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Chapter IX

Judicial impartiality and independence in the documents of the Council of Europe

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1. General comments

Judicial impartiality and independence are considered as essential elements of a fair trial as defined in Art. 6 paragraph 1 of the European Convention on Human Rights of November 5, 1950 ("Journal of Laws" of 1993, No. 61, item 284). It shows that everyone is entitled to a fair and public trial without undue delay by a competent, impartial and independent court.

According to Jacek Gołaczyński and Alicja Krzywonos, independence must stand for the autonomy of the judge both in respect to the litigating parties as well as to the state bodies. The obligation of impartiality goes beyond the scope of protection of the principle of independence, since it obliges the judge to oppose the assessments stemming from his experience, stereotypes and prejudices. In contrast, a judge's conflict with the principle of the independence must stand for such a lack of impartiality that results from making the content of the judicial decision conditional upon the external entity.[1]

The principle of judicial independence constitutes the guarantee of civil rights and freedoms, indispensable for a democratic rule of law. Therefore, this principle should be defined broadly. In addition, it is important that the right of the litigating party to have the case adjudicated by an independent and impartial court was respected at every stage of the proceedings, both by the court of first instance as well as by the highest tribunals adjudicating in a given country. The right to an

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[1] Jacek Gołaczyński, Alicja Krzywonos, *Prawo do sądu* [*The Right to Court*], in: *Prawa i wolności obywatelskie w Konstytucji RP* [*Civic Rights and Freedoms in the Polish Constitution*], Bogusław Banaszak, Artur Preisner (eds.), Wydawnictwo C.H. BECK, Warszawa 2002, p. 725–243.

impartial and independent trial is not given once and for all. For this reason, respect for that right must be monitored both by the jurisprudence, ombudsmen and non-governmental organizations dealing with human rights. It is also in the interest of the justice system itself to maintain the standard of a fair court trial at the highest level. Therefore, the judges themselves should be interested in observance of this right and in responding to a question whether their actions guarantee the party to the proceedings the right to an impartial and independent trial.

According to Bogusław Banaszak, the principle of independence means that the judge makes an independent interpretation of the legal provisions and the assessment of facts and evidence while undertaking the activities in the area of the enforcement of justice. The independence determines the autonomy of the adjudicating judge in relation to any other person, regardless of whom they represent, and to all other state bodies. Accordingly, judicial independence is thus understood as the inadmissibility of any outside interference or pressure on the judge towards a certain adjudication of the case.[2]

Andrzej Rzepliński pointed out that the concept of the judicial independence also entails a participatory influence of judges on the recruitment of new judges, tenure of judges, their disciplinary liability only before the court and the co-decisive role of the judicial self-government in creating the content of the judicial structure determined by law. It is expected, moreover, that carefully chosen judges, with respect to their traits of character, will refrain from any and all political activity.[3]

2. The European Convention for the Protection of Human Rights in the context of impartial and independent court

The most important document in the European system of the protection of human rights is the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), signed on 4 November 1950 in Rome by the Member States of the Council of Europe. The Convention entered into force on 3 September 1953.[4] The aim of the signatories of the signed international agreement was the protection and realization of human rights and fundamental

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[2] Bogusław Banaszak, *Konstytucyjne ujęcie zasady niezawisłości sędziowskiej w Polsce* [*The Constitutional Recognition of the Principle of Judicial Independence in Poland*], "Zeszyty Naukowe Sądownictwa Administracyjnego w Polsce" ["Scientific Papers of the Administrative Judiciary in Poland"] 2009, No. 6 (27), p. 13.

[3] Andrzej Rzepliński, *Sądownictwo w Polsce Ludowej. Między dyspozytywnością a niezawisłością* [*The Judiciary in the People's Republic of Poland. Between Dispositiveness and Independence*], Oficyna Wydawnicza „Pokolenie", Warszawa 1989, p. 6.

