactory for the complainant.[54] Such ombudsman operates, among others, in Ireland, Scotland, Sweden, Poland, Australia and Malta.[55]

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[50] Ch.L. Howard, *The Organizational Ombudsman. Origins, Roles, and Operations: A Legal Guide*, Chicago 2010, p. 4.

[51] *Ibidem*, pp. 4–10.

[52] *Historia Ombudsmana na świecie*, www.rpo.gov.pl/pl/content/historia-ombudsmana-na-swiecie [access: 10.01.2020].

[53] L.D. Mankin, *The Role of the Ombudsman in Higher Education*, "Dispute Resolution Journal" 1996, vol. 51(46), p. 48.

[54] *Ibidem*, p. 25.

[55] In Canada, there is also no ombudsman at the federal level. Civil matters are handled by ombudsmen appointed in the provinces, and some of them also handle complaints against universities.

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In Poland, the Ombudsman for Civil Rights (Rzecznik Praw Obywatelskich) has been actively involved in university affairs in recent years. These were often actions taken *ex officio* in relation to state administration agencies concerning the interpretation of laws or other regulations or the acts of those agencies, but also interventions in complaints and grievances by students or university staff, especially when previous university actions were not effective or satisfactory.[56] As a result of one of the cases in which the Ombudsman for Civil Rights intervened, the Minister of Science and Higher Education recommended that rectors of the universities in Poland shall appoint an academic ombudsman at each university to support students and employees in resolving conflicts and to ensure the principle of equal treatment.[57] The civil right ombudsman plays an important role in resolving major academic issues and conflicts, however, because his role goes far beyond academic disputes

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However, not all provinces appoint ombudsmen (see. *ibidem*, p. 27). In Ontario, e.g., the Canadian Provincial Ombudsman was not entrusted with these cases until 2006.

[56] An example of actions taken by the Civil Right Ombudsman (Rzecznik Praw Obywatelskich) in Poland concerned verbal and physical abuse and violence, as well as harassment of students by some employees of the Medical University of Silesia in June 2020. As a result of the Civil Right Ombudsman's intervention: five cases were reported to the prosecutor's office; the Disciplinary Prosecutor for Academic Teachers was instructed to initiate investigatory proceedings against seven academic teachers in accordance with Article 275 ff. of the Law on Higher Education and Science, and six further cases were referred to the Disciplinary Prosecutor for Academic Teachers; changes were made to the management of some departments, responsibilities has been delegated to a different person or to the dean's; five competitions for the position of heads of organizational departments were canceled. Other examples of complaints in which the Civil Right Ombudsman has recently taken action and intervened at universities are: a complaint against the actions of the Rector of the Warsaw School of Life Sciences, who ordered students to leave their dormitories immediately due to a pandemic – such an order brought doubts of the Civil Right Ombudsman in regards to respecting the rights and freedoms of students, because for many of them the dormitories are the primary place of residence, and a sudden order to leave – without a transitional period – could significantly affect their life situation; a complaint of students of the Air Military Academy in Dęblin about discrimination in access to the educational offer – as the Ombudsman indicates, the qualification for practical flight training varies depending on whether the student is accepted as a result of the first or subsequent recruitment. Meanwhile, the recruitment for such specialized training should be determined by substantive considerations, such as average grades and experience in aviation. See *Dostępność edukacji akademickiej dla osób z niepełnosprawnościami: analiza i zalecenia*, Warszawa 2015, www.rpo.gov.pl/sites/default/files/BIULETYN_RZECZNIKA_PRAW_OBYWATELSKICH_2015_nr_5.pdf [access: 10.01.2021]; Rzecznik Praw Obywatelskich, www.rpo.gov.pl/pl/raport_1/1001 [access: 10.01.2021].

[57] According to the Minister, the task of academic ombudsmen would be to support students and staff in resolving conflicts in situations which raise doubts and to ensure equal treatment and respect for all members of the academic community. The Minister defined the tasks of the ombudsman as activities for the benefit of the community of the university, a mediator and a steward resolve individual disputes concerning bullying and discrimination at the university and its community, or even ordinary interpersonal conflicts and relies on respect for the principles of confidentiality and impartiality and, above all, independence from organizational departments of the university.

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this institution is not included in the below classification, which concerns only the academic ombudsmen who exclusively deal with academic issues.

2. Definition and role of academic ombudsman

There are three types of ombudsman, although all have roots in the so-called classical ombudsman. The "classical ombudsman", described above, is appointed usually by a legislative body to represent the general public and deals with problems concerning the conduct of governmental entities and usually conduct formal investigation.[58] "Advocate" ombudsman acts and represents a certain group of citizens, e.g. patients.[59] The institution of the classical ombudsman became a model for the development of the so-called "organizational ombudsman", also referred to as institutional ombudsman, which became popular in corporations, government agencies as well as at the universities in the 1960s and 1970s.

As C. Steiber notes, there is a great similarity between the classical model of an ombudsman and an institutional ombudsman dealing with academic matters. The author describes him as "an investigator, facilitator and negotiator".[60] On another hand, Ch.L. Howard noticed that "the subsequent adaptation of this concept to universities and corporations in America drastically reshaped the way in which the ombudsman operates in non-governmental organizations and produced a new variety of ombudsman: the organizational ombudsman".[61] Unlike the classic and advocate ombudsman, the organizational one, most often, does not conduct investigation nor advocate for a certain group.[62] One of the definitions of the organizational ombudsman states that "the organizational ombuds is a designated neutral who is appointed or employed by an organization to facilitate the informal resolution of concerns of employees, managers, students, and, sometimes, external clients of the organization".[63] An organizational ombudsman is considered as an ADR method, who on one hand ensures procedural justice, fairness and equity, and on another is a part of the conflict management.[64]

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[58] M. Wesley, *The Compleat Ombuds: A Spectrum of Resolution Services*, "CPER Journal" 2004, no. 166, p. 6.

[59] *Ibidem*.

[60] C. Steiber, *Variation on a Classical Theme: The Academic Ombudsman in the United States*, [in:] *International Ombudsman Institute Occasional Paper*, no. 38, Edmonton 1987, p. 2.

[61] Ch.L. Howard, *op. cit.*, p. 4.

[62] M. Wesley, *op. cit.*, pp. 7–8.

[63] *Ibidem*.

[64] For example, American Bar Association (ABA) describe ombudsman as "a valuable form of alternative dispute resolution that addresses a wide range of issues which might not otherwise be heard or addressed due to the limitations of litigation, formal processes or fear of retaliation. Ombuds essentially stand for procedural justice, fundamental fairness, accountability and equity and act as

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Attention directed to the concept of organizational ombudsman and practical application of this institution in different public and private entities led to an interest in ombudsman in academia.[65] An academic ombudsman is an organizational ombudsman, operating however in very special institutions and environment, which are higher education institutions. The definitions concerning the academic ombudsman are quite general, due to the diverse range of activities and the role that can be entrusted to his depending on the needs of the university. An academic ombudsman is defined as an independent, impartial and neutral person to whom students, members of the faculties or administrative staff may turn for help in a formal or informal and confidential manner in dealing with complaints concerning the university and its community.[66] Sometimes the definition of an academic ombudsman emphasizes his role in dispute resolution and notes that the academic ombudsman is a designated neutral or impartial dispute resolution specialist whose main task is to provide confidential and informal assistance to members of the university community: students, staff, faculty.[67] It is often stressed that ombudsman's activities are informal in nature and that he has a possibility of using both flexible and more formal procedures depending on the problem and situation, as well as the parties involved.[68] The role of the ombudsman involves, among others, "discuss in confidence the concerns and questions that parties who approach them may have. They help by listening, explaining possible avenues for problem resolution, offering options and making referrals".[69] In conventional terms, however, the ombudsman does not act as an arbitrator or decision-maker. W.C. Warters emphasizes that, where appropriate, the ombudsman can work with all parties to the conflict and serve informally as a conciliator, and in some cases he can play the role of mediator.[70]

The discussion about the character of the procedures applied by academic ombudsman is still very relevant. For some authors, making a binding decision in academic disputes by the ombudsman is contrary to the idea of the functioning of this institution at universities. Opinions are expressed that the ombudsmen should not issue binding decisions or investigate the facts at all, as this stands in opposition to their role.[71] The institution of the ombudsman introduced at universities

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an important component of a comprehensive conflict management system" (*Ombuds Day*, www.americanbar.org/groups/dispute_resolution/events_cle/ombuds-day [access: 10.01.2021]).

[65] *Ibidem*, p. 10.

[66] F. Bauer, *The Practice of One Ombudsman*, "Negotiation Journal" 2000, vol. 16(1), p. 60 ff.

[67] www.jefferson.edu/content/dam/university/skmc/faculty/overview/ombudsman.pdf [access: 10.01.2020].

[68] W.C. Warters, *Mediation in Campus Community. Designing and Managing Effective Programs*, San Francisco 2000, p. 10.

[69] *Ibidem*.

[70] *Ibidem*.

[71] *IOA Standards of Practice*, 2009, www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf [access: 10.01.2021].

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was a counterbalance to the formalized mechanisms and top-down decisions of the administration. It was established to prevent arbitrary decisions of the university authorities which omitted a proper and due process and to ensure students' rights and their influence on the procedures applied at universities. Moreover, there is still a lot of room at universities for directive decision making processes, e.g. in grievance or disciplinary proceedings, therefore it is necessary to preserve the conciliatory and soft character of the mechanisms used by academic ombudsmen, as an alternative well suited to the educational mission of the university. Although the ombudsman is situated within the internal structure of the university, the main guiding principles in his work are independence, neutrality and impartiality. Because he is not able to make binding decisions or to apply pressure-generating tools, he can implement these principles. If the ombudsman would use adjudicative mechanisms the questioning its neutrality and independence would be a valid concern.

However, the fact that the academic ombudsman does not have any decision making powers does not mean that he has no influence on the course of the case or on the persons reporting to him. His authority is not so much legitimized by his powers as by his experience, knowledge, personal qualities, and the duties and function he performs.[72] M.P. Rowe, who was one of the first academic ombudsmen in the United States at the Massachusetts Institute of Technology (MIT), highlights the lack of authority to make a decision by ombudsman, who "may not make or change or set aside a law or policy" of the institution.[73] The ombudsman's strength lies in persuasion.[74] The ombudsman performs all functions related to handling of complaints with the exception of fact-finding, being a judge or an arbitrator.[75] The role of the ombudsman is also not to ensure due process, within the meaning of court proceedings. The ombudsman is committed to promoting the use of mechanisms and tools that are fair, sufficient and appropriate.[76]

R. Behrens' noticed that even if ombudsmen believe they can be involved in making decisions and establishing facts, they are very careful in applying more directive methods and they do not consider these decisions to be binding.[77] M.P. Rowe is opposed to ombudsmen being able to make authoritative decisions or in-

[72] B.H. Raven, *A power/interaction model of interpersonal influence: French and Raven thirty years later*, "Journal of Social Behavior and Personality" 1992, vol. 7(2), p. 220 ff.; idem, *The Bases of Power and the Power/Interaction Model of Interpersonal Influence*, "Analyses of Social Issues and Public Policy" 2008, vol. 8(1), p. 5 ff.

