**Zuzanna Topyłło**

**Outline of current understanding of right to court in Poland – study of legal acts and case law**

The starting point for considering the issue of the right to a court in Poland is Article 45 of the Polish Constitution, where this right is explicitly expressed[[1]](#footnote-1). It states: *Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court*. The right to a court in Poland is therefore complex in nature, and the case law itself distinguishes at least three of its elements[[2]](#footnote-2):

1. Access to a court as an independent and impartial body. The first attribute – independence – is of an external nature and determines the specificity of the relationship between the judiciary and the other authorities. According to the Constitutional Tribunal’s judgement issued in the case K 28/04, the principle of independence refers to the exclusive authority of the courts in the administration of justice, and therefore the absence of any external influence in the field of adjudication. This feature, according to the Constitutional Tribunal, is also associated with the absence of any interference in the structure, composition and operation of the judiciary[[3]](#footnote-3). The second requirement – impartiality – as an internal criterion is directed at judges and concerns their preservation of objectivity towards the parties[[4]](#footnote-4).[[5]](#footnote-5)
2. Right to a fair and public hearing. The right to a fair trial relates to the proper form of judicial proceedings and involves, for example, the right to the assistance of counsel or to appeal judgments and decisions rendered at first instance[[6]](#footnote-6). Openness, on the other hand, refers to the right of the parties to take part in the proceedings and allowing the public to access to court hearings[[7]](#footnote-7).
3. Right to a judgment understood as a binding settlement of a dispute issued by a court[[8]](#footnote-8).

The shape of the right to a court internationally is determined, among others, by Article 47 of the CFR[[9]](#footnote-9)[[10]](#footnote-10) and Article 6(1) of the ECHR.

According to the judicature of the CJEU, among the conditions that a body should meet in order to be considered a ’court‘ under the EU law are: the establishment by the law, its permanent nature, the compulsory jurisdiction, the adversariality of the proceedings, the application of the law by the body, and its independence[[11]](#footnote-11).

According to the case law of the ECHR, a court must always be established by law and meet a number of requirements, such as independence, particularly from the executive branch, and impartiality. In the context of the organization of the judiciary, the Court points to the need to establish a procedure for the appointment of judges that would protect them from undue influence by the executive and legislative branches.[[12]](#footnote-12)

At this point, it is worth mentioning the recent litigation that has emerged over the application of the right to a court. In view of the purpose of the project (“Rule of law and independent judiciary: Major challenges for Ukraine and Poland in the context of European Union integration”), of which this study is a part, and the already indicated examples of the Polish jurisprudence, the focus will be shifted to the international jurisdiction:

1) The National Council of the Judiciary (the body responsible for selecting candidates for the office of judge), in accordance with Article 187 of the Constitution, consists of 25 members, including 15 elected from among judges and four members elected by the Sejm[[13]](#footnote-13) from among deputies. Prior to the amendment of the Law on the National Council of the Judiciary, this provision was concretized on statutory grounds so that the Sejm elected 4 members from among deputies, while assemblies of judges elected 15 judicial members of the Council. Under the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017, the Sejm elects 15 members who are judges in addition to the 4 deputies[[14]](#footnote-14). This replacement of the selection by the assemblies of judges in favour of the decision of the Sejm, which is a political body, on the grounds of the joined cases C-585/18, C-624/18 and C-625/18, in the opinion of the CJEU, casts doubt on the independence of the judges elected by the NCJ thus formed, and thus does not guarantee the right to a court[[15]](#footnote-15).

2) The amendment to the Article 97 of the Supreme Court Act and Article 107(1) of the Act on the System of Common Courts provide for the possibility of disciplinary liability of judges due to the contents of their ruling. The CJEU, in Case C-791/19, held that "the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned"[[16]](#footnote-16).

3) In the joined cases of *Broda and Bojara v. Poland*, the ECHR considered the removal of the said judges from their positions as vice-presidents of district courts. According to the Court, Article 17(1) of the Act on Amendments to the Act on the System of Common Courts and Other Acts[[17]](#footnote-17) cited as the basis for the dismissal raises doubts from the perspective of the rule of law, and depriving the judges of the possibility to challenge this decision violates their right to a court[[18]](#footnote-18).

4) In the case of *Żurek v. Poland*, the ECHR addressed the issue of the executive branch exerting influence on the holder of the office of judge. In 2016, the [Central Anti-Corruption Bureau](https://www.diki.pl/slownik-angielskiego?q=Central+Anti-Corruption+Bureau) initiated an audit of assets and asset declarations of the applicant, who was a judge and former spokesman for the NCJ. The actions carried out by the [Central Anti-Corruption Bureau](https://www.diki.pl/slownik-angielskiego?q=Central+Anti-Corruption+Bureau) and the prosecutor's office also extended to the judge's closest relatives, and also brought 5 disciplinary proceedings against him. The ECHR concluded that the scrutiny applied to the complainant was too far-reaching, especially given the need to protect a group of people in judicial functions from measures that could threaten their independence and judicial autonomy[[19]](#footnote-19).

