

JUDICIAL INDEPENDENCE IN THE LIGHT OF ART. 6 OF THE EUROPEAN CONVENTION OF THE HUMAN RIGHTS – SELECTED ASPECTS

Judge Grzegorz Borkowski, Ph.D.

National School of Judiciary and Public Prosecution

Summary. The aim of this article is to examine how the judicial independence in its both aspects: independence of the judiciary and the internal independence of judges is perceived by the European Court of Human Rights in Strasbourg and to compare it with the Polish doctrine's approach. Court's case-law is the effect of its interpretation of the European Convention of Human Rights, and the importance of the Convention within the Polish legal system is already significant and it increases due to the fact that the Court's judgments often deal with the issues which are crucial for the Polish legal system, including the judicial independence.

Key words: independence of the judiciary, guarantees of the judicial independence, Convention for the Protection of Human Rights and Fundamental Freedoms, case-law of the European Court of Human Rights in Strasbourg

GENERAL REMARKS

The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law¹. It is said that judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial². Without the independence of judiciary from other branches of powers, especially the Executive (*niezależność sądów*), on one hand and without the inner independence of judges (*niezawisłość sędziów*), the right to fair trial would be only illusory. It may be noted at the very on the other that there are two ways of understanding the notion of judicial independence in English, while in Polish the wording „*niezawisłość*” is traditionally combined with judges and their internal independence while „*niezależność*” means the independence of the judiciary as a whole³; the division may be found in Polish Constitution (art. 178 par. 1 and art. 45 par. 1).

¹ See e.g. K. Gonera, *Judicial Independence as the Foundation of the Rule of Law*, in: *Independence of the Judiciary and Legal Professions as Foundation of the Rule of Law. Contemporary Challenges*, T. Wardyński, M. Niziołek. Warszawa 2009, p. 386.

² As stated in Bangalore Principle of Judicial Conduct of 2002.

³ See: M. Jankowski, *Niektóre zagadnienia niezawisłości (niezależności) sędziowskiej w prawie i doktrynie angielskiej i amerykańskiej*, Nowe Prawo, Feb. 1987, p. 79.

As it has been already mentioned the judicial independence is an indispensable part of the right to fair trial⁴; right which is guaranteed not only at the constitutional, but also at the EU, pan-European and finally – global level. As for the Polish citizens, their right to independent tribunal is guaranteed, beside of art. 45 of the Constitution of the Republic of Poland, also in:

– The Universal Declaration of Human Rights – as stated in its article 10: „Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

– International Covenant on Civil and Political Rights, stating in article 14(1) that: „All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...],

– European Convention on Human Rights – its article 6 says: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” [...] and finally:

– Charter of Fundamental Rights of the European Union, which in art. 47 guarantees that: „[...] Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law [...].

There are also numerous international acts dealing specifically with the issue of the judicial independence. At the European level, these documents include, inter alia:

- the UN Basic Principles on the Independence of the Judiciary⁵
- the Venice Commission Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)⁶
- the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia⁷

⁴ See a very interesting study by M. Kuijer, *The blindfold of Lady Justice*, Wolf Publishers, Leiden 2004, p. 203.

⁵ UN Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

⁶ CDL-AD(2010)004 available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx).

⁷ The OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, available at <http://www.osce.org/odihr/KyivRec?download=true>.

- the Recommendation of the Council of Europe Committee of Ministers on „Judges: Independence, Efficiency and Responsibilities” adopted in 2010⁸
- the opinions of the Consultative Council of European Judges (hereinafter „the CCJE”)⁹;
- the European Charter on the Statute for Judges¹⁰.

OSCE participating States are also committed to ensuring the independence of the judiciary, e.g. in the Copenhagen Document of 1990 (see par. 5), the Moscow Document of 1991 (see par. 19–20) and the Istanbul Document of 1999 (see 45). Also the Brussels Declaration on Criminal Justice Systems (2006) and the Ministerial Council’s Decisions No. 5/06 on Organized Crime (Brussels 2006) and Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area (Helsinki 2008) should be mentioned here.

