Przegląd Prawa Konstytucyjnego
-----ISSN 2082-1212-----
DOI 10.15804/ppk.2020.06.54
-----No. 6 (58)/2020-----

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The right to a fair trial in the system of individual rights and freedoms

Keywords: individual rights, individual freedoms, right to a fair trial
Słowa kluczowe: prawa jednostki, wolność jednostki, prawo do sądu

Abstract

The right to a fair trial is at the forefront of the key individual rights in a broad catalogue of all rights and freedoms, for at least several reasons. Firstly, because it provides for one of the most important procedural mechanisms for the enforcement of all the other rights and freedoms. Secondly, because it protects the individual against potential violation of their rights and freedoms. Thirdly, because it is a reflection of the relation between the individual and the state, indicating all those elements that are today commonly considered as specific measures in the democracy index. As a consequence, the manner in which the right to a fair trial is established and its specific structure determines all other rights and freedoms, and especially their practical application, which determines whether the rights and freedoms are concrete or only appearances.

Streszczenie

Prawo do rzetelnego procesu sądowego w systemie praw i wolności jednostki

Prawo do rzetelnego procesu sądowego zajmuje czołowe miejsce wśród kluczowych praw jednostki w szerokim katalogu wszystkich praw i wolności, co najmniej z kilku

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powodów. Po pierwsze dlatego, że przewiduje jeden z najważniejszych mechanizmów proceduralnych służących egzekwowaniu wszystkich pozostałych praw i wolności. Po drugie, ponieważ chroni jednostkę przed potencjalnym naruszeniem jej praw i wolności. Po trzecie, ponieważ jest odbiciem relacji między jednostką a państwem, wskazując wszystkie te elementy, które są dziś powszechnie uznawane za swoiste wskaźniki stopnia demokracji.

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The roots of the right to a fair trial can be traced back in Roman law[2] although the right itself emerged in Europe only in the 13 century. The first country to establish this institution was England. Its Magna Carta expressed the monarch's promise that: "No free man shall in future be arrested or imprisoned or disseized of his freehold, liberties or free customs, or outlawed or exiled or victimized in any other way (…) except by the lawful judgement of his peers or by the law of the land"[3]. This principle was then reflected in the *habeas corpus* institution that provided for the right to request that the lawfulness of imprisonment or other forms of limitation of rights be reviewed by a court.

In the Polish constitutional system, already the Constitution of May 3 proclaimed the principle of separation of powers, by which: "The judicial authority shall not be carried out either by the legislative authority or by the King, but by magistracies instituted and elected to that end," and ordered that "it shall be so bound to places, that every man find justice close by" and "The courts of first instance shall be ever ready and vigilant to render justice to those in need of it"[4].

In the Constitution of March 17, 1921, the principle was laid down in Art. 98, which stipulated that "No one may be deprived of the court to which he is subject by law", with an equally important reservation that "No statute may deprive a citizen of access to the courts for the purpose of demanding rep-

[2] W. Litewski, *Rzymskie prawo prywatne*, Warsaw 1995, p. 347.

[3] L. Garlicki, *Prawo do sądu* [in:] *Prawa człowieka. Model prawny*, ed. R. Wieruszewski, Wrocław 1991, p. 537.

[4] Z. Czeszejko-Sochacki, *Konstytucyjna zasada prawa do sądu*, „Państwo i Prawo" 1992, No. 10, p. 14.

aration for injury or damage". The above formula was then reiterated in the Constitution of April 23, 1935.

After World War II, the principle of the right to a fair trial went missing in the Polish legal system. It was only with the political changes of 1989 that the conditions emerged for seeking and re-establishing this principle in law. The problem was considered against the background of "the right to defence counsel", which was proposed to be considered in the context of a broader term, namely "the right to legal protection", i.e., "the rights of a citizen (individual) to have all cases and disputes related to him/her examined and resolved before bodies offering the maximum guarantee of making objective, fair and equitable decisions"[5].

