



**REGULATION OF JUDICIAL IMMUNITY IN CENTRAL EUROPEAN
CONSTITUTIONS. A COMPARATIVE PERSPECTIVE OF POLISH
EXPERIENCE.**

*A REGULAÇÃO DA IMUNIDADE JUDICIAL NAS CONSTITUIÇÕES DA EUROPA
CENTRAL. UMA PERSPECTIVA COMPARADA DA EXPERIÊNCIA POLONESA.*

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Resumo

O principal objetivo deste artigo é a apresentação da regulamentação constitucional da imunidade judicial na Polónia. O autor descreve o art. 181 da constituição polaca e define o tipo de imunidade concedida aos juízes. O autor também analisa o alcance subjetivo e objetivo da imunidade e compara-o com regulamentos constitucionais semelhantes de outros países da Europa Central. Também inclui informações e comentários sobre as tensões políticas atuais entre o governo e os juízes, que são determinadas até certo ponto, pelas mesmas questões que são o assunto do artigo.

Palavras-chave: Imunidade; Constituição; Juízes; Responsabilidade; Estado de Direito; Igualdade

Abstract

The main aim of this article is the presentation of constitutional regulation of judicial immunity in Poland. The Author describes art. 181 of the Polish constitution and defines the type of immunity which is given to judges. The author also analyses the subjective and objective range of the immunity and compares it with similar constitutional regulations of other Central European countries. It also includes information and commentary on current political tensions between the government and judges, which are determined to an extent, by the same issues which are the subject of the article.

Key-words: Immunity; Constitution; Judges; Liability; Rule of Law; Equality

1. INITIAL CONSIDERATIONS

According to many legal specialists, an impartial judiciary is an essential element of a democratic state where the rule of law prevails¹. To guarantee this, two other branches of power, the legislature and the executive, should have only a minor impact on the judiciary. The latter should function as a censor (or brake) that is able to counter executive or legislative inclinations to control citizens. Therefore, the judiciary, although being part of the state authority², should be equipped with special provisions allowing it to defend itself from political pressure. This distinctive characteristic of the judiciary is sometimes emphasized in the constitution. The current Polish *Magna Carta* states that courts and tribunals shall constitute a separate power and shall be independent of other branches of power³.

To safeguard the independent position of judiciary, legal theory has developed certain conditions which must be kept in order to make this rule a reality. Among them we may find the following features:

- independence of judges;
- judiciary shall only examine the legality of actions on the basis of law;
- courts and tribunals shall execute their functions in accordance with formalized procedures⁴.

From all above mentioned features the independence of judges is of paramount importance. It is a complex legal situation in which a judge has to be: 1) impartial from the trial parties; 2) independent from non-judicial organs [of state]; 3) autonomous from other powers including judicial; 4) independent from politicians; 5) personally independent⁵ 6) subject only to constitution and statutes. All those elements can be distributed between two groups of judicial independence: formal and material. The latter group touches upon personal qualities such as: courage,

¹ *Polskie prawo konstytucyjne na tle porównawczoprawnym*, (edit.) R. M. Małajny, Warszawa 2013, p. 173.

² For instance the art. 10 of the Polish Constitution from 1997 declares firmly that "the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals".

³ Art. 173 of the Polish Constitution from 1997.

⁴ J. Kuciński, *Konstytucyjny ustrój państwowy Rzeczypospolitej Polskiej*, Warszawa 2003, p. 294.

⁵ Rulings of the Polish Constitutional Tribunal from 24.06.1999, K3/98; from 14.04.1999, K8/99; from 09.03.2016, K47/15.

independence, sincerity, sympathy, resourcefulness and impeccable character. The formal ones are related to the legal provisions which define the structure of the judiciary, for which the state is responsible. Here we find such guarantees of legal independence as: transparent procedures for becoming a judge, an unlimited tenure once appointed as a judge, a fixed list of situations in which a judge might be removed from office, fair remuneration, vocational self-government, and legal immunity⁶.

