RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY
Rok LXXVIII – zeszyt 2 – 2016

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THE INDEPENDENCE OF THE COURTS AND JUDICIAL INDEPENDENCE FROM THE EUROPEAN UNION LAW PERSPECTIVE*

I. INTRODUCTION

It is commonly assumed that the independence of the courts and judicial independence constitute one of the pillars of the rule of law in a democratic state, and that the rule of law is the foundation of a democratic society, ensuring the equality of citizens before the law and securing the protection of their rights and freedoms. Equally, it provides impartial control over governance by the state. The main premise of the idea of the rule of law, which was originally established in England, is that in a state governed by the law no-one is above the law and no-one is outlawed. For the rule of law to apply it requires the duty to submit to the law to be recognised by all the citizens and all the organs of state, irrespective of their nature. Hence it embraces the executive, the legislature, and the judiciary. At the same time this kind of division of competence in executing state power is another feature of the rule of law. In a political system based on the separation of powers, the independence of the judiciary is a key element of the rule of law.

The historical experience indicates that all democratic systems are founded on a certain set of values. These values, especially the rule of law, are constantly put at risk by various factors. At the present time, these include terrorism, fundamentalism, or different kinds of radical populism, along with the commercialisation and political dependence of the media, and the exploitation of the law by the governing class. Democratic order is protected primarily through the currently applicable legal system and it is the judiciary, as the guardian of the rule of law, that may find itself under pressure from those abusing their power in the pursuit of political goals. For this reason, it is important to understand judicial independence correctly. Whilst discussing this topic, it is worth considering the regulations contained in European Union law. This is especially justified as the idea of the independence of the judiciary, initially adopted within domestic legal orders, has eventually broadened in scope and the principles of judicial independence have been laid down at an

* Translation of the paper into English has been financed by the Minister of Science and Higher Education as part of agreement no. 541/P-DUN/2016. Translated by Iwona Grenda and Aleksander Bucholski. (Editor's note.)

international level; recently, the increasing influence of international legislation on domestic legal systems has been evident. The United Kingdom is considered to be a telling example of this trend, where the case-law of the European Court of Human Rights resulted in the implementation of the European Convention on Human Rights in the domestic legal order through the passing of the Human Rights Act of 1998, followed by the Constitutional Reform Act of 2005, which introduced the separation of the post of Lord Chancellor from the judiciary. Prior to the reform, the Lord Chancellor was at one and the same time the head of the judiciary in England and Wales, whilst simultaneously fulfilling important duties both in Cabinet, and Parliament.

There are two distinct areas in which EU law refers to the independence of the judiciary and emphasises its importance. The first stems from the principle of the democratic legal state (*Rechtstaat*); the second is linked to the right of access to the courts as a keystone of the protection of individual rights and freedoms. These questions are the main focus of the discussion herein.

II. THE INDEPENDENCE OF THE COURTS AS THE KEYSTONE OF THE RULE OF LAW

Article 2 of the Treaty on European Union, which states the values on which the European Union is founded, such as human dignity, freedom, equality, and democracy, includes the rule of law. The preamble to the Treaty contains confirmation of the European Union's attachment/commitment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. The primary question then is how to understand the notion of the rule of law. It is assumed that the notion of the rule of law, as it appears in Article 2 of the Treaty on European Union, is indeed identical to the notion of the democratic legal state (*Rechtstaat*) in Article 2 of Constitution of the Republic of Poland.

The idea of the rule of law was conceived during the Enlightenment, in response to the legal system of absolute monarchy. Initially, the premise of the state of law encompassed the following elements: the principle of constitutionalism, the principle of the separation of powers, independence of the judiciary, Acts of Parliament considered as the basic source of law, compliance with the law by the organs of state, a democratic legislative process, and the contents of the law being themselves liberal. The set of principles of the legal state has been extended over time. Many appreciated the need for the *Rechtstaat* to further expand the system of institutions and guarantees of the compliance with the law of the organs of state, as well as to create a system safeguarding the protection of civil rights and freedoms. Later, the rule of law was extended to include socio-economic elements. Nowadays the rule of law is considered to be primarily built on:

1) The principle of constitutionalism
2) The sovereignty of the People
3) The separation of powers
4) Acts of Parliament considered as the basic source of law

5) Judicial independence
6) The existence of self-government
7) The existence of constitutional guarantees of civil rights and liberties.[1]

According to some authors, the essential features of a state governed by the rule of law include the right to a fair and speedy trial, the existence of a system of control over the organs of state, the prohibition of retroactive legislation, and the involvement of the state authorities in promoting justice.

