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PROCEDURAL JUSTICE AS A RULE OF LAW AND EXPRESSION OF RESPECT FOR HUMAN DIGNITY

1. INTRODUCTION

Under the constitutional conditions of the rule of law, the highest values of the legal system are the principles of human dignity, freedom and equality. These values determine the primacy of individual rights in relation to the society and the state. At the same time, they constitute the axiological foundation of legal regulation, including organization of procedures by which the state acts. The procedure is a set of ordered[1], successive acts and actions leading to decision-making, most often combined with defining the competence of decision-makers. The adjective "procedural" that concerns the stages or ways of making decisions can be clearly distinguished from the adjective "material, substantive" – the latter meaning the content of the decision. Thus, we are given a basis for distinguishing the title procedural fairness from its other types[2]. Appropriately organized procedures regulate the creation of law, its application, the appointment of state officials, etc. The main assumption adopted here is that the value of justice, rationality or equity relevant to respecting the dignity of the addressees of norms may be applied not only to substantive law and decisions made on its basis, but also to formal law and individual procedural solutions[3].

[1] As we read in par. one of the report from the First Section of the International Congress of Law in New Delhi in 1959: "In a free society ruled by the rule of law, the function of legislative power is to create and maintain conditions that uphold human dignity as the dignity of the individual. This dignity requires not only recognition of its civil and political rights, but also the establishment of social, economic, educational and cultural conditions that are necessary for the full development of its personality" – quoted after J. Raz, *Autorytet prawa*, P. Maciejko (transl.), Warszawa 2000, p. 211.

[2] W. Cyrul, *Proceduralne ujęcie tworzenia prawa* (in:) J. Stelmach (ed.), *Studia z filozofii prawa*, Kraków 2001, p. 187.

[3] N. Luhmann, *La légitimation par la procedure*, Les Presses de l'Université Laval 2001, p. 31 *et seqq*.

Human dignity can be considered on two levels. On the one hand, as a transcendent value, innate and inalienable, immanently connected with the fact of being a human being. It cannot be acquired, one cannot be deprived thereof, nor is it dependent on the state of consciousness or the ability to manage its behavior. Under the second approach, which is used in this study, human dignity is revealed in the values of mental life that translate into the subjective position of an individual in the society and into the respect due to each person. In the opinion of the Constitutional Tribunal, dignity in the second sense may be subject to violation and may be potentially affected by the behavior of other people and legal regulations[4]. The first aspect creates a situation of objective subjectivity, independent of the capacity for self-determination, the second – a situation of subjectivity, in which a person can demand self-respect and protection for his individual status, his goods or interests[5]. Both types of subjectivity are included in the assumptions of procedural fairness.

Unlike in the international law, Polish constitutional regulations do not guarantee *expressis verbis* the respect for a legal personality, and therefore it is the human dignity that is its normative reference[6]. At the same time, legal subjectivity is secondary to a much broader subjectivity in a philosophical (anthropological and moral) approach[7]. Belonging to a specific legal culture built primarily on liberal values and individualistic understanding of the individual, the creator of the constitution is already limited by a particular system of assessments. Human dignity is considered in the Polish law as the basis of the system of rights and freedoms regulated in Chapter II of the Polish Constitution of 1997 and also one of the principles of the political system of Poland[8]. It relates to the conviction expressed by the Constitutional Tribunal that the law must be an expression of certain systemic standards and conditions as well as the consequences of the adopted legal solutions[9]. Certain procedural values are also assessed in the light of previous ontolog-

[4] See judgment of the Constitutional Tribunal of 5 March 2003, K 7/01, OTK ZU No. 3/A/2003, position 19.

[5] T. Chauvin, *Homo iuridicus. Człowiek jako podmiot prawa publicznego,* Warszawa 2014, p. 171 *et seqq*.

[6] The human right to recognition of legal personality has been primarily articulated in Article 6 of the Universal Declaration of Human Rights ("Everyone has the right to recognition of his or her legal personality everywhere") and in Article 16 of the ICCPR ("Everyone has the right to recognize his legal personality everywhere"). This regulation has been repeated yet in Article 24 of the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families of 1990, in Article 12 (devoted to the principle of equality before the law) of the Convention on the Rights of Persons with Disabilities (ratified by Poland in 2012), as well as in regional files: Article XVII of the American Declaration of Human Rights, Article 3 of the American Convention on Human Rights, and Article 5 of the African Charter of Human and People's Rights.

[7] T. Chauvin, *Homo iuridicus*…, pp. 152-160.

[8] Judgment of the Constitutional Tribunal of 23 October 2007 (P 28/07).

[9] Judgment of the Constitutional Tribunal of 15 November 2010 (P 32/09).

ical and ethical assumptions regarding the law. A Dutch lawyer and philosopher Jan Broekman in the contemporary legal discourse on the relation of the individual to the law recognizes the following regularities[10]: 1) a man in law is perceived only and necessarily only as a subject; 2) this subjectivity is determined by human properties: rationality, intentionality and transparency of behaviors (acts, actions), that is, efficiency and responsibility built on the assumption of free will; 3) subjectivity manifests itself in situations of conflict and disturbed balance – the law plays its essential role in situations where it is necessary to prevent or resolve already existing conflict situations; 4) the law serves an individual to restore balance (therefore it is necessary to understand the rights perceived as the possibility of pursuing claims). As I will try to demonstrate, the above characterization of subjectivity is reflected not only in material norms, but also in formal law and specific procedural institutions.