[73] M.P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, "Negotiation Journal" 1991, vol. 7(1), p. 353.

[74] *Ibidem*.

[75] *Ibidem*.

[76] *Ibidem*.

[77] R. Behrens, *Being an Ombudsman in Higher Education: A Comparative Study*, ENOHE, June 2017, www.enohe.net/wp-content/uploads/2017/06/Being-an-ombudsman.pdf [access: 9.03.2021], p. 25.

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vestigate facts, but notes that at some universities, in exceptional cases and when soft tools for conflict resolution have failed, ombudsmen may use more authoritative measures.[78] In practice, there are examples where some adjudication by academic ombudsman is an important element of dispute resolution at universities, mostly in those countries where a centralized model of the academic ombudsman has been introduced or where the ombudsman appointed by the Parliament has been given the power to handle student disputes, e.g. in Australia, Ireland or Scotland, or where the functions of handling student complaints and grievances are entrusted to governmental bodies.[79] Although the cited studies show that some universities, for example in Spain and the Netherlands, which use adjudicative procedures that examine the facts, handle complaints and make decisions, adjudicative methods, apply them with great caution and only when more informal mechanisms such as mediation or facilitation do not work.[80]

Organizational forms of the ombudsman are very diverse. Additionally, there are at least two major types of the institution of ombudsman: parliamentary ombudsman and organizational ombudsman. For that reason, there is confusion about the term and the ombudsman's role. Moreover, there is a low awareness by the public about this institution. This confusion was the objective to create professional organizations which aim at the unification of standards and principles of ombudsmen work, sharing experiences, promoting the institution at the international and national level, making the public aware of the institution of ombudsman.[81] Some of those organizations focus on international promotion and cooperation, e.g. International

[78] M.P. Rowe, *op. cit.*, p. 353.

[79] R. Behrens, *op. cit.*, p. 27. For example, in Sweden, the Swedish Higher Education Authority (UKÄ), which oversees the higher education sector, and in particular the compliance of universities with the law and procedures, also issues decisions in cases of complaints submitted by mainly, but not exclusively, students and student councils. An appeal against the UKÄ's decision can be submitted to the parliamentary ombudsman. Independently of the UKA, the Higher Education Appeal Board resolved approx. 1,400 cases in 2015. See *Student rights*, https://english.uka.se/student-rights.html [access: 10.01.2021].

[80] R. Behrens, *op. cit.*, p. 27.

[81] International Ombudsman Association, www.ombudsassociation.org/learn-about-ioa [access: 20.01.2021]; International Ombudsman Institute, www.theioi.org/the-i-o-i [access: 20.01.2021]; European Network of Higher Education Ombudsman, www.enohe.net/what-is-enohe [access: 20.01.2021]; Australian and New Zealand Ombudsman Association, http://anzoa.com.au [access: 20.01.2021]; Association of Canadian College and University Ombudsman, http://accuo.ca [access: 20.01.2021]. See also Ombuds-Related Groups & Organizations, www.ombudsassociation.org/links-to-ombuds-related-organizations [access: 20.01.2021]. For example, the IOA promotes the continuous professional development of the organizational ombuds profession through its Standards of Practice and Code of Ethics, and fostering of communication and networking among ombuds: its strategic partnerships and communications with professionals sharing similar functions, as well as with government agencies and other organizations. This organization provides professional development, networking, mentoring.

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Ombudsman Institute (IOI)[82], European Network of Ombuds in Higher Education (ENOHE) or International Ombudsman Association (IOA). Others concentrate on cooperation of ombudsmen in a given country.

The largest and most active national organizations include: Australian and New Zealand Ombudsman Association (ANZOA), Association of Canadian College and University Ombudsman (ACCUO), British and Irish Ombudsman Association (BIOA). Most of those organizations include all types of organizational ombuds, however one namely ENOHE is devoted only to higher education ombuds. ENOHE consists of ombuds of higher education institutions all over the world. It is an informal network for ombuds in higher education to learn from each other, to help implement good governance at higher education institutions and create a more solid base for the ombud function in higher education. Activities of this organization aims at: sharing approaches to common problems, expanding knowledge, comparing working methods, enhancing skills, develop competences and learn from each other.[83]

3. Development of the institution of academic ombudsman in different countries

The first academic ombudsman has been appointed in 1965 at Simon Fraser University in Canada, although different sources are not consistent on that issue.[84] Today, in Canada the institution of ombudsman can be found at virtually every major university. Its popularity is also demonstrated by the establishment of the ACCUO in the early 1980s.[85] In the United States, the first ombudsman was appointed in 1967 at Michigan State University, and five years later, in 1974, the number of university ombudsmen exceeded 100, and in 1979 exceeded 200.[86] Originally,

[82] For example, IOI, established in 1978, is the only global organization for the cooperation of more than 200 in over 100 countries. This organization aim is cooperation and promotion of civil right ombudsman. See Ombuds-Related Groups & Organizations, www.ombudsassociation.org/links-to-ombuds-related-organizations [access: 20.01.2021].

[83] European Network of Higher Education Ombudsman, www.enohe.net/what-is-enohe [access: 20.01.2021].

[84] M. Conway, *Canadian and US Ombuds: What Are We Doing and Why Are We Doing?*, "Journal of the California Caucus College and University Ombuds" 2013 (11 July).

[85] L.C. Mitchell, *Whitney student teachers: An outside perspective*, 1998, www.academia.edu/9541991/Whiney_student_teachers_An_outside_perspective?email_work_card=thumbnail [access: 10.01.2021].

[86] W.C. Warters, *The History of Campus Mediation Systems*..., p. 1. Various publications point to other universities which were the first to introduce the ombudsman institutions. For example, J. Lee indicates that the first university in the US which established the institution of ombudsman was Eastern Montana College in 1966, and T. Rugass, a Norwegian historian, mentions that the institution of the academic ombudsman was already active in Sweden in 1960. See J. Lee, *Classical, Advocate, and*

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the establishment of this institution, as well as the introduction of mediation at universities, was a response to the widespread protests of students concerning civil rights, the war in Vietnam, establishing greater autonomy and due process for students at universities. W.C. Warters notes that the institution of the ombudsman at universities in the early period of their establishment was an attempt to respond to the need of the academic community to create a neutral, safe and confidential place where the complaints against the university authorities could be discussed and uttered without fear. By introducing this institution, the universities wanted to show that internal procedures are fair and to help members of the community to go through the "maze" of complex university procedures.[87]

The institution of the ombudsman, which became popular on the North American continent in the 1970s, began to be established in Europe and South America in the next decade. The universities which were the first in Europe to establish ombudsmen were the Leon University in Spain, in 1988,[88] and then universities in Grenada and Valencia.[89] Currently, there is a great variety of forms of the academic ombudsman's institution in Europe, both in terms of the level of development, the basis of its establishment and scope of operation. In Spain, e.g., this institution was quite popular for more than 30 years, presently is regulated by the law and established at the vast majority of Spanish universities. In Austria and Lithuania, the ombudsman for student affairs was established at the national level and deals with the matters of students from all universities. In other countries, for example in Belgium, Poland and Germany, the academic ombudsmen were appointed a decade ago and their position within the university structures, their role and responsibilities are determined individually by each university.

Comparative research conducted by P. Herfs in 2016[90] concerning the functioning of ombudsmen institutions shows the differences between academic ombudsmen at Canadian and Dutch universities. Although the generalization of conclusions from this research is certainly too far-reaching, similar differences can be observed

Organizational: An Overview of Ombuds from Scandinavian Origins to the Governments, Corporations, and Universities of America, "New Mexico Lawyer" 2018, vol. 13(1); R. Behrens, *op. cit.*, p. 12.

[87] W.C. Warters, *The Emergence of Campus Mediation Systems: History in the Making*, "Conflict Management in Higher Education Report" 2001, vol. 2(1), p. 3.

[88] R. Behrens, *op. cit.*, p. 13.

[89] *Ibidem*, p. 12. Although the terms "ombudsman", "ombuds", "ombudsperson" are quite popular in different countries, there are also other terms such as: *rzecznik akademicki* in Poland, *Provedor do Estudante* in Portugal, *defensor universitario* in Spain, *défenseur académique* in France or *akademisk talsmand* in Denmark. See J. Grier, J. Wohl, J. Leidenfrost, *Thirty Years of Solitude? University Ombudsmen's Pioneering Past, Confident Present, Challenging Future*, Report of the 12th ENOHE Annual Conference, Innsbruck 2015.

[90] P. Herfs, *Ombudsman at Canadian Universities Through the Eyes of a Dutch Ombudsman*, "Journal of the California Caucus of College and University" 2016, vol. 13, p. 24.

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between the countries in which university ombudsmen have been established for more than 40 years, i.e., apart from Canada, the United States, Australia, New Zealand, and some other countries, e.g., in Europe, where this institution has only recently emerged. There are many similarities in the activities of the ombudsmen in both countries such as the principles they follow in their work – independence, confidentiality, impartiality or the use of soft tools. According to the researcher, there are however many differences resulting mainly from the level of development of these institutions and the tradition of their functioning.[91] P. Herfs concluded that the institution of the ombudsman at the Canadian universities is more developed, popular, visible, more strongly placed in the university structure, ombudsman is treated as the asset of the university, enjoys greater authority and independence compared to those at Dutch universities. The main reason for these differences is the level of their development, their incorporation into university structures, and institutional support.[92]

Observation of the development of the institution of the ombudsman at universities leads to the conclusion that the role of ombudsmen is gradually evolving and that over time and with the actions taken, their position is becoming more established. As the ombudsman becomes recognized by members of the academic community, his role, authority and reputation are significantly strengthened with time. The reason for this gradual, although rather slow evolution is that the ombudsman uses mostly soft tools to support the parties and does not have any powers given to him by the administration of the university. His position at universities results from systematic building of trust in this institution among the members of the community.

4. Models of academic ombudsman

4.1. Adjudicatory and non-adjudicatory models of ombudsman

In the *Being an Ombudsman in Higher Education: A Comparative Study*, a report based on research conducted in selected countries around the world, R. Behrens observed that presently there are two models of the academic ombudsman, which developed in different countries. Although for a long time the difference between

[91] *Ibidem*, p. 34. According to the author, the main differences are as follows. In Canada there are regular trainings for ombudsmen. All ombudsmen deal with student affairs and some of them with administration and academics.,National organizations, such as ACCOA, have been established to support and promote the activities of academic ombudsmen. The office of the ombudsman usually employs more than one person. The institution of the ombudsman is known at the university through promotions, posters, etc. The institution has a more than thirty-year tradition, and the ombudsman is treated as an asset of the university – is independent and has a strong position.

[92] *Ibidem*, p. 35–36.