Even this short summary of the relevant European acts concerning the judicial independence (also the Bangalore Principle of Judicial Conduct of 2002 must be mentioned) shows clearly how important the issue is. The following remarks will be based mainly on the European Court of Human Rights’ judgments relating to the right to fair trial, the right protected in art. 6 of the European Convention on Human Rights, in which the judicial independence plays crucial law. It must also be noted that the scope of application of the European Convention on Human Rights is much wider than that of the European Charter of Fundamental Rights, as it applies not only to EU countries (as the Charter does) but to all Council of Europe Member States, i. e. all European Countries except of Belarus and Vatican.

THE POLISH PERSPECTIVE

Yet before examining the model of protecting judicial independence on the level of the Convention, one should take a closer look at the judicial independence in Poland. As it has been mentioned above, the judicial independence in Poland is guaranteed on the constitutional level. Art. 45 par. 1 of the Constitution of the republic of Poland states that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impar-

⁸ Recommendation CM/Rec(2010)12 of the Committee of Ministers to CoE member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=1707137>.

⁹ In particular Opinion No. 3 of the Consultative Council of European Judges to the attention of the CoE Committee of Ministers on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

¹⁰ European Charter on the Statute for Judges (Strasbourg, 8–10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23].

tial and independent court. Subsequently art. 178 par. 1 of the Constitution reiterates that Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. As it also has been stated above, in Poland (both in the doctrine and the provisions of relevant law) there is a distinction between court's independence (*niezależność*) and the judges' or judicial independence (*niezawisłość*).

Regarding the Polish doctrine, the issue is usually commented upon by naming and examining judicial independence guarantees. Those guarantees may have a procedural and a substantive (organizational) aspects¹¹.

I. From the procedural point of view, the following guarantees of judicial independence may be named (they apply to all kinds of court proceedings in Poland, i.e. criminal, civil and administrative):

a) Secrecy of debates and voting

The reason for this guarantee is quite clear – to avoid any influence on judicial decision-making. Yet, what is interesting, in Switzerland, the debates and voting by the judges of the Supreme Court were once open to public and such a solution was perceived as a judicial independence guarantee.

b) Sessions open to public

The public hearing by the court is a common feature of every democratic state and is guaranteed by all important international legal acts (see above). The right is not absolute yet and always certain exceptions exist (e.g. art. 6 of the Convention provides that „the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”).

c) Judge's discrecy when examining the evidence

A situation in which there is a list of evidence with different importance provided by law (e.g. two noblemen's statement is worth more than a document) and a judge is bound by such provisions was a feature a medieval trials and cannot persist in democratic society.

d) Exception of a judge

This institution exists in two forms: when a judge is excluded from a trial by law, e.g. when the proceedings concern his/her spouse, family members etc. (*iudex inhabilis*) or when there is some other relationship between a judge and a party (its representative), which might cause reasonable doubts as to the

¹¹ S. Włodyka, *Ustrój organów ochrony prawnej*, Warszawa 1975. Regarding the latest publications see: J. Bodio, G. Borkowski, T. Demendecki, *Ustrój organów ochrony prawnej. Część szczegółowa*, Wolters Kluwer 2013.

judge's impartiality (*iudex suspectus*). The institution of exception of a judge is common in basically every democratic society.

e) Adjudicating in panels

With regard to this guarantee it must be noted that in Poland the number of cases in which the court sits in panels is decreasing and most civil and criminal cases are nowadays with by a single-judge formation. Judicial panels are more common in higher instance courts or when lay judges accompany a professional judge (in some family and labour law-cases)

II. With regard to the substantive (organizational) guarantees of judicial independence, the following should be mentioned:

a) The sufficient moral and ethical level and professional qualifications

In fact there are two guarantees – professional qualification and the sufficient ethical level. It is quite obvious that a judge (professional one) must have not only sufficient, but a very good knowledge of law. The way of achieving this level is different in common law countries and continental law countries. In general, in common law countries to become a judge one has to work as a lawyer first and is evaluated afterwards. In continental law countries, including Poland¹², law faculty graduates are specially trained to become judges, without a condition of a professional (i.e. as a lawyer) experience. In both models, the knowledge of law is relatively easy to evaluate – either basing on previous working experience (as a lawyer) or on a judicial exam grades.