The aforementioned element of the independence of Polish judges is the subject of study of this article. The legal immunity in penal cases that judges enjoy in Poland has its constitutional basis in art. 181. From an historical perspective, the current Polish constitution has reverted to the one written in 1921 which in art. 79 enshrined judicial immunity⁷. Although, the 1935 constitution is sometimes referred to as the authoritarian one, but in art. 67 it guaranteed formal immunity and personal inviolability to judges⁸. The next constitution, written by Stalin, which introduced the communist system, omitted provisions regarding judicial immunity. It was an intentional move, since one of the main rules of that system was the unity of power, not its division⁹. However, communists did not eliminate the formal immunity of judges but moved the provision from constitution to statute¹⁰. Now returning to the present day, the current Polish Constitution of 1997 equips all judges with formal immunity in criminal law.

The article is divided into 4 parts, in which the following elements are covered: definition of, and types of immunities; constitutional provision regulating this issue; statutory procedures for lifting immunity, and, at the end, the results of comparative studies are presented. The text also includes a short description of the current tensions between political powers on the one hand and the power of the judiciary on the other hand, that we are currently facing in Poland. However, the information presented is strictly limited to that which is relevant to the topic of the article.

⁶ A. Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warszawa 2018, p. 58-60.

⁷ Konstytucja Rzeczypospolitej Polskiej from 17.03.1921, Dz. U. 1921, nr 44, pos. 267. <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19210440267>; access: 03.10.2019.

⁸ Ustawa konstytucyjna from 23.04.1935, Dz. U. 1935, nr 30, pos. 227.

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19350300227/O/D19350227.pdf>

⁹ *Polskie prawo konstytucyjne na tle porównawczoprawnym*, (edit.) R. M. Małajny, Warszawa 2013, p. 171.

¹⁰ § 49 of the regulation of the President of the Republic of Poland from 06.02.1928, Dz. U. 1964, nr 6, pos. 40. Art. 50 of the statute from 20.06.1985 *Prawo o ustroju sądów powszechnych*, Dz. U. nr 31, pos. 137.

2. IMMUNITIES AND THEIR TYPES

Let us begin with the definition of legal immunity. According to the majority of dictionaries, immunity is a special legal status wherein a person that benefits from it cannot be held liable for violation of the law¹¹. An entity can benefit from penal or civil immunity, or both. Immunities are not granted to specific persons. They always come as a privilege of certain offices, usually of great importance, in order to help enable the people occupying them in the performance of their duties. For instance: diplomatic or parliamentary immunity. Therefore, a strong link between the function, its role in the society and immunity must exist, since immunity is an exception to the cornerstone principal of every democratic country - equality before the law.

The history of judicial immunity is not so old. The earliest records in which it is known to have been mentioned, date from the 13th century and at that time the idea was connected with the inviolability of the privileges of the King, since the king could do no wrong, hence his judges could do no wrong either. In later times immunities were preserved as a necessary protection of judicial power from abuses from another power¹². In modern times, under the rule of law, this function has become more or less obsolete, but judicial immunities continue to exist. This is a phenomenon of Eastern member states of the European Council, as was noted by Tilman Hoppe¹³.

Other authors point out that “the doctrine of judicial immunity arose in response to the creation of the right of appeal. (...) As the right to appeal became available, it replaced amercements¹⁴ against judges, and gradually the doctrine of judicial immunity developed”¹⁵.

There are different types of immunities. The most famous division is the one that divides immunities into: material and formal¹⁶. The former can also be called absolute immunity since it declares total impunity for certain actions as long as they were undertaken in the performance of duties. A person enjoying this privilege shall

¹¹ W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, Warszawa 1994, p. 224; *Encyklopedia popularna PWN*, J. Kofman (edit.), Warszawa 1991, p.314.

¹² T. Hoppe, *Public corruption: li miting criminal immunity of legislative, executive and judicial officials in Europe*, /in:/ “ICL Journal” 4/2011, vol. 5, p. 539.

¹³ Ibidem, p. 540.