[4] Marek Antoni Nowicki, *Wokół konwencji europejskiej* [*Around European Convention*], Biblioteka Palestry, Warszawa 1992, p. 11–12.

freedoms. The catalogue of the established rights was intentionally limited to the most important rights that gained consensus among the states — founders of the Council of Europe.

As previously mentioned, the right of a party to a fair trial, including the right to impartial and independent court, was regulated in Art. 6 of the ECHR. According to Rzepliński, we can speak of the independence of the judiciary in a double sense, taking into account both the independence of the judiciary from all other authorities and the independence of judges in settling disputes and matters submitted to them by the parties for adjudication. In the context of judicial independence there arises the issue of the impartiality of a judge, which is not an equal notion. Judicial independence is the feature of the relation of a judge to the executive and the legislative power as well as to the judicial administration and political pressure groups or party authorities. Impartiality, in turn, as the term itself suggests, is a feature of the relation of the judge to the litigating parties.[5] There should be taken into consideration both the subjective and the objective elements of independence and impartiality. The subjective element concerns the determination of whether the judge's personal beliefs indicate the concern as to his independence and impartiality. There is presumed the impartiality of the judge until his partiality has not been proven. In practice, the evidence for the latter is considerably difficult to present. The objective component is determined by the fact of whether in the eyes of the litigating party the judge does not present himself as biased.[6]

A new phenomenon occurring in the modern world is to exert pressure through the media, referred to as the fourth power, next to the legislature, the executive and the judiciary. Hans Joachim Schneider draws attention to the often false image presented in the mass media, influencing public opinion and judicial decisions.[7] Therefore, judges should be particularly attentive to the fact whether publications, especially published in the electronic media, do not affect the rulings issued by the judiciary. In order for the judge not to yield and to resist such pressures, he must know the mechanisms for creating the views of the public through the mass media and seek to establish the objective truth. Therefore, justice system must be independent not only from the public authorities, but also from "the fourth power, namely the mass media".

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[5] Andrzej Rzepliński, *Zasada niezawisłości sądów i jej ustawowa aplikacja w Rzeczypospolitej Polskiej* [*The Principle of Judicial Independence and its Statutory Application in the Republic of Poland*], in: idem (ed.), *Prawa człowieka w społeczeństwie obywatelskim* [*Human Rights in Civil Society*], Wydawnictwo Helsińskiej Fundacji Praw Człowieka, Warszawa 1993, p. 118.

[6] Clare Ovey, Robin C.A. White, *European Convention on Human Rights*, 3rd Edition, Oxford University Press, Oxford 2002, p. 160.

[7] Hans Joachim Schneider, *Zysk z przestępstwa. Środki masowego przekazu a zjawiska kryminalne* [*Profit from Crime. Media and Criminal Phenomena*], Wydawnictwo Naukowe PWN, Warszawa 1992, p. 135–140.

It is equally important to show both to the litigating parties and to the public opinion that the judiciary is independent and impartial. This objective can be achieved through clear communication related to the trial, by holding a dialogue with the litigating parties and their attorneys, but also in the form of a clear system of providing the statements of reason of court judgements, both in oral and written form. In particular, a judge should be aware of the addressee of his decisions and identify what values he was guided by in presenting a particular adjudication. Marek Antoni Nowicki notes that the judicial power should not only be exercised, but it should be shown that the latter indeed takes place.[8]

It should be kept in mind that the judicial trial is not carried out in a democratic society in an utter isolation. Rather, it is integrated with the structure of the separation of powers and in the democratic public sphere with its own control mechanisms. Control instruments on the part of the public assume the form of the media and therefore the fundamental power of a judge should be the ability of handling the media in a competent and skilful manner. Therefore, judges should have a proper education in public relations. They should be able to explain their own decisions (judgments) in simple and understandable words. They should appreciate journalists as important players in the game of freedom and democracy.[9]

3. Recommendations of the Committee of Ministers of the Council of Europe and the independence and impartiality of the judge