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these models was not clear or even noticeable, however it is now more pronounced.[93] The first one is based on the classic Scandinavian model and is characterized by independence and its placement outside the structure of certain institution. In the classic form, the ombudsman has decision-making power and is the last instance if a party is dissatisfied with a proposal made by the university administration.[94] The second model was based on an organizational ombudsman developed in the private sector. The organizational ombudsman is also independent, but operates within the organization and uses mainly soft tools instead of making decisions.[95] Although the ombudsman's model based on the classical institution presently operates mainly within the internal structures of universities, he has the power to receive, consider and investigate complaints, conduct investigations, provide advice, mediate and facilitate. Sometimes in this model, the ombudsman also uses adjudicative procedures. On the other hand, the organizational model of the university ombudsman mainly concentrates on soft tools such as conciliation, mediation, shuttle diplomacy, counseling, listening and empowerment and does not investigate, does not make binding decisions or adjudicate.[96]

Apart from these differences, both models are very similar and share common features, such as non-binding nature of decisions, activities mainly aim for resolving students complaints, but often include issues concerning academics and administrative staff and providing their services free of charge. In their work, they use such mechanisms as mediation, facilitation, shuttle diplomacy. In addition, they are characterized by independence, impartiality, confidentiality, freedom from pressures and informality of the procedures.[97] A survey conducted by R. Behrens among ombudsmen from 18 countries from several continents, representing different models, shows that 85% of them are guided by the principle of independence, 88% are guided by the principle of neutrality and impartiality, 88% are guided by the principle of confidentiality and 78% are guided by the principle of non-formalism.[98] Although the issue of neutrality of ombudsmen is widely discussed since they are most usually an internal university institution and they are employed by universities, only 12% of respondents indicated that independence is not a principle they are bound by.[99]

The same research shows that all academic ombudsmen perform various tasks which are primarily of a non-binding nature. The most important of these are: ad-

[93] R. Behrens, *op. cit.*, p. 17.

[94] *Ibidem*.

[95] Ch.L. Howard, *op. cit.*, p. 3.

[96] *Ibidem*.

[97] See, e.g., International Ombudsman Association, *IOA Code of Ethics*, www.ombudsassociation.org/assets/IOA%20Code%20of%20Ethics.pdf [access: 10.01.2021].

[98] R. Behrens, *op. cit.*, p. 29.

[99] *Ibidem*.

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vising, collecting information, acting as agents of change. Moreover, other tasks of the ombudsmen are mediation and counselling. Very few respondents indicated that the ombudsmen are also involved in decision-making processes and in some cases even represent a party in formal proceedings or conduct adjudicative proceedings.[100]

As R. Behrens concludes, a "very fragmented landscape" of the ombudsman's institutions, which operate at central, regional or university level, emerges.[101] The scope of their activities is also varied. Most of them deal with student affairs, but some also handle disputes between employees or employees and administration. There is also no uniformity in the way ombudsmen are appointed. In some countries the appointment is made on the basis of statutory regulations and in others it depends exclusively on the decision of the university administration. Furthermore, it follows that several institutions of the ombudsman may operate in the same country, which are not mutually exclusive, at the central level and at the level of individual universities.[102]

4.2. External and centralized model of academic ombudsman – example of Austria and Lithuania

In a limited number of countries, including Austria and Lithuania, an office of academic ombudsman has been established at the national level to certain kinds of disputes. Although the Austrian Student Ombudsman (ASO) and Lithuanian Ombudsman for Academic Ethics and Procedures are both state institutions, established based on the national laws and deal with academic matters, and their jurisdiction extends to all universities in their respective countries, their nature and scope of activity is very different, and thus worth of the analysis.

In Austria, ASO is a centralized institution and is regulated by law at the national level.[103] In 2011, the Office of the Austrian Student Ombudsman (OASO) was appointed by the Ministry of Education, Science and Research in Vienna.[104] Such a position may suggest a kind of dependence of the ombudsman, however, in his activities *ex lege* he is independent from other bodies.[105] The OASO has a jurisdiction to handle complaints from all students in Austria, approximately 396,000 students, who study at 70 universities. Statutory regulation gives ASO a wide range of powers to assist students, but his decisions are non-binding. The Ombudsman

[100] *Ibidem*.
[101] *Ibidem*, p. 27.
[102] *Ibidem*.
[103] Chapter 8 § 31 item 3 of the Act on Quality Assurance in Higher Education, HS-QSG 2011.
[104] Federal Law Gazette I no. 74/2011.
[105] J. Leidenfrost, A. Rothwangl, *The Austrian Student Ombudsman, "student rights" and synopsis "student obligations" in the Austrian Higher Education Area: Between soft administrative control and proactive syntegration*, „Zeitschrift für Hochschulrecht" 2016, no. 15, p. 1.

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is obliged to answer any questions asked by a student about the study program, examinations, services and administration at the university.[106]

In order to perform this task correctly, the ombudsman may request information from the university concerning the matters he is dealing with, and the university is obliged to provide the requested information. The ombudsman addresses those responsible in a particular institution and tries to find an appropriate solution to the problem through dialogue. However, if the case involves multiple institutions or cannot be resolved by addressing those responsible, then the ombudsman urges the parties to mediate in order to facilitate resolution of the dispute.[107] In such a situation he may act as a mediator.[108] In addition to the matters mentioned above, ASO provides opinions and makes recommendations on changes in internal regulations of the universities concerning the students.[109] However, ASO is not entitled to issue binding instructions, decisions or recommendations.[110] The function of an ombudsman is referred to as soft administrative control.[111] The ombudsman also "tries to reconcile the rights and obligations of students", based on the assumption that students have not only rights but also obligations that the university should fully inform students about.[112] Parallel to the central office of ASO, there are academic ombudsmen at individual universities to assist at the local level. In 2004, the first academic ombudsman was appointed at the University of Natural Resources and Life Sciences in Vienna.[113] The role of ASO is also to coordinate the cooperation of other ombudsmen.

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[106] Chapter 8 § 31 item 4 of the Act on Quality Assurance in Higher Education, HS-QSG 2011. The report on the activities of the Student Ombudsman indicates the types of cases in which he provides assistance to students. The data for 2017/2018 shows that actions were taken in 140 cases concerning the course of studies, 82 cases concerning admissions, 66 cases concerning financial assistance, 41 cases concerning fees for studies, 23 cases concerning exams, 15 cases concerning academic degrees, 13 cases concerning financial assistance and grants, 13 cases concerning academic work. See Ombudsstelle für Studierende, https://hochschulombudsmann.at/ueber-uns-EN [access: 10.01.2021].

[107] See *ibidem*.

[108] J. Leidenfrost, A. Rothwangl, *op. cit.*, p. 1.

[109] In 2018, the Student Ombudsman issued 10 recommendations to the Parliament and the Minister of Education, Science and Research, and 7 recommendations to various university institutions. See *Annual Report of the Austrian Student Ombudsman 2017/18 submitted to the Austrian Minister for Education, Science and Research and to the Austrian Parliament*, www.enohe.net/wp-content/uploads/2019/03/Annual-Report-.pdf [access: 10.01.2021], pp. 4–5.

[110] See Ombudsstelle für Studierende, https://hochschulombudsmann.at/ueber-uns-EN [access: 10.01.2021].

[111] J. Leidenfrost, A. Rothwangl, *op. cit.*, p. 2.

[112] *Ibidem*.

[113] *Ibidem*, p. 15. The academic ombudsmen together with the national Student Ombudsman concluded an informal agreement in Klagenfurt on 2 June 2016, which aims at supporting each other through knowledge sharing, training, promoting change and the institution of the ombudsman. The

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The Office of Ombudsperson for Academic Ethics and Procedures of the Republic of Lithuania (Akademinės etikos ir procedūrų kontrolieriaus tarnyba) was formed in 2013 based on the Law on Higher Education and Research adopted by the Lithuanian Parliament, Seimas, in 2011.[114] According to Article 18 para. 1 the primary role of the Lithuanian Ombudsperson for Academic Ethics and Procedures is to examine complains and initiates investigation regarding the violation of academic ethics and procedures, thus contribute to the improvement of academic ethical standards and quality in higher education and ensure the observance of the principles of academic integrity, academic freedom, and impartiality in the evaluation of scientific works.[115] This institution does not deal with general complaints of the members of the academic community, and its scope of jurisdiction concerns only complaints and matters dealing with ethical issues.[116] Additionally, the Ombudsperson in Lithuania unlike ASO can determine whether a violation of ethical standards has taken place, and thus the main scope of its activity is to initiate and investigate violations of academic ethics and procedures.[117] The Ombudsperson for Academic Ethics and Procedures may also recruit independent experts to provide expertise regarding an investigation. Additionally, he may notify law-enforcement institutions if evidence of a criminal offence has been established.[118]

Moreover, what is different about Ombudsperson for Academic Ethics and Procedures in Lithuania, is that he makes not only recommendations for the higher education institutions to revoke a decision of a university awarding the academic degree or position in case of ethical violations but also he can make his decision binding for the university. Based on the Article18 para. 12 items 2 and 3 of the Law Ombudsperson may, among other things, recommend or even require the university, which awarded a scientific degree, to revoke its decision in regard to

agreement was concluded by: Austrian Agency for Research Integrity, Universities of Applied Sciences, Conference of Austrian Private Universities, Rectors' Conference of Austrian Universities of Education, Austrian Students' Union, Federal Ministry of Science, Research and Economy, Austrian Student Ombudsman, Austrian Agency for Research Integrity.

[114] Law on Higher Education and Research of 30 April 2009, no. XI-242, as last amended on 17 December 2015 – no. XII-2198, https://seimas.lrs.lt/portal/legalAct/lt/TAD/548a2a30ead611e59b76f36d7fa634f8?positionInSearchResults=0&searchModelUUID=d94ab877-d502-4028-856f-a7b966afd292 [access: 10.05.2021]. See also *Republic of Lithuania Office of Ombudsman for Academic Ethics and Procedures Activity Report for 2013*, Vilnius 2014, https://etikostarnyba.lt/wp-content/uploads/2019/12/Activity-Report-for-2013.pdf [access: 10.05.2021], hereinafter: *Report 2013*.

[115] *Ibidem*.

[116] *Report on the Activity of the Office of Ombudsman for Academic Ethics and Procedures of the Republic of Lithuania in the Year 2014*, Vilnius 2015, https://etikostarnyba.lt/wp-content/uploads/2019/12/Activity-Report-for-2014.pdf [access: 15.04.2021], hereinafter: *Report 2014*.

[117] *Ibidem*.

[118] *Ibidem*.

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awarding the degree, taking into regard the documents regulating the academic ethics and procedures.[119]

The activities of the Ombudsperson are based on the principles of legitimacy, impartiality, justice and openness, which is also different in comparison to other academic ombudsmen.[120] Unlike most other academic ombudsmen who act according to the principle of confidentiality, the main principle of the Lithuanian Ombudsperson for Academic Ethics and Procedures is openness, which means that the Ombudsperson may make public all cases which concerns violations of academic ethics and procedures. The Law also does not provide that the Ombudsperson may apply soft tools such as mediation, negotiation or shuttle diplomacy. However, the Ombudsperson in Lithuania can conduct consultations during which the applicants are given "explanations, advice, methods and possibilities of solving the problems related to academic ethics and procedures".[121] This institution varies from the Austrian counterpart, as well as other academic ombudsmen who as a matter of principle, do not investigate, issue binding decisions only in rare circumstances, and instead use soft mechanisms such as negotiation, facilitation and mediation. Additionally, most academic ombuds deal with a wide range of different complaints and matters in higher education institutions and put emphasis on resolving conflicts. Moreover, the Lithuanian Ombudsperson's goal is primarily not only to deal with complaints and investigate but also "monitor and supervise the compliance with academic ethics provisions and procedures".[122]

This institution can be described as a hybrid alternative method for conflict resolution. It is an alternative to the court in the sense that some cases are investigated and resolved outside of justice system, although the parties may appeal to the courts from the decisions of the Ombudsperson and, in fact, they often do.[123] In many cases he makes binding decisions, thus it has an adjudicatory nature. However, because of its strong investigatory obligations in ethical violations, this institution is more similar to a special prosecutor office than to a classical ombudsman whose function is to resolve academic conflicts.[124]

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[119] *Ibidem*.