¹⁴ A type of fine in the Middle Age England which was paid by the judge to the injured party for a rendered judgment.

¹⁵ J. M. Shaman, *Judicial immunity from civil and criminal liability*, /in:/ “San Diego Law Review”, vol. 27, 1990, p. 3.

¹⁶ W. Michalski, *Immunitety w polskim procesie karnym*, Warszawa, 1970, p. 9

never be tried or sentenced for such an action even if it constitutes a crime. In English literature this immunity is also called non-liability or non-accountability.

On the other hand, formal immunity, sometimes called inviolability, is seen as an obstacle in trial. If formal immunity can be lifted then we call it a relative immunity. In other words it is a hindrance in criminal procedure, which may be removed if a specific authority agrees. That is to say, consent is needed in order to continue with the prosecution.

If you take into consideration time, then we may single out permanent immunity, which protects the person that benefits from it not only during their tenure but also after it. Protection granted by the temporary formal immunity ends after a lapse of tenure¹⁷. Depending on the type of formal immunity, a person that benefits from this privilege may renounce it. That is the case for parliamentary immunity in Poland. However, judicial immunity cannot be relinquished. Even if conscience dictates that a judge should do so, his or hers decision to relinquish it, will actually be illegal.

3. POLISH REGULATION OF JUDICIAL FORMAL IMMUNITY

The Polish constitution in art. 181 guarantees two things to judges. The first is formal immunity, since a judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. The second one grants every judge personal immunity, as a judge shall be neither detained nor arrested, other than in cases when they have been apprehended in the commission of an offence and in which their detention is necessary to secure the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

We shall concentrate on the first sentence which regulates formal immunity. The grammatical construction of it shows that formal immunity is relative, because a judge may be brought to justice after permission is given by a specified court. The immunity is also permanent since there is no time limit stipulated in the provision. The legislator decided to grant it to all judges, not only to those that are working, but also to those who have retired. This special protection from criminal proceeding is granted to judges of common courts, administrative courts, martial courts and the Supreme

¹⁷ Sentence of the Polish Supreme Court from 18.02.2009, SNO 6/09.

Court. Here we must note that art. 181 of the Polish constitution does not grant formal immunity to judges of the two Polish tribunals. Yet, they have formal immunity, but the legal provisions granting these privileges to them are located in art. 196 and 200 of the Constitution. Which have nearly identical wording as the art. 181. The only thing that differs them are the authorities which are entitled to lift these immunities¹⁸.

The range of immunity is very broad since the constitution uses the words “criminal responsibility”, which has to be interpreted broadly. Therefore, this immunity covers all types of crimes and is not limited to actions which were undertaken in the course of executing justice. In other words, Polish judges are protected from being brought to justice for any type of crime as well, because they are protected from administrative penalties¹⁹. Neither the constitution nor statutes require any kind of relationship between the illegal action of a judge and his official duties. Last, but not least, it covers crimes that were committed prior to their appointment as a judge.

4. STATUTORY REGULATION OF JUDICIAL FORMAL IMMUNITY

Owing to this construction of legal immunity derived from the constitution, there is no error made if we refer to formal immunity as preclusive to criminal proceedings. To be able to accuse a judge, the formal immunity must be lifted. Before doing so a judge can never be charged, therefore the investigation can only be held in the *in rem* phase, never *in personam*. As we have already established, a judge can never renounce their immunity. The only authority entitled to do so is a disciplinary court constituted by other judges. If a prosecutor wants to accuse a judge, he needs to convince the disciplinary court that he is in possession of sufficiently strong evidence showing that a specific judge could have committed a crime. The court has to decide within 2 weeks from the day the demand was delivered. In order to more effectively hunt down criminals among the judiciary, a special unit of prosecutors was established within the National Prosecutor’s Office in 2016. Unfortunately, it does not publish

¹⁸ Art. 196 of the Polish Constitution: “A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal”. Art. 200 of the Polish Constitution: “A member of the Tribunal of State shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Tribunal of State”.

