

JUDGE'S RECUSAL AS ONE OF THE GUARANTEES OF FAIR CRIMINAL TRIAL A FEW REMARKS IN THE CONTEXT OF ARTICLES 40 AND 41 OF THE POLISH PENAL CODE

Dr. habil. Ewa Kruk, University Professor

Maria Curie-Skłodowska University in Lublin, Poland
e-mail: ewa.kruk@mail.umcs.pl; <https://orcid.org/0000-0003-1976-9330>

Abstract. The article presents the issue of recusal of a judge as one of the guarantees of a fair criminal trial. The author presented in the first part of the text the question of recusal of a judge under Articles 40 and 41 of the Code of Criminal Procedure in historical perspective. Looking from that perspective, she analysed the fundamental context of recusal of a judge in view of procedural principles, namely the impartiality and independence of the judge, and the function of judge's recusal. Finally, she presented conclusions for the currently applicable law and proposals for the law as it should stand and the consequences of admitting a judge affected by recusal under Article 40(1) or (3) of the Code of Criminal Procedure.

Keywords: recusal (disqualification) of judge under Articles 40 and 41 of the Code of Criminal Procedure; recusal of judge and the principle of impartiality; recusal of judge and court independence; functions of the recusal of a judge

INTRODUCTION

The recusal (disqualification) of a judge is a procedural institution which, like no other, implements the constitutional rule from Article 45(1) of the Polish Constitution of 2 April 1997¹ and, on the other hand, the Convention rule from Article 6(1) of the European Convention on Human Rights.² Both of those acts are astonishingly unanimous in describing the court as "independent" and "autonomous", with the Constitution also describing it as "impartial". All these values constitute a minimum standard of justice and their implementation is a prerequisite for finding that a fair trial has taken place. Despite some declarative nature of these values, they are actually present in judicial and systemic practice of the Polish judiciary.

¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

² European Convention for the Protection of Human Rights and Fundamental Freedoms done in Rome on 4 November 1950 (ETS No.005 as amended).

This paper seeks to illustrate the nature of the guarantee nature of the institution of judge's recusal, without analysing individual cases, as this issue has been examined in depth over the years in the literature of the subject [Skreutowicz 1994, 21-44; Jasiński 2009, 284-355].

1. RECUSAL OF A JUDGE – HISTORICAL PERSPECTIVE

Chapter 2 of Section II of the currently applicable Code of Criminal Procedure³ concerning courts contains provisions on recusal of a judge. The Polish equivalent of the word “to recuse” (*wyłączyć*) means with regard to an object “to stop the work of (something)”, and in relation to a person – “to exclude (someone) from some group or from some action.”⁴ The provisions of Articles 40 and 41 CCP as directly concerning the person of the judge, and *mutatis mutandis* also court referendaries and lay judges (cf. Article 44 CCP), it has the second of these meanings.

The institution of the exclusion of a judge was also present in the two previous codes of criminal procedure. Thus, the Code of 1928⁵ regulated the recusal of a judge in Chapter 2 of Book I (“Courts”), while the Code of 1969 regulated this issue in Chapter 2 of Section II (“Court”). The pre-war act used the Polish term *wyłączenie* (exclusion, recusal, disqualification) in the title of the relevant chapter, while the wording of Article 39,⁶ which catalogued the “grounds for recusal” in relation to a judge, formulated an explicit prohibition to proceed a case if any of the circumstances listed in the paragraphs occurred (“may not participate in proceeding the case”). These circumstances were referred to by the legislature as “grounds for recusal” (Article 39(2)) and as “causes of recusal” (Article 40(1) and (2), Article 42), each time referring to events that prevent a given judge to decide the case. It was not until the subsequent Code of Criminal Procedure⁷ when it was indicated that the recusal of a judge due to circumstances clearly specified by the law, still inconsistently referred to as “reasons” (Article 30(2)) or “causes” (Article 31(2), Article 32(2)), is a recusal effective *ex lege*, i.e. “by operation of law”. The same Code of 1969 did not impose on a judge the prohibition to participate in the conduct of a case, instead it contained a statement that the same judge is subject to “exclusion from participation

³ Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2021, item 534 as amended [hereinafter: CCP].

⁴ See *Słownik języka polskiego*, <https://sjp.pwn.pl/sjp/wylaczyc;2539715.html> [accessed: 11.04.2022].

⁵ Ordinance of 19 March 1928, the Code of Criminal Procedure, Journal of Laws No. 33, item 313 as amended.

⁶ According to the original numbering of Code provisions.