An important role in shaping a fair trial can be played by the recommendations of the Committee of Ministers of the Council of Europe. In fact there is a dispute as to the legal nature of the recommendations. They are not mandatory law, but they are especially important from moral and political point of view, as well as they are crucial in the development of international law. They affect the formation of legal opinions and the positions of other states, and they may also contribute to shaping the norms of customary law.[10]

The recommendations of the Committee of Ministers of the Council of Europe as a kind of soft law are addressed to the Member States. Although they are not formally binding, the Committee of the Council of Ministers has the right

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[8] Marek Antoni Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo*, t. 1: *Prawo do rzetelnego procesu* [*The European Court of Human Rights. Case Law*, Vol. 1: *The Right to a Fair Trial*], Kantor Wydawniczy Zakamycze, Kraków 2001, p. 279.

[9] Paul Tiedemann, *Wyzwania stawiane przed sędzią XXI wieku* [*The Challenges Posed before a Judge in the XXI Century*], "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 6 (45), p. 90.

[10] Remigiusz Bierzanek, Janusz Symonides, *Prawo międzynarodowe publiczne* [*Public International Law*], Wydawnictwo Naukowe PWN, Warszawa 1992, p. 286–288.

under Art. 15 point b of the Statute to address the Member States for information on how the case proceeds. The standards of the soft law are made use of when the Council of Europe is not yet ready to agree on convention-based solutions. Therefore, the recommendations inspire the creation of treaty-based standards (then their significance is of temporary nature), or they complement the latter (in such case their significance is permanent).[11] In the case of recommendations on fair trial the recommendations are of permanent character and they complement the understanding of the said issues contained in Art. 6 of the ECHR.

According to Z. Kmieciak, the provisions of the European soft-law entail the recommendations addressed not only to the national legislator, but also to practice. In the situation when there can be inferred adequately substantiated rules of conduct from the said soft-law, they can be regarded as an important source of interpretative directives that fill in the content of the framework of the national procedural regulations.[12]

The recommendation concerning the right to a fair trial was devoted to the excessive workload in courts and solutions to reduce the latter. The recommendation No. R (86) 12 of the Committee of Ministers dated 16 September 1986 on measures to prevent and reduce the excessive workload in courts drew attention to the possibility of an amicable settlement of disputes both in pre-court proceedings and in court. Moreover, it was recognized that some activities do not need to be performed by judges, e.g. maintaining business records and collecting court fees. Additionally, there was pointed out the need to regularly monitor the cases in terms of their number and degree of difficulty, thus ensuring the balance in the workload to ensure to the parties the safety in the adjudication of cases on the adequate legal level[13]. It should be stressed at this point that an excessively overloaded judge is not able to guarantee to the litigating party a fair conduct of the proceedings, i.e. to mobilize the appropriate time to prepare for the hearing, to secure the freedom of expression, to devote the adequate time for a hearing, and finally, to adjudicate the case within a reasonable time.

One of the most important documents of the Committee of Ministers of the Council of Europe is the Recommendation R (94) 12 of 13 October 1994 on

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[11] Jerzy Jaskiernia, *Rada Europy jako organizacja międzynarodowa kreująca i oddziałująca na implementację standardów demokratycznych* [*The Council of Europe as an International Organization Creating and Influencing the Implementation of the Democratic Standards*], in: idem, (ed.), *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989–2009* [*Council of Europe and the Democratic Transitions in the Central and Eastern Europe in the years 1989–2009*], Wydawnictwo Adam Marszałek, Warszawa 2010, p. 35.

[12] Zbigniew Kmieciak, *Postępowanie administracyjne i sądowoadministracyjne, a prawo europejskie* [*Administrative and Court-Administrative Proceedings*], Wolters Kluwer, Warszawa 2010, p. 93–94.