¹⁹ L. Garlicki, *Komentarz do art. 181, lin./* „Komentarz Konstytucji Rzeczypospolitej Polskie z 2 IV 1997 r. Tom 4”, Warszawa 2005, p. 4. When it comes to minor offences Polish judges enjoy from total impunity, since the statute declares that for this kind of breaches they might be punished only in disciplinary procedure. Art. 80 of statute from the 27.07.2001 o ustroju sądów powszechnych, Dz. U. z 2019, pos. 52.

statistical data of how many judicial immunities had been lifted since then, nor how many judges were tried and sentenced or acquitted. The National Prosecutor's Office only declared that they have been working on 170 cases, however no distinction between open and closed cases had been made. In a case held by the Constitutional Tribunal in November 2007 statistical data was presented by the National Council of the Judiciary. It included the time period from July 2001 till July 2007. During these 6 years there were 88 cases in which demands to lift immunity were made. In 43 of them immunity was lifted. In 27 cases demands were rejected. The remaining 16 cases were not concluded within that time frame²⁰.

In general, the process to lift judicial immunity may be initiated by a demand made by prosecutor or barrister²¹. The case is heard in the first instance by a professional disciplinary court, which consists of three professional judges which have at least 10 years of judicial practice. Their decision is not final, which means that both parties, that is the prosecutor and the judge whose immunity is to be lifted, may appeal to the court of the second instance.

A special, newly constructed, disciplinary chamber of the Supreme Court is the second instance. The composition of the court is semi-professional because it consists of two judges and one lay judge. The introduction of a non-professional member of the court was one of the elements of judicial reform in Poland. The government justified this move arguing that in this way it is reestablishing democratic control over courts in accordance with art. 182 of the Constitution²². The previous situation in which judges were the only ones deciding if the immunity of one of their peers should be lifted, was criticized in legal literature. It was argued that this situation could have led to the formation of a judiciary "caste", which would not have been acceptable in a democratic country²³.

However, the reform did not introduce any changes to the procedure of lifting immunity among administrative court judges. Curiously, when it comes to administrative courts and judges, their procedures did not undergo any change. They continue to decide among themselves if their colleague should be brought to justice or

²⁰ Sentence of the Polish Constitutional Tribunal from 28.11.2007, K 39/07.

²¹ Art. 80 § 2a of statute from the 27.07.2001 o ustroju sądów powszechnych, Dz. U. z 2019, pos. 52.

²² This provision rules that statute shall specify the scope of participation by the citizenry in the administration of justice.

²³ *Wartości w prawie administracyjnym*, J. Zimmermann (edit.), Warszawa 2015, LEX. A. Rzepliński, *Żeby się sędziom chciało chcieć*, /in:/ „Gazeta Wyborcza” 06.02.2004, nr 31. <http://stowarzyszenieprzeciwbezprawiu.pl/images/stories/zebySedziom.pdf>

not. This is an extreme omission, creating a situation which obviously encourages cronyism and corruption. It is also unconstitutional since it contravenes art. 182 of the Polish Constitution. For these two fundamental reasons, not to mention for the sake of the public's trust in the judiciary, it is clear that it ought to be changed immediately.

5. THE DISCIPLINARY CHAMBER OF THE SUPREME COURT OF POLAND

While discussing judicial immunities we would be remiss not to mention the new chamber of the Supreme Court. Since its establishment it has been highly criticized by the opposition and other judges. They both pointed out that it is a peculiar court indeed, whose only aim and purpose is to hunt down judges and lawyers who seek to oppose the government. The members of the disciplinary chamber were selected by the new National Council of the Judiciary, which is viewed by many opposing judges as unconstitutional and so they refuse to accept decisions made by this body. They claim that it is politically involved, since 15 members of the council - who are judges - were elected by Sejm (the lower chamber of Polish parliament) and not by judges, as would have been the case before the 2017 reform. Because of this they treat the new disciplinary chamber as an organ which endangers the impartiality and independence of all judges, as its members were, in their opinion, selected by an unconstitutional organ of government. This view was further reinforced in June 2018 by the non-binding opinion of the Advocate General of the EU, Jewgijenij Tanczew, who declared that "new" National Council of the Judiciary, whose main role is to safeguard the independence of courts and judges, is not able to perform this task since it was established under dubious circumstances and poorly constructed. He pointed out that the reform did not guarantee sufficient independence of the council from legislative power²⁴.

