Studia z Zakresu Prawa Pracy i Polityki Społecznej
Studies on Labour Law and Social Policy
2024, 31, nr 4: 307–318
https://doi.org/10.4467/25444654SPP.24.023.20283
https://ejournals.eu/czasopismo/szppips

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# PROBLEMS OF EMPLOYMENT OF ACADEMIC TEACHERS—REFLECTIONS *DE LEGE LATA* AND *DE LEGE FERENDA*

Abstract

The nature of employment of academic teachers is complex not only because their employment is regulated by the codes of practice with the auxiliary application of the provisions of the Labor Code and other sources of labor law, but also because it is related to the presence of public law elements in the obligatory bond of the employment relationship. The need for pragmatic regulation of the employment relationship of academic teachers seems obvious, and is justified by the differences in their rights and obligations in comparison with the general regulations. However, it should be noted that by approximating the structure of the academic employment relationship to the obligatory mechanism in the context of general labor law, we seem to ignore many specific and important features of this employment. Therefore, normative shortcomings of the applicable act can be observed. It seems that within *de lege ferenda* proposals, the one referring to the model solution, which takes into account the specificity of the work of academic teachers, is fundamental. Such a solution seems to be expected primarily due to the role played by the system of higher education and science in the structures of the state.

**Keywords:** higher education institution, academic teacher, law on higher education and science, codes of practice, nature of employment, public law aspects in employment, additional employment, working time

**ASJC:** 3308, **JEL:** K31

## Introduction

The perspective of the several years since the Law on Higher Education and Science Act of 20 July 2018 (Journal of Laws of 2023, item 742 consolidated text, as amended, hereinafter:

"LHES") became effective generates various reflections on the structure of the employment relationship of academic teachers, both in the subjective and objective aspects. Their genesis should be found, in particular, in the nature of employment, where the heterogenous dimension is not only limited to the application of pragmatic standards with the auxiliary application of the provisions of the Labour Code Act of 26 June 1974 (Journal of Laws of 2023, item 1465 consolidated text, as amended, hereinafter: "Labour Code")and other sources of labour law, but it is also connected to the presence of public legal threads in the obligatory bond of the employment relationship. Not only do these remarks provide the basis for deliberations on the existing model of employment of academic teachers, but they may also become a starting point for formulating conclusions *de lege ferenda*. The present study focuses on the key problems of the issue defined in the way described above.

## 1. The Law on Higher Education and Science as employment pragmatics

The analysis of the standards of the LHES that apply to the employees of the science and higher education system to the extent related to the structure of the employment relationship provides a basis for formulating a thesis that their nature is different than that of the regulations that apply to all employees in the common dimension. In the functional aspect, the employee-related part of the Act plays the role of a pragmatic regulation, pursuant to Art. 5 of the Labour Code) every employee pragmatics,[1] being an instrument of subjective differentiation of the labour law (Wagner 2006, p. 156), adapts the normative regulations to the specificity of working in the given sector or profession (Baran 2010, p. 375). This regulation meets the requirement of differentiating employment relationships in order to take into account their differences and to comply with the principle of rationality of the legal system. In the context of the evaluation of the reasonability of differentiating a pragmatics for employees of higher education institutions, the positive aspect of this mechanism is doubtless due to the tasks and the mission[2] that the legislatory authorities set for the whole higher education system and that are mainly realised by higher education institution and the academic teachers whom they employ. In terms of the applicability of labour law, distinguishing the employment relationship of employees of higher education institutions and differentiating them from the total workforce takes place within the objective criterion of differentiation, i.e. due to the specificity of the rights and obligations, and the LHES as an extra-Code regulation in itself may be treated as external differentiation. As a result of the internal diversification of the LHES, in particular with the types of higher education institutions, nature of employment, or the positions of academic

[1] On employee pragmatics see in particular: Baran, Góral 2021; Ćwiertniak 1992, pp. 8 ff; Ćwiertniak 2009, pp. 33 ff; Seler 1974, pp. 4 ff; Liszcz 1989, pp. 24 ff. Another category of pragmatics are service pragmatics, which define the legal status of persons who perform work in administrative law relationships.

[2] On this issue, see in particular: Marszałek 2010; Józefiak, Morawski 2009, pp. 45 ff.

teachers, it becomes reasonable to adopt the concept of internal differentiation (Lekston 2021a, p. 907).

