

Requirements of the Polish Constitutional Tribunal jurisprudence in relation to the psyche of an independent judge

Keywords: judicial independence, polish constitutional court, polish constitutional tribunal, judicial impartiality

Abstract: This paper examines the concept of judicial independence (JI) through an analysis of the Polish Constitutional Tribunal's jurisprudence. It elucidates the subjective dimensions of JI, exploring how judges experience and uphold independence in their decision-making processes. Key elements of personal JI, including impartiality, independence from external pressures, self-reliance, immunity from political influences, and internal independence within the judiciary, are identified and discussed. The paper underscores the role of fear in inhibiting personal JI and refers to the concept of positive JI, reflecting judges' assertiveness and confidence in their legal authority. By advocating for a holistic and empirical understanding of JI that encompasses both subjective aspects, this study contributes to a deeper comprehension of judicial independence and its implications for the rule of law.

Why the subjective notion of judicial independence matters

For every liberal democratic state, it is necessary to base its legal system on the rule of tripartite of powers. As a consequence of the tripartition of power, it is unthinkable for a modern or post-modern system to not regulate the separation of the judiciary from the legislative and the executive. One of the basic guarantees of this separation is the institution of judicial independence (JI). However, besides guaranteeing separation of powers, JI's function is to serve as a principle for the right to a fair trial. JI was tied to this right by not only multiple constitutions but also international agreements. Examples are International Covenant on Civil and Political

Rights in article 14, Universal Declaration of Human Rights in article 10, and Charter of Fundamental Rights of the European Union in article 47. Therefore, the JI is not only necessary for the tripartite of power but also it is a part of the right utilized to protect other rights. The whole role of the JI is to let the people successfully exercise and execute their basic rights.

What is trivial, the JI is addressed towards the Courts. The modern democratic standard is that the Courts or Tribunals must be independent, however, this independence emanates from the singular, named courts and tribunals. In the jurisprudence of the European Court of Human Rights (ECHR), JI can be understood in the means of external-internal framework (Sillen, 2019; Mańko, 2021). External JI can be understood as freedom from any pressure from any unnecessary outside institutions, such as the government, the head of the state, the church, or the press (Mańko, 2021). Therefore, external JI is also called institutional independence. On the other hand, internal JI is defined also as freedom from any unnecessary pressure, from within the judiciary. Internal freedom can be exercised on multiple levels, from the whole judicial system to the particular case in a particular court. It means that the Judges can't be pressured by any other members of their group while adjudicating (Sillen, 2019).

As it was recently remarked by Huchhanavar (2023), most of the Western legal jurisprudence and legal theory are focused on institutional aspects. Both the aforementioned internal and external approaches to the JI don't concern any personal factors about the judge. Those are often overlooked in favor of "measurable" and "objective" approaches. Despite that, the law often states expectations about the behavior of an independent judge. Moreover, both for the Judges and the Lawyers being independent is evident as inherently being connected with the subjectivity and experiencing the law-in-action. There are two main aspects of the subjective JI. Firstly, JI can be understood in negative terms, as freedom from outside pressure. In that state, the ruling judge should not feel fear or hesitation about the consequences of a fair ruling.

The second understanding is connected with the notion of positive JI (Hillbink, 2012). Here, the judge must act as if they were independent while exercising their power, free to adjudicate according to the law and their conscience. What is demanded from the psyche of a Judge – how they should proceed with their emotions, their perception, experience being-independent, and all that flourishing inner, subjective world – is mainly unknown when it comes to the JI.

Up-to-date research that tried to explore the field of experience JI did it rather without empirical methods. That is not a surprise because the topic of any personal JI was not deeply and broadly examined, except for the field of virtue jurisprudence. To my best knowledge, there were only two attempts to empirically get answers on the nature of JI– one in the global, historical measure of levels of JI in the years 1948-2012 (Linzer & Staton, 2015) and one using simple questionnaires (van Dijk, 2021). Both studies in my opinion did not grasp the idea of the subjectivity in JI. The lack of a widely known theory does not encourage legal and social researchers at all to study the judicial perspective as it is done, for example, in the context of another important component of a right to a fair trial – impartiality.