In the light of the above, it is beyond doubt that the independence of the courts and judicial independence are the foundation of the rule of law. Apart from the independence of the judiciary, which in the Polish legal system includes courts and tribunals (Article 173 of the Constitution), the critical element is the principle of the separation of powers. The separation of powers in its most general sense entails the organisational and functional separation of the legislature, the executive, and the judiciary. Its primary objective is to prevent the concentration of power, which encourages the abuse of power. Obviously, the principle does not assume superiority of any of the powers. It is commonly considered to be impossible to safeguard the independence of the judiciary without the separation of powers being respected. It is worth emphasising that the separation of powers not only involves a system of 'checks and balances' but equally envisions the mutual recognition of competences and cooperation between the powers; ensuring the independence of the judiciary is their joint obligation. What is within the exclusive competence of the judiciary is the administration of justice. This means that neither of the other two powers may interfere with how the courts adjudicate.

Within the judiciary, Poland's Trybunał Konstytucyjny (the Constitutional Tribunal) is competent to assess the hierarchical conformity of legal norms with the norms contained in the legislative acts of higher power, which are the standard of review. According to this principle, the standards of review for Acts of Parliament are legal norms contained in the Constitution or ratified international treaties (Article 188 of the Constitution). It must be stressed that according to Article 190 of the Constitution only the Constitutional Tribunal has the power to conduct a final assessment of the hierarchical conformity of legal provisions with the constitutional standard, its rulings having a universally binding effect. In this respect, the competence of the Constitutional Tribunal cannot be executed by any other organ of the judiciary.

In the Polish context, the model of a democratic legal state has been designed in response to the principle of the uniformity of state power which was in force under communist rule. The statement that 'the Republic of Poland is a democratic legal state' appeared for the first time in 1989, following subsequent amendments to the 1952 Constitution. Hence, the institutions of a democratic legal state have been present in Poland for a relatively short time. It has been underlined in many studies that in post-communist states there is a danger of the law being abused in the pursuit of political aims. An example of such an approach is the widespread opinion that 'the sovereign can make anything he wishes into law'. Using the law as a political instrument is con-

[1] M. Pietrzak, *Demokratyczne, świeckie państwo prawne*, Warsaw, 1999, 33.

sidered to be a combined outcome of bureaucratic and authoritarian practices of a bygone era on the one hand, and on the other hand of populist interpretations of the notion of democracy expressed in the belief that the political majority is always right. Consequently, abuse of the law in the pursuit of political aims usually results in the corrosion of the rule of law, notwithstanding some basic institutions and procedures to safeguard it having been implemented in the society in question.[2]