In turn, the rule of law that patronizes our conference is a key principle of constitutional democracy that respects the status of an individual. Only this type of state gives guarantees of non-arbitrary actions of the authorities and imposes restrictions enabling an individual to respect his dignity and free development. The status of a legal subject guarantees, on the one hand, freedom of action at the same time setting limits within which the subject can freely confirm his will. On the other hand, having rights gives an individual a special right to make appropriate demands if the use of a given right (freedom) is endangered or reserved[11].

2. PROCEDURAL JUSTICE

A research conducted by law sociologists has shown that regardless of the type of procedure, its global assessment is conditioned not only by the final resolution but also by the way of reaching it[12]. The conviction about the integrity and reliability of the latter may even, to some extent, affect the acceptance of an unfavorable final result. The respondents of the polls positively assessed the procedures, mainly judicial and administrative, if a particular emphasis was placed on equal treatment of the parties, impartiality of the judge or official and the opportunity to present their reasons. Respecting these rules has an impact on social trust in

[10] J. M. Broekman, *Droit et anthropologie*, Paris-Bruxelles 1993, p. 164.

[11] Compare: M. Safjan, *Jakiego prawa bioetycznego potrzebujemy?*, (in:) L. Bosek, M. Królikowski (eds.), *Współczesne wyzwania bioetyczne*, Warszawa 2010, p. 2.

[12] M. Borucka-Arctowa, *Koncepcja sprawiedliwości proceduralnej i jej rola w okresie przemian systemu prawa – analiza teoretyczna i funkcjonalna,* (in:) K. Pałecki (ed.), *Dynamika wartości w prawie*, Kraków 1997.

the law and the institutions representing them. If we take into account the above postulates, procedural justice becomes an important source of social legitimization of the law.

The procedural provisions, as an element of the competence standard, should determine as closely as possible the manner in which the state operates, first of all, in relation to individuals[13]. Procedural fairness, in a great simplification, is defined by a set of defined values and means "such organization of the process of obtaining information, its analysis, exchange of arguments and making a decision that allows the result of applying the procedure to be fair (honest, just)"[14]. The right criterion of the settlement can then be the procedure itself. The principle of procedural fairness has not been clearly expressed in the text of the Constitution, but a well-established jurisprudence of the Constitutional Tribunal binds it with observance of the principle of a democratic state ruled by law[15]. The Tribunal emphasizes that "in a democratic state ruled by law, proceedings before all public authorities that are legally called to decide on the situation of an individual should meet certain requirements of fairness and integrity. Based on the principle of the democratic rule of law the general requirement is that all proceedings conducted by public authorities in order to resolve individual cases meet the standards of procedural fairness"[16]. From the point of view of legal subjects, the essence of this principle is to ensure that parties to the proceedings can exercise their rights and procedural guarantees and to guarantee a reliable and substantive consideration of the case. The common core of various decision-making processes assessed from the perspective of reliability consists[17] of: the right to be heard; disclosing the motives of the decision in a clear manner, to the extent enabling verification of the way of thinking of the court (even if the decision itself is not passable – legitimization through transparency), thus avoiding arbi-

[13] The multiplicity of provisions containing norms of legislative competence appearing in normative acts prompted Z. Ziembiński to enrich the catalog of elements of this norm. These provisions were divided into several categories: a) provisions defining the entity to whom a competence is conferred, b) regulations defining the procedure - a way to perform a certain conventional action, c) provisions defining the content or the matter of the act performed, d) regulations defining entities that are the addressees of the competence standard (entities subordinate to this competence). These four sets of rules consist, according to the distinction mentioned, in the scope of application of the standard of normative competence – Z. Ziembiński *O stanowieniu i obowiązywaniu prawa*, Warszawa 1995, p. 46.

[14] Z. Kmieciak, *Postępowanie administracyjne w świetle standardów europejskich*, Warszawa 1997, p. 42.

[15] Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego, Warszawa 2015, p. 7 *et seqq*. See also: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 51.

[16] Judgment of the Constitutional Tribunal of 15 December 2008 (P 57/07).

[17] Judgments of 31 January 2005, SK 27/03, 14 June 2006, K 53/05, 12 July 2011, SK 49/0811, 30 October 2012, SK 8/12, 28 July 2004, P 2/04, 9 January 2006, SK 55/04, 12 December 2006, P 15/05, 23 July 2009, K 7/09.

trariness in the decision-maker's actions; ensuring process predictability for the participant, through adequate coherence and internal logic of the mechanisms to which it is subject; formulating procedural measures to allow for a fair balance of the procedural position of each party while defining the rights of the parties.

In one of the judgments, the Tribunal pointed out that the term "right to a fair procedure" used interchangeably with "the right to a fair trial" or just "procedural fairness" is ambiguous. It has also repeatedly emphasized that the right to a fair trial is universal, as it concerns all stages and types of proceedings, but stressed that the reliability of each procedure should be linked to its function and legal character[18]. As pointed out by the Tribunal in the judgment SK 40/07: "Procedural justice cannot be judged in abstract terms, irrespective of the category of cases that are subject to judicial review, individual configurations, the significance of particular categories of rights for the protection of the individual's interests, etc. The legislator retains a fairly large degree of freedom in this respect, which enables shaping of the judicial procedures taking into account these diverse factors and at the same time attempts to balance the interests remaining in a certain conflict". A common normative core for any type of procedure should be its effectiveness and coherence of the process mechanisms it creates[19]. Such a broadly understood issue can include not only the sphere of judicial and administrative application of the law[20], but also its establishment – the state's activity in which the organization's method determines to a large extent the legitimacy and democratization of the political system. Most often, however, the analyzes contained in the jurisprudence of the constitutional court should be connected with the requirements allowing for the implementation of the constitutional right to court, either in a more general sense or in relation to one of the elements of this law, as explained below.