[120] Article 18 para. 9 of the Law on Higher Education and Research. See also *Country Report Lithuania: National Research Integrity Landscape*, 16 December 2019, www.enrio.eu/country-reports/lithuania [access: 15.04.2021].

[121] *Report 2013*.

[122] *Report 2014*.

[123] For example, in 2014 in 11 cases the Ombudsman stated the violation of the ethical standards, half of those cases had been appealing to the courts. See *ibidem*.

[124] It is interesting that the constitutionality of Article 18 para. 12 item 2 of the Law on Higher Education and Research providing that the Ombudsperson can make a decision to require the university to revoke a degree has been brought to the attention of the Constitutional Court of Lithuania. In one case the habilitation degree was revoked by the academic institution based on the decision of the Ombudsperson in this regard. The petitioner claimed that the provision stating that Ombudsperson

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4.3. Internal and decentralized model of academic ombudsman created on the basis of national/state law – example from Spain, Croatia and Florida

Although in most cases the academic ombudsman is appointed and performs activities on the basis of internal regulations or charters of universities, and sometimes only on the basis of decisions of the university administration, in some countries this institution is regulated in the statues, which also underlines importance of the academic ombudsman in the legal system. This solution has been applied in Spain, Croatia, Malta, and also in Florida in the United States, which is the only state that introduced the institution of an academic ombudsman into the state law.

4.3.1. Spain

The institution of an academic ombudsman in Spain is regulated by Organic Law 6/2001 of 21 December 2001 on the University and by Royal Decree 1791/2010 of 30 December 2001 on the Approval of the Statute of University Students' Rights. Academic ombudsmen have been operating in Spain since the 1980s and it was on their initiative that the institution was regulated by law.[125] The Organic Law requires universities to establish an academic ombudsman to ensure the rights and freedoms of academics, students, administrative staff and university researchers. The Law is a general regulation which only indicates that the ombudsman is to be independent of the university's authorities, and detailed regulations, including the procedures for his appointment and operation, are to be set out in the internal regulations of each university. The Royal Decree further specifies that the academic ombudsman may take action in the form of mediation, conciliation and facilitation, while promoting the principles of high ethics, co-responsibility and co-existence

may request the university that has awarded a higher education degree to revoke that degree, violates Article 40 para. 3 of the Constitution, which guarantees the autonomy of higher education institutions. The Constitutional Court decided that this provision is not unconstitutional since "it is intolerable that qualification degrees representing higher education and scientific qualifications should be awarded or that individuals should be appointed to posts in institutions of science and studies while disregarding standards for academic ethics and procedures". The Court stressed that awarding a degree in that situation would discredit science and studies and would be incompatible with the general principles of law. See *The Ombudsperson for Academic Ethics and Procedures may oblige an institution of higher education to revoke an awarded scientific degree if he or she finds gross violations of academic ethics*, 3 December 2020, www.lrkt.lt/en/about-the-court/news/1342/the-ombudsperson-for-academic-ethics-and-procedures-may-oblige-an-institution-of-higher-education-to-revoke-an-awarded-scientific-degree-if-he-or-she-finds-gross-violations-of-academic-ethics:278 [access: 15.04.2021].

[125] J. Palazón, *Las Defensorías Universitarias como un instrumento para la mejora de las universidades*, "Revista Rueda" 2017, no. 2, p. 8.

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and good practices.[126] Students can turn to an academic ombudsman if they believe that their rights or freedoms have been violated. The ombudsman advises students on existing redress procedures and can work with both students directly and their representatives to this end.[127] The most common forms of activities of the Spanish ombudsmen are consultation, complaints and recommendations. An ombudsman may make recommendations on a specific case, offering alternatives to its resolution.[128] In addition, he may suggest regulatory changes that should improve the "implementation of justice and quality of university work". Usually, ombudsmen are accountable for their work to the body that chose them. The ombudsmen are chosen by a collective body *claustro* – an authority consisting of students, academics, rector and two other high-ranking university officials.[129] In February 2016, out of the 78 Spanish universities in 69 academic ombudsmen had been appointed.[130]

For example, the academic ombudsman (*Defensor Universitario*) of the Universidad Europea de Madrid considered 324 cases in the academic year 2017/2018.[131] At that University a complaint to the ombudsman can be submitted in any form, by phone, in a meeting, by e-mail, the case should be described in detail and, if necessary, the important documents should be attached. The ombudsman rejects all anonymous, pointless, unsubstantiated and unfounded complaints and those in which court proceedings are pending. After accepting the complaint, the ombudsman examines the case, proposes a solution or makes a recommendation to the university.[132] In individual and group disputes, the ombudsman may act as an active

[126] Article 46 (El Defensor Universitario) of the Real Decreto 1791/2010 de 30 de diciembre, por el que se aprueba el Estatuto del Estu-diante Universitario, Boletín Oficial del Estado, núm. 318, de 31 de diciembre de 2010, pp. 109353–109380.

[127] *Ibidem*.

[128] J. Palazón, *op. cit.*, p. 9.

[129] L. Espada Recarey, *The Ombudsman for Spanish Higher Education Institutions*, Vigo 2006. Mostly called *Defensor*, but some universities use different names, e.g., in Catalonia and Valencia *Síndic de Greuges*. Other universities use the name "ombudsman", e.g. Universidad de Cantabria, Universidad de Murcia, Universidad de Valladolid. *Annex: A Survey of Campus Ombudsmen in continental Europe, North and South America, and Australia and New Zealand*, [in:] Evidence of 1994 Group, *Pathway 3: Towards early resolution and more effective complaints handling*, OIA, Reading, October 2012, p.43.

[130] Sixty one of these universities are part of the National Conference of Academic Ombudsmen, which is an organization of academic ombudsmen that takes initiatives such as giving opinions on the government's actions in the field of university affairs or asking the government to take legislative initiative to regulate certain issues (e.g., a catalogue of serious and minor violations and related sanctions for public universities).

[131] Informe Defensor Universitario, *Anual Septiembre a Junio 2017/2018 vs 2016/17*, https://storage.googleapis.com/ue-cms-mvp-production-files/uploads/media/02/septiembre-2016-agosto-2017-2-cursos-1.pdf [access: 10.01.2021].

[132] Article 4 para. 4.2 in connection with Article 3 of the Reglamento del Defensor Universitariode de la Universidad Europea de Madrid.

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mediator who proposes solutions to end the conflict based on compromise.[133] Within the framework of his activities, the ombudsman is entitled to request information from all members of the academic community. In addition, he can demand access to the necessary documents and visit all departments at the university.

The ombuds at Spanish universities have several decades of experience. First, they were introduced at some individual universities and then this movement caused adoption of a national law which gave the framework and impetus to create ombuds at each university. Support of the institution by a legislative body leads over time to strong placement of those institutions in the higher education system and presently they are recognized "as an element of improving the culture of ethics, responsibility and trust between members of the university community".[134]

4.3.2. Croatia

In 2007, the Act on Higher Education introduced an obligation to establish an academic ombudsman institution at universities. The Croatian solution is distinguished by the fact that the role of an academic ombudsman is to be performed by a student appointed by the student government for a renewable one-year term of office.[135] This is an innovative and yet quite bold model that puts the academic ombudsman, a student, before the difficult task of resolving academic disputes involving students and protecting students' rights and freedoms. As a result, the appointment of an academic ombudsman – a student without experience and familiarity with this type of activity, carrying out this activity with no remuneration, may be insufficient to meet the ambitious goals set for this institution.[136]

Pursuant to the Law of 2007, one of the universities that introduced the institution of the academic ombudsman was the University of Zagreb, and his task is to mediate between students and different units of the academic community.[137] The main activity of the academic ombudsman is to handle all, even anonymous student complaints. As part of the investigation of a complaint, the ombudsman checks the facts of the case, monitors it, informs the students about possible solutions, warns

[133] Article 4 para. 4.3 of the Reglamento del Defensor Universitariode de la Universidad Europea de Madrid.

[134] M.E. Alonso de la Varga, J.M. Palazón Espinosa, *The Spanish case: One Ombuds office in each university by law*, ENOHE webinar, 29 September 2016, www.enohe.net/wp-content/uploads/2016/09/The-Spanish-Case-Webinar-Presentation.pdf [access: 10.04.2021]. The presentation includes list of all universities in Spain and the year of formation of ombuds institution.

[135] Croatian Higher Education Law 2007, "ENOHE News" 2009, no. 1, p. 12.

[136] J. Marinovic, *An Overview of the Student Ombudsman at the University of Zagreb*, [in:] *Common objectives – Different Pathway: Embedding Ombudsman Principles and Practices into Higher Education Institutions*, eds. M. Conway, J. Leidenfrost, Vienna 2010.

[137] See Studentski pravobranitelj Sveučilišta u Zagrebu, www.unizg.hr/studiji-i-studiranje/podrska-studentima/studentski-pravobranitelj [access: 10.01.2021].

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about the risks, makes recommendations and conducts a dialogue with the relevant university bodies and mediates between the parties.[138]

4.3.3. Florida

Florida was the only state in the US to introduce a statutory obligation to establish an academic ombudsman at each state university.[139] The state regulation defines the general scheme of the institution and indicates that the ombudsman's task is to defend proper administration with independence, objectivity and confidentiality in an informal procedure.[140] As a result, each university individually establishes an appropriate procedure for the operation of an academic ombudsman. For example, at the University of Central Florida (UCF), which is the largest university in Florida, an academic ombudsman was established as early as 1994.[141] It operates on the basis of IOA standards of good practice and the university regulation establishing the office. The academic ombudsman deals with complaints, questions and problems of all members of the academic community.[142] In response to complaints, the ombudsman explains the rules and provides advice on possible solutions and further action.[143] If the ombudsman finds it applicable, he may make a recommendation to the university's bodies indicating how they should resolve the problem complained of or what they should change in the university's policies and procedures.[144] However, the ombudsman's recommendations are not binding and he cannot order a specific action or impose sanctions on university bodies.[145] The ombudsman may not take part in any formal proceedings. In addition, the academic ombudsman, if asked by the parties, may participate in dispute resolution as a neutral third party who will informally, but also impartially and independently facilitate communication between the participants in the dispute.[146]

[138] *Ibidem*.

[139] See The 2020 Florida Statutes, Title XLVIII: K-20 Education Code, Chapter 1006: Support for Learning, 1006.51: Student ombudsman office, www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1006/Sections/1006.51.html [access: 10.01.2021]; Regulation of the Board of Governors of State University System of Florida, Section 7(d), Article IX, Fla. Const., 6.011, www.flbog.edu/wpcontent/uploads/6_011_Student_Ombudsman.pdf [access: 10.01.2021].

[140] *Ibidem*.