In response to the experience of the communist regime, Poland has included a number of guarantees of judicial independence in the Constitution currently in force. The political system has been founded on the principle of the separation and balance of the legislature, the executive and the judiciary (Article 10 of the Constitution of the Republic of Poland). In addition to the above, Article 173 of the Constitution emphasises the separate status of the judiciary and its independence from other powers. The principle of the separation of powers is then further elaborated in the provisions of the Constitution regarding the appointment of judges for an indefinite period (Article 179), the irremovability and immovability of judges (Article 180), the right to remuneration corresponding to the dignity of their profession (Article 178), and judicial immunity (Article 181). It seemed that such guarantees of judicial independence and of the independence of the courts, at the level of constitutional provisions, were enough to ensure the actual independence of the judiciary. However, the attempts to amend the Constitutional Tribunal Act over the last few months are evidence of still continuing threats in this area. Furthermore, these events have proven the importance of the role played by the Constitutional Tribunal in a democratic legal state, as a guardian of the sustainability of systemic provisions contained in the Constitution, including the principle of the separation of powers and the independence of the judiciary. An example of the significant role played by the Constitutional Tribunal in safeguarding the independence of the judiciary is the ruling of 14 October 2015 (Kp 1/15), in which the Tribunal touched on the question of the execution of supervisory powers over the common courts by the Minister of Justice. The Constitutional Tribunal ruled that conferring upon the Minister of Justice (within his supervisory powers) a competence to demand access to the files of a pending case would be an unjustified interference with the exclusive domain of the courts and would undermine the principle of judicial independence and the independence of the courts. The Tribunal has emphasised that external access to files, reflecting the course of the proceedings, might influence the administration of justice by disturbing the consideration of a case and exerting pressure on a judge, hence having an impact on the decision.

Another guarantee of judicial independence is introduced by Article 186 of the Constitution, which appoints the National Council of the Judiciary as guardian of the independence of the courts and judicial independence. In this area the Council has been given significant competencies regarding filling judicial vacancies. It has the power to request from the President the appoint-

[2] T.J. Stawecki, Niezależność zawodów prawniczych i rządy prawa w społeczeństwie postkomunistycznym, in: T. Waradyński, M. Niziołek (eds.), *Niezależność sądownictwa i zawodów prawniczych jako fundamenty państwa prawa*, Warsaw 2009, 57.

ment of recommended persons as judges. Furthermore, it has the right to ask the Constitutional Tribunal to assess whether a legislative act is in conformity with the Constitution, as far as the independence of the courts or judicial independence are concerned.

Distinguishing between the notions of the independence of the courts and judicial independence is a consequence of using different frames of reference. The independence of the courts is a question of their organisational and functional separation from other organs of state. According to the opinion of the Constitutional Tribunal expressed in the ruling of 9 November 1993 (K 11/93), the independence of a judge consists in a judge acting solely on the basis of the law in accordance with his conscience and inner conviction. However, judicial independence is closely linked to the independence of the courts. The notion of judicial independence encompasses a few basic elements:

1) Impartiality in respect of the participants in proceedings
2) Independence from non-judicial organs
3) Independence from judicial authorities and organs
4) Independence from political factors
5) Internal independence of judges.

III. INDEPENDENCE OF THE JUDICIARY FROM THE PERSPECTIVE OF THE RIGHT OF ACCESS TO COURT

Another area of the regulation of the independence of the judiciary in EU law is connected to the right of access to court. According to Article 6 of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties; furthermore, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Meanwhile, the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms shall constitute the general principles of the Union's law. Article 47 of the Charter of Fundamental Rights of the European Union states that everyone whose rights and freedoms guaranteed by the law of the European Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article and that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Whereas according to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. A comparison of this provision with the wording of Article 45 of the Constitution of the Republic of Poland, which states that everyone has the right to a fair and public hearing without unjustified delay by an independent and impartial court, reveals clear similarities between these two regulations. Hence it is understood that Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47 of the Charter of Fundamental

Rights of the European Union, along with the judicial decision delivered by the European Court of Human Rights, have significantly influenced the correct interpretation of the right of access to court contained in Article 45 of the Polish Constitution. An adequate understanding of this right is fundamental for the existence and functioning of a state governed by the rule of law.

