STUDIES AND COMMENTS

Romanian, Polish and German judge disqualification in disputes of administrative litigation

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Abstract

The subject matter of this article is to compare the regulations of Romanian, Polish and German guarantees of the right to an impartial court within the context of a judge disqualification in a court-administrative proceeding. The comparison of Romanian, Polish and German regulations pertaining to judge disqualification in court-administrative procedure leads to a conclusion that there are some significant distinctions among those regulations. It is worth noticing that the Polish court-administrative procedure is the only one, out of the three analyses systems, which could be featured as fully autonomous. At the same time both the Romanian as well as the German regulations depend on a reference to their civil procedures. On a side note, a reference to the provisions of the civil procedure also existed in Poland, until 2004, when the current Law on Proceedings Before Administrative Courts entered into force. All three legal systems underline the importance of the regulations on the judge's professional status within the context of providing conditions for impartial adjudication.

Keywords*: judge disqualification, administrative litigation, impartiality of judges, comparative administrative law.*

JEL Classification: K23, K41

1. Introduction

The impartiality is viewed as a feature of the court which is particularly important for the right to court guarantee. All other procedural guarantees and principles regarding court procedure seem less significant when a judge from the start has a preconception of how to decide the case. Therefore, there are mechanisms put in place with the aim of actualising the right to an impartial court. The subject matter of this article is to compare the regulations of Romanian, Polish and German

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guarantees of the right to an impartial court within the context of a judge disqualification in a court-administrative proceeding. When administrative courts as those deciding about the relationships between the state and an individual, then the requirement for their impartiality is of even more particular significance. Therefore, the research focused on the Romanian, Polish and German institutions of judge disqualification in their respective court-administrative procedures. Our choice of said systems was based on their development history, having very complex historical backgrounds stemming from the state-building processes and European standards to the right to court.

2. Romanian judge disqualification in disputes of administrative litigation

2.1 Introductory considerations

In Romania, administrative litigations are judged by the administrative contentious sections, organized at the tribunals, the courts of appeal and the High Court of Cassation and Justice. Disputes are judged under Law no. 554/2004 *of administrative contentious*[4]. The provisions of Law no. 554/2004 shall be complemented with the provisions of the Civil Code and those of the Civil Procedure Code to the extent that they are not incompatible with the specific nature of the authority relationships between public authorities, on the one hand, and the persons aggrieved in their legitimate rights or interest, on the other.

The justice-making activity in a state of law must be based on a set of principles that guarantee the establishment of truth and observance of the law in all cases subject to judgment[5], thus ensuring a fair trial. These principles include the independence and impartiality of judges.

2.2 Independence and impartiality of judges in the Romanian Constitution

In the trial, judges are independent of other state bodies and even their hierarchically superior bodies, being subject only to the law, whose provisions are called upon to respect them. The Romanian Constitution[6] enshrined this principle in art. 124 par. (3), according to which the judges are independent and subject only to

[4] Published in the Official Gazette, Part I no. 1154 of 07 December 2004, as subsequently amended.

[5] See Ioan Leș, Noul Cod de procedură civilă. Comentariu pe articole art. 1-1133 (New Code of Civil Procedure. Comment on articles art. 1-1133), C.H. Beck Publishing House, Bucharest, 2013, p. 72.

[6] The Romanian Constitution in force was adopted by the Constituent Assembly on 21 November 1991 and was approved by the national referendum held on 8 December 1991 (the date on which it entered into force). The 1991 Constitution was subject to a review process by Law no. 429/2003. The Law on Constitutional Review was adopted by the Parliament on 18 September 2003 and was approved by the referendum on 18 and 19 October 2003. Following the Revision Act, the Romanian Constitution was republished in the Official Gazette no. 767 of 31 October 2003.

the law, also the Law no. 303/2004 *on the status of judges and prosecutors*[7] in art. 2 par. (3), which provides that judges are independent, are subject only to the law and must be impartial. The independence of the judge implies the requirement to settle disputes without any interference from any state organ or from any person. Independence is also necessary to ensure the judge's impartiality towards the parties to the trial. Therefore, the attitude of the judge in the judicial proceedings must be neutral with regard to the position and interests of the litigants. In accordance with the principle of judicial independence, nobody can give orders, make suggestions or require a judge how to decide a given dispute; both the appreciation of the state of fact and the choice of law enforcement in each concrete case must remain the expression of the judge's intimate conviction, which he must form without any influence or external interference. The guarantor of the independence of the judiciary is the Superior Council of Magistracy according to the provisions of art. 133 (1) of the Constitution. The Constitution of 1991 shows in art. 152 (1) that its provisions on the independence of the judiciary can not be the subject of the review.