⁷ Act of 19 April 1969, the Code of Criminal Procedure, Journal of Laws No. 13, item 96 as amended.

in the case". The pre-war Code, in Article 42, also allowed for the recusal of a judge "irrespective of the reasons mentioned in Article 39" in the event of a situation where "there was a personal relationship between him and one of the parties, of such a kind that it could give rise to doubts as to his impartiality". This reason for recusal was adopted unchanged by Article 31 of the Code of Criminal Procedure of 1969. Only the institution of recusal of a judge due to a relationship between the judge and one of the parties (Article 42 of the Code of Criminal Procedure of 1928, Article 31(1) of the Code of Criminal Procedure of 1969) or a "circumstance of a [certain] kind" affecting the judge clearly indicate a related threat to the implementation of the principle of impartiality, which Article 40 CCP does not do, but which does not prevent considering the legislative *rationes* as identical.

2. JUDGE' RECUSAL AND THE PRINCIPLE OF IMPARTIALITY

Currently, the institution of recusal is not an instrument that distinguishes judges in any particular way, because the legislature provides for the possibility of disqualification of other proceedings participants, i.e. mediator (Article 23a(3) CCP), prosecutor, other persons who conduct pre-trial proceedings and other public accusers (Article 47(1) CCP), protocol officer and stenographer (Article 146(1) CCP), witness expert (Article 196(1) CCP).

The possibility of applying the institution of recusal also to other participants in criminal proceedings does not in any way undermine the position that judge's recusal is an institution firmly rooted in the constitutional model of justice, which, in accordance with Article 45(1) of the Polish Constitution, is based on "competent, impartial and independent" courts, and the actual hearing of the case by such courts should be "fair". Thus, notwithstanding the fact that recusal is now an institution applicable to various participants in the criminal proceedings, it is precisely the recusal of a judge, but also a lay judge, that seems to play a crucial role in shaping the proceedings in a manner consistent with the principle of impartiality, which, as P. Wiliński puts it, takes the form of a "procedural rule which imposes an obligation on the judge to hear the case without bias, objectively, taking the pursuit of the truth as the most important criterion of the independence of the court", following the regulation contained in Article 4 CCP [Wiliński 2020, 334].

Impartiality must be required from the court defined as a hearing panel and understood as a State body competent to administer justice, and from a particular judge who is a member of the hearing panel. In this respect, impartiality is a feature not only of the adjudicating authority but also of the persons entrusted with the exercise of judicial power. However, impartiality can also be referred to the proceedings themselves as a characteristic inherent in the judicial procedure concerned. Impartiality (or, more broadly,

objectivity) can take the form of procedural impartiality or substantive impartiality. Procedural impartiality is the elimination of any relationship between a judge and the parties to the proceedings, but also the case itself, which could lead him to be willing to issue a ruling with specific content, while substantive impartiality is the actual conduct of a judge in the proceedings which requires him to have an appropriate personal attitude, ability to distance himself from the parties and to treat them on an equal footing [Artymiak 2007, 87]. It is only a preliminary analysis of the problem that shows that it is easier to implement the first type of impartiality, because the second type constitutes a sum of elements which are often immeasurable and not self-evident [Tabor 2005, 12]. The institution of recusal is intended for the parties to defend against “overt bias”, but usually the party is deprived of the means of defending against “covert bias” that does not overlap for any reasons of recusal, whether under Article 40 or Article 41 CCP.⁸ However, even the institution of recusal is not capable of ensuring perfect impartiality understood as “elimination of any external element not strictly related to the matter of the case from the thought process of the procedural decision-maker,”⁹ but it can still serve to “maximize” that impartiality [Grzegorzcyk 2014].

Today, impartiality has nowadays been elevated to the rank of the supreme procedural principle by such authors as S. Kalinowski [Kalinowski 1966, 78; Kruszyński 2003, 108], S. Waltoś [Waltoś and Hofmański 2016, 226], J. Tylman [Grzegorzcyk and Tylman 1997, 81], K. Dudka [Dudka and Paluszkiewicz 2021, 158], P. Wiliński [Wiliński 2020, 332] and J. Kosonoga [Kosonoga 2017]. M. Cieślak has noticed that the principle of impartiality (objectivity) shows a strong link with the principle of material truth and the principle of equal rights of parties to the proceedings [Cieślak 1984, 319], but also that it is a principle that does not allow any deviations. And although he did not distinguish the principle of impartiality, he saw the need to preserve the “objectivity in judging” as an important factor affecting the judge’s assessment of evidence [ibid., 220 and 289].

It should be noted here that the situation of a judge differs from the status of other participants in criminal proceedings who may be subject to disqualification, since the objection of a sort of “systemic” inability to maintain impartiality, formulated by scholars in relation to the public prosecutor [Sowiński 2005, 114-22]¹⁰ as a procedural institution focused on the prosecution of offenders, do not apply to judges. It is therefore inconceivable

⁸ Judgement of the Supreme Court of 5 February 2008, ref. no. SNO 2/08, Lex no. 432189.

⁹ Resolution of the Supreme Court of 26 April 2007, ref. no. I KZP 9/07, OSNKW 2007, No. 5, item 39.