[13] Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe concerning measures to prevent and reduce the excessive workload in the courts.

independence, efficiency and role of judges.[14] The latter constitutes a kind of soft law and draws attention to an important element of fair trial. In the analysed document the emphasis was primarily put on Art. 6 of the ECHR, i.e. that "everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" as well as on the Basic principles of independence of courts and judges adopted by the UN General Assembly in November 1985. The introduction to the recommendations pointed out the important role of judges in protecting human rights and fundamental freedoms, since the independence of judges aims at strengthening the rule of law in democratic states in order to achieve an efficient and fair legal system. In the preamble it was recommended that the governments of the member states should adopt or consolidate any and all measures necessary to increase the role of individual judges and the entire judiciary and to strengthen the independence and autonomy, as well as efficiency.

An integral part of these recommendations is the Explanatory Memorandum,[15] which stated that the independence of the judiciary is one of the main pillars of the rule of law. The need to strengthen the independence of judges not only refers to individual judges but it may be also relevant for the entire system of justice.

The recommendation applies to all persons exercising judicial functions, including those appointed to adjudicate cases related to constitutional law, criminal, civil, commercial and administrative law. In general, the recommendations were divided into six principles:

1. General principles of judicial independence;
2. The authority of judges;
3. Adequate working conditions;
4. The right to associate;
5. Duties of judges;
6. Violation of duties and disciplinary offences.

The General Rules governing the judicial independence set forth that there should be applied any and all the necessary measures to comply with the protection and strengthening of independence, and in particular the independence of judges should be guaranteed in accordance with the provisions of the Convention and constitutional principles. Each state should create appropriate conditions so that:

1) judicial decisions could not be altered in any procedure other than that provided by law for the appellate proceedings;

2) the conditions of the terms of office of judges and their remuneration were statutorily defined;

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[14] Recommendation No R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges.

[15] Recommendations and explanatory memorandum issued in the form of a separate brochure "Independence, Efficiency and Role of Judges", *Legal Issues* (Council of Europe Publishing 1995).

3) no non-judicial body could take a decision on the court's jurisdiction under the law;

4) the government or the administration could not take any decisions derogating previously issued court decisions, apart from the use of amnesty, pardon or similar measures.

Judicial independence is mainly connected with the maintenance of the separation of powers (Art. 2 paragraph 2b of the Rules). The executive and legislative authorities have a duty to ensure the independence of judges. Some of the measures taken by these authorities may directly or indirectly interfere with the exercise of judicial power or modify it. Therefore, the executive and the legislative authorities should refrain from any steps that could undermine the independence of judges. This also applies to pressure groups and other interest groups (paragraph 15 of the commentary to the Rules).

What arises as the essential issue is the necessity of ensuring the independence of judges at the time of their appointment and during their entire professional career (Art. 2 paragraph 2c of the Rules) as well as avoiding any discrimination. The decisions in respect of appointing a judge and to promote him should be transparent in nature and be evaluated by independent bodies (paragraph 16 of the commentary to the Rules).

The recommendation contains the proposals (Art. 2 paragraph 2d) of the standards which should be preserved by all Member States so that these decisions were undertaken in a manner free from any undue influence from the executive power or the administration. In addition, judges should have the legal education, appropriate theoretical or practical knowledge and high skills, which — according to the authors of the commentary on the Rules — will guarantee greater independence from the administration (paragraph 16 of the commentary to the Rules).

Judges, when making their decisions, should be able to act independently (Art. 1 paragraph 2d of the Rules). The judge should have unlimited freedom to impartially adjudicate in the case, guided by the applicable law, in accordance with his conscience and understanding of the circumstances of the case. The aim of this recommendation is to ensure that there will not be any kind of pressure exerted on the judge to make him issue the ruling in accordance with the wishes of one of the litigating parties, the administration, the government, or any other authority. Attempted bribery of a judge should be prosecuted under criminal law. In some states, judges are obliged to inform the chairman of the court or other authorities, for example about delay in the examination of cases. The latter is thought to be necessary for the efficient management of limited personal resources in court and for planning and is, naturally, consistent with the idea of judicial independence. Since, however, it can be sometimes used to influence the judges, they should not be obliged to provide information about the merits of cases in justifying the decisions (paragraph 17 of the commentary to the Rules).