The pragmatic mechanism takes into account the component of regulating certain elements of the employment relationship of a specific category of employees by the standards of the Labour Code, provided that their existence is determined by the absence of the appropriate regulations in the special standards. The LHES does not bear the trait of comprehensiveness, and thus it does not precisely define all aspects of the academic employment relationship, which justifies the relevant reference to the provisions of the Labour Code in Art. 147 (Baran 2019, p. 25). In principle, the legislatory authorities focus on those issues that require to be regulated differently than in the Labour Code and without which the distinction of employment of a specific group of employees would not be legally justified (cf. Piątkowski 2015, p. 64). It is worth noting that the basis for applying the provisions of the Labour Code to academic employees is the absence of the relevant provisions in the LHES. However, this refers to situations, where the provisions of the referenced Act contain an objective legal loophole, i.e. the conventional meaning of specific actions or institutions within the employment relationship is insufficiently accurate (Baran 2019, pp. 264–265). For the sake of completeness, it is worth mentioning that, in the light of the academic labour law, the mechanism of the cascade application of the provisions of the Labour Code may also be applied, pursuant to the standard provided in Art. 147 item 1 of the LHES and Art. 300 of the Labour Code, taking into consideration the clause of adequacy, which means that the provisions of the Labour Code should be applied taking into account the specificity of the academic employment relationship. However, they may also be applied directly based on the *a fortiori* argument in the *a maiori ad minus* version (Baran 2019, p. 265). Academic employment relationships are also regulated by the standards provided in autonomous acts. Here, the essential meaning should be attributed to the stature[3] working regulations, remuneration regulations, and the collective labour agreement, whose application takes into consideration the principle of employee privilege. As a result of all the above, in the individualised academic employment relationship, we are dealing with the phenomenon of the diffusion of labour law standards, i.e. mixing of standards of the higher and lower orders. This, in turn, makes the status of the parties to this relationship strongly differentiated, and not always formed in compliance with the constitutional hierarchy (Baran 2019, p. 275).

In the light of the above, the question arises whether the accepted model of regulating the employment relationship of academic teachers, in the adopted spectrum of legal acts and their existing interrelations, is appropriate and sufficient and, whether it reflects the specificity of employment at a higher education institution in an adequate way. *Prima facie*, the affirmative answer to a question formulated in this way might seem justified. However, a thorough analysis of the individual components of the employment relationship of academic teachers might give rise to certain doubts. As far as exemplification is concerned, these doubts may refer, for example, to the relation between the nature of due diligence of

[3] On the statutes of higher education institutions see in particular: Korczak 2007, pp. 55 ff; Szymańska 2011, pp. 518 ff; Rozkuszka 2013, pp. 289 ff; Goździewicz 2015, pp. 103 ff; Matyjas-Łysakowska 2016.

the employment contract with the measurable aspect of the performance of research duties of an academic teacher, or the relation between the task-based working time, as stipulated in Art. 127 sec. 1 of the LHES with the provisions of Art. 140 of the Labour Code. The signalled problems may constitute a basis for formulating conclusions *de lege ferenda* to provide a wider approach to the characteristics of the academic employment relationship in the standards of the LHES. They may also generate doubts of a systemic nature that boil down to the evaluation of bringing the employment of an academic teacher closer to the obligatory employment relationship in the common understanding, which, in terms of the model, may be dysfunctional with respect to the tasks and mission of the academic institution in the higher education system.

## 2. Selected elements of the special position of the academic teacher as an employee

The systemic approach to the education sphere results from the strategic role that academic institutions and other educational institutions play in the activity of the state. In this context, the pragmatic regulation of the employment of academic teachers may be perceived as a consistent normative complement to the systemic construction. However, it should be noted that, while such reflection seems justified in the general dimension, in the specific aspect the adopted employment constructs can be accused of insufficiently or inconsistently taking into account the specificities of academic staff employment.