Regarding the constitutional consecration of the impartiality of the judges, we underline that according to the provisions of art. 124 par. (2) of the Romanian Constitution, *justice is unique, impartial and equal for all*.

It is stated in the doctrine that the judge's independence means the absence of any subordination, while impartiality is the absence of any prejudices, passions, weaknesses or personal sentiments; the former is considered in relation to a third party, the latter in relation to the magistrate himself. However, it is clear that independence and impartiality are closely linked. Thus, a court that is not independent of the executive can not be impartial. Also, the requirement of independence from the parties is basically confusing with the need for impartiality[8].

The ECHR case-law distinguishes between *objective impartiality* (Micallef v. Malta case, Hauschildt v. Denmark case) and *subjective impartiality* (Micallef v. Malta case, Kiprianou v. Greece case).

The *objective impartiality* involves determining whether, irrespective of the judge's personal conduct, certain circumstances or facts that are verifiable allow the questioning of their impartiality. As such, the ECHR has decided that appearances have a special role to play in the assessment of impartiality, because in a democratic society, courts have to inspire full confidence in the judiciary[9].

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[7] Republished in the Official Gazette, Part I no. 826 of September 13, 2005, as amended.

[8] See Cristi V. Dănileţ, Imparţialitatea justiţiei din perspectivă europeană (Impartiality of justice from a European perspective), https://cristidanilet.ro/docs/impartialitatea%20justitiei.doc, p. 2, consulted on 15.09.2017.

[9] See Viorel Mihai Ciobanu, Comentariul art. 124 – Înfăptuirea justiției (Art. 124 - Enforcement of justice) in I. Muraru, E.S. Tănăsescu (coord.), Constituția României. Comentariu pe articole (The Constitution of Romania. Comment on articles), C.H. Beck Publishing House, Bucharest, 2008, p. 1220.

The *subjective impartiality* is related to the judge's internal force and, therefore, the ECHR has ruled that it is presumed until the contrary. In order to overthrow this presumption of impartiality it must be proved that, in its inner force, favored or disfavored a part, a difficult test to be made in the circumstances in which the appearances are not sufficient to ascertain the judge's partiality, but its prejudice must be externalized to be proven[10].

"What is being discussed when judging the impartiality of a judge is the confidence that a tribunal of a democratic society must inspire for the public. Therefore, a judge on whom a legitimate fear of impartiality is faced must be withdrawn." (Micallef v. Malta case, paragraph 98).

2.3 Regulation of judges' disqualification cases

Impartiality of judges is guaranteed by establishing a system of incompatibilities, prohibitions and incapacity[11]. In Romanian law, some of them are provided in the Constitution and / or Law no. 303/2004 *on the statute of judges and prosecutors* (the magistrate can not hold any other post except for teaching positions in higher education, can not be involved in trade activities and in the management or administration of companies, can not provide legal advice, can not be a member of a political party or political activities, is not entitled to strike), others in the Code of Civil Procedure (cases underlying the refusal or denial, or transfer) or in the Civil Code (Article 1653 forbids the judge to buy litigation rights that are within the jurisdiction of the court in whose jurisdiction they operate), or even special laws (Law 161/2003 *on measures to ensure transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption*[12]: prohibition to conduct arbitration in litigation etc.).

We will then analyze the cases of disqualification that would affect the objective impartiality of the judge provided by the Code of Civil Procedure[13] in articles 41-54. We mention that under the conditions provided by art. 28 (1) of the Law no. 554/2004 *of the administrative contentious*, these provisions shall also apply to the administrative contentious judge, to the extent that they are not incompatible with the specific nature of the authority relationships between public authorities, on the one hand, and the persons aggrieved in their legitimate rights or interest, on the other.