[141] University of Central Florida Ombuds Office, Ombuds Office Charter, www.ombuds.ucf.edu/docs/OmbudsCharter.pdf [access: 10.01.2021].

[142] *Ibidem*.

[143] *Ibidem*.

[144] *Ibidem*.

[145] *Ibidem*.

[146] *Ibidem*.

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4.4. Internal and decentralized model of academic ombudsman based on internal decisions, regulations or statutes of universities – example of the University of Warsaw

In Europe, the United States and Canada, the most popular model is the institution of an ombudsman appointed by the university within its internal structures, without a statutory legal basis. As R. Behrens notes, independently of other institutions that deal with academic matters, the most important role in handling problematic issues and disputes is played by ombudsmen appointed by individual universities.[147] This model is based on the organizational ombudsman, whose responsibilities include all activities focused on resolving problems and disputes among members of the community.[148] In this model, ombudsmen accept complaints and help to resolve problems through their analysis, as well as contact with various university departments, if necessary as well as through shuttle diplomacy or informal discussion. Occasionally, the ombudsmen themselves examine the facts and resolve complaints, as well as make decisions and apply adjudicative procedures. However, such activities are relatively rare and are only used when the soft methods do not bring the expected results. Due to the fact that the ombudsman is appointed based on the internal decisions of the university administration, without a broader legal framework, there is a great variety of ombudsmen at the universities in the same country, which are characterized by different scope of activity, emphasis on different issues depending of the need of an individual university, which is expressed in a variety of names of a person who holds such a position.

In Poland, the academic ombudsman at the University of Warsaw is an example of this institution created by an individual higher education institution, namely Ordinance of the Rector. The Academic Ombudsman (Rzecznik Akademicki) was established in 2011 pursuant to Ordinance no. 30 of the Rector of the University of Warsaw of 16 August 2011 on the appointment of the University of Warsaw Academic Ombudsman.[149] It is worth noticing that it was the first office of academic ombudsman established at the Polish universities. Since then over 12 ombudsmen at various Polish higher education institutions were formed, many quite recently, although their activities vary in scope of activities, names and the issues they handle.[150]

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[147] R. Behrens, *op. cit.*, p. 26. In some countries ombudsman do not always deal with university matters. In Ontario, Canada, e.g., the Canadian Provincial Ombudsman was not entrusted with these matters until 2006.

[148] Ch.L. Howard, *op. cit.*, p. 12 ff.

[149] http://ombudsman.uw.edu.pl/wp-content/uploads/2017/10/Zarz%C4%85dzenie-o-powo%C5%82aniu-Rzecznika-Akademickiego-ds.-studenckich-i-pracowniczych.pdf [access: 10.01.2021].

[150] *Ibidem*. Since then, several other universities in Poland have established the office of ombudsmen, but the scope of their duties, as well as the type of their functions are different, as evidenced

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Since 2011 there has been a gradual increase in the number of complaints brought to the University of Warsaw Academic Ombudsman. In 2012, 130 cases have been brought to the Ombudsman and in 2019 the number of cases almost doubled to 252. In the last two years (2018–2020) the number of cases submitted to the ombudsman increased again by 70%. Besides understanding the relations with the University by the students as consumer like relations, this trend can be related to the growing knowledge of the University of Warsaw community about the ombudsman's activities, and increasing the trust she enjoys, as well as efforts to popularize this institution. For example, recently a campaign was conducted by the University of Warsaw Ombudsman under the slogan "Equalizing" ("Równoważni") emphasizing that "there is no place for discrimination at the University of Warsaw and those who experience it will find support at the University".[151] In addition to the change of the position at the University, as the authority of the ombudsman develops and strengthens, the recognition of the ombudsman among the academic community, relations with the university administration and with the deans of individual faculties also changes.[152] The ombudsman implemented at the University of Warsaw has three main areas of activity: prevention of conflicts and promotion of ADR in the academic community; intervention in submitted cases; whistleblowing activity and promotion of development and corrective solutions.

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by the names of these offices, e.g.: Academic Ombudsman at the Nicolaus Copernicus University in Toruń, Ombudsman for Equal Treatment and Anti-Discrimination at the University of Wrocław, Rector''s Proxy for the Protections of Rights and Values at the Jagiellonian University in Krakow, Academic Ombudsman at the Medical University of Warsaw, Academic Ombudsman at the Catholic University of Lublin, Rector's Proxy for Equal Treatment at the Maria Curie-Skłodowska University in Lublin. Each of these universities develops its own formula of an ombudsman. However, the conversation with some of the academic ombudsmen shows that they look at the University of Warsaw model, while structuring their offices. In turn, the initiative to establish an Academic Ombudsman at the University of Warsaw was a result of cooperation with the Consortium on Negotiation and Conflict Resolution at Georgia State University (GSU). The GSU Consortium was formed as the result of a strategic decision taken by the Board of Regents on conflict resolution at public universities in Georgia. Based on that decision one of the largest integrated and comprehensive conflict management systems at universities in the US has been introduced. See Georgia State University, *Inter-University Consortium on Negotiation and Conflict Resolution*, https://law.gsu.edu/faculty-centers/cncr [access: 10.01.2021].

[151] Uniwersytet Warszawski, Sprawozdanie z działania Rzecznika Akademickiego ds. Studenckich i Pracowniczych w okresie od 1 stycznia do 31 grudnia 2019 r., 31.01.2020, http://ombudsman.uw.edu.pl/wp-content/uploads/2020/03/Sprawozdanie-z-dzia%C5%82a%C5%84-Rzecznika-2019.pdf [access: 10.01.2021], p. 9. The evolution of the ombudsman's position at the University of Warsaw is also evidenced by other circumstances, such as the expansion of his Office. At the beginning of his activity, the ombudsman was employed only half-time, at present there are three people employed in his Office, and there are plans to employ a fourth one, which will primarily deal with conducting mediation.

[152] *Ibidem*.

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In 2019, over 250 cases were submitted to the University of Warsaw Academic Ombudsman, and the number of complaints submitted by students doubled, and those submitted by staff have increased by one-third in recent years. The largest number of students complaints included issues related to the organization and course of studies, such as: expulsion, reinstatement, a problem with graduation or passing an exam or certain class, changes in the regulation of studies during the course of studies, the way the classes are conducted or graded by the academics. The second-largest category involving students are conflicts and communication difficulties, e.g., between students, between students and lecturers or thesis supervisors, complaints about dean's office work. Last year the number of discriminatory and harassment complaints has also increased. As far as employment issues are concerned, three categories were most frequently reported: bad treatment (discrimination, harassment), working conditions and personnel policy, and unethical behavior of students and other employees.

Pursuant to § 7 of the above-mentioned Ordinance no. 30 of the Rector of the University of Warsaw, the Academic Ombudsman may take various actions in the reported cases, but they are not binding decisions.[153] He may take the following actions in the submitted cases:

- provide appropriate information on the functioning and legal regulations in force at the University of Warsaw,
- indicate the units/persons competent to deal with the matter,
- support settlement of the matter by obtaining information or explaining the matter in the appropriate unit,
- support conflict resolution by diagnosing the problem and choosing the method to solve it,
- recommend mediation or conduct mediation,
- present to the Rector information and recommendations which are within the scope of the Academic Ombudsman's duties, regarding the indication of necessary changes in the university system or in ways the university operates.

The most common type of actions taken by the Academic Ombudsman in 2019 were:

- providing information on the functioning and legal regulations in force at the University of Warsaw (117),
- indication of departments/persons competent to deal with the matter (13),
- intervention in the department: obtaining information or clarifying the case (25),
- coaching: support in diagnosing the problem and choosing a solution (29),
- mediating: recommendation and conducting (15),

[153] Ordinance no. 30 of the Rector of the University of Warsaw of 16 August 2011 on the appointment of the University of Warsaw Ombudsman.

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- whistleblowing in writing: providing a description of the problem and/or recommendations for systemic changes or corrective actions at the university (4).[154]

It is important to mention the Academic Ombudsman's Office also cooperates with the Center for Dispute and Conflict Resolution at the Faculty of Law and Administration of University of Warsaw, which has been operating at the University since 2002. Its purpose is, i.a., promoting mediation and other amicable dispute resolution (ADR) methods at the University of Warsaw and the academic community. The Center, which is supported by the Rector of the University of Warsaw, cooperates with several professional mediators who are employees of the University of Warsaw or who work with the Center and, among other things, mediate any academic disputes free of charge. The cases are referred to the Center by the Academic Ombudsman, the University Rector, other departments at the University or when one of the parties to the dispute who is a member of the academic community brings a motion to mediate.[155] The Center also popularizes conciliatory methods of dispute resolution and soft skills by organizing workshops for students and employees of the University of Warsaw in effective communications skills and conflict resolution at work. In a sense, the University of Warsaw, taking into consideration many benefits of an interest-based approach to conflict resolution in academia established a dispute resolution system consisting of: Academic Ombudsman, the Center for Dispute and Conflict Resolution, as well as a training system for members of the academic community to deal with conflicts.

ALTERNATIVE ADJUDICATIVE AND MIXED PROCEDURES IN RESOLVING ACADEMIC DISPUTES

1. Nature of adjudicative methods

Many studies show that the most effective method of resolving disputes is the application of mixed procedures, e.g. mediation which has a conciliatory nature, and if it does not bring resolution of conflict, then application of more direct and

[154] Uniwersytet Warszawski, Sprawozdanie z działania Rzecznika Akademickiego ds. Studenckich i Pracowniczych w okresie od 1 stycznia do 31 grudnia 2019 r.

[155] Academic mediation and promotion of ADR at the University is the main core activity of the Center. The Center receives also cases referred by courts and within mediation clinic, students, after an intensive and practical training in negotiations, dispute resolution and mediation, become co-mediators and act as first contact mediators in cases referred by the courts. Students do not take part as co-mediators in academic mediations since most of them concern employees.

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adjudicative methods.[156] Although mediation, analyzed in the first part of this study, carries many positive benefits in academic disputes, however it does not always involve a final settlement. Besides, mediation may not be an appropriate method in some academic disputes which typically include the situations when the parties are involved in a value-based conflict and there is no room for compromise, the party may not effectively get involved in a negotiation, one party refuses to participate in good faith, the case needs to be decided by the court, one of both parties do not intend to mediate, there is imbalance of power between the parties, which mediator may not redress or parties are not committed to the process.[157]

It was noticed that if in some conflicts conciliatory methods are not sufficient because of the parties involved and the character of the disputes, then the application of adjudicatory methods may be more appropriate. Classic examples of these methods are arbitration and court proceeding which ultimately end the dispute by the decision of the neutral third party, which is binding. Adjudicative procedures most often refer to decision by a court or other body empowered to do so, in which a judge, arbitrator or other neutral person examines the facts, reviews the evidence, listens to the legal arguments of the parties, in order to make a binding decision that determines the rights and obligations of the parties to the dispute.[158] Although arbitration is an adjudicative method where the arbiter makes a final decision and applies his authority and powers through a binding decision, this method is applied instead of courts and for that reason it is often described as an ADR method. The opinions on that subject however are not uniform and some authors do not consider arbitration as an ADR method since it is not conciliatory.[159]

On the other hand in arbitration unlike, in the court proceedings, autonomy of the parties is a key element in the choice of forum, through signing an arbitration

[156] A.L. Limbury, *Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?*, "New York State Bar Association Dispute Resolution Journal" 2009 (Spring).