Pursuant to Art. 117 of the LHES, the employment relationship with an academic teacher, *lege non distunguente*, of a public or non-public higher education institution, is established based on an employment contract. The gradual withdrawal from the appointment-based employment of academic teachers has become a fact *de lege lata*, and only pursuant to Art. 248 of the Act of 3 July 2018 implementing the Law on Higher Education and Science Act (Journal of Laws of 2018, item 1669) employees of higher education institution who are employed based on appointment on the effective date of the LHES shall remain employed in the same form and for the same period. The withdrawal from appointment-based employment relationships is a common trend, in particular in the civil service law. However, although, in that sphere one may argue that the absence of appointment as an act that creates permanent employment relationships has a clear political context, in the sphere of higher education it is difficult to find convincing prerequisites that would justify this option. This reflection is even more justified if we consider the wider context of the educational system, which, apart from the higher education system, also includes the education system where, in spite of the important amendments to the pragmatic solutions provided in the Teachers' Charter Act of 26 January 1982 (Journal of Laws of 2024, item 986 consolidated text, hereinafter: "Teachers' Charter"), the legislator decided to leave appointment-based employment relationships for "nominated" and "certified" teachers in the structure of the professional promotion ladder. *De lege ferenda* the thought that strives to restore the regulations of the Higher Education Law Act of 27 July 2005 (Journal of Laws of 2017, item 2183 consolidated text, hereinafter: "Act of 2005"),

as amended in 2011[4] seems justified. Pursuant to those regulations, appointment was the basis for establishing an employment relationship with an academic teacher who holds the academic title of the Professor. In this variant, appointment would become, *per analogiam* to the educational system, a specific synchronisation of the academic promotion with the promotion in the structure of the academic institution.

Considering the structure of the rights and obligations of academic teachers, as well as other legal structures decreed in the LHES, it seems justified to conclude that the different employment status of university teachers is in fact a heterogeneous solution, where the obligation-based nature of the employment relationship is complemented with elements that are characteristic for public law service relationships (see also: Lekston 2020, pp. 281 ff). In the further parts of this study, the authors will present those elements of the employment relationship of academic teachers that determine its specificity in terms of exemplification, along with the reservation of the defective nature of the normative approach.

It is doubtless that the position of an employer on the market is determined by a conglomerate of various factors with a diverse subjective and objective characteristics. In this respect, the staff potential, defined, in particular, by quantitative, competence- or qualifications-related factors, plays a major role. Higher education institutions that function within the higher education system, are, in principle, subject to the same mechanisms, as it is the structure of their employees, in particular academic ones, that determines the position of an academic institution in its environment. What seems to be specific for the higher education system in this respect is the fact that the employment of academic teachers at the same time influences the spectrum of the rights of these institutions to educate or to grant academic degrees.

The starting point for the discussion of the interrelation defined in this way is the process of evaluating the scientific activities of an academic institution within the given discipline of science. Pursuant to Art. 265 sec. 2 of the LHES, the evaluation applies to all employees who conduct scientific activity. However, pursuant to sec. 4 of the said provision, evaluation is conducted within the given discipline in entities that employed, as of the 31 December of the year preceding the evaluation, at least 12 employees who conduct scientific activity in this discipline, calculates as full-time units of work connected to conducting scientific activity in the discipline. The evaluation of scientific activity results in assigning the categories A+, A, B+, B, or C in the given discipline, where A+ is the highest, and C the lowest category. Assigning a higher education institution to a specific category determines its rights to provide education on a specific level, faculty, and profile, provided that it is granted the relevant permission from the competent Minister (art. 53–54 of the LHES), as well as the rights to award the academic degrees of doctor and habilitated doctor pursuant to Art. 185 sec. 1 and Art. 218 of the LHES.

The human resources potential of the higher education institution is also an element of the education quality assessment conducted by the Polish Accreditation Committee. Pursuant to Art. 242 sec. 2 point 2 of the LHES, in conducting the programme assessment, the teaching

[4] See Act of 18 March 2011 amending the Higher Education Law Act, the Act on academic degrees and academic title and on the degrees and title in arts and amending certain other Acts, Journal of Laws of 2011, No. 84, item 455 as amended.

and academic staff is taken into consideration in particular. Consequently, pursuant to § 1 sec. 4 of the Ordinance of the Minister of Science and Higher Education of the 12 September 2018 on the criteria for programme assessment (Journal of Laws of 2018, item 1787), one of the criteria for this assessment is the level of competences and experience of the academic teaching staff.[5]

The described normative mechanisms justify adopting the thesis on the immanent link between the potential of the employed academic teachers and the position of the higher education institution in the system of science and higher education. However, one may argue that, *de lege lata*, this type of circumstance does not have a significant influence on the characteristics of the employment relationship of academic teachers in terms of the LHES.