In art. 41 of the Code of Civil Procedure are regulated the cases of absolute incompatibility. Thus, the judge who pronounced an interlocutory order or a judgment which has solved the case can not judge the same cause of action in

[10] Idem, p. 1220.
[11] Cristi V. Dănileţ, op. cit., p. 7.
[12] Published in the Official Gazette, Part I no. 279 of April 21, 2003, as amended.
[13] Republished in the Official Gazette, Part I no. 247 of 10 April 2015, as amended.

appeals, appeals in the annulment or review, or after referral to a retrial. Also, the one who was a witness, expert, arbitrator, prosecutor, lawyer, legal assistant, assistant magistrate, or mediator in the same case can not be the judge.

Other cases of incompatibility are mentioned in Art. 42 of the Code of Civil Procedure. Thus, the judge is also incompatible with judging in the following situations:

1. when he previously expressed his opinion on the solution in the case he was assigned to judge. Involving the parties ex officio of matters of fact or of law does not make the judge incompatible;
2. when there are circumstances that justify the fear that he, his spouse, ascendants or descendants or their affinity, as the case may be, have an interest in the cause being judged;
3. when he is a spouse, relative or affine to the fourth degree, including the lawyer or the representative of a party, or if he is married to the brother or sister of the spouse of one of these persons;
4. when the spouse or ex-spouse is a relative or affinity to the fourth degree including one of the parties;
5. if he / she, their spouse or relatives up to the fourth degree or their affinities, as the case may be, are parties to a trial being tried in the court in which one of the parties is a judge;
6. if between him, his or her husband or their relatives up to the fourth degree inclusive or their affinity, if any, and one of the parties there was a criminal trial no later than 5 years before being appointed to judge the cause. In the case of criminal complaints made by the parties during the trial, the judge becomes incompatible only in the case of bringing the criminal action against him;
7. if he is a guardian or curator of one of the parties;
8. if he, his spouse, ascendants or descendants received gifts or promises of gifts or other benefits from one of the parties;
9. if he, his or her husband or one of their relatives up to the fourth degree inclusive or their affinity, as the case may be, are in hostile relationship with one of the parties, the spouse or relatives up to the fourth degree inclusive;
10. if, when instigated with an appeal, the spouse or a relative of his or her up to the fourth degree participated, as a judge or prosecutor, in the same cause of action before another court;
11. if he is a spouse or relative up to the fourth degree inclusive or affine, as the case may be, with another member of the panel;
12. if the spouse, a relative or an affine up to the fourth degree inclusive represented or assisted the party in the same matter before another court;
13. where there are other elements which give rise to reasonable doubt as to its impartiality.

The husband-related provisions also apply to concubines.

The Code of Civil Procedure regulates the institution of abstention and recusal in the event of the occurrence of any of these incompatibilities. Thus, according to the provisions of art. 43 of the Code of Civil Procedure before the first

hearing, the Registrar shall verify, on the basis of the case file, whether the judge is in any of the cases of absolute incompatibility and, where appropriate, draw up an appropriate report. The judge who knows there is a reason for incompatibility with him is obliged to refrain from hearing the case. The declaration of abstention is made in writing as soon as the judge has known the existence of the incompatibility or verbal case at the hearing, being recorded in the court order.

Also, according to art. 44 of the Code of Civil Procedure, the judge in a situation of incompatibility may be recused by either party before any debates begin. When the reasons for incompatibility have arisen or have been known to the party only after the start of the debate, they must request the recusal as soon as they are known to them.

In the cases of absolute incompatibility provided by art. 41 of the Code of Civil Procedure, the judge can not participate in the trial, even if he has not abstained or been recused. Irregularity can be invoked in any state of the case (Article 45 of the Code of Civil Procedure).

Only the judges who are part of the panel of judges to whom the case has been assigned for resolving (Article 46 of the Civil Procedure Code) may be recused.

The request for recusal may be made verbally in the hearing or in writing for each individual judge, showing the case of incompatibility and the evidence that the party understands to use (Article 47 (1) of the Civil Procedure Code).

Abstention or recusal is settled by another panel of that court, whose composition can not be entered into by the judge who has been recused or who has declared that he abstains. When, due to abstention or recusal, the panel can not be formed, the request shall be judged by the higher court (Article 50 of the Civil Procedure Code).