¹⁰ Differently: Kuczyńska 2020, 161 – based on Articles 2 and 64 of the Act of 28 January 2016, the Law on Prosecutors (Journal of Laws of 2021, item 66 as amended) – and Kulesza 2020.

in the case of a judge that his or her impartiality is more declared than actual, which is the case with the public prosecutor [Tokarczyk 2009, 25-26]. The profession of judge was and still is a public trust function, and its significance result from the judicial tasks entrusted to them [Świda 2011, 509]. Although the degree of this trust may vary, depending on the attitude of the professional community itself or intentional actions of the executive power, nothing can exempt a judge from keeping an appropriate ethical and professional attitude. It is difficult, however, to agree with the view expressed by G. Artymiak that “since the concept of human rights ingrained in the social consciousness, when we have committed ourselves to applying human rights covenants on a daily basis, the life of an independent judge has been more difficult,” because none of these factors can have a negative impact on a judge’s ability to fulfil their constitutional and statutory obligation to remain objective in a criminal case [Artymiak 2010, 226]. The judge was, and still is, a criminal trial participant who is expected to maintain a particularly high ethical and moral level as well as a kind of neutrality towards the parties and the case. The argument that a higher degree of legal awareness of other participants of criminal proceedings would have a negative impact on the conditions of deciding the case cannot be taken seriously as following this line of thought, one should consider reducing the parties to the role of passive executors of court orders and the need to abandon the application of Article 16(1) and (2) CCP in their present form, which obviously is out of question.

3. JUDGE’S RECUSAL AND INDEPENDENCE OF THE COURT

P. Wiliński sees the difference between the independence of the court under Article 187(1) of the Constitution of the Republic of Poland as subordination of judges in the exercise of their duties only to the Constitution and laws, and independence of the judge understood as an expression of the place of the judiciary within the system of state authorities, independent from the legislative power and executive power [Wiliński 2020, 335]. The position of the judge thus determined will manifest itself in judge’s ability to independently and autonomously assess whether there are grounds for his recusal in the case. Depriving the court of any of these powers means that it will not be able to hear the case as required by the standards of fair trial [Nowicki 1998, 157]. The judges themselves, upon assuming the office of judge, take an oath, an essential part of which is the obligation to administer justice ‘in accordance with the law, impartially, according to (their) own

conscience' (Article 66(1) of the Law on the System of Common Courts¹¹)¹². The same is true for judges of the Supreme Court (cf. Article 34(1) and Article 41(1) of the Act on the Supreme Court¹³)¹⁴.

Judge independence is considered by M. Cieślak as "a very important, necessary principle of a democratic process, safeguarding the rule of law and the objectivity of the operation of our judiciary" [Murzynowski 1994, 225], but he denies its unlimited nature, as in his opinion it is limited by the content of "laws, thus by the will of the legislature". However, it is the rational legislature's responsibility to shape the content of the law so as not to unduly restrict judicial freedom, both in the procedural and political aspects, but the latter, as publicly stated by some, may unfortunately be jeopardized by the recent legislative efforts towards deconstruction of the procedure of appointment of the members of the National Council of the Judiciary leading to its definitive politicization or, finally, the activities of certain presidents of courts in disciplining their subordinate judges based on unclear charges.

Such activities cannot be reconciled with the content of Article 45(1) of the Constitution, nor with Article 6(1) ECHR and in this respect nothing will be changed by disavowing those of the judiciary who criticize such behaviour, or by creating constructs based on the alleged collision of the Convention model of justice with the national model.

Referring to the allegations about the above-mentioned state of affairs raised by representatives of various milieux of the legal community, it should be stated that these arguments, especially regarding the recusal of a judge appointed by the new National Council of the Judiciary, are not fully justified.

In my opinion, the current regulations do not provide for the possibility of using the institution of recusal of a judge (Articles 40 and 41 CCP) to challenge the prerogatives of an individual judge to adjudicate in a case, by invoking doubts as to the manner of his appointment to this position or the manner of appointing a hearing panel in the case, which transfers this problem to the appellate stage.

From this perspective, however, there is a question whether the appellate court, when examining the objection under Article 439(1)(1) CCP that

¹¹ Act of 27 July 2001, the Law on the System of Common Courts, Journal of Laws of 2020, item 2027 as amended.

¹² The same case is associate judges – Article 106i (3) of the Law on the System of Common Courts and lay judges of common courts – Article 164(2) of the Law on the System of Common Courts.

¹³ Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2021, item 2027 as amended).