Academic teachers are employed in generally defined positions divided into the groups of teaching staff, research staff, and teaching and research staff. The placement in a group defined in this way determines the scope of duties of an academic teacher. In principle, the tasks of academic teachers who are employed in positions classified as research or academic employees will refer, first of all, to scientific activities, while those of teaching staff will focus on conducting the educational process. The duties of academic teachers employed in research and teaching positions will be a combination of tasks from both these spheres. Organisational duties related to a specific type of activity will be, in a way, complementary. However, as opposed to the duties connected to the nature of the position, they will not be fundamental, which is important for the termination of the employment relationship if these duties are violated (see: Lekston 2012). The duties that are assigned by way of statute to the work of an academic teacher are not of a common but of a professional nature, as they are the content of the abstract and specific employment relationship of this category of employees (Wagner 2006, p. 154). However, the spectrum of duties of an academic teacher will also include those that are generally defined in the Labour Code. Moreover, they may be shaped by autonomous sources or in the obligatory dimension. Nevertheless, the duties specified in the LHES may be treated as essential from the point of view of the specificity of the academic employment relationship.

The issue of working time remains intrinsically connected to the duties of an academic teacher as defined above. *De lege lata*, legislatory authorities in Art. 127 sec. 1 of the LHES point out *explicite* that the academic teacher is employed in the task-based working time system. This system is defined in Art. 140 of the Labour Code, stating that if justified by the nature, organisation or place of work, a task-based working time system may be adopted. The time necessary to perform the assigned tasks is determined by the employer, upon consultation with the employee and on the basis of the working time standards referred to in Art. 129 of

[5] See also Appendix to Resolution No. 4/2018 of the Polish Accreditation Committee of 13 December 2018—Statute of the Polish Accreditation Committee (uniform text containing the amendments introduced by Resolutions of the Polish Accreditation Committee of 18 February 2019, No. 1/2019 and of 16 February 2022, No. 1/2022), where Appendix No. 2 to the Statute—Criteria for performing programme evaluation, in Criterion 4 the authors list the competences, experience, qualifications, and number of teaching staff and the development and improvement of staff.

the Labour Code. One of the views is the doctrine states that the task-based working time system regulated by special acts is different from that defined in the Labour Code and that it would be a mistake to equate them (Stefański 2020, p. 1104). The specific nature of the employment relationship of academic teachers, especially if considered through the prism of the aforementioned duties connected with their position, justifies accepting the option stating that the task-based working time system as decreed in the LHES is autonomous. This option seems to be justified, apart from the specificity of the tasks, by such structures as the statutory, not obligatory mechanism establishing the task-based working time system, as well as the working time organisation, in particular in terms of the educational pensum and research duties (see more: Latos-Miłkowska 2015; Lekston 2021b). In the practical approach, even accepting the thesis about the autonomous nature of the task-based working time system of an academic teacher may raise certain doubts in the context of the settlement of working time with respect to the research component of organisational duties. It seems that the structure adopted by the legislator in the period of validity of the Act of 2005, which refers to defining the working time of academic teachers by defining their research, teaching, and organisational duties, reflected the specificity and pragmatic nature of employment in this professional group in a more precise way. The postulate of accepting this type of mechanism *de lege ferenda*, or to provide more detailed standards of the task-based working time of academic teachers by measuring all their duties instead of only the teaching ones, seems justified in this context.

Here, it is worth mentioning another problem that is related to the scope of duties of academic teachers. In the common approach, the employment contract as a basis for establishing an employment relationship, is by nature focusing on due performance, not on the result. This means that the employee may perform the assigned duties by exercising due diligence. This mechanism remains valid in the academic employment relationship, due to the absence of different norms in the LHES. This may raise certain doubts, in particular in reference to research tasks that are connected to the aforementioned process of evaluating the scientific activities of a higher education institution in specific disciplines of science. If the evaluated entities are obliged to demonstrate specific achievements of their employees who conduct research activity, then the mechanism of redefinition of the nature of the employment relationship concluded between the parties in obligatory terms and focusing on the results instead of due diligence becomes more common. Moreover, the employees whose research activities are taken into account in the process of evaluating the scientific activity are required to provide not only the outcome of their research works, but the effect should be appropriately valuated in the point assigning system of monographs, articles, publishing houses or journals. These circumstances are a direct consequence of the mechanism of assessing the quality of publications in the Polish science and higher education system as adopted by the legislation authorities. It is worth noting that this mechanism is widely criticised. One may assume without any doubts that this type of formulas in employment are directly opposed to the labour law standards that determine the nature of an employment relationship. However, on the other hand, it may seem understandable, considering the best interest of the higher education institution as an employer who is subject to normative limitations in the systemic aspect. It seems that the postulate *de lege ferenda* to introduce certain changes to the system

of evaluating scientific activity that would not imply this kind of doubts seems rather obvious in this context.