At this point, it is worth adding that in the opinion of the Tribunal the principle of procedural fairness is not absolute and may be subject to limitations, which are exhaustively defined in Article 31 para. 3 of the Constitution. This provision formulates conditions for the admissibility of restrictions on the use of constitutional rights and freedoms that have to be met cumulatively. The limits of interference in constitutional rights and freedoms are thus determined by the principle of proportionality and the concept of the essence of individual rights and freedoms. In the context of acceptable limitations of the principle of procedural fairness, one should also see its relationship with the principle of procedural formalism[21].

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[18] Judgments of the Constitutional Tribunal of 30 May 2007, SK 68/06, OTK ZU No. 6/A/2007, position 53 and of 20 May 2008, P 18/07, OTK ZU No. 4/A/2008, position 61 and jurisprudence indicated therein.

[19] P 7/16.

[20] See judgments of the Constitutional Tribunal on the rule of procedural justice in administrative proceedings, e.g. judgment of 8 April 2014.

[21] Judgment of the Constitutional Tribunal of 30 October 2012 (SK 8/12).

A look at procedural justice can be arranged in two different scopes: firstly, fair (right, true) is everything that is consistent with previously accepted rules that are to have only a formal meaning[22]. The validity and integrity of the proceedings is determined by their compliance with certain rules, which, in addition, must meet the requirement of rationality and must be legitimized. Predictability in this context should not be combined with the possibility of predicting a favorable solution within the limits of the law. It is, however, about the existence of clear, predetermined and applicable rules for the conduct of particular types of proceedings from the beginning to the end[23]. Such an understanding of procedural fairness ensures respect for the formally recognized rule of law. It seems, however, that this is an equally fundamental condition as it is insufficient. It is as valuable as the value of its certainty, predictability and associated sense of legal security from the point of view of the recipients of the law. It is necessary to subordinate the state's activities both in the sphere of law-making and its application to a fixed, clearly defined and subject to control of competence norms and clearly defined procedural norms. Formally understood legal security is limited to "external procedural justice". If we want to go one step further, then the substantive law, so important in the conditions of a democratic state of law, will determine internal procedural justice. The procedure itself, but also its results, are assessed on the basis of their compliance with certain principles of material justice, such as human rights.

In the light of the second and broader approach, everything is in accordance with the formally understood rules that set the conditions for a rational and effective discourse. It is only this group of conditions that gives us the answer to the question of how procedures can be used to protect the primate values of the system. The role of procedural fairness is not simply to ensure the effectiveness of legal norms. Its equal task should be to guarantee the conditions of correct communication, which is aimed not so much at the effectiveness of decisions as to achieve an agreement, understood here as a goal. Thus, one should not stress the strictly teleological nature of procedural fairness but also take into account its deontological aspect.

The perspective of respect for human dignity and subjectivity leads to giving more meaning to the second approach. The judicial procedure, assessed from the perspective of the application of the discursive model of law, should respect validity claims (to truth, equity, sincerity[24]) modified by the specificity of legal

[22] J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2004, p. 20.

[23] SK 16/05; SK 11/07; SK 8/12; see also: A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, pp. 330-332.

[24] Validity claims were formulated for the so called perfect communication situation by Jurgen Habermas. See J. Habermas, *Działanie komunikacyjne i detranscendentalizacja rozumu*, Warszawa 2004.

discourse[25] as well as the values and formal conditions of decision-making, which should be the result of a formally fair process. Let us remember that the legal discourse, regardless of its specificity and close connection with the positive law restricting its freedom, remains an argumentative, normative discourse in which the only criteria of a decision are such values as fairness or rationality and not truthfulness. The literature presents a set of rules that define the acceptance criteria for a practical discourse. These include: undertaking discourse in the event of a dispute (broadly understood – the divergence of interests or legal situations necessary to be removed or resolved); belief in the validity of the rules applicable to the resolution of the dispute; telling the truth (here we find discrepancies between general practical discourse and legal discourse); taking into account or respecting the actual findings (which is also connected with the necessity of having appropriate competences to participate in the dispute); argumentation in discourse should take into account commonly accepted practices and principles; argumentation should be conducted with respect for the principles of freedom and equality of the participants (this condition is also not fully realized by the legal discourse); an argument should go directly to the goal; arguments should respect the basic principles of linguistic communication (including, *inter alia*, openness of discourse, use of a basic universal language, use of coherent definitions applicable to all).

The Constitutional Tribunal adjudicates in a similar, discursive spirit focusing on such features of conduct as its integrity, openness or impartiality. In the judgment of 16 January 2006, the Tribunal stated that procedural justice belongs to the essence of the constitutional right to court, because without a standard of fairness, the law would have a façade character[26]. Explaining the sense of this requirement, the Tribunal stressed that despite the multiplicity of doctrinal concepts trying to establish the conceptual scope of this principle its meaning nucleus is common. They mainly refer to the conditions which should be reflected in the relationship between the judge, as the privileged subject of the proceedings and the parties to this proceeding[27]. These are some minimal conditions for the correctness of proceedings in the perspective of formally and procedurally perceived justice. The constitutional source of justice understood in this way is the principle of a rule of law, whose main task is to prevent arbitrariness in state activities.