An important guarantee of judicial independence is the way of allocating cases. There are many ways of distributing the cases, for example, by a draw, according to the alphabetical order of the names of the judges, by allocating cases to specialized sections in court, according to a predetermined sequence (i.e. automatic division of cases) or assigning cases to judges by the chairman of the court (Art. 2 paragraph 2e of the Rules). What is important is obviously not the very system of distributing cases, but that it was not subject to external influence and that it did not provide an advantage to one party. In some cases (illness of the judge or conflict of interest, it is permissible to transfer the case to another judge (paragraph 18 of the commentary to the Rules).

In addition, the judges, both elected and appointed, should be guaranteed the performance of the office until retirement age or the expiry of the period of appointment, if it exists (Art. 3 of the Recommendations).

Rule II of the Recommendations concerns the authority of judges. To ensure the respect due to the judge's office as well as efficient proceedings, all participating entities (parties, witnesses, experts) must be, in accordance with the national law, subject to the judicial authority. Public authorities and their representatives must also be subject to the judicial authority. Judges should be provided with practical measures and appropriate powers to ensure order in the proceedings. If they are provided with such powers they have the duty to prevent any situation that would call into question their independence. As an example, there could be indicated the proceedings, existing in some Member States, in respect of the contempt of court. Moreover, during the trial it may prove necessary to guarantee the presence of the guards to remove the people who cause disturbances (paragraphs 22–25 to the commentary to the Recommendations).

The third part of the Recommendations is devoted to creating appropriate working conditions for judges. Suitable working conditions are a noteworthy element of the projects aimed at improving the efficiency and fairness of justice. Judges' right to such working conditions stems from the authority vested in them and from the requirement of its independent implementation. It is necessary to acquire the appropriate number of judges to prevent excessive workload and allow them to bring to an end the instituted proceedings in a reasonable time, regardless of their number (Art. 1 paragraph 1a). The states could also consider the possibility of hearing cases in one-judge panel in the first instance. In order to ensure the proper application of the law one cannot just limit to set forth the requirement, at the recruitment stage, of the judges holding appropriate qualifications; they must be properly trained before their appointment and during their professional careers. Important elements of appropriate working conditions are the status and the remuneration. The status granted to the judge should relate to the dignity of his office, and the salary should sufficiently compensate the weight of his responsibilities. These factors are important for the independence of judges. What is of utmost importance is the recognition of the importance of their role, expressed in terms of the respect

due to them and adequate remuneration (paragraphs 25–29 of the Commentary to the recommendations). Besides, there should be taken all measures necessary to ensure safety of judges, such as the presence of the policing service in courts and providing police protection to the judges who may become or have become victims of serious threats (Art. 2 of the Rule III of the Recommendations).

In addition, Rule IV of the Recommendations indicates the right of association of judges in their own groups that guard the independence of judges.

Rule V of the Recommendations was devoted to the obligations of judges. In the course of the proceedings judges have a duty to protect the rights and freedoms of all people. Judges have the duty and should be equipped with powers enabling them to fulfil the judicial duties in such way that they can ensure the proper application of the law and the impartial, efficient and quick adjudication of cases.

Judges should in particular be required to:

a) adjudicate all cases independently and without any external influence,

b) adjudicate all cases in an impartial manner in accordance with one's own assessment of facts and understanding of the law, to ensure that all the parties are duly heard and to respect the procedural rights granted to the litigating parties under the provisions of the Convention,

c) withdraw from the adjudication of the case or to refrain from a specific action when this is justified by legitimate reasons, and only in such cases. Such reasons should be prescribed by law and may refer, for example, to serious health problems, conflicts of interest or conflict of the interests of justice,

d) to impartially explain to the litigating parties the procedural issues, if such need arises,

e) to encourage parties, where appropriate, to conclude a settlement,

f) to provide clear and complete as well as easily understandable motives of the decisions, unless the law or established practice prove to the contrary.