¹⁴ The same case is lay judges of the Supreme Court – Article 63(2) of the Act on the Supreme Court.

the adjudication involved an unauthorized person or more precisely, a judge who, proposed by the currently functioning National Council of the Judiciary and appointed by the President of the Republic of Poland to perform the functions of common court judge or Supreme Court judge, should express a positive opinion on such an objection having a self-standing appellate character without specific reasons contained in the appeal, deeming the self-standing reason as sufficient and constituting the basis for repealing the judgment. It seems that such a practice would lead to a kind of schizophrenia and destabilisation of judgments subjected to higher-instance review, a state that cannot be reasonably justified by anything, and in particular in the context of the applicable procedural law provisions. At the same time, such a state of affairs would correlate with the deprivation of experienced judges in lower-instance courts of the obvious right for their judicial work being appreciated and a well-deserved nomination to adjudicate in higher instance courts, since the so-called “newly” appointed judges would risk without any reason that they lose their judicial functions and administering justice in the context of their participation in the criminal justice process. Therefore, taking into account the following situations: possible demand in the request to recuse a judge without a legal and factual reason, not being justified in the grounds for recusal under Articles 40 or 41 CCP and the possible formulation of an objection based on the above-mentioned situation, devoid of both the reason and the legal basis for recognizing the reason for the recusal, it should be considered that in the light of the applicable provisions, a recusal or resulting repeal of the judgment seems unacceptable.

Recusal of a judge was also subject to a position taken by the Supreme Court, which proceeds requests for judge recusal in the following cases: in the first case, the recusal of a judge due to doubts as to his independence and impartiality resulting from the appointment procedure,¹⁵ in the second, the recusal of a judge appointed by the so-called the new National Council of the Judiciary.¹⁶

4. FUNCTIONS OF THE RECUSAL OF A JUDGE

Recusal is designed to perform three basic functions. K. Papke-Olszaukas mentions among them: ensuring the impartiality of adjudication, strengthening social trust in the impartiality of the court and elimination

¹⁵ Decision of the Supreme Court of 8 October 2020, ref. no. I NWW 59/20, Lex no. 3066719; see also decision of the Supreme Court of 3 November 2021, ref. no. IV KO 86/21, Lex no. 3251718.

¹⁶ Decision of the Supreme Court of 16 June 2021, ref. no. I NWW 27/21, Lex no. 3304790.

of conflicts of judge's conscience [Papke-Olszauskas 2017, 52]. I fully agree with this view, adding that trust in the impartiality of the court can be considered in general terms (trust in the system of justice) or in terms of a specific case (trust in a given hearing panel), while the elimination of conflicts is nothing more than the need to provide the judge with ease in adjudicating.¹⁷ This comfort is needed because the shaping of procedural decisions is the result of a complex and multidimensional process. E. Skrętowicz noticed that the content of a procedural decision is influenced by a number of factors of a different nature. These factors are not only of a legal, but are also logical, philosophical, ethical and psychological nature [Skrętowicz 1989, 9].

The application of the institution of recusal entails a change in the composition of the hearing panel, which is an exception from the principle of the invariability of the hearing panel in criminal cases, which can be derived from the provisions of the Code of 1997.¹⁸ This exception, due to its statutory origin, is within the limits allowing to state that at least in the model and doctrinal terms the modern criminal judiciary is free of administrative influence, which prevents arbitrary appointments for these bodies [Glaser 1934, 96-97]. Needless to say, this freedom should be considered one of the guarantees of a fair trial, but also a circumstance that serves the performance of the adjudication function, which is considered by P. Hofmański as one of the most important procedural functions [Hofmański 2013, 524]. The guarantee function is also a feature of recusal itself. Scholars in the field note that this very role of recusal outweighs its practical value [Jankowski 1986, 7].

The guarantee character of the institution of recusal of a judge due to one or even several reasons under Article 40(1) or (3) CCP can be looked at from the negative and positive perspectives. On the negative side, the recusal of a specific judge is intended to eliminate from the trial a judge who does not guarantee a proper judicial attitude [Waltoś 2003, 223], and on the positive side, it strengthens us in the belief that every other judge already gives such a guarantee. In the same doctrine, the recusal of a judge is primarily related to the guarantees of the interests of the judiciary [Skrętowicz 1968, 1176], but it seems that this institution can also be associated with guarantees for the interests of other participants in criminal proceedings and a guarantee of an appropriate penal response [Papke-Olszauskas 2017, 55].

Judges are covered by the most comprehensive list of circumstances that prevent them from adjudicating, but there is also no need to convince

¹⁷ It should be noted, however, that the institution of recusal of a judge eliminates him from any acts performed in the case, including those that do not fall within the concept of "adjudication" or "settlement".