[25] J. Stelmach, *Kodeks argumentacyjny…*, p. 58 *et seqq*; R. Alexy, *Idée et structure d'un système de droit rationnel*, „Archives de philosophie du droit" 1988, Vol. 33, p. 30 *et seqq*.

[26] Judgment of the Constitutional Tribunal of 16 January 2006 (SK 30/05), OTK ZU No. l/A/2006, position 2.

[27] J. Stelmach, *Kodeks argumentacyjny…*, p. 63.

3. THE RIGHT TO COURT AS THE BASIS FOR THE CONSTITUTIONAL PRINCIPLE OF PROCEDURAL JUSTICE

The constitutional right to court plays a special role in the area of resolving conflicts and determining the legal status of an individual. The respect for this right by the state indicates the existence of an undeniable link between fundamental rights and procedures, and in some interpretations – the dependence of a content-just right from an appropriately organized procedure[28]. The Polish constitutional regulation of the right to court is important for at least two reasons. Firstly, in the period after the amendment of the Constitution of 1952 made in 1989, the Constitutional Tribunal derived the right of citizens to court and the individual's right to a fair and public trial (civil, administrative and criminal) from the democratic rule of law. In the current regulations, the provisions of Article 2 of the Constitution being still in a broader context the basis for the right to court does not constitute this right alone – they are rather a set of interpretative guidelines for a detailed regulation included in Article 45 of the Constitution[29]. Secondly, the regulation of Article 45 of the Polish Constitution due to its position in the group of personal rights wider than in international law, scope and richness of ethically colored characteristics of proceedings (fair, public and pending without unreasonable delay) and specific features of the court (competent, independent and impartial), is the most comprehensive catalog of obligations when it comes to respecting the principles of a fair and reliable procedure by the state.

The content of the right to court has been developed in law sciences and in the jurisprudence of the Constitutional Tribunal. It includes in particular: the right of access to court, i.e. the right to run the proceedings before a court – an independent and impartial body; the right to shape the court proceedings in accordance with the requirements of fairness and transparency; the right to judgment understood as the right to obtain binding resolution of the case and the right to appropriate shape of the system and position of the authorities examining the case[30]. It should be mentioned at the same time that "in a state of law, the right to court should not be understood only formally, as the availability of a judicial path in general,

[28] R. Alexy, *Teoria praw podstawowych*, Warszawa 2010, p. 354.

[29] P. Sarnecki, *Artykuł 45*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2003. The principle of procedural fairness is primarily based on Article 45 para. 1 of the Constitution. The jurisprudence of the Constitutional Tribunal also associates this principle with values derived from the principle of a democratic state ruled by law, assessing the challenged provisions through the prism of Article 45 para. 1 in connection with Article 2 of the Constitution (see resolution of the Constitutional Tribunal of 12 September 2007, SK 99/06, OTK ZU No. 8/A/2007, position 100, and judgment of the Constitutional Tribunal SK 40/07 and jurisprudence cited therein).

[30] This right was added by the judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06.

but also materially as the possibility of legally effective protection of rights in court"[31]. The broad interpretation of the right to court is also demonstrated by the Constitutional Tribunal and the Supreme Court's interpretation of the term "case", where it is noticed autonomously for Article 45 para. 1 of the Constitution nature, including matters that are not civil, court-administrative or criminal cases[32] (this also goes beyond the content of Article 6 of the ECHR).

The subjective right under Article 45 of the Constitution is one of the most important elements of the constitutional status of an individual. It is an autonomous right to protection under the constitutional complaint procedure and at the same time the strongest measure to protect the material freedoms and rights enunciated in the Constitution and in normative acts of a subconstitutional rank. At the same time, it has an instrumental character. It serves – as the Constitutional Tribunal clearly says[33] – as a guarantor of human dignity and human autonomy. It connects an individual as a subject of law with an objective order of positive law, allowing him to apply for protection from the state (the individual has an appropriate claim against the state[34]).

The addressees of the subjective right to court are public authorities who are obliged to perform a specific type of activity. This activity is not limited only to the necessity to set specific norms and procedures and to adhere to them but also to "create appropriate infrastructure and financial safeguards to allow the unit case to be dealt with and resolved in a proceeding corresponding to constitutional standards". An individual may ask the court in any matter to request the determination of his legal status, including in situations of uncertainty. The existence of this subjective right is an important element of the rule of law, which by opening the way to justice for everyone, fulfills its function in the area of granting legal protection and thus guaranteeing legal security. Giving a man the feeling of "being under the protection of the law"[35] contributes both to respect for his dignity and his libertarian status. Appropriate shaping of the procedure that is of primary interest to us, within the meaning proposed by the Constitutional Tribunal, provides the parties with: the right to be heard; the right to obtain a justification of the decision (learning the reasons for the decision), which prevents arbitrary action in the court; ensuring predictability of the proceedings; guarantee of procedural measures balancing the position of the parties; ensuring instanced control

[31] Judgment of 12 July 2011, SK 49/08.

