

Judgement of 24th October 2007, SK 7/06
EXERCISE OF JUDICIAL POWER BY ASSISTANT JUDGES
 (OTK ZU 2007, No. 9A, item 108)

Type of proceedings: Constitutional complaint Initiator: A natural person	Composition of Tribunal: Plenary session	Dissenting opinions: 0
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Legal provisions under review:	Basis of review:
<p>Vesting in the assistant judge the performance of the duties of the judge with regard to adjudication.</p> <p>[Act of 27th July 2001 – The law on the organisation of common courts: Article 135 § 1, 2, 5 and 6, Article 135 § 1, read in conjunction with Article 134 § 1, Article 136 § 2, read in conjunction with Article 91 § 1 and Article 77 § 1; Act of 6th June 1997 – Code of Criminal Procedure: Article 250 § 1, read in conjunction with Article 135 § 1 of the above-indicated Act]</p>	<p>Principle of a democratic state ruled by law</p> <p>Principle of separation of powers</p> <p>Legal protection of freedoms</p> <p>Personal inviolability and personal freedom</p> <p>Right to court</p> <p>Exercise of the administration of justice by courts</p> <p>Independence of judges</p> <p>Appointment of judges</p> <p>Irremovability of judges</p> <p>Immunity of judges</p> <p>[Constitution: Article 2, Article 10, Article 31 paragraph 1, Article 41 paragraph 1, Article 45 paragraph 1, Article 175 paragraph 1, Article 178, Article 179, Article 180, Article 181 Convention for the Protection of Human Rights and Fundamental Freedoms: Article 5 and Article 6]</p>

Within the Polish legal system the institution of the assistant judge serves to prepare a person to assume the office of the judge by way of enabling the persons to gain practical experience. A statute precisely specifies the requirements for the assumption of the office of an assistant judge. The office of the assistant judge may be assumed by a person holding Polish citizenship, enjoying full civil rights, having impeccable character, who has completed legal studies in Poland and has obtained a Master's degree or has completed such studies abroad, provided that the studies are recognised in Poland, who is able, regarding the person's state of health, to perform the duties of the judge, and who has also completed a judge's or a public prosecutor's traineeship and has passed a judge's or a public prosecutor's examination.

While indicating the competencies of assistant judges, it is possible to enumerate two types of tasks performed by them: one within the scope of the administration of justice and the other within the scope of legal protection (Article 2 § 3 of The law on the organisation of common courts). Pursuant to the challenged regulation, assistant judges shall, while adjudicating, be independent and subject only to the Constitution and statutes (Article 135 § 2 of The law on the organisation of common courts). For the period of performing the duties of the judge an assistant judge remains under the supervision of a judge who performs the function of a consulting judge (Article 135 § 5 and 6 of The law on the organisation of common courts). The consulting judge assists the assistant judge with judicial technique and the

performance of duties related to judicial administration, as well as carries out reviews of court sessions presided over by the assistant judge. In turn, vesting the performance of judicial acts in the assistant judge lies within the competence of the Minister of Justice.

Proceedings in the present case were initiated by way of two constitutional complaints challenging regulations on the basis of which assistant judges had adjudicated upon the complainants' rights and freedoms. The main allegation presented by the complainants concerned the content of Article 135 paragraph 1 of The law on the organisation of common courts, based on which the Minister of Justice may, with the consent of a regional court's board of judges, vest in an assistant judge the performance of the duties of the judge in the regional court for a specified period not exceeding four years. It is possible to extend the period until the assistant judge has attained 29 years of age or until the completion of the procedure for gathering information on the candidate for a judge that contain data important for the assessment of the candidate's fulfilment of the requirement of impeccable character.

The initiators alleged non-conformity of this regulation to the Constitution, pointing to the equality between assistant judges and judges in terms of the power to adjudicate, while, simultaneously depriving assistant judges of the constitutional guarantee of independence.