In turn, Rule VI of the Recommendations applies to misconduct and disciplinary offences. It provides for the responsibility of the judge when he does not carry out his duties efficiently and properly or in the event of disciplinary offences. In respect of disciplinary liability of judges the law should establish appropriate procedures to ensure all the procedural guarantees provided for the ECHR, for example, the adjudication of cases within a reasonable time and the right to respond to any objections (Art. 1 and 2 of Rule VI of the Recommendations).

4. The European Court of Human Rights in Strasbourg as a guarantor of a fair trial

The most important role in the area of setting the standards for the protection of human rights in practice is played by the European Court of Human Rights in Strasbourg (hereinafter ECHR), which operates in the structures of the

Council of Europe. The case law of the Court has most often taken the issue of the interpretation of Art. 6 of the ECHR, including the right to an impartial and independent court.

In its judgment of 10 January 2012 on *Pohoska vs. Poland* (application no. 33530/06),[16] the ECHR has made attempts to define an independent and impartial court. The Court pointed out that in deciding whether a given body can be considered 'independent' — notably independent of the executive power and of the parties involved in a case — there should be taken into account, among other things, the appointment of its members and the duration of their term of office, the existence of guarantees against outside influence and there should be also settled the question of whether this body has external attributes of independence (see case *Campbell and Fell vs. United Kingdom*, June 28, 1984, § 78, Series A no. 80; *Findlay vs. United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I; *Incal vs. Turkey*, 9 June 1998, § 65, *Reports* 1998-IV; *Brudnicka and Others vs. Poland*, No. 54723/00, § 38, ECHR 2005-II; and *Luka vs. Romania*, No. 34197/02, § 37, 21 June 2009). Moreover, the requirement of the irremovability of judges by the executive during their term of office must be generally regarded as a natural consequence of their independence, and therefore it must also be subject to the guarantees provided in Art. 6 § 1 (see *Campbell and Fell* case, cited above, § 80). The Court further reminded that the required guarantees of independence are applicable not only to 'court' within the meaning of Art. 6 paragraph 1 of the Convention, but they extend also to "judge or other officer authorized by law to exercise judicial power", as referred to in Art. 5 paragraph 3 of the Convention (see *McKay vs. United Kingdom* [GC], No. 543/03, § 35, ECHR 2006-X). The Court also notes that in a democratic society the issue of fundamental importance is the existence of public confidence in the courts. To this end, Art. 6 requires impartiality of the court under its scope. Normally, impartiality stands for no bias and prejudice, and its existence or its absence can be checked using various tests. The Court has made, therefore, a distinction between a subjective approach — that is the desire to determine whether in a particular case there are any judicial beliefs or interests of a personal nature, and an objective approach — that is, determining whether a judge provides guarantees sufficient enough to rule out any reasonable suspicion in this respect (see *Piersack vs. Belgium*, 1 October 1982, § 30, Series A No. 53, and *Grieves vs. United Kingdom* [GC], No. 57067/00, ECHR 2003-XII (exceptions)). The Court in its judgments consistently argued that the existence of personal impartiality of a judge should be adopted as early as the premise, unless

[16] The analysis of the judgment: Agnieszka Wilk-Ilewicz, *Definicja niezawisłego i bezstronnego sądu oraz dostęp do sądu administracyjnego* [*Definition of an Independent and Impartial Court and Access to the Administrative Court*], "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 2 (41), p. 96–99, and the full text of the judgment and its translation on www.ms.gov.pl.