The court shall immediately adjudicate in the council chamber without the presence of the parties and shall hear the recused judge or who has declared that he abstains, unless he considers it necessary. Under the same conditions, the court will also be able to hear the parties. If there are recusals and abstentions for different reasons at the same time, they will be tried together. Interrogation is not admitted as a means of proving the grounds for recusal. Abstention or recusal shall be settled by a decision pronounced at a public hearing. If abstention or, as the case may be, recusal is admitted, the judge shall withdraw from the trial. In this case, the court judgment will show to what extent the acts performed by the judge are to be preserved (Article 51 of the Civil Procedure Code).

The court order to dismiss the appeal may be appealed only by the parties, together with the decision to settle the case. When the latter decision is final, the conclusion may be appealed to the hierarchically superior court within 5 days from the delivery of that judgment. The court order by which the abstention was upheld or refused and the one by which the recusal was granted are not subject to any appeal. If the court of appeal finds that the recusal has been wrongly rejected, it recovers all procedural documents and, if it deems it necessary, the evidence at first instance. When the Board of Appeal finds that the recusal was wrongly rejected, it will settle

the case by ordering the case to be referred back to the court of appeal or, when the appeal is appealed, to the first instance (Article 53 of the Civil Procedure Code).

The provisions of the Code of Civil Procedure concerning the incompatibility of judges also apply to prosecutors, assistant magistrates, judges and court clerks (Article 54 of the Civil Procedure Code).

The principle of impartiality implies that the authorities with the task of doing justice are neutral[14]. In fact, the Constitutional Court stresses that *neutrality is the essence of justice*[15]. These authorities are represented by judges, who are obliged to solve the cases without partiality, thus ensuring the equality of the citizens before the law, a principle recognized by art. 16 par. 1 of the Romanian Constitution.

3. Impartiality and independence in the light of the Constitution of the Republic of Poland

3.1 Introductory considerations

At the beginning of the deliberations concerning the principle of courts' independence in the Polish law, it should be noted that the guarantee of court independence is provided for not only in the Constitution of the Republic of Poland, but also by the Convention for the Protection of Human Rights and Fundamental Freedoms[16], which states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Art. 6). In another act, to which Polish doctrine points in the context of court status is the International Covenant on Civil and Political Rights[17]; Article 14 (1) of the Covenant stipulates that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (...). Another document setting out the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law is the Charter of Fundamental Rights of the European Union[18].

In Article 45 (1), 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[19]. The Constitution of the Republic of Poland refers to the concept of "impartiality" in three instances. In the first instance, the Constitution refers to the impartiality of Polish public authorities in matters of

[14] Cristi V. Dănileț, op. cit., p. 2.

[15] Decision of the Constitutional Court no. 410 of 12 October 2004 published in the Official Gazette no. 1049 of November 12, 2004.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, amended by Protocols no. 3, 5 and 8, and supplemented by Protocol no. 2, Journal of Laws of 1993 No. 61, item 284.

[17] International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, Journal of Laws of 1977, No. 38, item 167.

[18] Official Journal of EU C. of 2007.303.1.

[19] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as adjusted and amended.

personal conviction, both religious and philosophical ones (Art. 25), and in the second instance, to the purpose of the corps of civil servants (Art. 153). Article 45 of the Polish Constitution states that everyone has the right to a hearing of their case by an impartial court. Wording of Article 45 of the Polish Constitution needs to be stressed out, as the Polish legislator of the constitutional system uses three terms of similar meaning: "niezależność" (autonomy), "niezawisłość" (independence) and "bezstronność" (impartiality)[20]. Impartiality of the judges is a means to enforce the constitutional right to be heard by a court. The provision of Art. 45 (1) of the Polish Constitution, however, assigns the impartiality requirement to the court, whereas judicature notes that – using a doctrinal approach – it would be more precise to assign it to judges. It is assumed that impartiality is one of the components co-creating judges' independence and courts' autonomy[21]. In a democratic state, judicial independence is of particular significance[22], as it sets forth the right of citizens to be heard by an impartial, independent and competent court[23], while prohibiting any and all external impacts on the jurisdictional decisions issued by the judge[24]. At the same time, the court's autonomy means they are fully independent in hearing cases and adjudicating[25]. This autonomy is understood as courts' independence from other entities, and in consequence, also as their impartiality, manifested in the relationship between the court and parties to the proceedings, as well as the court's obligation to treat parties equally[26]. "Independence" and "autonomy" are of emphatically objective nature. The concept of "impartiality" is additionally extended by a more individual character, related to the sphere of jurisdictional operations in the area in which judges are obliged to act severally from their emotions or bias[27]. What is particularly important is that impartiality is expected to be an attribute of both the court as a body of the judiciary, as well as the judge as a substrate of this body.