This point of view has been shared by the judges of the European Court of Justice. In their sentence from 19th of November 2019²⁵ they concluded that neither the European Charter of Human Rights nor the European Union Charter of

²⁴ Opinion of the Advocate General of EU from 27.062019 in joined cases nr C-585/18, C-624/18 i C-625/18; points 118, 130-132,134,135,137.

²⁵ European Court of Justice (Grand Chamber) judgment in joint cases nr C 585/18, C 624/18, C625/18. Available at: <http://curia.europa.eu/juris/document/document.jsf?text&docid=220770&pageIndex=0&doclang=EN&mode=req&dir&occ=first&part=1&cid=2649859>

Fundamental Rights requires States to adopt a particular constitutional model governing the judicial system²⁶. Hence, every state may construct the system of relations between the three powers autonomously. However, according to the judges there are some principles that cannot be violated, because they might threaten judicial independence. Surprisingly, the tribunal stated that it did not only examine legal provisions but also took into account other, non-legal circumstances relating to events that occurred around the time of the justice system reform in Poland <sic!>²⁷.

Therefore, the biggest critiques were directed at the new method of choosing judges as members to the National Council of the Judiciary. Before the reform, 15 members of the council, all being judges, were elected by judges. Nowadays this purview has been given to Sejm, the lower chamber of the parliament. The system of nominating candidates to the council underwent changes, too. 2 000 citizens or 25 judges may propose candidates from which members of parliament elect 15 judges which become members of the council for the 4-year tenure. This change is seen by judges as jeopardising judicial independence, since 23 out of 25 members of the council are elected by the political authorities²⁸.

Unfortunately, critics fail to notice that constitution constructed the council as an inter-branch forum in which representatives of all powers work together. The executive is represented by the Minister of Justice and an individual appointed by the President of the Republic. Both chambers of parliament choose their representatives to the council (Sejm – 4; Senate – 2). The judiciary is represented not only by the First President of the Supreme Court and the President of the Supreme Administrative Court, but also by the 15 members, which all ought to be judges. It has to be noted here, that the constitution does not specify how those 15 members shall be elected, providing only that the organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

²⁶ Point 130 of the European Court of Justice (Grand Chamber) judgment joint cases nr C 585/18, C 624/18, C 625/18.

²⁷ Point 140 and 142 of European Court of Justice (Grand Chamber) judgment joint cases nr C 585/18, C 624/18, C625/18.

²⁸ In accordance with the art. 187 of the Constitution the National Council of the Judiciary shall be composed of: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators; and 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts.

The European tribunal, analyzing the Polish justice system reform, declared its unease with how the new council exercises its functions. Yet, European judges refrained from making a firm decision, deferring instead to the Polish Supreme Court's right to ascertain whether or not the "new" council²⁹ offers sufficient guarantees of independence in relation to the legislature and the executive. In the ruling it was emphasized that Polish court has to take into consideration all pertinent points of law and fact, relating both to the circumstances in which the members of KRS are appointed and the way in which that body actually exercises its role.

After such a strong endorsement from a judicial organ of the European Union, the Polish Supreme Court, in the Labor and Social Security Law division, declared in December 2019 that the National Council of the Judiciary does not guarantee sufficient independence from the legislative and executive branch, therefore it is unable to perform its constitutional functions correctly. Because of this assertion, judges declared that the Disciplinary Chamber of the Supreme Court is not a court according to European law³⁰. This opinion has been recently strengthened by a resolution issued by joint civil, penal and labor and social law chambers of the Supreme Court³¹. The presented opinion is unambiguous, because it declares that all judges which were presented by the "new" National Council of the Judiciary to the President of the Republic to be nominated as judges cannot perform judicial functions from 24th of January 2020. It must be emphasized that, the Supreme Court did not dismiss them from their posts. Nonetheless, if they continue to perform judicial functions after this date, then it shall be treated as a gross violation of the procedure, as if a person unauthorized or incapable to rule participated in issuing a judgment. When it comes to sentences issued by the Disciplinary Chamber of the Supreme Court, the judges of the joint chambers declared that all the rulings made by this unit since its establishment are not valid³². In this complex situation the Constitutional Tribunal, after a demand made by the Marshall of Sejm, issued a temporary ruling in which it suspended the Supreme Court's resolution³³. But the Supreme Court declared