In the debate on the right to a fair trial at that time, it was pointed out that this right "means the right to demand that a criminal, civil or administrative case be examined and finally resolved by a court independent of other state bodies or political parties, subject only to the Constitution and statutes. The subjective scope of this right covers both Polish citizens as well as citizens of other countries and stateless persons, regardless of mutual protection granted by other countries. This will meet the requirement contained in Art. 2 of the International Covenant on Civil and Political Rights"[6].

The constitutional bills in the period of the provisional system, i.e., the years 1989–1992, did not contain the right to a fair trial, hence the need to interpret it out of the doctrine and jurisprudence of courts. No doubt, the introduction of the principle of a democratic state ruled by law into the text of the Constitution was of key importance for decoding the right to a fair trial.

Leszek Garlicki believed that since the framers included in the Constitution the term known to many systems of developed democracy, it also seemed permissible to treat the meaning assigned to a state ruled by law in these systems as an interpretative guideline. Also, the establishment of the rule of law principle in Art. 1 implies two fundamental consequences: firstly, the rule in interpreting provisions that are unclear or insufficiently regulate procedural issues should be to give them a meaning that would not prevent an individual

[5] Ibidem, pp. 18–19.

[6] L. Wiśniewski, *Gwarancje praw i wolności człowieka i obywatela w przyszłej konstytucji* [in:] *Prawa, wolności i obowiązki człowieka i obywatela w nowej polskiej Konstytucji*, ed. Z. Kędzia, Poznań 1990, pp. 72–73.

from pursuing their claims in court and, secondly, the rule of law establishes a specific "positive obligation" for the legislator to make legislative changes in a way that operationalizes the rule of law[7], including the right to a fair trial, as a certain "obvious" component in the general concept of the rule of law.

The adoption of a new, full-fledged Constitution in 1997 led to a qualitatively new situation in the subject matter. The principle of the right to a fair trial became an independent constitutional principle set out in Art. 45 of the Constitution. Article 45 of the Polish Constitution stipulates that "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". Article 45 (1) lays down the right to a fair trial in the most positive way as compared to the content of Art. 77 (2), according to which "Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights". The latter complements the constitutional principle of the right to a fair trial[8], being its specific determination.

The Constitutional Court also commented on the subjective scope of the right to a fair trial in its judgement in case ref. SK 5/02 of June 11, 2002, stating that it was determined by the constitutional concept of a case. The implementation of constitutional guarantees of the right to a fair trial covers "all situations – regardless of detailed procedural regulations – in which it is necessary to decide on the rights of an entity (…), while the nature of these legal relations precludes the arbitrariness of decision-making on the legal situation of an entity by the other party in the relation" (judgement in case ref. K 21/99 of May 10, 2000).

Another important term contained in Art. 45 (1) of the Polish Constitution, i.e., "hearing of the case", also requires an analysis. The concept of a

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[7] A clear prohibition of a restrictive interpretation of the right to a fair trial appeared in the judgement of the Constitutional Court of January 7, 1992 (case ref. K 8/91, OTK 1992/1/5); see: J. Gołaczyński, A. Krzywonos, *Prawo do sądu* [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, eds. B. Banaszak, A. Preisner, Warsaw 2002, p. 730; L. Garlicki, *Materialna interpretacja klauzuli demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego* [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, ed. S. Wronkowska, Warsaw 2006, pp. 123–139.

[8] For more on this see: judgement of the Constitutional Court case ref. SK 9/99 of May 25, 1999; judgement of the Constitutional Court case ref. K 21/99 of May 10, 2000; judgement of the Constitutional Court case ref. SK 29/99 of May 15, 2000.

"case" as an object of the constitutional right to a fair trial is vague. A precise definition of the term will refer to the determination of the material scope of the right to a fair trial.

The constitutional determination of the right to a fair trial expressed in Art. 45 (1) contains both systemic and procedural components. The systemic requirements indicate the court as the only body competent and obliged to hear a case brought. At the same time, the framers of the Constitution determine the character of the court as competent, independent and impartial.