[32] P. Kapusta, *Nowe technologie w służbie prawa do sądu*, http://www.bibliotekacyfrowa.pl /Content/59077/18_ Piotr_Kapusta.pdf, (visited June 17, 2018); see also: L. Wiśniewski, *Prawo do sądu*, (in:) K. Działocha (ed.), *Podstawowe problemy stosowania Konstytucji Rzeczypospolitej Polskiej. Raport wstępny*, Warszawa 2004, p. 142.

[33] Judgment of the Constitutional Tribunal of 15 November 2000, P 12/99.

[34] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)*, „Państwo i Prawo" 1997, issue 11–12, p. 63.

[35] P. Sarnecki *Artykuł 45*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2003.

of the decision; impartiality of the court. Meeting these requirements guarantees respect for human dignity of the participant in the proceedings, which translates into a subjective assessment of the procedure by that participant (the so called subjective procedural fairness) and in a broader context the possibility of accepting a decision, also unfavorable. Such shaping of the procedure also constitutes an implementation of the principle of conducting argumentative discourse to which parties and the judge are participants.

4. PROCESS AND RESULT. PROCESS VALUES

Making decisions within the limits of law is a deliberate act[36]. As mentioned above, an individual who asks the court to consider a case in properly formulated court proceedings, also expects his case to be resolved and to obtain a judgment. The right to such a decision is an indispensable element of the right to court. If there was no guarantee of obtaining a court decision, the right to court in order to ensure access to court and fair proceedings before him would be deprived of importance.

In the literature it is noted that the legal subject has the right to judgment, but not to a favorable judgment[37]. Therefore, from the perspective of an individual seeking a solution to a conflict or establishing his/her right, the question becomes to establish procedures to generate a fairly substantive result and, consequently, recognize that result as the criterion determining the validity or legitimacy of the procedure. Answers in this matter were sought by such thinkers as John Rawls, Robert Alexy and Robert Summers. The concept of process values proposed by the latter will serve as a summary of the analysis of the relationship between procedural justice and human dignity. Robert Summers, in the work "Evaluating and improving legal processes – a plea for process values", tries to show that each legal procedure can be assessed from two perspectives: on the one hand, as a means to achieve the most just result (result-oriented values) and on the other hand, as a means of implementing and realizing certain values (process-oriented values)[38]. The first approach is, as the author writes, an important social practice and the most widespread position in the way of evaluating procedures. According to a similar scheme, Rawls formulates his conception of perfect and imperfect procedural justice on the one hand (when the criterion

[36] L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe*, Toruń 1988, p. 29 *et seqq.*

[37] P. Sarnecki *Artykuł 45…*

[38] R. Summers, *Evaluating and improving legal processes – a plea for process values*, "Cornell Law Review" 1974, issue 1, p. 4.

of a fair result is known, we know what we want to achieve through the procedure), and pure justice on the other, where the emphasis is on a well-organized and well-respected procedure. In the Polish doctrine, Maria Borucka-Arctowa distinguishes, on the same principle, the instrumental and non-instrumental perception of the procedure, the essential criterion being the adequate level of satisfaction in the participating unit (psychosocial theory of procedural justice). On the one hand, the individual may treat the procedure in a completely instrumental way: it is to be only a means of achieving the expected result. The assessment procedure is positive in so far as it is able to lead or bring to a fair result, to meet the expectations of the entities affected by the decision. Performance counts. The opposite concept makes us perceive the procedure as an end in itself. In this case, the satisfaction that the individual can give his reasons is valued the most. Regardless of the result achieved, the emphasis is placed on the impartiality of the procedure and the fact that it satisfies the requirements of correct communication. This is called an expressive theory of procedural justice. The expressive approach to procedural justice means a positive evaluation of the procedure for its own sake, on the standards it respects.

In the concepts presented above a conviction prevails that ultimately it is not the result that becomes the criterion for assessing the process as good but the fact that it respects whether it serves, through its organization, specific process values. Summers' declared intention to demonstrate the usefulness of the second of the presented approaches is to try to organize the values, often already present in the legal discourse, and indirectly also the proposal for individuals to more effectively control the activities of public authorities. To raise the level of legal awareness it is necessary to be able to formulate specific claims towards the decision-makers and processes through which this control is carried out. The implementation of particular process values in a given process is determined by specific normative solutions adopted in a particular procedure. Its individual institutions may favor or not meeting these values.

The process value is one that: 1) can be implemented through specific features of the legal process (specific solutions or procedural institutions adopted therein); 2) can be achieved already during this process – it is not only the result of its implementation; 3) allows to assess individual features (institutions, normative solutions) of the process regardless of the results of their application[39].

As we pointed out in Summers, an appropriate process organization can demonstrate the ability to implement or serve certain process values, regardless of the "good result effectiveness" mentioned above (to which the process can lead independently). For establishing of the catalog of process values, which are legitimized by the obligation to respect human dignity, we can use the summaries proposed by Summers. It includes:

[39] R. Summers, *Evaluating*..., p. 13.

1) Participation, which consists in granting people as legal entities a specific way of participating in the decision-making process and the possibility of avoiding participation

Summers treats this value broadly, taking into account both the participation of citizens in the elections, the law-making process (consultations, citizens' initiative) and the application of law. Under Article 45 of the Constitution, first of all, the right to initiate a trial (the right to bring an action, the right to initiate legal proceedings) deserves to be emphasized. The related wider right of access to court includes not only the possibility of launching court proceedings but also a system and organizational guarantee with respect to the authority examining the case (property, independence, independence, impartiality. R. Summers and L.B. Solum who wrote about procedural justice emphasize the importance of participation in the discourse to achieve respect for dignity and autonomy. For L.B. Solum one can assume that: "Procedural fairness is deeply entwined with the old and strong idea that a process guaranteeing the right to significant participation is a necessary precondition for the legitimate authority of the norms regulating activities. The meaningful participation requires notification and the ability to be heard, and requires a reasonable balance between costs and accuracy"[40].