Much more difficult to evaluate is the issue of sufficient moral and ethical level; in this case the common law countries model is much better as the candidate for judicial position is perceived through his previous behaviour as a lawyer. In continental law countries this issue is much more difficult, as the ethical level is very hard to evaluate. In fact, the only aspects which are usually examined by the authorities is the criminal records of a candidate and the opinion among the neighbours. Needless to say, both are far too less to examine the candidate's ethical and moral level¹³. In many countries the judicial self-government bodies issue a code of judicial conduct, in which the importance of judicial independence is always stressed.

a) Stability of the profession

In other words – irremovability (tenure) of a judge. The most important issue is that a judge may not be removed from his post by any member of either legislative or executive power. The only situations in which a judge may lose his/her

¹² About the Polish model of training judges and possible amendments in this field see: D. Dudek, *Jak uczyć sztuki sądenia*, „Rzeczpospolita” z 19 Oct. 2012.

¹³ More: G. Borkowski, *Immaculacy of Character and Vocation for Legal Professions*, in: G. Borkowski (ed.), *Ethics of Legal Professions. Mutual Relationships and Expectations*, Lublin 2012, pp. 205–214.

post are: the judgment of a disciplinary court stating that a judge has seriously breached judicial ethics, the re-organisation of the judicial system and liquidation of a court, lack of possibility of continuing fulfilling the judicial duty due to the health reasons or to the advanced age (in Poland – 67 years¹⁴).

c) Financial independence¹⁵

According to art. 178 par. 2 of the Republic of Poland judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties. But this seems to be rather wishful thinking, at least in Poland¹⁶.

d) Incompatibilitas

It means that a judge may not join examining the duties of his/her post with any other power's activities. i.e. a judge may not be an MP (in Poland – poseł or senator) – see below, or a part of the executive power (strangely enough, in Polish conditions it is possible, that an acting judge becomes a deputy minister of justice). What is more, according to art. 86 § 1 and 2 of the Law on Common Courts Organisation (Act of 27 July 2001) a judge may not undertake additional employment, except that of a lecturer, lecturer and researcher or researcher, in the aggregate number of working hours not exceeding the number of working hours of a full time employee holding such a post, if such employment does not interfere with the performance of the duties of a judge; neither may a judge take up other jobs or gainful occupations which could interfere with the performance of the duties of a judge, weaken the confidence in his/her independence or prejudice the authority of the office of judge. The additional restriction regarding a judge's involvement in companies' bodies apply. It should also be mentioned here that a professional judge in Poland may not serve as an arbitrator; this applies only to acting (i.e. not retired) judges, though.

e) Political neutrality

According to art. 178 par. 3 of the Constitution a judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

f) Judicial immunity and disciplinary responsibility

The judicial immunity is not a common feature in European countries¹⁷. In those in which it exists, the immunity may be of a procedural or substantive nature. As for the substantive immunity of judges in Poland, it applies only to

¹⁴ Sudden and radical lowering of the retirement age of judge may also cause the breach of the judicial independence. For example in Hungary it has been changed from 70 to 62.

¹⁵ Very important issue, in the light of austerity. On this issue see especially CCJE (Consultative Council of European Judges' Situation Report of 18 January 2012 (CCJE(2011)6) on the judiciary and judges in different states.

¹⁶ See the data published every two years by CEPEJ (European Commission for the Efficiency of Justice). In the 2012 edition see pp. 260–273.