²⁹ Polish abbreviation for the National Council of the Judiciary – Krajowa Rada Sądownictwa.

³⁰ Sentence of the Supreme Court from 05.12.2019, III PO 7/18.

<https://tvn24.pl/polska/izba-pracy-sn-uchyla-uchwale-krs-orzeczenie-w-zwiazku-z-wyrokiem-tsue-ra990738-2508695>; <https://wpolityce.pl/polityka/476216-kluczowy-wyrok-sn-w-sprawie-tsue-kasta-neguje-krs>.

³¹ <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=598-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>

³² Unfortunately before delivering this article a written justification has not been published.

³³ The Constitutional Tribunal ruling from 28.01.2020, Kpt 1/20.

that it is in no dispute over authority with Parliament, hence the ruling of the Constitutional Tribunal does not apply in this case³⁴.

The current situation causes a lot of confusion, which cannot be mitigated. Some judges have taken leave from performing their duties following the Supreme Court's decision, whereas others continue to try. The Disciplinary Chamber of the Supreme Court, which was declared by members of the other chambers of the Supreme Court, as a non-judicial organ in accordance with EU law, has not ceased its judicial functions³⁵. If it does then it will be a huge defeat for the current ruling majority, since the creation of this special chamber was one of the main aims of the justice system reform made by the Law and Justice party.

6. LIFTING OF JUDICIAL FORMAL IMMUNITY IN POLAND

Despite the fact that the legal situation has not yet been decided, we cannot omit descriptions of the prerequisites needed in order to lift judicial immunity and how they are interpreted by courts and the Disciplinary Chamber of the Supreme Court, which made a noticeable change in jurisprudence

Before the reform, the prerequisite of sufficiently justified suspicion of a crime having been committed was understood as presenting evidence which proves highly probable that a judge has committed a crime. To do so correctly, the old Supreme Court entitled the disciplinary courts to evaluate the legitimacy of the whole investigation and the evidence collected. The disciplinary court was even empowered to check if, in a specific case, all conditions constituting a crime were met³⁶. Frankly speaking, thanks to such broad interpretation, the criminal liability of judges was strongly limited, and even precluded. The practical understanding of immunity drifted a long way from the theory, where immunity has been treated as an exceptional privilege which could be used to protect judges only in rare cases, where the refusal

<http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/10945-spor-kompetencyjny-miedzy-sejmem-rp-a-sadem-najwyzszym-oraz-miedzy-prezydentem-rp-a-sadem-najwyzszym>

³⁴ <https://www.prawo.pl/prawnicy-sady/uchwala-sn-ws-nowych-sedziow-tk-zawiesza,497548.html>

Since the situation in Polish judiciary is very dynamic I must declare that all of these information were valid in the time of delivering this article for publication, so for 10th of February 2020.

³⁵ <https://tvn24.pl/polska/izba-dyscyplinarna-odroczyła-rozprawę-powodem-uchwała-trzech-izb-sadu-najwyzszego-3474077>

³⁶ Resolutions of the Supreme Court from 08.05.2002 SNO 8/02, from 27.06.2003, SNO 19/02, from 27.01. 2009, SNO 95/08, from 09.10.2013 SNO 20/13 or from 17.11.2017 SNO 4/17.

to lift it could be justified only for the good of the justice system as a whole³⁷.