2) Legitimization of the process; with respect to this condition, in my opinion, one can refer to it at different levels and thus go beyond the author's suggestion. One of them may be the level of the constitutional decision, in which citizens participate in one form or another. However, it is also possible to point to elements of the rule of law that determine the operation of all public authorities, including courts. The principle of legalism expressed in Article 7 of the Constitution, which is an element of the rule of law, serves to implement and protect certain values. The standards encoded in these provisions allow to indicate the following content elements: actions taken by public authorities must be based on the competence assigned to them; interference in the sphere of individual rights and freedoms must be based on a specifically indicated norm; actions of public authority should be deprived of arbitrariness. Also, moral legitimacy, which Summers does not use in his conception or approximate, can be useful here to simply point to the axiology of the legal system, which has already been referred to above.

3) Peacefullness of the process – action to mitigate conflicts; Summers interprets this point at a fairly high level of abstraction, excluding as "processes" occurrences that deny this condition such as war, revolution or private revenge. On the basis of the opposition, it can be pointed out that every process remaining in the hands of the state and proceeding according to known and accepted rules, in accordance with the binding law, fulfills the postulate of peace.

[40] L. B. Solum, *Procedural justice,* https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1875&context=facpub (visited December 2, 2018).

4) Humanitarianism and respect for human dignity; as I am trying to show that the implementation of procedural norms adopted in the legal state is conducive to the implementation of human dignity, the condition put forward by Summers should be understood as a prohibition by the public authority to take actions that may violate human dignity illegally or that constitute violation of the law. As an example, one can provide here evidence obtained illegally and evidence obtained contrary to the law (in violation of the conditions provided for the conduct of a given act). This also applies to the prohibition of using certain methods of gathering evidence (coercion, hypnosis, narkoanalysis). First of all, it is necessary to look at the problem of protecting the dignity of people who violate the legal order and are in the position of a suspect, accused or convicted. Humanitarianism means treating a person with respect due to every human person, not causing him unnecessary suffering and adjusting the punishment to the degree of the offense. Man is the subject of dignity regardless of his behavior or his will. This is evidenced by the binding criminal law regulations that warrant respect for the principles of humanism and humanity in relation to perpetrators of criminal acts. The ordinance of dignity is not in the power of its bearer or authorities.

The observance of the principle of humanitarianism is devoted to many documents to which Poland is a party[41]. Both the jurisprudence and the doctrine regarding constitutional provisions in a direct way protect dignity, in addition to Articles 30 and Article 41 para. 4 of the Constitution, stating that everyone deprived of liberty should be treated in a humanitarian manner[42] – imposes a special type of obligation towards public authorities to conduct appropriately. The principle of humanitarianism therefore has the rank of a constitutional norm in Poland, whereas in the Polish Penal Code the principle of humanitarianism is regulated by the provision of Article 3 on the supreme principles of the application of penalties: penalties and other measures provided for in the Code shall be applied taking into account the principles of humanity, in particular respect for human dignity. Although Article 3 of the Penal Code refers directly to the issue of the sentence dimension, the principle of humanitarianism should be observed at all stages of liability, and thus also in preparatory proceedings, in adjudicating penalties and penal and protective measures as well as in their application (see Article 4 para. 1 of the Executive Penal Code)[43].

In connection with the broadly understood duty of respect for dignity it can be mentioned, although this is not directly related to the procedural regulations in

[41] See Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10 of the ICCPR, Article 3 of the ECHR, and the UN Convention of 10.12.1984 on the prohibition of torture and the European Convention of 26 November 1987 on the prevention of torture and inhuman or degrading treatment, ratified by Poland – see "Journal of Laws" 1995, issue 46, position 238, 239.

[42] L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa 2012, p. 92.

[43] *Ibidem*, p. 32.

§ 12 of the Set of rules of professional ethics of judges, which as part of the rules of service imposes on the judge the duty to maintain order and proper conduct and the appropriate level of application of procedures in which he participates, and in relation to the parties and other persons involved in the proceedings, he is required to maintain a dignified attitude, patience, courtesy and to exercise proper behavior from them. The judge should also respond appropriately in case of inappropriate behavior of persons participating in the proceedings, in particular in the event of a person being prejudiced on grounds of race, sex, religion, nationality, disability, age or social or property status or for any other reason[44].

5) Protection of personal life; this condition, like others form the list presented, can be analyzed in different contexts. I will limit myself to mentioning two examples, namely the issue of protection of the right to privacy, which is particularly important in connection with the constitutional principle of open proceedings and restrictions imposed by the protection of personal life in evidentiary proceedings in a criminal trial. According to Radosław Koper, the shape of the relationship between publicity and the right to privacy in criminal proceedings reflects the tension that accompanies them in social relations and relates primarily to the relationship between protection of the public interest and private interest[45]. Publicity understood as the so called external transparency is an inseparable feature of the democratic criminal process allowing for the exercise of the right to information and social control over the administration of justice. On the other hand, internal disclosure towards the parties is the main guarantee of controversy – in order to have a dispute, one must take part in it. The audience principle suffers statutory restrictions only in cases strictly provided for by law.