¹⁸ This view is also shared by Artymiak 2007, 89.

anyone that this they are particularly important participants in criminal procedure. Article 40(1) CCP lists as many as ten circumstances, the presence of which makes a judge incapable of adjudicating (*iudex inhabilis*). These circumstances are: direct interest of the judge in the case (“the judge is directly concerned”) – item 1; marriage to, or being in cohabitation with, a party or victim, or their defence counsel, attorney or legal representative – item 2; consanguinity or affinity in the straight line and in the lateral line up to the degree of kinship between children of the siblings of persons referred to in para. 1(2) or being related to one of those persons under adoption, care or guardianship relationship – item 3; being a witness to the offence in question, or being heard as a witness or acting as an expert witness in the same case – item 4; participation in the case as a public prosecutor, defence counsel, attorney, legal representative of a party, or conducting the ruling or issuance of the challenged order – item 6; participation in the issuing of the repealed ruling – item 7; participation in the issuance of a ruling against which an objection has been lodged – item 9; mediation – item 10. Since 2003, the participation in the decision on conditional discontinuance of proceedings has not constituted a reason for recusal (para. 1(8) currently not in force).¹⁹ This list is supplemented by the provision of Article 40(3) CCP. The provision precludes a judge who was involved in the issuance of a ruling subject to those measures from deciding on a request for renewal, annulment or extraordinary action.

Each of the grounds of recusal under Article 40(1) is equivalent, but it is evident that not all of them have similar universality, as evidenced by the comparison of grounds of recusal based on the proven rule *nemo iudex in causa sua* [Skřętowicz 1969, 333] (item 1 of Article 40(1) CCP) e.g. with the ground under Article 40(1)(9) CCP. Some of the grounds stated in Article 40 CCP are applied to adjudication in a second instance court, e.g. the reason specified in item 6, whereas the reason stated in paragraph 3 is applicable to proceedings carried out after the judgment has become final. The grounds from paragraphs 5 and 10 of Article 40(1) CCP are the result of the exercise of procedural functions other than adjudication, which is also partly the case with paragraph 4 *in fine* of Article 40(1) CCP. In contrast to recusal under Article 41 CCP, recusal by operation of law is in principle based on objectively existing, easily verifiable and even measurable grounds (an exception may, however, constitute the ground based on “cohabitation with one of the persons” listed in item 1 of Article 40(1) CCP and that mentioned in item 4). The catalogue in Article 40(1) items 1 to 10 (para. 3) CCP is also a close-ended enumeration, as confirmed by the Supreme Court

¹⁹ Article 40(1)(8) repealed by Article 1(13)(c) of the Act of 10 January 2003 (Journal of Laws No. 17, item 155) amending that Act.

in many judgments.²⁰ Perhaps except the reason set out in Article 40(1) item 1 CCP, i.e. the judge's personal interest in the case ("the case directly concerns that judge"), the rest of the reasons set out in Article 40(1) CCP, is of a strict nature.

The situation is different with the reason under Article 41(1) CCP, which refers to "a circumstance of such a kind that could raise a reasonable doubt as to the impartiality of [the judge] in a given case." This reason requires an assessment by the judge himself (Article 41(2) CCP) and the court (Article 41(4) CCP), and the result of this assessment affects the future of the judge in the case. At the same time, it is a reason that requires plausibility and objective occurrence,²¹ because Article 41 CCP cannot serve to eliminate an inconvenient judge, but only one who does not guarantee impartiality in this particular case. It may also happen that some part of the judge-related circumstances invoked is confirmed, but also their gravity is not as serious as considered by this party. Undoubtedly, the reasons under Article 40 CCP are characterized by a greater gravity than that under Article 41 CCP, hence the more strict legislature's reaction to them [Mucha 2006-2007, 402].

Both groups of reasons for recusal, both those from Article 40 and those from Article 41, serve to disqualify an individually specified judge, and not to generally disqualify an entire organizational unit of the justice system, e.g. the Regional Court in Lublin [Grajewski and Steinborn 2015]. However, it is possible to submit recusal requests in relation to any subsequent member of the adjudicating panel who has "replaced" the previously disqualified one, which in effect may lead to the situation constituting the subject of Article 43 CCP [Stefański 2007, 450].

The obligation to disclose circumstances that may be the grounds for recusal is borne by the judge, even though it does not appear explicitly from any provision of the Code of Criminal Procedure.

Concluding reflections on the guarantee nature of the institution of recusal of a judge, it should be pointed out that pre-emptive disqualification of this participant in a criminal case makes it possible to avoid further perturbations with the ruling, which enhances stability of adjudication and, in the long run, also the stability of the legal environment of citizens.²² I my-

²⁰ Decision of the Supreme Court of 14 November 2017, ref. no. V KK 216/17, Lex no. 2449657; decision of the Supreme Court of 12 February 2014, ref. no. V KO 4/14, Lex no. 1427480; judgment of the Supreme Court of 15 November 2013, ref. no. III KK 227/13, Lex no. 1403880; judgment of the Supreme Court of 4 January 2011, ref. no. SDI 30/10, Lex no. 1223732.

²¹ Decision of the Supreme Court of 11 January 2012, ref. no. III KK 214/11, OSNKW 2012, No. 4, item 40. Supera 2010, 75.