Prior to considering the case at a hearing, on 30th October 2006 the Tribunal directed to the Sejm a signalling procedural decision numbered S 3/06. The Constitutional Tribunal pointed to the necessity of undertaking a legislative initiative with regard to the regulation of the appointment system of persons exercising the judicial power in order to ensure full realisation of the constitutional standards of the right to court. The Tribunal emphasised that a potential finding of unconstitutionality of the challenged provisions could trigger a paralysis of the functioning of the administration of justice.

RULING

I

Article 135 § 1 of the Act of 27th July 2001 – The law on the organisation of common courts does not conform to Article 45 paragraph 1 of the Constitution of the Republic of Poland.

II

1. The Tribunal delayed the loss of binding force of the unconstitutional provision for a period of 18 (eighteen) months following the day on which the judgement was published in the Journal of Laws of the Republic of Poland.

2. Acts of assistant judges, enumerated in Article 135 § 1 of the Act referred to in Part I of the Judgement, shall not be subject to a challenge on the grounds of Article 190 paragraph 4 of the Constitution.

Moreover, the Tribunal:

pursuant to Article 39 paragraph 1 point 1 of the Act of 1st August 1997 on the Constitutional Tribunal, decided to discontinue proceedings:

a) regarding the review of the constitutionality of Article 135 § 5 and 6 as well as Article 136 § 2 of the Act of 27th July - The law on the organisation of common courts, given the inadmissibility of adjudication,

b) within the remaining scope, given the superfluity of adjudication.

PRINCIPAL REASONS FOR THE RULING

1. The subject of review of the constitutionality, initiated by way of a constitutional complaint, may only comprise normative acts, upon which basis a final decision on the complainant's constitutional freedoms, rights or obligations has been issued (Article 79 of the Constitution). The basis of the decision encompasses all legal provisions (norms) applied by a given organ in order to issue an act of applying the law.
2. One of the prerequisites for the admissibility of a review of the constitutionality within the procedure of a constitutional complaint is the existence of a relation between the norm under review and a legal basis of a final decision. It is possible to indicate four types of situations, in which the relation in question exists: 1) where the allegation of unconstitutionality concerns a normative act directly referred to in the sentencing part of a final decision (closest relation); 2) where the allegation concerns a norm that is used for the reconstruction of content of a decision, which has not, however, been expressly indicated in the sentencing part of an individual act of applying the law; 3) where the challenged norm has found its application in a decision concerning a secondary or incidental issue, not referred to *expressis verbis* in the content of the final decision; 4) where the allegation concerns institutional provisions that constitute the basis for a final decision (loosest relation).
3. The constitutional right to court, besides the three most frequently indicated elements, i.e. the right to initiate court proceedings, the right to have court procedures shaped in an appropriate manner as well as the right to obtain a binding court decision, also encompasses the right to an appropriately shaped organisation and position of organs considering cases.
4. It is possible to indicate three types of competencies characteristic of courts: 1) competencies connected with their fundamental task, that is, implementing the administration of justice (see Article 175 of the Constitution); 2) other competencies

conferred by the Constitution; 3) non-constitutional competencies conferred by a statute. The constitutional legislator vests certain competencies in courts, taking into account the necessity of fulfilment by the organs of certain requirements regarding their organisation and procedure, as stemming from provisions of the Constitution. Accordingly, one has to acknowledge that the guarantees specified in Article 45 of the Constitution are applicable to all competencies reserved in the Constitution to courts, yet do not find any application to the remaining non-constitutional competencies of the organs. With regard to the non-constitutional competencies these are the general guarantees of procedural justice, constituting the essential element of the principle of a state ruled by law, that should be applied.-