6) Procedural fairness, which in its interpretation is generally based on equal access to participation in the process; the implementation of this value according to Summers, varies depending on the process. The procedural right in the proposed approach is related to the implementation of equality and concerns in particular equal access to the process and equal treatment of parties in the ongoing process. Its sources should be sought in the regulation of Article 32 para. 1 of the Constitution. In civil proceedings, the parties' equal rights have two aspects: both parties must be guaranteed the possibility of using the same means of defense of their rights and both have the right to be heard by a court. These conditions make up the formal equality of the parties in the process.

In the jurisprudence of the Constitutional Tribunal, as mentioned above, the right to be heard gained a special value. Deprivation of this right, commonly recognized as a component of the right to court, is considered by the Court *expres-*

[44] http://www.krs.pl/pl/dzialalnosc/zbior-zasad-etyki-zawodowej-sedziow/c,18,uchwaly/p,1/4582,uchwala-nr-252017-krajowej-rady-sadownictwa-z-dnia-13-stycznia-2017-r (visited June 21, 2018).

[45] R. Koper**,** *Jawność rozprawy głównej a ochrona prawa do prywatności w procesie karnym***,** Warszawa 2010, p. 17.

sis verbis as an infringement of the right to a fair trial. The Tribunal stated that "the manifestation of a violation of the right to court may also be the deprivation of (...) the so called right to hearing, which, although not expressed in the Constitution, is universally recognized as a component of the right to court". The right to be heard is one of the guarantees of fairness of proceedings. It has a deep justification in the assumption of the subjective treatment of persons taking part in the process – it constitutes an expression of respect for human dignity[46]. Detailed conditions that make up the right to be heard, such as the right to submit motions and demands, factual claims and evidence supporting them, to be informed about the proceedings (the so called internal disclosure of court proceedings), to read the position of the party contrary, also constitute the conditions for practical discourse and define quality of participation in it[47].

Regarding the material aspect of process equality, Summers also applies the rule of equality. Reflecting on whether some of the process solutions guaranteeing the effectiveness of a good result may also support some result-oriented values, he analyzes the right to an attorney-in-office granted to indigent persons.

7) Procedural legality, consisting of ensuring certainty and predictability (there are rules that do not give too much recognition to decision-makers and control mechanisms of regularity in decision-making as well as the decision itself); the most important issue conducive to the implementation of this condition is the need to clearly define the law of competence of judicial authorities. Despite the fulfillment of this condition at the constitutional and statutory levels, a fair procedure should provide for the possibility of challenging the decision taken in the first instance. In this connection, it should be pointed out that it is necessary to interpret Article 45 in connection with Article 78 and Article 176 para. 1 of the Constitution. The content of the subjective right formulated in Article 78 is to establish for each party of each type of procedure the possibility of starting the procedure verifying the correctness of all decisions issued by the authority acting in the first instance[48]. Garlicki assumes that if, in accordance with the case-law of the Tribunal, it is assumed that the right to court also includes "the right to appropriate court procedures", the regulations guaranteeing the control unit decision become a necessary element of this formation. The principle of procedural fairness cannot be seen only through the prism of the constitutional right to court. In the judgment of 16 November 1999, SK 11/9912, the Tribunal stated that the constitutional right to appeal against decisions and decisions issued in the first instance is a very important factor in the implementation of the so called procedural justice. Article 78 of the Constitution, which

[46] P. Grzegorczyk, K. Weitz, *Commentary to Article 45 of the Polish Constitution*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP, Komentarz*, T. I, Warszawa 2016.

[47] *Ibidem*.

[48] L. Garlicki (ed.), *Artykuł 78*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2003.

establishes the right to appeal against judgments and decisions issued in the first instance, applies not only in the context of court proceedings, but also administrative procedures. In the latter case, the basis for formulating the principle of procedural fairness is Article 78 in connection with Article 2, Article 7 and Article 31 para. 3 of the Constitution.

8) Procedural rationality, which is a contradiction to arbitrariness – this rationality is based on careful, impartial and objective analysis of evidence, reasonable selection of arguments and justifying the decisions made; the procedural rationality in Summers' juxtaposition is a very capacious construction, indicating the primate ideas of every conduct that has the characteristics of rationality and, at the same time, by its formal aspect is a denial of arbitrariness or the use of force. In the verdict P 7/16[49] the Constitutional Tribunal notes that court proceedings should be constructed in such a way as to create the greatest probability that the decision issued by the court "will be based on real factual findings and will be in accordance with substantive law"[50]. Judicial justice does not guarantee that the decision will be accurate in every case, but the state is required to form a fair trial before an impartial judge and cannot establish such procedural obstacles that would be insuperable to the parties[51]. The most important factor regarding the subject of respect for the dignity of the participants in the proceedings is be the principle of impartiality of the decision-maker and the necessity to justify the decision. While the first trait is typical of legal discourse, in which the external party to the dispute and not interested in the specific resolution refers to the evidence presented to him, the arguments and the participants themselves, the requirement to rationalize the decision in the form of its justification is a condition for each practical discourse.

Unlike independence, which relates to the relationship of the judge with the environment, the principle of impartiality concerns the relationship between the judge and the parties and generally means a behavior of distance, objectivity, lack of personal prejudice and sympathy or disfavor towards any party, and therefore ultimately means treating them equally. Impartiality, its guarantees and the doctrine and jurisprudence of the Constitutional Tribunal, have been dealing with internal impartiality for a long time.