¹⁷ See e.g. *Independence, Accountability and the Judiciary* edited by G. Canivet, M. Andenas, D. Fairgrieve, London 2006.

art. 81 of the Law on Common Courts, for committing petty offences (misdemeanours) a judge is liable only on disciplinary grounds. The issue of a procedural aspect of judicial immunity has a constitutional background: according to art. 181 of the Constitution a judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

It must be stressed that, regardless whether there is a judicial immunity in a certain country or not, the disciplinary reliability of a judge is a usual feature¹⁸.

THE STANDARD OF THE CONVENTION

The conditions presented above should be, according to the doctrine, examined to find a Judge independent. Some of them are indispensable, while some others are merely an aim to be reached in the blurred future. In order to know the relation between them and the standards guaranteed in the European Convention on Human Rights it is necessary to examine the ECHR's case-law on article 6 of the Convention.

According to the Court there is a close link between the concepts of independence and objective impartiality. For this reason the Court commonly considers the two requirements together¹⁹. It must be stressed that the principles applicable when determining whether a „tribunal” can be considered „independent and impartial” apply equally to professional judges, lay judges and jurors²⁰.

The Court has also stated that although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met²¹.

¹⁸ See the interesting summary in: *Les Juges: de l'Irresponsabilite a la responsabilite?*, Aix-en-Provence 2000.

¹⁹ *Findlay v. the United Kingdom*, § 73. This and other examples may be found in D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights, Council of Europe*, Strasbourg 2012, p. 37. All judgments and many decisions of ECHR are available at HUDOC database.

²⁰ *Holm v. Sweden*, § 30.

²¹ *Henryk Urban and Ryszard Urban v. Poland*, § 46.

When it comes to determining whether a body may be considered independent, the Court examines the three following criteria:

– the manner of appointment of its members and the duration of their term of office;

– the existence of guarantees against outside pressures;

– (whether the body presents an) appearance of independence.

Let us then examine those criteria step by step²²:

1. Manner of appointment

The Court is of opinion that

– The mere appointment of judges by Parliament cannot be seen to cast doubt on their independence (*Filippini v. San Marino* (dec.)); *Ninn-Hansen v. Denmark* (dec.))

– Similarly, appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (*Campbell and Fell v. the United Kingdom*, § 79)²³. The latter opinion seems to be extremely important in the Polish legal system, as the provisions of the Constitution provide that judges are appointed for life (for an indefinite period, to be exact), by the President of the Republic.

As for the duration of appointment the Court is of opinion that no particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that other necessary guarantees are present (*Campbell and Fell v. the United Kingdom*, § 80).

An additional, very important issue, which should be stressed at this moment: according to well-established case-law of the Court, although the assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6 § 1, and, in particular, with its requirements of independence and impartiality (*Moiseyev v. Russia*, § 176).

2. Guarantees against outside pressure²⁴

In fact the Court examines the vulnerability of a judge not only against outside, but also inside pressure. Judicial independence demands that individual judges be free from undue influences outside the judiciary, and from within. Internal judicial independence requires that they be free from directives or pres-

²² See an exhausting comparative study by Anja Seibert-Fohr (ed.), *Judicial independence in transition*, Max Planck Institute 2012.

²³ From the latest case-law see especially judgment of 18 July 2013 in case *Maktouf and Dajanović vs. Bosnia and Herzegovina*, concerning the international judges in Bosnia.

²⁴ See P. Hofmański, A. Wróbel, w: *Komentarz pod red. L. Garlickiego*, p. 386.

asures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified (Parlov-Tkalcic v. Croatia, § 86; Daktaras v. Lithuania, § 36; Moiseyev v. Russia, § 184).

Those opinions are generally in line with the doctrine's view, yet it should be stated that a judge should be independent from the views of society and the mass media (outside pressure), as well as his/her supervisors and fellow judges (inside pressure) and also, which seems to be the most obvious, against the parties of the proceedings (see remarks on *iudex inhabilis* and *iudex suspectus* above).

3. Appearance of independence

There is a broad ECHR case-law related to the issue of appearance of independence. For example the Court stated that in order to determine whether a „tribunal” can be considered to be independent as required by Article 6 § 1, appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (Şahiner v. Turkey, § 44).