One of the main elements that define the specificity of employing academic teachers is the mechanism that restricts additional employment. Although the normative mechanism of limiting professional activity is also known in other employment pragmatics,[6] the provisions of the LHES define it in a specific way. Pursuant to Art. 125 sec. 1 of the LHES, an academic teacher employed in a public higher education institution which is their primary place of employment may, with the consent of the rector, undertake or continue additional employment with only one employer conducting teaching or research activity. The wording of sec. 8 of the cited provision indicates that this mechanism shall apply accordingly to academic staff of a non-public higher education institution, unless the statutes provide otherwise. Even a superficial analysis of the statutes of non-public higher education institutions proves that the structure limiting additional employment is commonly applied *mutatis mutandis*. The literal interpretation of the norm limiting the additional professional activity of academic teachers leads to the conclusion that the use of the term "employment" by the legislator refers *lege non distinguente* not only to employment based on an employment contract, but also to civil law relationships (contracts of mandate, contracts on the provision of services, and other due diligence agreements) as well as employment under administrative law (in military or police higher education institutions) (Baran 2019, pp. 133–134). Importantly, the restrictions on additional employment are limited to circumstances when the academic teacher intends to take or continue employment at an employer who conducts teaching or research activity. Therefore, *a contrario*, it is justified to state that no consent is required if the work will be performed for an employer who does not conduct such activity. This is also justified in the argument in *dubio pro libertate* in reference to Art. 65 sec. 1 of the Constitution of the Republic of Poland (Baran 2019, p. 136). Consent will not be required, either, for additional employment in entities listed in sec. 3 of Art. 125 of the LHES, in particular in public administration offices, educational entities or cultural institutions. Due to different regulations (Art. 125 sec. 7 of the LHES), the analysed mechanism will not apply to self-employment, either, because in this case the legislator only imposed an informational obligation on the academic teacher.

In assessing the discussed regulation, first of all, it should be emphasised that defining the main place of work of university teachers and the control of employment in secondary places of work, as well as limiting their possibility to conduct business activity are closely connected to the changes resulting from the political transformation and the expansion of non-public higher education institutions after 1990. For a long time, employment at the main or additional place of work was considered by universities as a condition to possess the competences to teach a specific level or faculty, as one of the elements of the so-called minimum academic staff complement. *De lege lata*, the legislation authorities do not foresee such mechanism. However, it is worth noting that the mechanism of proportions of the teaching hours of

[6] E.g. Art. 80 of the Act of 21 November 2008 on civil service, Journal of Laws of 2024, item 408 consolidated text.

classes that must be conducted by academic teachers who are employed at the primary place of work in relation to the number of hours conducted by other persons who conduct classes (Art. 73 sec. 2 of the LHES).

What is important, considering the *ratio legis* of the limitation of the professional activity of academic teachers, *de lege lata* the legislator does not define the circumstances that might justify the refusal to grant consent for employment at an additional workplace. As a result, the decision seems rather arbitrary and discretional. Based on the systemic interpretation, one may assume that the aim of the mechanism of main place of work and the necessity to obtain permission for employment at the additional place of work was to ensure high quality of teaching and scientific work of academic staff by focusing their activities generally in one place of work. However, it is worth adding that in the previous legal state, pursuant to Art. 129 sec. 2 of the Act of 2005, the rector refused consent for additional employment is performing teaching or academic services for a different employer reduced the university's capacity for proper functioning or was connected with using its technical equipment or resources. This option justifies the thesis that the structure of the analysed provision was, and, in fact, still remains a specific "employment regulator" of the Polish higher education market, which results in eliminating those higher education institutions whose operations are based on academic teachers whose primary places of employment are other academic centres.