The issue of why there is such little focus put on the subjectivity and personality of experience in the JI might be of a linguistic nature. In many modern languages, there is only one word for independence, both of the Judges and the judiciary, both external, internal, negative, positive, etc. In Poland, JI is expressed by two different, yet related notions. One of them refers to the broadly examined “objective” JI. This notion is created by the word “niezależność” and can be easily and directly translated as independence. The second notion, “niezawisłość” is much more ephemeral and refers in some way to independence, but in the personal, subjective dimension, available only to the incumbent judge. Therefore, for the purpose of this paper, I will further refer to “niezależność” as institutional and “niezawisłość” as subjective or personal JI. Moreover, the hypothesis of the uniqueness of the notion of “niezawisłość” and its value in comparative studies can be supported more by the Sapir-Whorf hypothesis, according to which

the perception of the world is created differently for native speakers of different languages (Studnicki, 1992). The hypothesis manifests itself in the perception of colors and emotions (Perlovsky, 2009)

Despite Poland's recent crises concerning JI and the rule of law, the idea of subjective JI can be borrowed as helpful in a broader understanding of the notion of JI in practice. Moreover, the notion of subjective independence sustained any levels of JI in Poland, leaving foundations for a further comeback towards constitutional values.

Therefore, as the JI is a constitutional value, in the lack of empirical data, we should examine the notion of subjective JI through the jurisprudence of the Polish Constitutional Tribunal (PCT). It would help to explore and bracket different expectations to the sphere of what the Judges should think and feel. This idealized world must however be confronted with an ontological assumption taken in this paper, that the people are not responsible for their thoughts nor their affects. Yet, extracting those psychological requirements might reveal the idealistic world of what it means to be subjectively independent.

Personal judicial independence according to Polish Constitutional Tribunal

JI is stated in the Polish constitution and lower hierarchy legal acts. This paper focuses only on the constitutional understanding of it as the constitution emanates on all Polish legal acts¹. The main constitutional regulation of subjective independence is placed in Article 178, section 1.

Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

¹ One of the examples is the principle of autonomy of the constitutional terminology, (ruling of PCT P 1/05).

However, in English translation two mentioned words – respectively for institutional and personal independence – were merged into “shall be independent”. Even official translation could not grasp the difference. Those two notions of personal and institutional independence – “niezawisłość” and “niezależność” are sometimes even used synonymously by PCT (K 40/07). However, whether those are synonymous should depend on the case, as there are always reasons for the constitutional legislator to create different terminology for different institutions. What is more certain is that both, institutional and personal/subjective JI cannot be entirely separated. In one of the most cited cases on personal JI – K 3/98 – PCT based on the desk research of Polish legal doctrine constructed 5 elements of personal JI. Those are:

1. Impartiality towards the participants.
2. Independence towards extra-judiciary institutions.
3. Self-reliance of the judge in relation to the authorities and other judicial bodies.
4. Independence from political factors, especially from political parties.
5. Internal independence of the judge.

Ad 1 – PCT interconnected impartiality with personal JI. Here, it is clearly demanded for the ruling judge to reduce the outcome of their biases (Mack et al., 2021). As bias or prejudices are inevitable (Allport, 1954) main thing that is demanded here is insight and knowledge about own biases (K 11/93). As PCT stated in later case SK 7/06 – *the judge must additionally have the inner conviction of being able to pass judgment without favoring any participant in the proceedings*. Moreover, the judge must not get carried away by any emotions towards the participants. Impartiality however is not a subject of this article and, therefore will not be elaborated further. I must redirect here to the much broader literature on this topic.

Ad 2 – It is nothing more than external, institutional JI, corresponding with the Western doctrine and jurisprudence of ECHR.

Ad 3 – Here, the PCT tried to emphasize that the judge needs to be decisive in the meaning, that they have to have mental capabilities to decide on the case alone, easily create their own opinion, and then consequently follow it. This self-reliance in relation to other judicial bodies is similar to ECHR's concept of internal JI. It is however a really difficult quest as they need to control their impartiality at the same time. What also PCT demands from the judges is to be “a man of integrity” (Soniewicka, 2021).

Ad 4 – Independence from political factors is interconnected with the classical tripartition of the powers. What does also PCT demands here is that the judge will reduce their bias toward the political beliefs of litigants.

Ad 5 – Internal independence must be understood differently than in the context of ECHR. The PCT referred to the independence of the singular judge as a person.