²² For more on the stabilization function of the procedural criminal law itself, see Olszewski 2019, 71-79.

self am also in favour of admissibility of requesting by a party for the recusal of a judge referred to in Article 40(1)(3) CCP, although from the wording of the Code provisions, such a procedure seems to be reserved exclusively for a judge under Article 41 CCP. Although the cases referred to in Article 40 CCP concern “self-disqualification” by the judge, nothing prevents a party from requesting such recusal of the judge. This may counteract the passivity of the judge himself, although whenever such a judge has made an appropriate statement, the party’s request will be unreasonable (see Article 42(2) CCP). This manner of interpretation results from the conviction that the parties to the procedure have controlling function, and also from the fact that Article 42(1) CCP does not specify that the “request of a party” mentioned there should be limited to the grounds of recusal from Article 41 CCP. J. Kosonoga, who presents a similar view on this issue, proposes, and I fully share this postulate, to delete from Article 42(3) CCP the phrase: “pursuant to Article 41” [Kosonoga 2018, 166], which would determine the admissibility of filing a request for recusal also with regard to a judge specified in Article 40 CCP.

CONCLUSIONS

Judge recusal proceedings have all the features of an incidental proceeding, but still important [Kaczorkiewicz 2006, 197]. A judge affected by any of the grounds of recusal listed in Article 40 or 41 CCP, will never be able to hear a criminal case well. The process with his participation will be characterized by the original sin of partiality, and without impartiality it is difficult to talk about a fair trial. Disqualifying such a judge is therefore necessary, but also quite exceptional.

The differentiation of the procedure for the recusal of a judge and the “separation” of the grounds of recusal into two provisions, i.e. Articles 40 and 41 CCP (although both types of recusal perform the same function) demonstrates a certain gradualness of these circumstances: the circumstances absolutely supporting the disqualification of a judge from the trial are included in Article 40 CCP, and those that are relative (evaluative) – in Article 41 CCP. The first is assigned more gravity, which results in a certain “automatic”²³ disqualification in a situation to which the legislator attaches an indelible legal presumption of the judge’s inability to adjudicate impartially, and in the second case – the resignation from such unconditionality of removing the judge from the case.

The uniqueness of the rules providing for the recusal of judges was noticed as early as in the 1930s by A. Mogilnicki, who was against their

²³ The “rule of automatic disqualification” is referred to by Wąsek-Wiaderek 2007, 97-110.

extensive interpretation [Mogilnicki 2019, 94].²⁴ On the one hand, the recusal of a judge is an exceptional institution, since it serves to remove a person professionally qualified to hear the case and appointed to the hearing panel in accordance with the provisions of Chapter 1 of Chapter II CCP, and on the other hand it is a most obvious institution in a democratic state, because it is to safeguard what is considered necessary in relation to the administration of justice and naturally related to this dimension, namely impartiality of adjudication. This, in turn, is a prerequisite for the attainment of the general objective of the criminal trial [Marszał 2021, 32-33; Idem 1997, 13], namely the decision about the matter of that trial. In a sense, Article 40ff. CCP are an expression of shaping the criminal proceedings to make it possible to achieve this objective by a court which is distanced to the case and to the parties, regardless of the fact that it seems that this impartiality is not mentioned in any of the paragraphs of Article 2(1) CCP. The omission of the condition of impartiality of the court is, however, ostensible, since it is not derived from the above-mentioned Article 45(1) of the Constitution that is superior to the Code provisions. Regardless of the constitutional origin of the condition of impartiality, I believe that it can also be inferred from the content of Article 2(2)(1) (“no innocent person can be held liable” [Kulesza 2020; Kurowski 2022]), 2 (“obligation of an appropriate punitive response”) and 2 (“principle of material truth” [Kurowski 2022]).

The admission of a judge affected by the reason for recusal under Article 40(1) or (3) CCP to adjudicate in the case, unlikely from the practical perspective, but theoretically possible, should be considered in terms of the absolute grounds of appeal referred to in Article 439(1)(1) CCP. The very location of this reason in the structure of this provision shows that a breach of law consisting in taking part in the issuance of a judgment by a person “subject to disqualification under Article 40” is considered by the legislature as one of the most serious procedural shortcomings. On the other hand, the more likely admission to adjudication of the judge referred to in Article 41 CCP, is covered by the postulate *de lege ferenda* to equate it with “improper staffing of the court”, i.e. the ground of appeal under Article 439(1)(2) CCP [Artymiak 2007, 96]. This view seems to be too far-fetched. J. Kosonoga, who has no doubts that the proceedings in which there are justified doubts as to judge’s impartiality are defective, considers the infringement through the prism of Article 438(2) CCP and this position is closer to the truth [Kosonoga 2013, 195]. Defectiveness of proceedings with the participation of the judge referred to in Article 41 CCP is manifested in its inconsistency with the principle of impartiality, and to challenge the appealed judgment, the impact of this infringement on its content must be demonstrated.