The presented normative circumstances along with the objective of the regulation may lead to a reflection on the need to sustain the standard that limits the additional employment of academic teachers. The conditions on the higher education market, where higher education institutions in general, including non-public ones, base their human resources potential on academic teachers employed at their main place of work seem to challenge the reasonability of the structure of Art. 125 of the LHES. This conclusion is supported by the internal inconsistency of the *ratio legis* of the cited regulation. Assuming the above view, stating that the intention of the legislator was to tie the activity of academic teachers to one or two academic institutions with the aim to improve the teaching quality, the mechanism that enables them to conduct professional activity outside the higher education system seems rather contrary. If the *ratio legis* of Art. 125 of the LHES is limited to the subjective scope of the higher education institution, similar conclusions may be derived from the common use of employment under commercial law, which is excluded from the discussed mechanism. Moreover, it should be emphasised that the structure that limits additional professional activity is an exception from the constitutional principle of the freedom of work, where the norm of Art. 65 sec. 1 of the Constitution of the Republic of Poland may also imply the freedom concerning the number of places of work. In this context, the standard provided in Art. 125 of the LHES is a permitted statutory exception. However, as it has been proven, with at least doubtful justification for the reasonability of such limitation. Obviously, one may consider the analysed mechanism in the category of public law threads in the obligation-based employment relationship of academic teachers, provided that such heterogenous formula, defined in such way, only supports the thesis about the normative inconsistency of the legislator in defining the employee status of an academic teacher. In the light of the above, *de lege ferenda*, one may argue that the provision of Art. 125 should be removed from the LHES.

There is one more important disadvantage of the academic employment relationship of academic teachers. According to well-established views of the judiciary,[7] the conduct of a university teacher connected with performing their duties are the realisation of one of the constitutional tasks of the State (Art. 70 sec. 1 of the Constitution of the Republic of Poland), which meets the criterion for performing public function. The public or non-public nature of the institution that employs the university teacher is irrelevant for this conclusion. At the same time, academic teachers are not public officials, as they were not included in the subjective scope of Art. 115 § 13 of the Criminal Code Act of 6 June 1997 (Journal of Laws of 2024, item 17, hereinafter: "Criminal Code"). Moreover, due to the absence of a relevant standard in the LHES, academic teachers do not enjoy the protection foreseen for public officials in performing their duties, which may be treated as a noticeable gap and inconsequence of the legislator, who foresaw such mechanism for teachers who are subject to the regulations of the Teachers' Charter.[8] Considering the identical prerequisites for performing a public function, the differentiation between school and university teachers can hardly be considered justified. *De lege ferenda* it would be reasonable to call for adding relevant provisions, modelled on those in the Teacher's Charter, to the LHES.

## Conclusions

The necessity to pragmatically regulate the employment relationship of academic teachers seems obvious, which is justified, in particular, by their different rights and obligations. It may be assumed that, in functional terms, the norms of the LHES perform the role defined in this way. However, it is worth noting that bringing the structure of the academic employment relationship closer to the obligation-based mechanism applied in common labour law seems to neglect many important and specific features of such employment. In this respect, the deficiencies of the currently binding Act become noticeable. If we add that the profession of an academic teacher is performed in an environment that is differentiated on many planes, both subjective and objective, and determined by the full spectrum of labour law sources, including autonomous one, it is difficult to speak about a model solution. However, such solution seems to be expected from the point of view of the role that the higher education and science system plays in the structures of the State.

[7] See: Decision of the Supreme Court of 25 June 2004, V KK 74/04, OSNKW 2004, No. 7–8, item 79; Judgment of the Supreme Administrative Court of 18 August 2010, I OSK 775/10, LEX No. 737508; Judgment of the Supreme Administrative Court of 19 April 2011, I OSK 125/11, LEX No. 1080919; Judgment of the Supreme Administrative Court of 30 January 2014, I OSK 1978/13, LEX No. 1415697; Judgment of the Supreme Administrative Court of 10 April 2015, I OSK 1108/14, LEX No. 1773500; Judgment of the Supreme Administrative Court of 8 July 2015, I OSK 1530/14, OSP 2017, No. 5, item 53.

[8] Pursuant to Art. 63 sec. 1 of the Teachers' Charter, the teacher, during or in connection with performing professional duties, shall enjoy the protection foreseen for public officials, on the terms specified in the Criminal Code.

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