[20] B. Banaszak, Konstytucyjne i ustawowe uwarunkowania niezawisłości sędziowskiej [Constitutional and legal conditions of judicial independence], "Iustitia" 2014 No. 1, p. 6.

[21] Z. Czeszejko-Sochacki, Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej [Right to a court in the light of the Constitution of the Republic of Poland], „Państwo i Prawo" 1997, vol. 11-12, pp. 99-100.

[22] B. Banaszak. Porównawcze prawo konstytucyjne współczesnych państw demokratycznych [Comparative constitutional right in modern democratic states], Lex 2012 No. 150985.

[23] H. Zięba-Załucka, System organów państwowych w Konstytucji Rzeczypospolitej Polskiej [System of state bodies in the Constitution of the Republic of Poland], Lex 2007 No. 64690.

[24] Judgement of the Constitutional Tribunal of 24 June 1998 Case file no. K 3/98, www.trybunal.gov.pl (consulted on 25.08.2017).

[25] Judgement of the Constitutional Tribunal of 14 April 1999 Case file no. K 8/99, www.trybunal.gov.pl (consulted on 25.08.2017).

[26] H. Pietrzykowski, Zarys metodyki pracy sędziego w sprawach cywilnych [Outline of the methodology of judge's work in civil-law cases], Lex 2006 No. 53193.

[27] M. Grzymisławska-Cybulska, Bezstronność sądu i sędziego jako element budowania zaufania do władzy sądowniczej [Independence of the court and judge as a factor in building trust in the judiciary], Przegląd Sejmowy (Parliamentary Review) 2017.

3.2 Institution of judge recusal

The institution of judge recusal is to equally ensure real impartiality of the court and to strengthen the authority of the judiciary, by removing even the seeming appearances of a lack of impartiality, by eliminating the influence which may be exerted due to certain categories of relations (personal, economic, professional, etc.) on adjudicating in a judicial proceedings at any of its stages[28]. In Polish law, the institution of judge recusal is considered to be the "main" mechanism ascertaining court's impartiality[29]. The purpose of the institution of judge recusal is essentially to embrace all the situations which could lead to reasonably justified doubts as to judge's impartiality – i.e. the doubts either in a party to the proceedings or at least in an objective, external observer[30]. The institution of judge recusal is a procedural guarantee of his or her impartiality in a particular proceedings, conditional upon judge's independence from both state authorities and the parties[31]. It is emphasized in the doctrine that the institution of judge recusal is a procedural guarantee, the essence of which is that the contents of a case ruling may not be influenced by personal views, prejudices or interests of the person involved in the settlement process[32]. It is stressed out across court and administrative case law that the institution of the disqualification of a judge may not be treated as a possibility to eliminate this judge from the proceedings whom a party considers unsuitable relative to that party's subjective interests[33].

3.3 Disqualification of a judge in the Polish court-administrative proceedings

Proceedings before Polish administrative courts is governed by the Polish Act of 30 August 2002 – Law on Proceedings Before Administrative Courts[34]. The Polish act on court administrative procedure provides for judge disqualification by law and on a motion. What is important, if there are no conditions presupposing

[28] Judgement of the Constitutional Tribunal of 13 December 2005 Case file no. SK 53/04, OTK-A 2005 No. 11, item 134.

[29] Judgement of the Constitutional Tribunal of 11 December 2002 Case file no. SK 27/01, OTK-A 2002, No. 7, item 93.

[30] Decision of the Supreme Administrative Court of 20 October 2006 Case file no. I FZ 182, ww.nsa. gov.pl (consulted on 25.08.2017).

[31] T. Woś, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz [Law on proceedings before administrative courts. Comments.], Lex 2016.