Needless to say, such appearance may be very subjective and the same court may seem independent to someone and not independent to someone else. For this reason the Court is on the position that in deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality²⁵, the standpoint of the accused is important but not decisive. What is decisive is whether his doubts can be held to be objectively justified (Incal v. Turkey, § 71). In other words no problem arises as regards independence when the Court is of the view that an „objective observer”²⁶ would have no cause for concern about this matter in the circumstances of the case at hand (Clarke v. the United Kingdom (dec.)).

Obviously when a „tribunal's” members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, the accused may entertain a legitimate doubt about those persons' independence (Şahiner v. Turkey, § 45). The above remarks are certainly also applicable in civil cases and the doubts of a party or his/her representative.

There is no „one-size fits all” definition of a body, which „appears independent” and the Court has developed a rich case-law on this subject. For example, the Court found the following bodies as independent tribunals:

²⁵ On the difference of those two notions see Volkov vs. Ukraine, p. 104–107.

²⁶ See S. Guinchard, L'Impartialité du Juge, in: *L'Impartialité du Juge et de L'Arbitre* pod red. J. Van Compernelle, G. Tarzia, p. 25.

– Industrial tribunal, the implementation of whose decision was subject to executive discretion (Van de Hurk).

– Prison disciplinary body whose members were appointed by minister, but not subject to any instructions as to their adjudicatory role (Campbell and Fell).

– Compensation tribunal, two members of which were appointed by minister – himself respondent in the impugned proceedings – where the parties were consulted prior to and made no disagreement as to the appointment (Lithgow and others).

– Specialised land tribunal involving civil servants under statutory obligation to act independently (Ringelsen).

– Military tribunal with jurisdiction over the parties who are members of the military (Incal v. Turkey; but compare with Miroshnik v. Ukraine).

– Mixed court martial involving a civil judge, the accused being entitled to object to certain appointments to the body (Cooper v. the United Kingdom).

On the contrary, the Court found as lacking independence the following bodies:

– Courts martial with jurisdiction over civilians (Incal).

– Single police officer sitting as a tribunal, in view of the theoretical subordination of the officer – merely as a matter of appearance – to the superiors of the police force who brought proceedings against the applicant (Belilos).

– Two lay assessors sitting on a tribunal revising a lease, who had been appointed by associations having an interest in the continuation of the existing terms of that lease (Langborger v. Sweden)

– Mixed court involving lay judges (judicial assistants) with no sufficient guarantees as to their independence, such as the protection against premature termination of duties or restrictions from deciding cases involving parties on whose behalf they had been appointed (Luka v. Romania).

– Military tribunal where judges were appointed by the defendant (the Ministry of Defence), and were dependent financially on it, in view in particular of the ministry's role in distributing housing among officers (Miroshnik v. Ukraine).

– Special commission, combining investigative and adjudicative functions, conducting disciplinary proceedings against a financial company (Dubus S.A. v. France).

– Assessors in Polish courts who could be removed from office by decision of the Ministry of Justice, given no adequate guarantees protecting the assessors against the arbitrary exercise of that power by the minister (Henryk Urban and Ryszard Urban v. Poland).

THE COURT'S APPROACH – A CASE-STUDY

The last judgment (Henryk Urban and Ryszard Urban v. Poland²⁷) is especially interesting, as it dealt with the institution, which had been rooted in the Polish legal system for a long time and was of great impact on the whole picture of the judiciary and its independence. For this reason, it deserves a greater attention.

The case originated from an application of Polish citizens, whose cases in Polish courts were tried by so-called „assessors”. The institution of assessors existed in the Polish legal system since 1928 and was not questioned till the first decade of the 21st century. It was based on a German „Richter auf Probe” or a „judge to be tested” institution; assessor was authorized to exercise judicial powers in a district court for a specified period of time and while adjudicating he/she was independent and subject only to the Constitution and statutes. The difference between a judge and an assessor was that the latter, during the period of exercising judicial powers, remained under the supervision of a judge designated to carry out the function of a consulting judge.