[157] On discussion about disputes which are not suitable for mediation, see H. Abramson, *Mediation Representation: Advocating in a Problem – Solving Process*, Boulder 2004, p. 117 ff.; P. Young, *The "What" of Mediation: When Is Mediation the Right Process Choice*?, October 2006, www.mediate.com/articles/young18.cfm [access: 10.01.2021]; Ch. Moore, *The Mediation Process: Practical Strategies for Resolving Conflicts*, San Francisco 1996, p. 13; T. Grillo, *The Mediation Alternative: Process Dangers for Women*, "The Yale Law Journal" 1991, vol. 100(6), p. 1585; R. Delgado, Ch. Dunn, P. Brown, H. Lee, D. Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, "Wisconsin Law Review" 1985, no. 1359, p. 1387 ff.

[158] *Adjudication*, https://dictionary.thelaw.com/adjudication [access: 10.01.2021].

[159] For example, R. Morek (*ADR – w sporach gospodarczych*, Warszawa 2004, p. 2) expressed the opinion that arbitration may not be defined as ADR because of its adjudicatory character. On the another hand, many authors believe that arbitration in spite of adjucative character may be included into ADR methods, because it is alternative to the court proceeding as well as include some features indicating a strong autonomy of the party. See L.L. Riskin, J.E. Westbrook, *Dispute Resolution and Lawyers*, St. Paul 2002, p. 3; C. Meankel-Meadow, L.P. Love, A.K., Schneider, *Mediation: Practice, Policy and Ethics*, New York 2005, p. 383.

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clause or agreeing for *ad hoc* arbitration, choosing an arbiter and input regard to the procedures. Some authors express the opinion that arbitration is directive, contentious and adversarial in nature, and thus not suitable for settling cases involving academic matters.[160] This argument is also raised in regards to making binding decisions by academic ombudsmen, which was discussed earlier in this article, and a model of an academic ombudsman who resolves conflict through final and binding decisions is applied very rarely and with great caution.

The introduction of ADR methods at universities which have predominantly conciliatory character was not only a response to the growing number of cases and complaints against universities that were brought to formal procedures including courts, but also an expression of change in relations between university and academic community from power-based and rights-based into interest-based approach. In many countries where ADR procedures for academic disputes have been introduced, they have become a counterweight to more formal and adjudicative procedures. According to R. Behrens, the ombudsmen at the universities in countries such as Canada, the United States, Norway, Germany, Belgium or Poland do not presently, as a matter of principle, use authoritative and adjudicative procedures in fulfilling their duties.[161]

On the other hand, advocates for the introduction of adjudicative proceedings in university disputes use valid and important arguments that these proceedings can be complementary to facilitation, mediation, consultation or counseling, and if they are used sensibly and only when other mechanisms are not effective, they can be useful.[162] An example of effective use of mixed method with predominant adjudicative functions in academic disputes is the Office of the Independent Adjudicator.

2. Office of the Independent Adjudicator (OIA)

2.1. General description

The Office of the Independent Adjudicator, whose jurisdiction extends to England and Wales, is an example of an exceptional institution that uses a variety of adjudicative and conciliatory methods to resolve academic disputes. The OIA was established in 2004 under Article 13 of the Higher Education Act.[163] The Act requires the establishment of a national agency to deal with student complaints in England and Wales. The name of the institution underlines the main rule in handling

[160] R. Behrens, *op. cit.*, p. 41.

[161] *Ibidem*.

[162] *Ibidem*, p. 49.

[163] Higher Education Act 2004, www.legislation.gov.uk/ukpga/2004/8/part/2#commentary-key-3412c79329f6012fa4741c6292f67ab7 [access: 10.01.2021].

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the complaints which is independence, as well as the basic nature of its activities and the decision-making process which is adjudication. As a part of its activities, OIA handles complaints from students and former students from all universities in England and Wales.[164]

The institution discussed here has been approved by the Chartered Trading Standards Institute (CTSI), an institution of the UK government, as the body that resolves consumer disputes through alternative dispute resolution and dispute settlement. Consumers in this case are students or former students who may bring complaints concerning any act or omission of a higher education institution.[165] The OIA report of 2019 states that students are treated as consumers when they make complaints and grievances.[166] In 2019, 2,371 students submitted complaints to the OIA, which is 21% more than in the previous year, and this is the largest number of complaints received by OIA since its inception.[167] In 71% of cases, complaints were submitted by domestic students, while in 29% of cases, complaints came from foreign students, including 21% from non-EU students.[168] It is worth noting that the increase in the number of complaints in regards to universities made by students the OIA does not interpret negatively, as it believes that in accordance with the principle of treating students as consumers, it indicates their growing awareness.[169]

This interesting institution does not have counterparts in the world and may not be easily classified within the framework of existing ADR methods, although some express the opinion that the OIA resembles the institutions of the ombudsman.[170] On the other hand, the OIA rarely uses methods such as informal conversation, facilitation, shuttle diplomacy or mediation, which are basic tools for the work of ombudsmen.

2.2. The nature of OIA

The basic procedure used by OIA is inquisitorial in nature, as opposed to the adversarial nature of court or arbitration proceedings. In the inquisitorial procedures, the neutral third person making the decision takes an active role and supervises the collection of evidence necessary to resolve the case, seeks evidence and interro-

[164] OIA Scheme Rules, www.oiahe.org.uk/media/2276/oia-rules-april-2018.pdf [access: 10.01.2021], Article 2.1 (hereinafter: OIA Scheme Rules).

[165] Guidance Note: OIA Scheme Rules – April 2018, www.oiahe.org.uk/media/2268/guidance-note-rules-april-2018.pdf [access: 10.01.2021], p. 7, point 33.

[166] OIA Annual Report 2019, www.oiahe.org.uk/media/2470/oia-annual-report-2019.pdf [access: 10.01.2021], p. 7.

[167] *Ibidem*, p. 6.

[168] *Ibidem*.

[169] *Ibidem*.

[170] R. Behrens, *op. cit.*, p. 27.

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gates witnesses, as opposed to the adversarial system, where the role of the judge is passive and those activities are taken over by the legal representatives. The aim of both, the adversarial and inquisitorial proceedings, is to find the truth, however, in the adversarial process the truth is sought using the contradictory nature of the trial and thus the parties are put against each other. In the case of OIA, decisions are based solely on documents submitted by the parties, and OIA's activity in gathering and searching for evidence is quite significant.[171]

The Office of the Independent Adjudicator is difficult to classify into one formula but it is recognized as an ADR method since OIA procedures are applied instead of court proceedings. Moreover, the inquisitorial nature of OIA's procedures means that the proceedings before this body are not adversarial, and therefore it can be classified as an ADR procedure, understood not only as an alternative to the court, but also as non-adversarial proceedings. Moreover, the OIA procedures have sometimes hybrid nature and also include mediation and negotiation, which confirms a conciliatory nature of the OIA proceedings but, on other hand, OIA in most cases makes decisions which are binding, at least for one of the parties.

2.3. Procedures and remedies applied by OIA

The analysis of the procedure before the OIA leads to the conclusion that it is quite formal as opposed to the methods and procedures used by academic ombudsmen who follow the principle of informality. Even the procedure of submitting a complaint to the OIA is formalized. There is a specific time for submitting the claim and submitting the response to the claim, clearly defined subject matter of the claim and who can be the claimant, framework and limitations of the complaints in question, all documents have to be presented in writing and the departure from those principles are exceptional.[172] In addition, before filing a complaint with the OIA, the student must exhaust all remedies within the internal dispute resolution procedures at the home university, and only in exceptional cases the OIA handles complaints that have not exhausted this route.[173] If the complaint is justified or partially justified, the OIA issues a recommendation, which is binding, but only for the university.[174] The OIA recommendation is not binding on students, who can decide whether or not to follow it without any consequences.[175]

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[171] *Inquisitorial System*, https://legal-dictionary.thefreedictionary.com/Inquisitorial+System [access: 10.01.2021].

[172] See Guidance Note: OIA Scheme Rules – April 2018.The OIA does not consider complaints concerning those cases which has already been resolved by a court or another ADR institution (see *ibidem*, Rules 4–5).

[173] Article 7.1 OIA Scheme Rules.

[174] Article 14.1 OIA Scheme Rules.

[175] Article 14.9 OIA Scheme Rules.

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Examples of OIA's recommendations to universities include sending the complaint back to the university for reconsideration, recommending action by the university that is considered fair and reasonable under the circumstances, changing the way complaints are handled, changing internal procedures or regulations, making a payment to the student, which may include compensation for suffering and inconvenience, or apology issued to the student. The university should comply with the recommendations and instructions within the prescribed deadlines and is obliged to inform the OIA about their implementation. However, if the university does not comply with the recommendations, the sanction for the university is to report the matter by the OIA in an annual report, which is public.[176] In 2019, the OIA found that 50% of student complaints were unjustified, only 3% were fully justified, 11% were partially justified, and 9% of complaints were settled.[177]

The OIA Scheme Rules provide that this office shall conduct settlement proceedings and such proceedings shall be referred to as an informal resolution of the complaint, without a full investigation of the facts.[178] One of the recommendations for the university may be that the university should make a proposal to the student to resolve the matter, but OIA has the authority to evaluate such an offer. If the student accepts the offer in its entirety, the settlement is considered to be a final resolution and the student, as a rule, will not be able to initiate legal proceedings in regard to the same case. OIA plays an active role in the settlement procedure, which can be described as a facilitator of the process. At the same time OIA not only manages, hosts and facilitates the process, but also has a much more active and directive role in settlement, e.g. may offer the parties to settle the dispute, ask the university to submit settlement offers, propose and use an external mediator. This active role of OIA is evidenced by the statements such as: "[…] we [OIA] may try to settle a complaint", "Sometimes we will invite the higher education provider to make an offer to the student", "We will always give the student and the higher education provider time to consider the proposed settlement […]", "In some cases we may suggest that the complaint should be referred to an external mediator […]".[179]

Often the parties to an academic dispute decide on a settlement in which the university commits itself to reinstate the internal proceedings in the student's case, while acknowledging that the previous procedure was flawed. In some cases, OIA suggests that the parties in the dispute shall use a mediator to help them to reach

[176] Guidance Note: OIA Scheme Rules – April 2018, p. 11.

[177] OIA Annual Report 2019, p. 12.

[178] Guidance Note: OIA Scheme Rules – April 2018, Rule 39.1: "Settlement is the informal resolution of a complaint brought to us. This means that the complaint is resolved without the need for a full review".

[179] *Ibidem*, Rules 39, 39.1, 39.3, 39.5.