The position taken by the Polish Constitutional Court as regards competence of the court is interesting. It concluded, in the case ref. K 2/01 of April 23, 2002, that the right to a fair trial implied the legislator's obligation to structure the scope of jurisdiction of individual types of courts in such a way that no cases, regardless of the complexity, are beyond the scope of the due process of law. A court should be competent to hear a case, which means that it should have substantive, local and instance jurisdiction.

The independence of the courts is closely related to the independence of judges. The independence of the courts is thus generally understood in the doctrine as "the result of the separation of the judiciary from the legislative and executive powers. This separation must lead, in particular, to the prohibition of the legislative and executive from taking control of judicial decisions and the exclusion – except for the power of pardon – of the possibility of the legislative or executive changing or revoking a court decision"[9].

Judicial independence is defined in the doctrine as: a) impartiality towards litigators, b) independence from extrajudicial bodies, c) internal independence of the judge from other judicial bodies, d) independence from social factors; e) individual independence of the judge[10]. Judicial independence, apart from the external dimension, also has an extremely important individual dimension. Judicial impartiality concerns the subjective attitude of a judge, and one of its components is the requirement of apoliticality of judges, which has a clear constitutional basis in the prohibition of judges from

[9] A. Murzynowski, A. Zieliński, *Ustrój wymiaru sprawiedliwości w przyszłej konstytucji*, „Państwo i Prawo" 1992, No. 9, p. 3 f.

[10] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (Ogólna charakterystyka)*, „Państwo i Prawo" 1997, No. 11–12, p. 99.

performing public activities incompatible with the office or from being members of a political party[11].

The third criterion, i.e. the requirement of impartiality of a court, generally means that its composition is formed so that it does not lead to identification with the interests of only one party to a dispute[12]. Closely related to the principle of impartiality is the right to be heard. In the Polish legal system, this right results from the adopted concept of the rule of law and from the systemic axiology, in particular the protection of human dignity[13].

In the procedural aspect, the right to a fair trial includes three conditions for hearing a case, i.e., the examination is to be fair, open and carried out without undue delay. A fair hearing "requires at least that those forced to assert their claims as to their rights and obligations in court have a realistic opportunity to present their arguments"[14]. Open hearing of a case means an examination with access to the case both in the external and internal dimension. In the court practice, internal openness is of fundamental importance, meaning free access to evidence for the parties to the proceedings, which is also an element that guarantees the adversarial nature of the court process as its defining feature.

Another procedural guarantee is the constitutional mandate that the case be heard "without undue delay". This directive requires special caution, as after all its main idea is to ensure full effectiveness of judicial protection, and "the right to a fair trial loses its relevance when it entangles the interested party in protracted, long-lasting trials and, apart from the expenditure of energy and financial resources, does not bring them any benefit"[15].

In conclusion of the discussion on the essence of the constitutional mandate that a case should be heard "without undue delay", it seems that one

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[11] J. Szymanek, *Apolityczność sądów i sędziów,* [in:] *Niezależność sądów i niezawisłość sędziów,* eds. M. Dąbrowski, J. Szymanek, M.M. Wiszowaty, J. Zaleśny, Warsaw 2020, p. 46f.

[12] For more on this, see: judgement of the Constitutional Court case ref. SK 11/01 of February 6, 2002.

[13] For more on this, see: M. Sawczuk, *Naruszenie prawa do wysłuchania podstawą skargi konstytucyjnej*, „Annales Universitatis Mariae Curie-Skłodowska" Sectio G, 1997, vol. XLIV, p. 97 f.

[14] S. Frankowski, R. Goldman, E. Łętowska, *Sąd Najwyższy USA. Prawa i wolności obywatelskie*, Warsaw 1997, p. 223.

[15] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji…*, p. 103.

should agree with the opinion[16] that the mandate is addressed primarily to the courts themselves, so that, taking into account the realities of a case, they also have a due regard to the efficiency of the proceedings. This efficiency is an important guarantee of the right to a fair trial, as it determines the effectiveness of the due process of law.

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[16] Ibidem, p. 104.