[32] J.P. Tarno, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz[Law on proceedings before administrative courts. Comments.], Warsaw 2011 and Z. Kmieciak, Europejskie standardy prawa i postępowania administracyjnego a ustalenia orzecznictwa Naczelnego Sądu Administracyjnego [European standards of administrative law and procedure and the case law of the Supreme Administrative Court], Ruch Prawniczy Ekonomiczny i Społeczny 1998, No. 1, p. 55.

[33] Decision of the Supreme Administrative Court of 22 September 2017 Case file no. I OZ 1388/17 Decision of the Supreme Administrative Court of 22 February 2008 Case file no. II FZ 61/08 and the Decision of the Constitutional Tribunal of 31 January 2011 Case file no. K 3/09, publ. "Orzecznictwo Trybunału Konstytucyjnego" 2011, series A, no.1, item. 5).

[34] Journal of Laws of 2017, item 1269.

judge recusal by virtue of law, he may be disqualified on a motion filed either by a party to the proceedings or the judge himself or herself (the so called self-recusal of the judge).

Under Polish law, it is understood that the institution of the disqualification of a judge is a procedural guarantee of the principles of objectivity and impartiality. For a judge to be disqualified *ex lege*, the person exercising the judicial office must become unfit to adjudicate (*iudex inhabilis*) in the case, with respect to which the above mentioned reasons are uncovered[35]. Pursuant to Art. 18 of the Polish Law on Proceedings Before Administrative Courts, a judge is subject to recusal by law from the cases in which he himself is a party, in which his relationship to a party in the proceedings may influence his or her rights or obligations (para. 1), and in the event when the case concerns his/her spouse, relatives or affinities, and persons to whom he or she is related by adoption, guardianship or custody (paras. 2 and 3), and the reasons justifying the disqualification also continue after such marriage, adoption, guardianship and custody termination (§ 2). The judge who previously participated in the case as a legal representative of a party, provided legal assistance to a party, or participated in the case in the capacity of a prosecutor is also subject to disqualification (paras. 4 and 5). Another condition for the disqualification of a judge by law is set out in Art. 18 § 1 para. 6 of the Polish Law on Proceedings Before Administrative Courts, which stipulates that a judge shall be disqualified from the cases in which he or she participated in issuing a decision that was appealed against, the cases concerning the validity of a legal act prepared or heard by him or her, and from the cases in which he or she participated in the capacity of a prosecutor. The provision of Art. 18 para. 6a of the Polish Law on Proceedings Before Administrative Courts, added by an amendment of 23 October 2009, stipulates that a judge shall be disqualified from the cases in which a complaint was filed against the decision or a final ruling concerning the substance of the case, in an extraordinary administrative proceedings, provided that the judge participated in the issuance of the final judgement or decision, ending the prior level court-administrative proceedings concerning the control of legal validity of a decision or a ruling issued in an ordinary administrative proceedings. The last condition is set out in para. 7, which indicates that a judge shall also be disqualified by law if he or she participated in the case settled by the bodies of public administration.

In the provision of Art. 18 of the Polish Law on Proceedings Before Administrative Courts, the legislator provides for a complete catalogue of conditions which disqualify a judge from adjudicating in a particular case, i.e. the catalogue which should not be interpreted extensively.[36] The conditions for the disqualification of a judge referred to in Art. 18 of the Polish Law on Proceedings Before Administrative Courts pertain to the relations of a judge with either the subject matter

[35] H.Knysiak-Sudyka, Skarga i skarga kasacyjna w postępowaniu sądowoadministracyjnym. Komentarz i orzecznictwo [Complaint and cassation complaint in court-administrative proceedings. Comments and case-law.], Warsaw 2016.