Also the Law on Common Courts Organisation of 27 July 2001 stipulated the requirements that had to be fulfilled to assume the office of a district court judge. A candidate for such office was required, among other conditions, to complete a judge's or prosecutor's training (aplikacja) and then pass the relevant examination. Subsequently, he or she had to work a minimum of three years as an assessor in a district court (it should be stressed that the minimum period of serving as an assessor was gradually growing, to reach three up to four years in the above mentioned Act).

Section 134 of the Act provided that the Minister of Justice may appoint as an assessor a person who has completed a judge's or prosecutor's training and passed the judge's or prosecutor's examination and who meets the specific requirements and that the Minister of Justice may also discharge an assessor, having given him notice and subject to approval by the board (of judges) of a regional court. According to the official statistics, the Minister of Justice had never exercised the power to dismiss an assessor during his/her term.

Because of the growing scope of activities of common courts (e.g. since 2001 the misdemeanors' (or, in other words, petty crimes') offenders have been tried by common courts) and due to the prolonging period of being an assessor at the beginning of the judicial career, the number of assessors in common courts was constantly growing. In 2006 there were more than 8 million new cases in district courts and in the same year there were 8181 judges in common courts, in that number 5237 in district courts and out of them 1675 were assessors (over 30%).

In 2006 the Constitutional Tribunal tried to draw attention of the lower chamber of Parliament (Sejm) to the fact that there was a case pending in the

²⁷ Application no. 23614/08.

Tribunal challenging the assessors' judicial powers and both the Ombudsman and the National Judicial Council shared the claimants' main arguments. There was no reply, however.

In its judgment of 24 October 2007²⁸ the Constitutional Tribunal found that the vesting of judicial powers in assessors by the Minister of Justice (representing the executive) was unconstitutional since the assessors did not enjoy the necessary guarantees of independence which were required of judges.

The Tribunal noted, *inter alia*, that in accordance with the text of the statute, while adjudicating an assessor shall be independent and subject only to the Constitution and statutes (section 135 § 2). „However such regulation of itself is only a declaration, not ensuring the real and effective independence required by the Constitution, unless the independence is supplemented by concrete guarantees, namely particular legal regulations related to effective securing of the observance of the particular elements of the concept of independence. The issue of independence from the Minister of Justice should be seen from the angle of the assessor's appointment, the vesting of judicial powers in an assessor and his or her dismissal. In respect of the appointment, and in particular the vesting of judicial powers, the statute does not precisely specify the time frame in which such appointment should be made. Considered from the functional point of view, independence does not have to mean appointment for life or appointment until retirement age, but it must mean a certain level of stability in employment and in the exercise of judicial powers. It should be indicated here that the Strasbourg case-law underlines precisely that if judges or persons exercising judicial powers are not appointed for life, they could be appointed for a certain term of office, and that they must benefit from a certain stability and must not be dependent on any authority (judgment of the ECHR of 23 October 1985 in the case of *Bentham v. the Netherlands*, no. 8848/80). It may be indicated here that in attempting to define more closely a certain minimum period which would guarantee professional stability the European Court of Human Rights found three years to be sufficient (judgment of the ECHR of 28 June 1984 in the case of *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, and the judgment of the ECHR of 22 October 1984 in the case of *Sramek v. Austria*, no. 8790/79). The regulation of the assessor's status does not contain such guarantees, since there is no minimum period for which such a person is employed and no minimum period for which an assessor is vested with judicial powers. It is undoubtedly a situation which gives rise to significant misgivings as to its compliance with the principle of independence. In this respect the situation would have looked unambiguous if the statute had expressly determined the period for which an assessor was appointed and the period for which the judicial powers were vested. The existing regulation, implying discretion of the minister and the

²⁸ Case no. SK 7/06.

board of judges of the regional court [...] thus amounts to one-sided dependence of the assessor's professional status on those organs.