The intangibility of internal independence

In K 3/98 PCT referred mostly to the cognitive factors. Any place for affects or ephemerality lies in the impartiality factor and significantly – in the internal independence of the judge. In the jurisprudence of PCT, this term of internal independence is never further elaborated – there is no singular mention referring to this exact aspect of JI, yet all those five aspects had been quoted often in the jurisprudence. Jerome Frank (1947) put a thesis, that for a judge there are some intimate phenomena *which no biographer, however sedulous, is likely to ferret out, and the emotional significance judge, or a psychologist in the closest contact with him, could comprehend*. Perhaps, the internal independence as constructed by PCT is such an

intimate phenomenon, that can be experienced exclusively by the Judges and understood with the use of psychological methods. Nonetheless, I will try to unveil more of the subjective requirements from the jurisprudence of PCT.

The PCT narrative on JI is constructed around the notions of “guarding”, and “protecting” the judiciary from the outside pressure, which is considered as “danger” (K 11/93). What also must be remembered is that according to PCT the main guarantee of personal JI is judicial immunity and non-transferability principle (K 1/98). The legal system should create conditions for the Judges that would not generate any fear of the loss of their job, position, or authority. Therefore, what can be inferred – for PCT one of the most important factors that would make a judge not independent – is fear. To be precise, the system should not make the Judges worry about their position. The stress generated by the fear would make the adjudicating judge biased. A stressed, pressured judge would then rule not to exercise a right to a fair trial, which is the whole reason for the existence of the personal JI (e.g. SK 7/06), but to maintain their job and position in the social hierarchy.

If we look through the lens of fear as a main factor that prevents the JI, five of the above aspects gain a deeper meaning. The judge cannot be independent if they fear any consequences of a fair ruling that would come from the litigants. It is especially important when the litigators are connected to the politics.

For example, the pressure comes even when the litigants are from the political party that is for either *a* expansion or *b* reduction of the sphere of judicial privileges. In case *a* – the judge might fear a missed chance to enhance their authority or improve living conditions and in case *b*, the judge might fear the loss of their privileges or even the job. In conditions *a* and *b*, the judge would not be independent as they would be motivated by fear, not by the social role they are in nor by the law.

Lack of fear is also visible in the jurisprudence on judicial salaries. According to the PCC, the financial aspect can help keep up the level of personal JI. The judge that does not need to fear about their income is less prone to the influence of political factors. Moreover, the danger of poverty can cause lower cognitive functions (Mani et al., 2013), impacting directly decision making.

Positive-negative judicial independence

According to PCC, personal JI is not only a privilege but also a duty (Kp 1/15, K 3/98, K 11/93). How can internal independence be a duty? Perhaps, the notion needs to be understood not only negatively, as a lack of fear or lack of pressure, but rather in a positive way. Here, positive JI demands more concrete behavior from the judges. It can be simply understood as acting as an independent judge, with judicial assertiveness (Hilbink, 2012).

The positively independent judge should assert *legal authority against powerful actors*, even outside the court (e.g. non-political judicial activism²; Hilbink, 2012). In other words, positive JI understood on a personal and subjective level should allow the judge *freedom to envision and realize certain goals* (Karlán, 1999). Such positive JI is correlated to judicial self-reliance. It was mentioned as a cognitive and affective factor of the personal JI by PCT (K 3/98). To achieve full self-reliance, according to PCT, the pressure cannot *disqualify the professional skills* of the judge (Kp 1/15). What is demanded from the judge are some levels of sense of agency and self-reliability. It is impossible for a judge to feel intimate phenomena of the JI when they do not feel competent when they do not possess healthy self-esteem. Judge without this quality is deemed to be dependent on non-rational and unwanted factors, such as pressure and indecisiveness.

² Of course, if there can really be any non-political judicial activism ever.

Conclusions and closing remarks

People do not really have a choice in what they feel or what they think. In this paper, I tried to present only some prerequisites and expectations directed from PCT towards the Polish judges based on the notion of personal or subjective JI. A truly independent judge should feel independent not because he or she has the right mental predisposition, but because he or she is able to act courageously and face his or her fears despite negative mental predispositions. In the end, not much can be extracted through the sole analysis of the jurisprudence of PCT. The notion of the internal independence of the judge remains unknown, and probably it was not elaborated by PCT on purpose. Moreover, intimacy of personal, truly internal JI might also be the core of the JI itself, when we treat personal JI *per analogiam*³ to the right to privacy (K 24/98).