Judgements:

Judgement of the Constitutional Tribunal of 9.06.1998, K 28/97, OTK 1998/4/50

Judgement of the Constitutional Tribunal of z 24.06.1998 r., K 3/98; OTK 1998/4/52

Judgement of the Constitutional Tribunal of 27.01.1999, K 1/98, OTK 1999/1/3

Judgement of the Constitutional Tribunal of 16.11.1999, SK 11/99, OTK 1999/7/158

Judgement of the Constitutional Tribunal of 11.06.2002, SK 5/02, OTK-A 2002/4/41

Judgement of the Constitutional Tribunal of 6.12.2004, SK 29/04, OTK-A 2004/11/114

Judgement of the Constitutional Tribunal of 19.07.2005, K 28/04, OTK-A 2005/7/81

Judgement of the CJEU of 17.02.2017, C-503/15, Ramón Margarit Panicello v Pilar Hernández Martínez, EU:C:2017:126

Judgement of the CJEU of 19.11.2019, C585/18, C624/18 i C625/18, A. K. v. Krajowa Radza Sądownictwa and CP, DO v. Sąd Najwyższy, EU:C:2019:982

Judgement of the CJEU of 15.07.2021, C-791/19, European Commission v Republic of Poland, LEX nr 3196950

Judgement of the ECHR of 09.10.2009, 6945/04, Ilatovskiy v. Russia, HUDOC

Judgement of the ECHR of 12.03.2019, 26374/18, Guðmundur Andri Ástráðsson v. Islandia, HUDOC

Judgement of the the ECHR of 29.06.2021 r., 26691/18, 27367/18, Broda and Bojara v. Poland, HUDOC

Judgement of the ECHR of 15.03.2022 r., 43572/18, Grzęda v. Poland, HUDOC

Judgement of the ECHR of 16.06.2022 r., 39650/18, Żurek v. Poland, HUDOC

1. Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended). [↑](#footnote-ref-1)
2. Judgement of the Constitutional Tribunal of 9.06.1998, K 28/97, OTK 1998/4/50. [↑](#footnote-ref-2)
3. Judgement of the Constitutional Tribunal of 19.07.2005, K 28/04, OTK-A 2005/7/81. [↑](#footnote-ref-3)
4. Judgement of the Constitutional Tribunal of 27.01.1999, K 1/98, OTK 1999/1/3; Judgement of the Constitutional Tribunal of z 24.06.1998 r., K 3/98; OTK 1998/4/52. [↑](#footnote-ref-4)
5. Objectivity towards the parties is sometimes treated as an aspect of impartiality indicated as a separate element of the right to court, see, e.g. P. Grzegorczyk, K. Weitz [in:] *Konstytucja RP. Tom I. Komentarz do art. 1–86*, eds. L. Bosek, M. Safjan, Warszawa 2016, art. 45, <https://sip-1legalis-1pl-147d9pe5v0a7c.hps.bj.uj.edu.pl/document-view.seam?documentId=mjxw62zogizdkmjsha2tsmroobqxalrsgu4tamy&refSource=toc> [accessed: 26.01.2023]; a part of the doctrine also uses the concept of independence concerning courts, see, e.g. *EU standards on effective judicial protection and judicial independence*, <https://justice-uapl.project.uj.edu.pl/wydarzenia> [accessed: 27.01.2023]; the Constitution itself refers the concept of independence to courts in Article 45, and to judges in other provisions. [↑](#footnote-ref-5)
6. Judgement of the Constitutional Tribunal of 16.11.1999, SK 11/99, OTK 1999/7/158. [↑](#footnote-ref-6)
7. Judgement of the Constitutional Tribunal of 6.12.2004, SK 29/04, OTK-A 2004/11/114. [↑](#footnote-ref-7)
8. Judgement of the Constitutional Tribunal of 11.06.2002, SK 5/02, OTK-A 2002/4/41. [↑](#footnote-ref-8)
9. Charter of Fundamental Rights of the European Union, http://data.europa.eu/eli/treaty/char\_2012/oj [accessed: 23.02.2024]. [↑](#footnote-ref-9)
10. European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/Convention\_ENG [accessed: 23.02.2024]. [↑](#footnote-ref-10)
11. Judgement of the CJEU of 17.02.2017, C-503/15, *Ramón Margarit Panicello v Pilar Hernández Martínez*, EU:C:2017:126. [↑](#footnote-ref-11)
12. Judgement of the ECHR of 09.10.2009, 6945/04, *Ilatovskiy v. Russia*, HUDOC; Judgement of the ECHR of 12.03.2019, 26374/18, *Guðmundur Andri Ástráðsson v. Islandia*, HUDOC. [↑](#footnote-ref-12)
13. The Polish Lower House. [↑](#footnote-ref-13)
14. The Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other Acts (Journal of Laws of 2018, No. 8). [↑](#footnote-ref-14)
15. Judgement of the CJEU of 19.11.2019, C‑585/18, C‑624/18 i C‑625/18, *A. K. v. Krajowa Radza Sądownictwa* and *CP, DO v. Sąd Najwyższy*, EU:C:2019:982. [↑](#footnote-ref-15)
16. Judgement of the CJEU of 15.07.2021, C-791/19, *European Commission v Republic of Poland*, LEX nr 3196950. [↑](#footnote-ref-16)
17. The Act of 12 July 2017 amending the Act on the System of Common Courts and Other Acts (Journal of Laws of 2017, item 1452), Article 17(1): *Presidents and vice-presidents of courts appointed on the basis of the provisions of the Act amended in Art. 1, in its current wording, may be cancelled by the Minister of Justice within a period not longer than 6 months from the date of entry into force of this Act, without upholding the requirements specified in Art. 27 of the Act amended in Art. 1, as amended by this Act.* [↑](#footnote-ref-17)
18. Judgement of the the ECHR of 29.06.2021 r., 26691/18, 27367/18, *Broda and Bojara v. Poland*, HUDOC; on the right to a court in the context of loss of office, see also Judgement of the ECHR of 15.03.2022 r., 43572/18, *Grzęda v. Poland*, HUDOC. [↑](#footnote-ref-18)
19. Judgement of the ECHR of 16.06.2022 r., 39650/18, *Żurek v. Poland*, HUDOC; on the case of Judge Żurek and other Polish judges, see also Amnesty International report “Poland: free courts, free people”, <https://www.amnesty.org/en/documents/eur37/0418/2019/pl/> [accessed: 31.01.2024). [↑](#footnote-ref-19)