5. All cases (except for those that fall under the jurisdiction of tribunals) shall be considered before competent, impartial and independent courts specified in the Constitution. The Independence and impartiality of the court and the judge are closely related to each other. Independence of courts refers, above all, to the organisational and functional separateness of the judiciary from other organs of public authority in order to guarantee full autonomy thereof in terms of consideration of cases and adjudication. In turn, independence of judges means that the judge shall act solely on the basis on the law, in accordance with one's conscience and personal convictions. Several elements are connected with the notion of independence: impartiality with regard to the participants in proceedings, independence of a judge from non-judicial bodies, independence of a judge from authorities and other judicial bodies, independence from the influence of political nature as well as internal independence of a judge.
6. Impartiality is an inherent feature of the judicial power and, simultaneously, an attribute of the judge, the loss of which deprives the judge of qualifications to discharge their function. Impartiality consists in the objective assessment of parties to proceedings, both in the course of a pending case and while adjudicating. Lack of impartiality of a judge while adjudicating constitutes a particularly gross violation of the principle of judge's independence. Adjusting the content of decisions to suggestions and orders made by external entities results in the emergence of a phenomenon of the so-called "judge at one's disposal", which precludes the possibility of the administration of justice.
7. The features of courts and court proceedings, as laid down in Article 45 paragraph 1 of the Constitution, should be understood in the context of provisions included in Chapter VIII of the Constitution, which concerns courts and tribunals. Standards set by the provisions of this chapter are part of the content of the right to court, guaranteed in Article 45 of the Constitution. Independence of courts, as specified in Article 45 paragraph 1, closely refers to the independence referred to in Article 178 and the following of the Constitution. An independent court is composed of persons, in which the law vests the attribute of independence, not only in the form of a declaration, but also by shaping the system that determines the activity of judges, which amounts to a guarantee that is real and effective. In turn, it stems from the principle of two-instance court proceedings (Article 176 paragraph 1 of the Constitution) that a court of any instance should meet the requirements of independence and impartiality.
8. A public assessment of a court as an institution that is indeed independent requires that the administration of justice be performed in such a manner which removes any

potential reservations of parties to proceedings in terms of independence and impartiality of the court. This opinion has been confirmed by the European Court of Human Rights, which points to the importance of regarding the administration of justice as impartial and independent.

9. According to the Constitution, courts are composed of judges and citizens participating in the administration of justice. A possibility consisting in an arbitrary vesting of judicial power in other persons would mean the loss of significance of guarantees specified in Article 45 paragraph 1 of the Constitution. This would result in the admissibility of the realisation of the right to have one's case determined by a court by way of activities of organs, in which the constitutional standard of independence is lower than the guarantee of judge's independence, as specified in Chapter VIII of the Constitution.
10. The Constitution does not provide for a provision which would directly prescribe that the administration of justice be performed solely by judges. An exception from the rule regarding the administration of justice by judges is the participation therein of the citizenry on the principles specified by statute. Further departure from the indicated rule is admissible on condition that two requirements are fulfilled: 1) such departure from the rule must be justified by a constitutionally legitimate objective and be encompassed within the limits of the realisation of the objective; 2) all the essential "substantive" requirements conditioning the impartiality and independence of the court must be fulfilled.
11. The institution of an assistant judge may not be associated with the principle envisaging participation of citizenry in the administration of justice (Article 182 of the Constitution). An assistant judge is not a representative of the society and discharges their function within an employment relation, as opposed to a duty of a citizen.
12. A statutory regulation, pursuant to which the assistant judge, while adjudicating, shall be independent and subject only to the Constitution and statutes, constitutes merely a declaration, which does not provide for an actual and effective independence required by the Constitution. Such a regulation needs to be accompanied by specific legal solutions with regard to the practical assurance of the observance of individual constituents making up the notion of independence. In particular, the following are impermissible: dependence of the assistant judge on the Minister of Justice, lack of specification of the time frame as regards the assistant judge's performance of the function of the judge, exclusion of the National Council of the Judiciary from participation in the procedure of vesting in the assistant judge the performance of the duties of the judge, dependence on a regional court's board of judges and on the consulting judge, lack of guarantees as regards the political neutrality of assistant judges.
13. A regulation envisaging the existence of the institution of the assistant judge or the possibility of adjudicating by persons other than judges (within the constitutional meaning) has to take an appropriate normative shape. While seeking new solutions, the legislator should take into account the international standards binding upon Poland, which point at other solutions conforming to principles of a state ruled by law. The new regulations should guarantee the actual separation of the judicial power from other powers (Article 10 of the Constitution), weaken bonds between assistant judges