The new disciplinary chamber, that has published only a few sentences since November 2018, has changed views in accordance with the constitution and bill³⁸. Nowadays the same prerequisite is interpreted more narrowly. The chamber declared that an approach in which strong evidence - that would guarantee the sentencing of a judge - was needed at the time of making a request to lift the immunity, was not good approach. This is because lifting the immunity is only a phase in an investigation, which allows a prosecutor to charge a suspect but not to sentence them³⁹. Moreover, if a disciplinary court was entitled to evaluate the criminal liability of a judge in this phase, then it would double not only the investigation's role, but also the role of the criminal court⁴⁰. Last, but not least, the argument presented by the newly adopted chamber touches upon the equality before the law⁴¹. In one of the cases, the judges stressed that an acceptance of a view in which a consent to charge a judge shall be granted only if there is a higher probability of committing a crime than the one needed when an ordinary person is brought to justice, would be contrary to the notion of legal equality stipulated in the constitution. To lift the judicial immunity only a sufficiently justified suspicion is needed, not certainty, the court states. Unfortunately, although noticeable change is seen, Polish courts are far from declaring what in common law systems is obvious; that is the fact that judicial title "does not render its holder immune from responsibility even when the criminal act is committed behind the shield of judicial office"⁴².

The fact that the constitution gives judges formal immunity has been used as an argument to prove that this privilege is one of the fundamental elements constructing judicial independence and impartiality. Any attempt to change, limit or eliminate it is seen as an attack on the rule of law and the third power. Also, as a first step in establishing an authoritarian system. But are those opinions justified or just emotional? Is there really a space within the immunity to cloak criminals just because

³⁷ The Court of Appeals in Poznań declared that judicial immunity should be perceived a legal presumption of a judge being honest and of impeccable character, with very high moral standards. Resolution from 24.11.2015, ASDo 6/15.

³⁸ Views that had been already present in the jurisprudence long time ago, for instance: from 28.11.2002, SNO 41/02, from 03.10.2014, SNO 48/14 and 23.02.2006 SNO 3/06.

³⁹ Resolution of the Disciplinary Chamber of the Supreme Court from 26.03.2019, I DO 25/18, from 23.07.2019, I DO 31/19.

⁴⁰ Resolutions of the Disciplinary Chamber of the Supreme Court from 11.06.2019, I DO 31/18.

⁴¹ Resolution of the Disciplinary Chamber of the Supreme Court from 25.06.2019, I DO 21/19.

⁴² J. M. Shaman, *op. cit.*, p. 18.

they are judges?

7. COMPARATIVE PERSPECTIVE

The legal systems of many countries - like the USA, Great Britain, Germany, or France - do not provide judges with formal criminal immunity⁴³. The American constitution declares that federal judges may be criminally prosecuted while still in office. Meanwhile, United Nations in the declaration of Basic Principles on the Independence of Judiciary from 1985 did not foresee formal immunity. On the contrary, it only recommends an introduction of civil immunity to judges for monetary damages for improper acts or omissions in the exercise of their judicial functions. Something we do not have in the Polish system. *Nota bene*, none has said that a lack of this privilege means that our judges are not independent.

Comparative studies among constitutions of Central European countries provide us with very interesting results. The constitutions of Hungary, Latvia, Austria and Germany do not provide judges with formal immunity in penal cases. Other states, like Russia and Croatia represent a limited approach to this subject, since their constitutions only declare that judges shall be brought to justice in a procedure provided by the bill.

Another group consists of countries which give constitutional formal immunity only to certain groups of judges. For instance, in the Czech Republic this privilege is given to judges of the Constitutional Court. "Justice of the Constitutional Court may be criminally prosecuted only with the consent of the Senate"⁴⁴.

In neighboring Slovakia, judges of the constitutional court enjoy the same immunity as members of parliament. Other judges benefit from formal criminal immunity, too. However, the provision is a bit unclear since it is located in the chapter regarding the constitutional court. It is most probably justified by the next provision which empowers solely the constitutional court to lift the judicial immunity. However, contrary to Polish regulations, the Slovakian judicial immunity is not persistent, but temporary. According to art. 136 passage 4, if the Constitutional Court refuses its consent, the prosecution or the pre-trial detention shall be precluded for the duration

⁴³ L. Garlicki, *op. cit.*, p. 3.