²⁴ Decision of the Supreme Court of 7 January 2019, ref. no. V KK 361/18, Lex no. 2602690; decision of the Supreme Court of 9 October 2018, ref. no. III KK 477/18, Lex no. 2561613. See also the case-law cited by Paprzycki 2007, 389-400.

REFERENCES

- Artymiak, Grażyna. 2007. "Problematyka wyłączenia sędziego orzekającego w sprawach karnych – wybrane zagadnienia." In *Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi*, edited by Ireneusz Nowikowski, and Jakub Kosowski, 85-96. Lublin: Wydawnictwo UMCS.
- Artymiak, Grażyna. 2010. "Konstytucyjne gwarancje prawa do sądu w kontekście powoływania osób sprawujących władzę sędziowską (ze szczególnym uwzględnieniem niezależności sędziego) – wybrane zagadnienia." In *Węzłowe problemy procesu karnego*, edited by Piotr Hofmański, 222-38. Warszawa: Wolters Kluwer.
- Cieślak, Marian. 1984. *Polska procedura karna. Podstawowe założenia teoretyczne*. Warszawa: PWN.
- Dudka, Katarzyna, and Hanna Paluszkiewicz. 2021. *Postępowanie karne*. 5th edition. Warszawa: Wolters Kluwer.
- Glaser, Stanisław. 1934. *Polski proces karny w zarysie wraz z prawem o ustroju sądów powszechnych*. Kraków: Księgarnia Powszechna.
- Grajewski, Jan, and Sławomir Steinborn. 2015. "Komentarz do art. 40." In *Komentarz aktualizowany do art. 1-424 Kodeksu postępowania karnego*, edited by Lech Krzysztof Paprzycki. Lex el.
- Grzegorzczak, Tomasz, and Janusz Tylman. 1997. *Polskie postępowanie karne*. Warszawa: PWN.
- Grzegorzczak, Tomasz. 2014. "Komentarz do 41." In Tomasz Grzegorzczak, *Kodeks postępowania karnego. Tom I. Artykuły 1-467. Komentarz*. Lex el.
- Hofmański, Piotr. 2013. "Funkcja sądenia – u progu przebudowy modelu." In *Z problematyki funkcji procesu karnego*, edited by Tomasz Grzegorzczak, Jacek Izydorczyk, and Radosław Olszewski, 524. Warszawa: Lex a Wolters Kluwer business.
- Jankowski, Michał. 1986. *Wyłączenie sędziego w polskiej procedurze karnej*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.
- Jasiński, Wojciech. 2009. *Bezstronność sądu i jej gwarancje w polskim procesie karnym*. Warszawa: Oficyna a Wolters Kluwer business.
- Kaczorkiewicz, Dorota. 2006. "Postępowanie w przedmiocie wyłączenia sędziego od udziału w sprawie karnej." *Przeгляд Sądowy* 7-8:197-203.
- Kalinowski, Stanisław. 1966. *Postępowanie karne. Zarys części ogólnej*. Warszawa: PWN.
- Kosonoga, Jacek. 2013. "Glosa do wyroku Sądu Apelacyjnego we Wrocławiu z dnia 31 maja 2010 r., II AKa 103/10." *Ius Novum* 1:192-98.
- Kosonoga, Jacek. 2018. "Wniosek o wyłączenie sędziego." In *Proces karny w dobie przemian. Zagadnienia ogólne*, edited by Sławomir Steinborn, and Krzysztof Woźniewski, 162-78. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.
- Kosonoga, Jacek. 2017. "Komentarz do art. 4 k.p.k." In *Kodeks postępowania karnego. Tom I. Komentarz do art. 1-166*, edited by Ryszard A. Stefański, and Stanisław Zabłocki. Lex el.
- Kruszyński, Piotr (ed.). 2003. *Wykład prawa karnego procesowego*. Białystok: Temida 2.
- Kuczyńska, Hanna. 2020. "Sprawiedliwość czy „zwycięstwo za wszelką cenę”: podejście prokuratora do zasady prawdy materialnej – analiza porównawcza." In *Istota i zasady procesu karnego 25 lat później. Księga poświęcona pamięci Profesora Andrzeja*