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an agreement, although it is not clear from the Scheme Rules and Rule Guidance to OIA Scheme Rules whether mediation can be used at the request of one of the parties or only at the initiative of OIA. The Scheme Rules do not explain who the mediator is, except that it is an outside mediator, or what mediation procedure shall be applied. The Scheme Rules state that mediation takes place if the student and the university agree to such a recommendation, so mediation is initiated on a voluntarily basis. The Scheme Rule provides only mediation, as a conflict resolution method while OIA's Rule Guidance mentions mediation and conciliation. Mediation can only be conducted in limited situations, i.e., when the student and the university agree that there has been a violation, but cannot agree to remedy the situation, or when OIA considers the complaint to be justified/partially justified and mediation could help to find a joint solution to the dispute.[180] OIA also emphasizes that mediation is a particularly desirable form of dispute resolution when the student wants to continue his or her studies at the university.[181]

The OIA Scheme Rules also respect academic autonomy. For example, the OIA cannot intervene in cases of "academic judgement" and may not directly recommend a change in the student's grade, but it may recommend that a student's application for late submission after the deadline be considered positively, which may indirectly affect their evaluation and grade. OIA's recommendations are addressed to the university, so they cannot order a particular faculty member to behave in a particular way. In a situation where a practical solution is not available or inappropriate, OIA may recommend a financial solution, e.g. recommend the tuition refund for a certain period of time or recommend the payment of compensation to the student for damages and losses.[182] However, in order to obtain compensation, the student must prove the losses incurred, e.g. submit bills. In addition, the OIA may recommend the payment of a certain amount of compensation for damage – stress and inconvenience – which is usually limited to the amount of £ 5,000, and higher compensation is paid only in exceptional cases.[183]

[180] *Ibidem*, Rule 39.5. See also *The good practice framework: handling student complaints and academic appeals*, www.oiahe.org.uk/media/1859/oia-good-practice-framework.pdf [access: 10.01.2021], pp. 12–13.

[181] *The good practice framework…*, p. 6. Examples of proposed recommendations: resubmission of the case where the procedure used by the university was flawed or biased; change in the way the student's work is evaluated or change of the university's procedures; reassessment of the student's work based on correct evaluation procedures; the college should apologize to the student for the situation.

[182] *Ibidem*.

[183] *Ibidem*, p. 8. The amounts of compensation are as follows: £ 500 described as moderate, £ 501 to £ 2,000 described as significant, between £ 2,001 and £ 5,000 described as severe.

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2.4. Judicial review of OIA's decisions

The decisions of the Office of the Independent Adjudicator are subject to judicial review. If a student feels that his complaint has not been properly considered, he or she brings the complaint about the OIA's decision to the court.[184] However, court proceedings are extremely rare, as it is the court that must give permission to bring the complaint about the OIA's decision.[185] For example, in 2019 there were only eight cases brought to the court against OIA decisions. Even in those rare cases, the courts' rulings provide important guidance on the scope and jurisdiction of OIA.[186] The case of *Siborurma v. OIA* was important from the point of view of judicial review of OIA's decision, which confirmed two rules. First, although OIA's decisions are subject to judicial review, the courts take into account OIA's expertise and the accuracy of its decisions and for this reason only a few plaintiffs were granted permission to bring the case in front of the court. This approach of the courts is confirmed in statistics, as four out of five plaintiffs are denied permission to file a lawsuit against OIA. Moreover, the court confirmed the very wide discretionary scope of OIA and its freedom to determine the nature and extent of its control: the OIA is not only able to analyze the regulations adopted by universities, but also to examine whether those regulations are reasonable.[187] In the case of *Sandhar v. OIA*[188] the court confirmed the rule that proceedings before OIA's are based on written documents and OIA is not obliged to hold an oral hearing and that such hearing should be exceptional in nature. The court also confirmed the independent and non-partisan nature of OIA's procedures. In the case *Burger v. OIA*[189] the court refused to treat OIA's proceedings as court proceedings, stating that OIA's goal is to provide free and informal proceedings and that OIA is not appointed to replace court proceedings, so its decisions should not be analyzed in the same way as court decisions.

In several other cases, the courts have confirmed the principle of excluding from OIA's jurisdiction cases regarding "academic judgement", e.g., OIA may not interfere with academic assessment and put itself in the position of academic

[184] *Siborurma v. OIA*, [2008] ELR 209. The Court stated that OIA decisions are subject to judicial review. See also *Greater clarity given on students' rights to judicial review*, 22 February 2017, https://wonkhe.com/blogs/analysis-clarity-given-students-rights-judicial-review [access: 10.01.2021]; England and Wales High Court (Administrative Court) Decisions, www.bailii.org/ew/cases/EWHC/Admin/2017/188.html [access: 10.01.2021].

[185] The first step in starting the procedure in court is to apply to the court for "permission" to file a suit. The court *a priori* rules out cases where it will not see any possible legal basis for filing a lawsuit or if a party does not have a legal standing.

[186] OIA Annual Report 2019.

[187] F. Mitchell, *The OIA and Judicial Review: Ten principles from ten years of challenges*, December 2015, www.oiahe.org.uk/media/1885/oia-and-judicial-review-fm.pdf [access: 14.02.2021].

[188] [2011] EWCA Civ 1614.

[189] [2013] EWCA Civ 1803.

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teachers, recommend re-grading or comment on grades.[190] What it can do is analyze whether the university has followed its own assessment and evaluation procedures and whether decision-making process could have been unjust.

3. Arbitration

Due to the variety of activities carried out by universities, it is also worthwhile to consider the use of arbitration in disputes involving universities as an alternative to more formal internal and external proceedings. Arbitration as an adjudicative method, in which an arbitrator usually makes a binding and final decision, brings many benefits, which include resolution of a dispute by an arbitrator or a panel of arbitrators, who are not only neutral but also specialize in a particular type of disputes, ensuring confidentiality, and thus the possibility of saving face, reputation or good relationships. In addition, in comparison to court proceedings, arbitration procedures are less formal. In choosing this approach to academic disputes, one must consider several factors including: what kind of cases can be resolved through arbitration, who will be the arbitrator, where the seat of arbitration will be and what rules will govern the proceedings. Even if it turns out that the use of arbitration in disputes to which the university is a party is limited to certain cases, the opportunity to participate in an impartial and neutral procedure, characterized by confidentiality, lack of formalism and relative speed of proceedings, are important arguments in the discussion on its use.

So far, arbitration in university disputes has been applied only to a limited extent, and the universities in the United States have considerable experience in its application. One example of the application of arbitration in university disputes is grievance arbitration.[191] This type of arbitration is used mainly in the last phase of class actions; however, it has also started to function in employment disputes when dealing with complaints and grievances against the university's activities submitted by employees.[192] Grievance arbitration is permitted in 20 states in the United States and is mainly used at those universities where unions are formed. Unions prefer this type of dispute resolution because it guarantees greater independence and professionalism of decisions compared to those issued by the university council or

[190] *Curran QC in R (Gopikrishna) v. OIA1*, [2015] EWHC 207, item 143 ff.; *Clark v. University of Lincolnshire and Humberside13 and Moroney v. Anglo-European College of Chiropractic14b*, [2000] 3 All ER 752; *Cardao-Pito v. OIA*, [2012] EWHC 203 (Admin); *R (Mustafa) v. OIA and Queen Mary, University of London*, [2013] EWHC 1279 (Admin).

[191] *Grievance Arbitration*, https://content.next.westlaw.com/5-517-3012?__lrTS=20200719124713227&transitionType=Default&contextData=(sc.Default)&firstPage=true [access: 10.01.2021].

[192] N.B. Lovell, *Greviance Arbitration in Arbitration*, Bloomington 1985, p. 10.

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similar body.[193] In the United States, arbitration in the public sector, among others at public universities, is being used quite often, and the jurisprudence of the courts favors the use of such a method.[194]

On the other hand, American experience shows that in cases involving students, arbitration is not always the appropriate procedure. An example is the introduction of mandatory arbitration clauses in enrollment contracts between universities and students. In recent years, public institutions, including universities, have increasingly included the so-called mandatory arbitration clauses in contracts between students and universities regarding the conditions of study, as well as the rules of financing studies. They are mandatory because a refusal to sign a contract containing an arbitration clause, in principle, excludes the possibility of studying at a given university. These clauses have been severely criticized, but despite doubts about the constitutionality of these clauses in consumer disputes, the United States Supreme Court ruled that the inclusion of mandatory clauses in contracts is consistent with the Constitution and does not restrict the right to a court.[195] These clauses in the contracts between the university and the students make it impossible for the state or federal administration to determine whether, for example, universities are committing improper use of financial support from the federal or state authorities. Due to the confidentiality clause, students cannot file complaints and, as a result, bring before the court cases against the university's activities, which results in a lack of transparency of the procedure and lack of supervision of the university.[196] In the case of arbitration, the university is not responsible for its actions and, according to some authors, there is a bias in such a procedure, involving favoring the university,

[193] *Ibidem*.

[194] *Ibidem*, p. 23.

[195] B. Mayotte, *How Arbitration Helps, Hurts Defrauded Student Loan Borrowers*, 14 July 2016, www.usnews.com/education/blogs/student-loan-ranger/articles/2016-07-14/how-arbitration-helps-hurts-defrauded-student-loan-borrowers [access: 10.03.2021].

[196] A. Walsh, *States Should Act to Prohibit Mandatory Arbitration in College Enrollment Contracts*, 26 May 2020, https://tcf.org/content/commentary/states-act-prohibit-mandatory-arbitration-college-enrollment-contracts/https://tcf.org/content/commentary/states-act-prohibit-mandatory-arbitration-college-enrollment-contracts [access: 10.01.2021], p. 3. In 2016, during President Obama's administration, the use of mandatory arbitration clauses in contracts containing provisions on student loans from universities was banned at public universities that received financial support from the federal government, in order to prevent unfair practices and to provide students with the opportunity to file complaints and grievances where the last resort is a court case. In 2019, President Trump's administration removed this prohibition and from July 2020, mandatory arbitration clauses can be introduced in student loan agreements, except that this case is currently in court and pending. In the face of such a decision by the federal administration, individual states have now begun to make decisions on the application of mandatory arbitration clauses in student loan agreements. The states of Virginia and New Jersey, e.g., have prohibited arbitration clauses in such contracts.

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because the university knows the system better and will be able to convince the arbitrators of its reasons more effectively.[197]

Despite doubts about the application of mandatory arbitration clauses in contracts with students, there are many spheres of university activities where arbitration can be effectively applied. This includes the international activity of universities. Universities engage, sometimes very intensively, in international activities due to the "internationalization of education". Universities enter into various relationships and agreements with other universities, organizations or even private business in other countries. Arbitration has traditionally been most common in international commercial disputes because of the neutrality of arbitrators, the professional and expert character of the procedure, or the relative ease of enforceability of arbitral awards under the 1958 New York Convention. To date, arbitration has had little use in agreements to which universities or colleges and other entities from two different countries are parties, e.g., for joint research, research funding, student exchange grants or other international programs. It is worth considering whether arbitration in such cases, especially in combination with mediation through the introduction of mixed mediation-arbitration clauses, could apply, e.g., because of the preservation of the relationship between the partner institutions, the ruling issued by arbitrators who know the academic culture and are neutral may ensure confidentiality.