⁴⁴ Art. 86 of the Constitution of the Czech Republic of 16th December 1992.

of the function of a Constitutional Court judge, the function of a judge or the function of the General Prosecutor⁴⁵.

In Slovenia, judges enjoy limited criminal immunity, since a consent of the parliament must be obtained in order to charge them for crimes committed in connection with their duties⁴⁶. Interpreting this provision a contrario we see that the immunity does not cover crimes which were committed outside judicial functions. A similar provision is in force in Bulgaria, where judges cannot be tried for the execution of their duties unless they constitute ordinary intended crimes⁴⁷. This regulation is similar to the common law perception of the criminal liability of judges which in general is broad. An exception has been made for malfeasance or misfeasance in the performance of judicial tasks undertaken in good faith.

In Estonia judges possess formal immunity as long as they discharge judicial functions. The competent body to lift the immunity for ordinary judges is the president of the republic, after a demand made by the Supreme Court. Meanwhile judges of the Supreme Court shall be charged only on the motion of Chancellor of Justice after a consent is given by a majority of vote of members of parliament⁴⁸.

In another Baltic state, Lithuania, judges enjoy a similar immunity to their Polish counterparts, with one small exception regarding authority, which may lift immunity. There, the consent is given by parliament⁴⁹.

As has been presented, some constitutions introduce special courts or entitle an authority from a different branch to lift immunity, somehow violating the cornerstone principle of separation of powers. They do so in order to avoid a conflict of interest, which could arise if judges were to decide about their own responsibility. Frankly speaking this is a justified exception. The Polish regulations at this point leave it to judges to decide about their own immunity.

8. SUMMARY

The results of comparative studies show that a constitutionally guaranteed

⁴⁵ Art. 136 of the Constitution of the Slovak Republic of 1st of September 1992.

⁴⁶ Art. 134 of the Constitution of the Slovenia Republic of 23rd of December 1991.

⁴⁷ Art. 132 of the Constitution of Bulgaria Republic of 12th of July 1991.

⁴⁸ § 153 of the Constitution of Estonia Republic of 28th of June 1992.

⁴⁹ Between the sessions of the parliament a consent must be obtained from the President of the Republic. Art. 114 of the Constitution of the Lithuania Republic of 25th of October 1992.

formal immunity to judges is not a *conditio sine qua non* of judicial impartiality and independence. A good and fair system is not built on exceptions and privileges. Formal immunity is a relic of old times, where the most noble groups had their own courts and were tried by people of the same or similar status. The same privilege in a democratic state, where we are constantly fed with the new opium for the masses - equality - has no further place or reason to exist.

This is especially true if we read about how judges tend to evaluate themselves. I have analyzed several books written by judges about their own profession. In all of them judges are described as a special, exceptional group of people of impeccable character who find committing crimes repulsive. Judges are honest, hard-working, balanced, conscientious, courageous, patient, sensitive, and compassionate, with good manners, polite, self-critical, open-minded, and fair⁵⁰. If they really see themselves like this then what do they need the formal immunity for? It could only impede the removal of "black sheep" from this outstanding group of great jurists. Are they afraid of being tried by such fine lawyers?

Or maybe, formal immunity gives judges the impression that they are completely independent? That bringing them to justice is so complicated that they can do more. Do we really need this form of favoring judges? Maybe high moral standards, professionalism, broad knowledge, high competences, and rich private and labor experience would be a better guarantee of an impartial and independent judge. In my humble opinion it is counterproductive, and I oppose all forms of formal immunities given to state clerks. A democratic state where the rule of law prevails should be built on common values and rules which should apply to all in the same way. I do not agree that Central European countries have not developed their democratic systems enough to cancel formal immunities, but I do think that judges do not want to lose this privilege because they know how the justice system really works.

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