The justification, that is, disclosing the motives of the decision in a clear way is one of the main elements of the right of the individual to a fair procedure. The justification, which we treat here as a typical example of legal reasoning, means to quote the arguments for the decision. These arguments appoint selected standards or assessments that the decision-maker accepts. However, it should be emphasized that justification is an important and necessary ethical attitude that binds the participants of the argumentative discourse focused on the search for

[49] Judgment of the Constitutional Tribunal of 14 March 2018, P 7/16.

[50] *Commentary to Article 45 of the Polish Constitution*…

[51] A. Łazarska*, Rzetelny proces…,* p. 375.

equity and justice. It is also an expression of respect for the parties to the proceedings and allows them even to decide whether or not to use the appeal procedure.

9) Carrying out the process in a timely manner (without delay, but also without hurry); in the analyzed provision, the individual is guaranteed the right to have his matter considered without unreasonable delay. This expectation should be combined with efficiency, effectiveness and speed of conduct. Respecting these principles is conducive not only to respecting the individual's interest or even his dignity during the proceedings (see below), but it is also in the public interest as delays lead to weakening of confidence in the justice and state institutions in general. The subjective nature of this right is emphasized by the institution of complaint against the excessive length of proceedings[52].

10) The presence of mechanisms to implement process values.

5. CONCLUSIONS

The remarks presented above were aimed at showing two issues that I consider important. First of all, the respect for human dignity and the subjective treatment of addressees of legal norms by public authorities is the basic vocation of the state that we define as a legal state. Secondly, one of the ways of respecting individual as a subject of law, is the particularly understood organization, reliability, rationality and validity of procedures used by the state, the effect of which is to be individual and specific decisions. Our sense of dignity and the broader concept of trust in the state and law (i.e. one of the leading principles of the rule of law) also consists of a specific way of treating us as participants and recipients of these processes. One of the greatest advantages of shifting the focus from material decisions to procedures allows us to avoid ontological and axiological disputes. The fair procedure is structured to guarantee respect for pluralism and respect for divergent interests, which in itself is also a condition of respect for dignity and diversity. Wherever we refer to justice or equity we obtain a guarantee that acting in accordance with known, accepted and respected communication rules will lead to a rational and justified result.

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Summary

Human dignity in the Polish law is considered as the basis for the system of rights and freedoms regulated in Chapter II of the Constitution of 1997. In turn, the rule of law is a principle of constitutional democracy respecting human rights. Procedural rules focus on the manner in which the state operates, also in relation to individuals. Procedural justice as a principle derived from the rule of law can be defined as a set of values whose guarantee in legal norms and implementation in procedural practice affects their fairness and enables their positive evaluation. The jurisprudence of the Constitutional Tribunal considers the principle of procedural fairness as one of the principles of the rule of law and binds it with the right to court which means exactly: 1) the right of access to court, 2) the right to really fair procedure, 3) the right to court judgment, and 4) the right to appropriate shape of the system of the authorities examining cases. Appropriate shaping (fairness) of the procedure within the meaning presented by the Constitutional Tribunal ensures in particular that the parties of proceedings have: the right to be heard; the right to obtain a justification of the decision, which prevents arbitrary action of the court; ensured predictability of the proceedings; guarantee of procedural measures balancing the position of the parties; ensured the control of the decision by a superior instance; guarantee of impartiality of the judge. Meeting these requirements guarantees respect for dignity of a man as a participant in the proceedings.

KEY WORDS

dignity, rule of law, procedural justice

Streszczenie

Godność człowieka, zarówno w wymiarze osobowym, jak i osobistym jest na gruncie polskiego prawa podstawą systemu praw i wolności regulowanego w rozdziale II Konstytucji z 1997 r. Z kolei zasada państwa prawnego to kluczowa zasada demokracji konstytucyjnej respektującej prawa człowieka. Przepisy proceduralne skupiają się na sposobie, w jaki państwo działa, również w stosunku do jednostek. Sprawiedliwość proceduralna jako zasada wywodzona z zasady państwa prawnego może być więc definiowana jako zbiór wartości, których zagwarantowanie w normach prawnych i faktyczne wdrażanie w praktyce procesowej wpływa na ich sprawiedliwy przebieg i umożliwia jego pozytywną ocenę. Orzecznictwo Trybunału Konstytucyjnego wiąże zasadę sprawiedliwości proceduralnej, jako jedną z zasad państwa prawa przede wszystkim z prawem do sądu. Oznacza ono w szczególności: 1) prawo dostępu do sądu, 2) prawo do

odpowiedniego ukształtowania procedury sądowej, 3) prawo do wyroku sądowego oraz 4) prawo do odpowiedniego ukształtowania ustroju i pozycji organów rozpoznających sprawy. Odpowiednie ukształtowanie procedury w rozumieniu Trybunału Konstytucyjnego zapewnia stronom prawo do bycia wysłuchanym; prawo do uzyskania uzasadnienia decyzji, co pozwala zapobiec arbitralności w działaniu sądu; zapewnienie przewidywalności postępowania; zagwarantowanie środków proceduralnych równoważących pozycję stron; zapewnienie instancyjnej kontroli decyzji; bezstronność sądu. Spełnienie tych wymogów gwarantuje poszanowanie godności człowieka jako uczestnika postępowania.

SŁOWA KLUCZOWE

godność, państwo prawa, sprawiedliwość proceduralna