Within the framework of negative-positive JI, it must be said, that in the context of personal independence two main factors are the most relevant. Negative – as lack of fear and positive – as self-agency and self-esteem. Therefore, negative JI is associated mostly with the affects and positive – to cognition.

Clearly, inspired by Frank's studies on the judicial mind (1930:2017, 1947) there is much left to explore in the empirical field when it comes to the personal JI, especially to the fifth aspect of the JI – the internal independence of a judge (K 3/98). Assuming that personal JI is intimate and can be bracketed autobiographically by the judges or by close psychological case studies (Frank, 1947), the quantitative and experimental methodology must be for now excluded. If the goal of the research is to understand the close phenomena of being-an-independent-judge placed in the lived-world, then only the qualitative methodologies are suitable, providing hermeneutical and phenomenological tools to amplify the experience (Alase, 2017). Despite

³ The basis for an analogy is derived by the similarity of personal and subjective qualities in both institutions.

the lack of clear definitions, cited jurisprudence exposed some factors, genuine to Polish legal context, that are based on the unique word “niezawisłość”. This uniqueness leaves a broad field for further interdisciplinary analyses.

REFERENCES:

- Alase, A. (2017). The Interpretative Phenomenological Analysis (IPA): A Guide to a Good Qualitative Research Approach. *International Journal of Education and Literacy Studies*, 5(2), 9. <https://doi.org/10.7575/aiac.ijels.v.5n.2p.9>
- Allport, G. W. (1954). *The nature of prejudice*. Addison-Wesley.
- Ferejohn, J. A., & Kramer, L. D. (2002). Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint. *New York University Law Review*, 77(4), 962–1039.
- Frank, J. (1948). Say It with Music. *Harvard Law Review*, 61(6), 921. <https://doi.org/10.2307/1336139>
- Frank, J., & Bix, B. H. (2017). *Law and the Modern Mind*. Routledge. <https://doi.org/10.4324/9780203787533>
- Gizbert-Studnicki, T. (1992). Język prawny a obraz świata. In G. Skąpska, J. Czapska, Krystyna Daniel, Jakub Górski, & Krzysztof Pałeczki (Eds.), *Prawo w zmieniającym się społeczeństwie. Księga jubileuszowa prof. Marii Boruckiej-Arctowej*. Wydawnictwo Adam Marszałek, Uniwersytet Jagielloński.
- Hilbink, L. (2012). The Origins of Positive Judicial Independence. *World Politics*, 64(4), 587–621.
- Huchhanavar, S. S. (2023). Conceptualising Judicial Independence and Accountability from a Regulatory Perspective. *Oslo Law Review*, 9(2), 110–148. <https://doi.org/10.18261/olr.9.2.3>
- Karlan, P. S. (1998). Two concepts of judicial independence. *Southern California Law Review*, 72, 535–558.

Linzer, D. A., & Staton, J. K. (2015). A Global Measure of Judicial Independence, 1948–2012. *Journal of Law and Courts*, 3(2), 223–256. <https://doi.org/10.1086/682150>

Mack, K., Anleu, S. R., & Tutton, J. (2022). Judicial Impartiality, Bias, and Emotion. *Australian Journal of Administrative Law*, 28(2), 66–82.

Mani, A., Mullainathan, S., Shafir, E., & Zhao, J. (2013). Poverty Impedes Cognitive Function. *Science*, 341(6149), 976–980. <https://doi.org/10.1126/science.1238041>

Mańko, R. (2021). *Council of Europe standards on judicial independence*. European Parliamentary Research Service.

Perlovsky, L. (2009). Language and emotions: Emotional Sapir–Whorf hypothesis. *Neural Networks*, 22(5–6), 518–526. <https://doi.org/10.1016/j.neunet.2009.06.034>

Soniewicka, M. (2021). Integralność sędziego z perspektywy jurysprudencji cnót. *Krytyka Prawa*, 13(3). <https://doi.org/10.7206/kp.2080-1084.473>

Van Dijk, F. (2021). *Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary*. Springer International Publishing. <https://doi.org/10.1007/978-3-030-63143-7>

JUDGMENTS OF THE POLISH CONSTITUTIONAL COURT:

- of 9th of November 1993, K 11/93
- of 24th of July 1998, K 3/98
- of 21st October 1998, K 24/98
- of 27th January 1999, K 1/98
- of 24th October 2007, SK 7/06
- of 14th October 2015, Kp 1/15