there is evidence to the contrary (see *Hauschildt vs. Denmark*, 24 May 1989, § 47, Series A No. 154). Regarding the evidence required in this respect, the Court, for example, seeks to ascertain whether a given judge shows hostility or ill will or has arranged to assign him with a specific case for consideration for personal reasons (see *De Cubber vs. Belgium*, 26 October 1984, § 25, Series A No. 86). The principle, according to which the court is deemed to be free of prejudice and bias, has for long time been perpetuated in the case law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere vs. Belgium*, 23 June 1981, § 58, Series A No. 43). The Court noted that in some cases it will be difficult to provide evidence to rebut such an assumption, however, it should be remembered, at the same time, that the requirement of objective impartiality provides a further important guarantee (see *Pullar vs. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III). In other words, the Court recognized the difficulty of finding a violation of Art. 6 due to the subjective bias of the judge, and therefore in most cases concerning the issues of the impartiality of the court — it focused on the objective test. However, one cannot strictly separate these two concepts here, since the specific conduct of a judge may not only lead to an objective fear as to his impartiality from the point of view of an external observer (an objective test), but it may also touch on the question of his personal conviction (a subjective test) (see *Kyprianou vs. Cyprus* [GC], No. 73797/01, § 119, ECHR 2005-XIII). Regarding the second type of test — in the situation when we apply it for the entire panel of the judges, it consists of determining whether — regardless of the personal conduct of any of the members of this panel — there exist verifiable facts which may raise doubts as to its impartiality. In this regard, external attributes may also be of some significance (see *Castillo vs. France*, 28 October 1998, § 45, Reports 1998-VIII; *Morel vs. France*, No. 34130/96, § 42, ECHR 2000-VI and *Kyprianou vs. Cyprus* [GC], cited above, § 118, ECHR 2005-XIII). In deciding whether in a given case there is a legitimate reason to fear that a given body is not impartial, the position of the people raising the objection of impartiality is important, but not decisive. The decisive factor is indeed the fact whether such a fear may be regarded as objectively justified (see *Ferrantelli and Santangelo vs. Italy*, August 7, 1996, § 58, Reports 1996-III, and *Wettstein vs. Switzerland*, No. 33958, § 44, ECHR 2000-XII).

In the context of the analysed case, the Court noted that the applicant's neighbour, and at the same time the opponent, in some cases turned out to be the brother of inspecting judge in the Regional Court in Elbląg. In the Polish judicial system the inspecting judge is responsible for the quality of rulings rendered by judges of the Regional Court and the district courts, as well as for the manner in which they perform their duties in the framework of the cases adjudicated by them. The functions of the inspecting judge can influence the course of the careers and promotions of other judges. The Court of Appeal in Gdańsk, bearing in mind the relationship between D.Ł. and an inspecting judge, repeatedly held that the

judges adjudicating in Elbląg courts should be excluded from cases involving the applicant. The Court considers that it cannot be ruled out that the situation in which national courts deem appropriate to exclude judges from adjudicating a given case and then the same judges are appointed to examine another case involving the same parties—may raise questions in the light of Art. 6 of the Convention. The Court notes, however, that in the particular circumstances of the present case it is not necessary to undertake a detailed examination of this particular aspect of the case, due to the following reasons. The Court notes that in the case initiated by the applicant, the assessor E.M. dismissed the applicant's request for excluding K.S., i.e. another assessor appointed to examine the case. The said ruling did not refer either to the links between D.Ł. and the inspecting judge, or to the earlier decisions of the Court of Appeals in Gdańsk. In this context, the Court observes that at the material time the inspecting judges were responsible for the evaluation of the suitability of assessors to perform judicial functions. Furthermore, the Court observes that at the material time the assessors were appointed by the Minister of Justice, provided that they meet a number of conditions specified in the Act of 27 July 2001 (as amended) on common courts ('the Act of 2001'). The Minister could trust the assessors the performance of judicial duties in the district court, subject to the approval by the college of regional court judges, for a period not exceeding four years (Art. 135 paragraph 1). In accordance with Art. 134 paragraph 5 of the Act of 2001, the Minister could have dismissed the assessor, including the assessor performing judicial duties.

The Court has previously held, bearing in mind the position of the Constitutional Court, that the court consisting of assessors was not independent within the meaning of Art. 6 paragraph 1 of the Convention, due to the fact that the Minister of Justice could have dismissed the assessor at any time during his term of office, and that there were not sufficient guarantees to protect him against the arbitrary exercise of the Minister's privileges (see *Henryk Urban and Ryszard Urban vs. Poland*, cited above, §§ 51–53). In conclusion, the Court therefore held, having regard to all the circumstances of the case, that there has taken place the violation of Art. 6 paragraph 1 of the Convention.