The provisions referred to above suggest the correct context in which the significance and function of judicial independence should be assessed in a state governed by the rule of law. In such a political system the primary aim of the principle of the independence of the courts and judicial independence is to safeguard the right of access to court, as expressed in Article 45 of the Polish Constitution. Furthermore, these provisions clearly indicate the existence of a link between the independence of the courts and judicial independence, and the impartiality of the judge and the guarantee of the right to a fair hearing by a court. They illustrate that the independence of the judiciary is not a privilege of those who administer justice, as is frequently portrayed by some politicians and the media, but an actual guarantee of the protection of individual rights and freedoms. It is especially vital when relation between individuals and public authorities is concerned, which was pointed out by the Constitutional Tribunal in the reasons for the judgment of 9 November 1993 (K 11/93). The Tribunal stressed then that the notion of judicial independence had an established definition and provided the basic guarantee of impartial adjudication. The principle of judicial independence correlates to the duty of impartiality on the judge's side. The scope of this obligation is sometimes even wider that of the principle of judicial independence. As much as the principle relates to its impact on third parties, the duty of impartiality binds the judge to put aside convictions originating from his experience, stereotypes that he might have in mind, and bias. For judicial independence is not a subjective right of a person performing the duties of a judge; it is rather an element of their of professional integrity and in such a context judicial independence also safeguards individual rights and obligations.

The rulings by the European Court of Human Rights, in which the Court delivered the interpretation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the light of a correct understanding of the notion of judicial independence, have undoubtedly been of crucial significance for domestic law. They are often cited equally by the Constitutional Tribunal, the Supreme Court, and the common courts. The European Court of Human Rights has indicated on numerous occasions which elements should be considered in determining whether the conditions for judicial independence have been met. In the Court's opinion, one has primarily to take into consideration the procedure of appointing the judges, the duration of their term of office, the appropriate financial status of the judges, the rules of disciplinary responsibility of the judges, the procedure for suspending or removing the judges from office and the existence of bulwarks against external pressure, and the question of whether the court displays independence (see the judgment by the European Court of Human Rights of 25 February 1997 in the case of *Findlay v. United Kingdom*). The perception of the court as independent is essential from the point of view of its impartiality. The social perception of the court as independent and impartial is predominantly subject

to an assessment of whether the guarantees and conditions the court has been provided with are considered by the general public as vital in the context of the court's independence. It is emphasised that the key requirement for the administration of justice to be efficient is to maintain the trust of society in the independence and impartiality of the courts. The importance of this question was raised by the Constitutional Tribunal in the reasons for the judgment of 9 December 2015 (K 35/15), when it referred to the ruling by the European Court of Human Rights of 30 November 2010 in the case of *Henryk Urban and Ryszard Urban v. Poland*. Hence it needs stressing that strengthening the confidence of society in the justice system (and in a broader sense in the judiciary) is a significant factor in preserving judicial independence. From this perspective, the attempts to undermine the authority of the judiciary by representatives of other state powers, along with reckless actions undertaken for political reasons, compromise not only the principles of the democratic legal state, but equally the guarantees of individual rights and freedoms.

It must be borne in mind that the independence of the courts and judicial independence are closely linked to the rules of judicial responsibility. Under the current law there are a number of mechanisms which safeguard the proper functioning of the judiciary, including the possibility of compensating for a loss caused by an unlawful judgment. The judges themselves are responsible to society, both for their professional conduct and their personal behaviour in their private lives. Conferring the attributes of independence upon the judges entails expecting them to comply with high professional and behavioural standards, and maintain them in their private lives too. These standards need to be in line with the principles of judicial ethics and put substantial limitations on the personal lives of judges and these limitations are much more severe than those to which the ordinary citizen is subject. Yet they are necessary in order to ensure that society has confidence in the justice system.

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INDEPENDENCE OF THE COURTS AND JUDICIAL INDEPENDENCE FROM THE EUROPEAN UNION LAW PERSPECTIVE

S u m m a r y

The independence of the courts and the judiciary constitutes one of the foundations of the rule of law and is one of the basic values of the European Union. Judicial independence is also guaranteed by the principle of the separation of powers. According to this principle courts are the only competent body to execute judiciary powers and no other organs may be permitted to interfere in judicial decisions or their making. Democratic states must have the independence of the courts ensured in their constitutions. The basic function of judicial independence is ensuring citizens the right to a fair trial as provided in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 45 of the Constitution of the Republic of Poland. From the point of view of the right to a fair trial the relationship between the independence of the courts and judicial independence on the one hand and the guarantee of the impartiality of the courts and of a fair trial on the other, is important. The independence of the courts and the judiciary is closely related to the principle of the responsibility of judicial authority.