When considering arbitration in academic disputes, careful consideration should be given to what kind of cases it may be applied in, taking into regard the nature of those disputes, which often relate to academic independence and academic freedom. Therefore, the decisions of the arbitrator should not concern whether the academic evaluation was correct or not, but whether the correct procedure was followed and how it influenced the academic evaluation, that is, if the decision was arbitrary or constituted an abuse of discretion.[198] With such a delineation of the boundaries of academic arbitration, this procedure can bring many benefits, especially if it is applied instead of the court proceedings characterized by the principles of legalism and formalism. In arbitration, the nature of the disputes and parties is taken into account, and in the case of academic disputes, values important to the academic community and the characteristic of universities.[199] Therefore, in academic arbitration it is particularly important that the arbitrators are sensitive to academic values and also understand the academic community, while ensuring neutrality and impartiality, which remain the most important characteristics of an arbitrator.[200]

[197] See in general the criticism of binding arbitration clauses: M. Charmatz, *Binding Arbitration: Bad for Students, Bad for Schools*, "Disability Compliance for Higher Education" 2019, vol. 26(6).

[198] M.W. Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, "Southwestern Law Journal" 1976, vol. 30(2).

[199] *Ibidem*.

[200] *Ibidem*.

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Opinions are also expressed that arbitration can be effectively used in cases involving students. For example at the newly established universities in the United Kingdom, the independent arbitrators have been appointed whose role is comparable to that of visitors.[201] University education law experts suggest that the application of arbitration in such matters gives students the opportunity to use a neutral and independent procedure in which they would obtain relatively fast decisions and the reasoning of the decisions.[202] For universities, arbitration is valuable because of saving costs, as well as confidentiality. Referring to arbitrators' decisions in academic disputes is also a reference to traditional academia dispute resolution, when students often turned to the neutral third person – rector or president of university for help to make a decision and solve their problem

CONCLUSION

Today, universities face many problems and challenges arising from both changing expectations in their traditional role in seeking the truth and the need to adapt to social, economic and political crises that have arisen in the 21st century. The complex nature of academic communities and the above-mentioned challenges make universities "laboratories of conflicts". Moreover, conflicts and disputes at universities have always been an inseparable part of academic life because finding the truth takes place through disputes and arguments. Academic independence, the existence of different interest groups, individualistic working patterns and hierarchical structures also make universities particularly vulnerable to conflict. In this situation, universities face not only many conflicts, but also increased numbers of complaints and grievances and potential court proceedings brought by members of the university community against their *Alma Mater*. Since colleges and universities began to struggle with financial problems and had to introduce tuition fees or increase tuition fees, students have made higher demands on their universities and perceive the relationship with the university more often as a contractual relationship between consumers and service providers.

Moreover, this tendency is connected with a departure from the doctrine of *in loco parentis*, which traditionally, until the 1970s, gave universities very broad powers to interfere in the lives of students and act "on behalf of the parent". Universities had the legitimacy to impose restrictions, punish students and limit their rights without any control by external institutions, including courts. While the courts continue the tradition of not interfering with university freedom and academic

[201] F.N. Dutile, *Law and Governance Affecting the Resolution of Academic and Disciplinary Disputes…*, p. 59.

[202] *Ibidem*.

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evaluation, some countries, of which the United States is the clearest example, show an increasing number of cases against the universities brought in the courts. As for other countries, it is predicted that it is only a matter of time since, despite the long tradition of dispute resolution in internal structures, it turns out that they are not sufficient to resolve complex problems which are faced by the universities.

As a result, universities around the world began to look for new ways of solving disputes that would protect their independence, perform an educational function and resolve disputes through dialogue having in mind tolerance and respect for the views of others. These procedures are intended to effectively replace or supplement often inadequate internal procedures, as well as court proceedings characterized by high costs, lengthy procedures and formalism, and introduce instruments that are better adapted to the nature of the academic community. The most frequently used alternative methods in disputes at universities are mediation and the academic ombudsman institution. They are generally non-binding and informal. They use soft tools, and their application is based on the belief in the broadly understood independence of members of the academic community. That is why mediation participants or those who came for help to ombudsman have equal influence on the process and its outcome, and consensus is reached through dialogue. In the university environment, its educational character is important, especially in disputes involving students who take part in a process that takes into account their voice, the possibility of influencing the result of the dispute, ensure equality of the parties, or encourage to listen and understand the other party's arguments.

Although, as the analysis shows, both mediation and the institution of the academic ombudsman, as well as other ADR methods, bring many benefits to the university and its community members, their application is neither obvious nor common, and even at universities operating in the same country, there are significant differences in their application. The analysis of mediation in academic disputes, which is included in the first part of the study, leads to the conclusion that there is no common application of mediation, its application varies and is often random, rather than systematic. The popularity of mediation in an academic context depends on factors such as: the level of development and popularity of mediation in a given country; convincing university administration that this method is effective and justified in university disputes; engaging members of the academic community in promoting mediation at the university and formal factors such as regulations, statutes or regulations that regulate the use of mediation at universities.

As concerns the ombudsman institution, its establishment and functioning depend on the involvement and support by the university administration and understanding that the ombudsman is an asset to the university. Moreover, it may turn out to be important to adopt legal regulations at the national level regarding the academic ombudsman, which would motivate or require universities to establish those institutions. An example is Spain where academic ombudsmen were introduced based on

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the national law and as a result, they were appointed at all universities in that country and became an important element of university culture. Moreover, as shown by many years of experience of many universities, the consolidation of the ombudsman institution requires many promotional activities at the university by providing full information for students and employees about its functioning and scope of activity.

Another conclusion drawn from the research of the development of an academic ombudsman institution at universities in Spain, the United States, Canada or Australia is that a systemic approach to dispute resolution is needed and is most effective when it relies on multi-faceted and proactive actions taken by universities. The review of ombudsmen institutions in selected countries also leads to the conclusion that the scope of the matters they deal with depends on the goals set by the university administration. Sometimes their actions relate to any issues or conflicts that members of the community address, however most often they are limited to matters involving students. Although there is a large diversity in the form of the activities of academic ombudsmen, they usually use soft tools such as mediation, facilitation, persuasion, conversation, shuttle diplomacy, and only in few cases they are entitled to investigate the facts or make decisions. The conducted research emphasizes that the ombudsman institution has a stronger position in the academic environment and structures over the years if it is consistently supported by the university administration. Additionally, because of the different scope of activities, variation of applied tools and mechanism, even very different names of the academic ombudsmen, the experience of countries shows the need for cooperation and creation of the associations or network at the national level to expand knowledge between academic ombudsmen, share experiences, cooperate or enhance public awareness about the institution.

The study of university disputes and ADR methods also highlighted the applicability of mixed and adjudicatory methods in university disputes. An example of such a method is the Office of the Independent Adjudicator, which makes decisions based on the documents presented by both parties, but also uses other methods such as mediation or conciliation. The activity of OIA is an expression of the diversity of ADR methods used in university disputes, which are an important experimental field for conducting such proceedings. In addition, it is worth considering that arbitration as an adjudicative method may be a valuable complementary method for resolving academic disputes. So far it was applied seldom in disputes to which a university is a party, e.g. in labor disputes, but it could be also used as a complementary method to mediation, for example by introducing mediation-arbitration clauses in contracts concluded by universities, as well as in any employees disputes or even in disputes with the participation of students, if mediation did not bring the expected results in the form of a settlement.

Universities are not only an excellent experimental field for introducing various ADR methods, but also due to their educational mission, positive experiences of some universities in this area, as well as the changing expectations of the academic

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community towards universities, should seriously consider introducing these methods. It is also worth considering the benefits of a systemic approach to conflict resolution at universities, by introducing key elements of such a system, which include the ombudsman institution, a mediation center that would resolve academic disputes, and a system of workshops and training employees and students on conflict resolution. The creation of such a system is associated with various challenges, including: convincing university authorities that the introduction of such a system is not just another bureaucratic structure, but will favor community integration, obtaining the support of the university rector, which is crucial in terms of the legitimacy of these institutions to act on behalf of the university, or finally cooperation between the elements of this system, in particular between the rector, academic spokesman, mediation center, if any, the disciplinary commission and other entities or groups that should be involved in building this structure. The study also shows the need for more research concerning: present approaches to conflicts by various universities and how they are dealt with, models of ombudsmen applied at individual universities and which one is the most appropriate in academia, application of mediation, types of mediation applied in disputes between members of the higher education institutions, as well as research of the systematic approach to conflicts.

The research carried out in both parts of this study also suggests the following *de lege ferenda* conclusions be considered by researchers, universities and national legislative bodies:

1. Consideration to introduce the institution of an academic ombudsman at those universities where they do not function.
2. Introduction of obligation or strong consideration to submit the case to an academic ombudsman or/and participation in mediation before starting any kind of formal proceedings.
3. Introduction of mediation as an element of the disciplinary proceedings against all members of the academic community – students, doctoral students, as well as academics.
4. The wider use of mediation or mediation-arbitration clauses in all types of contracts concluded by universities.
5. Consideration by the universities to introduce a system of conflict resolution in academic disputes which is an expression of systematic approach of a university to conflict.
6. Adoption of relevant legislative provisions by the parliaments which require or encourage the universities to introduce the institution of academic ombudsman and/or mediation in academic disputes at all levels.
7. Development of national networks of academic ombudsmen aiming at cooperation, experience sharing, setting up high standards and public awareness.
8. More research and study focusing on conflict resolution at the universities and developing a systematic approach to conflict resolution.

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ABSTRAKT

Niniejsze opracowanie stanowi drugą część artykułu pt. *Analiza przyczyn konfliktów na uczelniach wyższych i alternatywne sposoby ich rozwiązywania*. W pierwszej części przeanalizowano przyczyny konfliktów na uczelniach oraz podstawową alternatywną metodę ich rozwiązywania – mediację. W drugiej natomiast skupiono się na zagadnieniu sporów akademickich w kontekście ich rozstrzygania przez sądy, a także omówiono instytucję ombudsmana/rzecznika akademickiego, arbitrażu w sporach akademickich oraz metody mieszane na przykładzie Office of the Independent Adjudicator. Ze względu na zmianę oczekiwań studentów wobec uczelni wyższych, oparcie relacji pomiędzy studentami a uniwersytetami na stosunkach kontraktowych, wzrost liczby postępowań sądowych przeciwko uczelniom wyższym lub antycypowanie takiego wzrostu, zauważalną zmianę podejścia uczelni wyższych do społeczności akademickiej i oparcie go na interesach (*interest-based*), a także dość powszechny rozwój metod ADR w różnych dziedzinach uczelnie wyższe na całym świecie zaczęły poszukiwać nowych sposobów rozwiązywania sporów akademickich, które chroniłyby niezależność uniwersytetów i jednocześnie pełniłyby funkcję edukacyjną i realizowałyby misję uniwersytetu. Alternatywne metody rozwiązywania sporów, takie jak mediacja, ombudsman czy arbitraż, mają efektywnie zastępować lub uzupełniać niewystarczające procedury wewnętrzne oraz postępowania sądowe, charakteryzujące się wysokimi kosztami, czasochłonnością i formalizmem. Metody te są lepiej przystosowane do charakteru społeczności akademickiej, uwzględniają bowiem głos uczestników, dają możliwość wpływu na przebieg i wynik sporu, zapewniają równość stron. Spełniają ponadto cele edukacyjne, szczególnie w sporach z udziałem studentów, gdyż dają możliwość zakończenia sporu poprzez dialog i z uwzględnieniem punktu widzenia drugiej strony.

Słowa kluczowe: spory akademickie; ombudsman; rzecznik akademicki; arbitraż; mediacja