In another judgment as of 29 February 2012 on *Kinský vs. the Czech Republic*, application number 42856/06 (published in SIP LEX No. 1107808), the ECHR held that Art. 6 of the Convention requires that the courts were independent and impartial. The existence of impartiality for the purposes of Art. 6 paragraph 1 of the Convention must be settled in accordance with the subjective criterion, namely based on the personal conviction of a particular judge in a given case, and also according to an objective test, namely, after assessing whether a given court gave guarantees sufficient to exclude any legitimate doubt in this respect. This case concerns an objective criterion, since the applicant had not raised in his application the question of personal prejudice against him on the part of the judges. As for the objective criterion, it must be decided whether apart from judges' behaviour

there exist the facts — subject to assessment — that may raise doubts as to their impartiality. This means that when deciding on the existence in a given case of a justified reason to fear that a particular judge or authority exercising the function of the adjudicating panel lacks impartiality, the position of the person concerned is important but not decisive. The decisive question is whether this fear can be objectively justified. In this respect even appearances may be of some importance or, in other words, justice must not only be served, it must be also visible. What is at stake here is the confidence which the courts in a democratic society must inspire in society. In this case the applicant's statements show clearly that in his opinion, the judges were not impartial. It should, however, be decided whether those doubts were objectively justified. The Court understands that the media and the politicians are interested in the issue of the return of property confiscated before 1990 due to general action aiming to determine the owners of the property. The success of such activities could lead to the return of trillions-worth-of assets not only to the applicant, but to many other people who lost their property before 1990 and to whom the (national) regulations in respect of restitution did not apply. Consequently, one must agree with (the respondent) Government that the interest of politicians in this question and their meetings aiming at finding solutions to this situation were legitimate and, as such, they did not raise questions under the Convention.

In another judgment as of 29 May 2012 *Ute Saur Vallnet vs. Andorra*, application number 16047/10 (published in SIP LEX No. 1164656), the ECHR decided that in the present case it was beyond dispute whether Judge S. was a partner of a law firm that provided legal services for remuneration to the respondent Government at a time when the proceedings were pending under appeal. This follows from a decision of a national criminal court as of June 15, 2011, which states that at a time when S. was a partner in the law firm concerned, the respondent Government paid to the company conducting audits the amount corresponding to invoices issued for various services rendered. Although the respondent Government maintained that the law firm's invoices for the respondent Government covered the period that did not coincide with the period specified in this judgment, and the national criminal court erred in this respect, the Court cannot ignore the position of this court, according to which "the legal representative [of the applicant] submitted certain invoices issued to the respondent Government by the law firm R., where S. was a partner, in respect of the period in question, namely the year 2004, which coincides with the peak of the crisis between [the applicant company] and the Government [concerning the wastewater treatment plant]", which proves "the existence of an economic relationship at the material time between the law firm R. […] and one of the parties". In any case, it should be noted that in his letter as of 27 May 2005, "the Minister responsible for planning [of the respondent State] referred to the letter as of 29 July 2004 in which the applicant [the company] has been informed about the

displeasure of the administrative bodies due to the lack of non-compliance by the said wastewater treatment plant with the minimum requirements of wastewater disposal, set forth in the contract, indicating that the 'crisis' mentioned by the criminal court, began in 2004 at the latest".

5. Conclusion

The right to an impartial and independent court is an essential element of a fair trial as defined in Art. 6 of the ECHR.

One of the most important documents of the Committee of Ministers of the Council of Europe is a type of soft law that draws attention to a crucial element of due trial, namely Recommendation R (94) 12 of 13 October 1994 on independence, efficiency and the role of judges.[17]

The European Court of Human Rights in many of its judgments aimed to interpret Art. 6 of the ECHR for the impartiality and independence of the judiciary.

Judges themselves should put efforts that their work does not raise questions as to judicial impartiality and independence both in objective and subjective terms.

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