- Murzynowski*, edited by Maria Rogacka-Rzewnicka, and Hanna Gajewska-Kraczkowska, 157-78. Warszawa: Wolters Kluwer.
- Kulesza, Cezary. 2020. "Komentarz do art. 4." In *Kodeks postępowania karnego. Komentarz*, edited by Katarzyna Dudka. Lex el.
- Kurowski, Michał. 2022. "Komentarz do art. 2 k.p.k." In *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, edited by Dariusz Świecki. Lex el.
- Marszał, Kazimierz. 1997. *Proces karny. Zagadnienia ogólne*. Katowice: Wydawnictwo Volumea.
- Marszał, Kazimierz. 2021. "Rozdział I. Zagadnienia wstępne. Podrozdział 3. Cel procesu karnego." In *Proces karny*, edited by Jarosław Zagrodnik, 3rd edition, 27-47 and 79-82. Warszawa: Wolters Kluwer.
- Mogilnicki, Aleksander. 2019 (reprint from 1933). *Kodeks postępowania karnego. Komentarz – reprint*. Warszawa: Wolters Kluwer.
- Mucha, Andrzej. 2006-2007. "Udział w wydaniu orzeczenia osoby nieuprawnionej lub niezdolnej do orzekania bądź podlegającej wyłączeniu na podstawie art. 40 k.p.k. jako jedna z bezwzględnych przyczyn odwoławczych." In *Państwo – prawo – jednośćka. Problemy państwa, prawa oraz nauk pokrewnych*, edited by Czesław Kłak, Katarzyna Kaczmarczyk, and Andrzej Kiełtyka, 397-406. Rzeszów: Wydawnictwo Mitel.
- Murzynowski, Andrzej. 1994. *Istota i zasady procesu karnego*. Warszawa: PWN.
- Nowicki, Antoni M. 1998. *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*. Warszawa: C.H. Beck.
- Olszewski, Radosław. 2019. "O stabilności i funkcji gwarancyjnej prawa karnego procesowego." In *Artes serviunt vitae sapientia imperat. Proces karny sensu largo – rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorzycy z okazji 70. urodzin*, edited by Radosław Olszewski, Dariusz Świecki, Jarosław Kasiński, et al., 71-79. Warszawa–Łódź: Wolters Kluwer.
- Papke-Olszauskas, Katarzyna. 2007. *Wyłączenie uczestników procesu karnego*. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.
- Paprzycki, Lech K. 2007. "Iudex inhabilis i iudex suspectus – w polskim procesie karnym – po latach." In *Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi*, edited by Ireneusz Nowikowski, and Jakub Kossowski, 389-400. Lublin: Wydawnictwo UMCS.
- Skrętowicz, Edward. 1968. "Wyłączenie sędziego na podstawie art. 37 k.p.k." *Nowe Prawo* 7-8:1176-182.
- Skrętowicz, Edward. 1969. "Podstawy wyłączenia sędziego z mocy prawa w świetle orzecznictwa i doktryny." *Annales UMCS* vol. XVI (11), Sectio G:333-55.
- Skrętowicz, Edward. 1989. *Wyrok sądu karnego pierwszej instancji*. Lublin: Wydawnictwo UMCS.
- Skrętowicz, Edward. 1994. *Iudex inhabilis i iudex suspectus w polskim procesie karnym*. Lublin: Wydawnictwo UMCS.
- Sowiński, Piotr. 2005. "W kwestii bezstronności prokuratora. Uwagi na tle przepisów art. 47 i art. 48 k.p.k." In *Godność obywatela, urzędu i instytucji. Zmiany prawno-ustrojowe Prokuratury RP*, edited by Halina Zięba-Załużka, and Maciej Kijowski, 114-22. Rzeszów: Wydawnictwo Drukarnia Steiner.

- Stefański, Ryszard A. 2007. "Postępowanie w przedmiocie wyłączenia sędziego w postępowaniu karnym." In *Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi*, edited by Ireneusz Nowikowski, and Jakub Kosowski, 433-51. Lublin: Wydawnictwo UMCS.
- Supera, Łukasz P. 2010. "O powszechnie występującej podstawie wyłączenia sędziego na wnioski w sprawach karnych." *Palestra* 11-12:75-81.
- Świda, Zofia. 2011. "Sędzia jako zawód szczególnego zaufania społecznego – wymogi i uprawnienia." In *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tyłmana*, edited by Tomasz Grzegorzczak, 509-21. Warszawa: Wolters Kluwer.
- Tabor, Zygmunt. 2005. "Bezstronność sędziego." *Przegląd Sądowy* 6:3-15.
- Tokarczyk, Roman. 2009. "Etyka prokuratora – zarys przedmiotu." *Prokuratura i Prawo* 6:7-30.
- Waltoś, Stanisław. 2003. *Proces karny. Zarys system.* Warszawa: LexisNexis.
- Waltoś, Stanisław, and Piotr Hofmański. 2016. *Proces karny. Zarys system.* Warszawa: Wolters Kluwer.
- Wąsek-Wiaderek, Małgorzata. 2007. "Przesłanka wyłączenia sędziego z art. 41 k.p.k. a standard prawa do sądu bezstronnego określony w Europejskiej Konwencji Praw Człowieka." *Studia Prawnicze KUL* 2-3:97-110.
- Wiliński, Paweł (ed.). 2020. *Polski proces karny.* Warszawa: Wolters Kluwer.