The principal argument indicative of the unconstitutionality of the vesting of judicial powers in an assessor is the admissibility of his or her dismissal, including even during the period in which an assessor exercises judicial powers. Even assuming the constitutional admissibility of the institution of temporarily vesting those powers in an assessor within the jurisdictional and temporal limits specified by a statute, then a rudimentary aspect of the principle of independence which must be adhered to also in this case requires that it should be possible to remove an assessor from office only in the same way as judges may be so removed or even only in some of those cases. The existing regulation, firstly, does not contain a proviso that the dismissal of an assessor (at least one who has been vested with judicial powers) is allowed only as an exception to the rule. Secondly, the statute does not precisely set out the factual circumstances serving as justification for dismissal from the office. Thirdly, a decision on dismissal is taken by the Minister of Justice and not by a court. It follows that, regardless of whether dismissal from the office of assessor may be reviewed by a court, the essential requirements of independence from non-judicial authorities stemming from Article 180 § 1 of the Constitution are not met. The obligation [to secure] the approval of the board of judges of a regional court is not a pertinent circumstance, since this body is not a court but an organ of court administration, and moreover its approval is also of a discretionary character as there are no specific legal norms which indicate whether or not a dismissal is justified in a given situation. Consequently, there are no substantive guarantees and no adequate procedural guarantees which would indicate that the assessor's dismissal on the ground of the content of his/her rulings is excluded [...].”

The Constitutional Tribunal also ruled that the provisions of section 135 § 1 of the Act will lose its binding force eighteen months after the promulgation of the judgment, therefore during the eighteen-month period it was constitutionally admissible for the assessors to continue adjudicating. That period was also necessary for Parliament to enact new legislation dealing with the matter. On 23 January 2009 Parliament enacted the Law on the National School for the Judiciary and Public Prosecution, which entered into force on 4 March 2009; the law *inter alia* abolished the institution of judicial assessors.

On 30 November 2010 the European Court of Human Rights in Strasbourg gave a judgment in above-mentioned case of Henryk Urban and Ryszard Urban v. Poland concerning the situation of Polish citizens tried by assessors. In written grounds of the judgment, the Court has frequently recalled the above-cited Constitutional Tribunal's judgment, following its way of reasoning. The Court, *inter alia* stressed that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under article 45 § 1 of the Constitution,

guarantees which are substantively identical to those under Article 6 § 1 of the Convention.

The Court also noted, recalling its previous judgments, that appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role. It further stressed that the Constitutional Tribunal did not exclude the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence and that it pointed to the variety of possible solutions for allowing adjudication by persons other than judges.

In conclusion, the Court considered that the assessors lacked their independence required by Article 6 § 1 of the Convention, because they could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister. By contrast, the Court recalled case of *Stieringer v. Germany*²⁹, in which the relevant German regulation provided that dismissal of probationary judges was susceptible to judicial review.

What is important, the Court ruled that the assessors were not independent, yet they did not lack impartiality. Subsequently the Court did not find it necessary that all the proceedings in which assessors were in the judicial formation (in fact, mainly it was a single-judge formation) be re-opened. The Court stated however that this might be the case if the Minister of Justice put a pressure on a assessor.

As a contrary, merely half a year later the Court found so in the case *Mirośław Garlicki vs. Poland*, in which breach of art. 5 par. 3 of the Convention was found, according to which „everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power [...]”. The case originated from the application of a well-known doctor, specialising in cardiac surgery; one of the few specialists in Poland qualified to perform heart transplants. At the relevant time, i.e. in 2007 he was the Director of the Cardiac Surgery Clinic in the Ministry of Internal Affairs and Administration Hospital in Warsaw and an assistant professor at the Jagiellonian University Medical College in Kraków. One day a dozen masked and armed officers of the Central Anti-corruption Bureau (CBA) stormed the Cardiac Surgery Clinic. Some of the officers burst into the applicant’s office pointing their firearms and shouting. The officers threw the applicant to the floor, pinned his head to the floor and then handcuffed his hands behind his back. The Warsaw Regional Prosecutor charged the applicant with twenty offences, including exposing a patient to a direct danger to his life or health, homicide of a patient, harassing a member of staff, forgery of medical documentation, and sixteen counts of taking bribes from patients.