and the Minister of Justice as well as ensure the influence of the National Council of the Judiciary on the professional career of the judge.

14. A situation where lower ranking norms decide upon the scope of application of constitutional norms is impermissible. Such approach contradicts the principle of direct application of the Constitution and its supreme position within the hierarchy of sources of law. Only in cases envisaged by the Constitution itself is a statutory limitation of the scope of application of some of its provisions permissible (e.g. Article 37 paragraph 2 of the Constitution).
15. When adjudicating upon the constitutionality of a normative act the Constitutional Tribunal should recognise that the legal order emerging after the pronouncement of its judgement may not infringe the Constitution or , in consequence, lead to such infringement. In order to prevent such situations from occurring the Tribunal may specify the effects of its decision in the prospective aspect by way of delaying the entry of the judgement into force. In each case the Tribunal undertakes assessment of whether it is necessary or at least appropriate to delay the entry into force of a judgement. The prerequisites for the delay may include: actual effects triggered by an instantaneous elimination of an unconstitutional provision, the protection of constitutional norms, principles or values as well as the need to undertake extensive and broader legislative activity necessary to restore the state of conformity of the law to the Constitution.
16. The protection of the legal force has been consolidated in Article 7 of the Constitution, pursuant to which the organs of public authority shall function on the basis of, and within the limits of, the law. It stems from the indicated provision that legally valid decisions shall be encompassed by the presumption of the constitutionality. The presumption may be rebutted where the decision itself departs from the constitutional standard (within the scope of provisions of substantive law or procedure, utilised *in concreto* for issuing the legally valid decision), while institutional provisions do not demonstrate, *in concreto*, the unconstitutionality of the normative basis for a judicial decision. It would be disproportionate to challenge legally valid decisions on the grounds of oriented *pro futuro* finding of unconstitutionality, affecting the composition of organs issuing the decisions, which – while pronouncing the judgement – had acted in accordance with the Constitution. It is not possible to challenge decisions issued by assistant judges in the period when the vesting of the power to adjudicate in assistant judges had not been challenged. For the same reason, the Constitutional Tribunal has not granted the privilege of advantage to the initiator of the constitutional complaint. This privilege makes it possible, pursuant to Article 190 paragraph 4 of the Constitution, to challenge proceedings also within the period of the postponement of the effects of a judgement.
17. A judgement of the Constitutional Tribunal, characterised by a delayed entry into force, shall remain ineffective in the sphere of individual cases based on a norm deemed unconstitutional if the legislator promulgates provisions that substitute the unconstitutional ones, since the basis for the re-opening of proceedings on the grounds of Article 190 paragraph 4 ceases to exist. In such a case the source of amendment to provisions lies in the regulation enacted by the legislator, and not a judgement of the Constitutional Tribunal.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 31.[...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 41. 1. Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute. [...]

Art. 45.1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.[...]

Art. 175.1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts. [...]

Art. 178. 1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

2. 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.

3. 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.

Art. 179. Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

Art. 180. 1. Judges shall not be removable.

2. Recall of a judge from office, suspension from office, removal to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.

3. A judge may be retired as a result of illness or infirmity which prevents him discharging the duties of his office. The procedure for doing so, as well as for appealing against such decision, shall be specified by statute.

4. A statute shall establish an age limit beyond which a judge shall proceed to retirement.

5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration.

Art. 181. 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.