[36] Decision of the Supreme Administrative Court of 16 March 2004 Case file no. GZ 4/04, www.orzeczenia.nsa.gov.pl (consulted on 25.08.2017).

or the objects of a judicial proceedings[37]. It is underlined that the conditions for the disqualification of a judge pursuant to Art. 18 of the Polish Law on Proceedings Before Administrative Courts pertain to such relations, in respect of which the interest of the administration of justice necessitates that the judge, who fulfils the conditions referred to in the above mentioned provision, should not adjudicate in the case, regardless of the opinions of the participants in the proceedings or the judge himself or herself[38]. Judge recusal under the circumstances referred to in Art. 18 of the Polish Law on Proceedings Before Administrative Courts does not require any ruling concerning the matter of recusal[39]. Nevertheless, pursuant to Art. 21 of the Proceedings Before Administrative Courts, the judge is obliged to make a statement saying that the basis for disqualification by law has occurred, provided that the said conditions are fulfilled[40]. In the judicial and administrative case law, it is emphasized that Art. 18 (as well as other provisions concerning judge recusal) constitutes a procedural guarantee of judge's impartiality, and the said provision should not be used for other purposes, for example to prolong legal proceedings or challenge effective operation of courts[41]. Therefore, when applying extensive interpretation to the provisions only to remove appearances of the lack of impartiality, it is advisable to exercise caution, balance and reason[42].

Provision of Art. 19 of the Polish Law on Proceedings Before Administrative Courts stipulates that the court disqualifies the judge on a motion of a party in the event of circumstances which may reasonably question judge's impartiality in a particular case. In judicial decisions, it is emphasized that judge disqualification on conditions referred to in Art. 19 of the Polish Law on Proceedings Before Administrative Courts is to ensure court objectivity, and may not be treated as a possibility to eliminate the judge whom a party considers unmatching its subjectively viewed interests, that is, it may not enable parties to choose the composition of judicial panels in accordance with their opinions, which may lack objectivity. A party to the proceedings has the right to file a motion for judge recusal, along with the justification of such a motion. However, it is underlined in courts' decisions that neither party's conviction that a judge conducts the case defectively, i.e. especially with bias or lack of objectivity, nor party's subjective view on the irrelevance of a judicial decision issued with the assistance of the particular judge may constitute a reasonable doubt as to judge's impartiality[43]. The judge, in respect

[37] J.P. Tarno, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz [Law on proceedings before administrative courts. Comments.], Warsaw 2006, p. 72.

[38] T. Woś, Prawo o postępowaniu przed sądami administracyjnymi. Comment [Law on proceedings before administrative courts. Comments.], Lex 2016.

[39] *Idem.*

[40] B. Adamiak, J. Borkowski, Metodyka pracy sędziego w sprawach administracyjnych [Methodology of judge's work in administrative cases], Lex 2015.

[41] Judgement of the Supreme Administrative Court of 4 July 2006 r., II OSK 370/06, LEX no. 266487.

[42] Decision of the Supreme Administrative Court of 21 October 2010, I OZ 805/10, LEX no. 742062, and Decision of the Supreme Administrative Court of 14 July 2010, II OZ 92/10, LEX no. 663841.

[43] Decision of the Supreme Administrative Court of 26 July 2016 Case file no. I OZ 794/16, www.nsa.gov.pl (consulted on 25.08.2017).

of whom the motion was filed, submits a statement in which he or she states whether any circumstances justifying doubts as to his or her impartiality have actually occurred. In the event when a judge denies the existence of the circumstances reasonably justifying their recusal, it is assumed that the moral authority of the judge speaks in favour of the credibility of his or her statement, and if the party moving for recusal maintains that the statement is not accurate, such a party is obliged to point to and prove the circumstances which could undermine the credibility of the judge's statement[44].

Provisions of the Law on Proceedings Before Administrative Courts stipulate that regardless of the reasons referred to in Art. 18 of the Polish Law on Proceedings Before Administrative Courts, the court disqualifies the judge at his or her request if the kind of circumstances exist, which could give rise to a justified doubt as to the judge's impartiality in the case. It is assumed that the guarantee of judicial impartiality should be broadly understood, i.e. in the manner enabling disqualification in the event of the circumstances (both internal and external) which may reasonably question the ability of a particular judge to issue a decision that is based on fully objective premises[45]. Pursuant to Article 21 of the Polish Law on Proceedings Before Administrative Courts, a judge is required to notify the court of an existing basis for their disqualification, and refrain from participating in the case. In the doctrine and case law concerning the topic discussed, it is observed that in accordance with the legislator, it is primarily the judge who is to evaluate whether he or she is able to hear the case and issue a decision in an objective and independent manner[46].