²⁹ No. 28899/95, Commission decision of 25 November 1996.

As a result, an assessor at the Warsaw-Mokotów District Court, remanded the applicant in custody for 3 months. On the same day, following the pronouncement of the Warsaw-Mokotów District Court's decision, the Minister of Justice - Prosecutor General and the Head of the CBA held a press conference concerning the applicant's case. The case was well-known in Poland and the Minister of Justice was very much personally involved in the case, finally losing a civil case brought against him by the applicant. According to the judgment, Mr Z. Ziobro – the Minister of Justice at the relevant time was ordered to publish a public apology directly after the main evening news programmes on the three national television stations and to pay a certain sum of money to the applicant as a compensation for non-pecuniary damage.

Taking under account the circumstances of the case the Court came to the conclusion that the assessor, who remanded the applicant in custody, was under a pressure from the Minister of Justice due to his personal involvement in the case³⁰ and, subsequently, found that the assessor of the Warsaw-Mokotów District Court was not independent of the executive as required under Article 5 § 3 of the Convention (which requires that a judge or an officer authorised by law to exercise judicial power be independent and impartial).

However it should be stressed that, with regard to professional judges, the Court considers them as impartial „by definition”, as such, because unlike a jury, they have experience and training to enable them to avoid any external suggestion at trial³¹.

SUMMARY

To sum up, the topic of judicial independence is not very popular, especially in the era of austerity; therefore it is still important to explain the meaning of judicial independence and why it is so crucial³². It is necessary to stress that although all the guarantees of judicial independence which were elaborated in the doctrine are indispensable, and so are the conditions which must be met, according to the European Court of Human Right's case-law, yet, what is most important for enjoying the judicial independence is the vocation for the profession, as only someone fully committed to his work, yet open-minded and understanding the different roles of judicial professions and importance of judicial activities for the whole society may be a truly independent judge. In other words, quoting the

³⁰ As for the personal involvement of the Minister of Justice see also case *Konstas vs. Greece*, where MoJ, during a plenary debate in the Parliament declared that he was satisfied with the first instance court verdict, while the appellate proceedings were still pending.

³¹ *Craxi vs. Italy*, par. 104.

³² J. Laffranque, *Judicial Independence in Europe: Principles and Reality* (in:) N.A. Engstad, A.L. Froseth, B. Tonder (eds.) *The Independence of Judges*, Eleven International Publishing 2014, p. 127.

French ethical code of judges: „Ruling in an independent fashion is also a state of mind”; or, to quote Lord Hope of Craighead from the other side of the English Channel – the independence lies in the hearts and minds of the judges.

NIEZAWISŁOŚĆ SĘDZIOWSKA W ŚWIETLE ART. 6
KONWENCJI O OCHRONIE PRAW CZŁOWIEKA
– WYBRANE ZAGADNIENIA

Streszczenie. Celem artykułu jest ukazanie stosunku Europejskiego Trybunału Praw Człowieka do zagadnienia niezależności sądów i niezawisłości sędziów oraz porównanie go ze stanowiskiem polskiej doktryny. Orzecznictwo Trybunału jest efektem jego postanowień Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności, znaczenie Konwencji w polskich realiach jest coraz większe, z uwagi na to, że działalność orzecznicza Trybunału często dotyka kwestii mających podstawowe znaczenie dla polskiego systemu prawnego, w tym kwestii niezawisłości sędziów i niezależności sądów.

Słowa kluczowe: niezawisłość sędziowska, niezależność sądów, Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, gwarancje niezawisłości sędziowskiej, orzecznictwo Europejskiego Trybunału Praw Człowieka w Strasburgu