4. Conditions for a disqualification of a judge in the German court-administrative proceedings

4.1 Introductory considerations

The institution of the disqualification of a judge in the court-administrative proceedings is governed by the laws of the Federal Republic of Germany, as well. A number of provisions determine the scope to which this institution may be applied. Nevertheless, in the German Code of Administrative Court Procedure (German: Verwaltungsgerichtsordnung – hereinafter the German CACP), there is one provision governing this institution[47]. The remaining regulations are contained in the German Code of Civil Procedure (German: *Zivilprozessordnung* – hereinafter the

[44] See Decisions of the Supreme Administrative Court of: 12 March 2012 r., Case file no. I FZ 147/12, 9 October 2013 r., Case file no. II OZ 851/13 and 24 September 2014 r., Case file no. I OZ 754/14, publ. http://orzeczenia.nsa.gov.pl (consulted on 25.08.2017).

[45] Judgement of the Constitutional Tribunal of 13 December 2005, SK 53/04, OTK-A 2005, No. 11, item 134.

[46] T. Woś, *op. cit.* (2016) and Decision of the Supreme Court of 7 September 1994, I PO 10/94, OSNAP 1995, No. 4, item 56.

[47] See Verwaltungsgerichtsordnung of 21 January 1960, published in the Federal Law Gazette Part I page 17, last amended on 18 July 2017, Federal Law Gazette.

German CCP)[48], to which German CACP partly refers in Section 54 as regards this subject matter. Judges are disqualified both by virtue of law and on a motion filed by participants in the proceedings. In the first case, a judge is recused by operation of law.[49] In the second case, an additional court decision is usually required in this regard.[50]

The institution of disqualification is therefore given shape in the German law first of all by the provisions set forth in the German CCP, as referenced to in Section 54 (1) of the German CACP, and secondly by the norm resulting from Section 54 (2) of the German CACP.[51]

4.2 Conditions for the disqualification of a lay judge and a judge included directly in the German CACP

Section 54 (2) of the German CACP contains a separate condition for judge recusal, which is independent from the ones referred to in the German CCP. The said condition is related to the essence of the legal-administrative proceedings.[52] Pursuant to this provision, a judge or a lay judge shall also be disqualified from exercising their judicial function if they participated in the prior level administrative proceedings. It is assumed that extensive interpretation should be applied to the concept of "participation". In the light of German legislation, participation of a given person takes place not only in the event when such a person issued a decision that was appealed against, but also when such a person acted within the supervisory body[53] or in the appeal proceedings, and also, when such a person participated in the preparation of preliminary studies or other activities carried out by other bodies engaged in the administrative activities conducted under the proceedings.[54] In literature, it is assumed that there exist no grounds for the disqualification of a judge

[48] See the Zivilprozessordnung act in the wording applicable in accordance with the publication of 5 December 2005 (Federal Law Gazette p. 3202, amended by the Federal Law Gazette of 2006 p. 431 and the Federal Law Gazette of 2007 p. 1781, last amended by art. 11 (15) of the Act of 18 July 2017 – Federal Law Gazette p. 2745.

[49] R.P. Schenke, Verwaltungsgerichtsordnung Kommentar. (ed. W-R. Schenke), Munich, Beck 2016, p. 635.

[50] Seq., Verwaltungsrecht. VwVfG/VwGO/Nebengesetze (ed. M. Fehling, B. Kastner, (publ.) R. Strömer, edition no. 3 of 2013, NOMOS, Baden-Baden, p. 1780.

[51] The aforementioned provision reads in German as follows: (1) Für die Ausschließung und Ablehnung der Gerichtspersonen gelten §§ 41 bis 49 der Zivilprozessordnung entsprechend. (2) Von der Ausübung des Amtes als Richter oder ehrenamtlicher Richter ist auch ausgeschlossen, wer bei dem vorausgegangenen Verwaltungsverfahren mitgewirkt hat. (3) Besorgnis der Befangenheit nach § 42 der Zivilprozeßordnung ist stets dann begründet, wenn der Richter oder ehrenamtliche Richter der Vertretung einer Körperschaft angehört, deren Interessen durch das Verfahren berührt werden.

[52] J. v. Albedyll, Verwaltungsgerichtsordnung. Kommentar anhand der höchstrichterlichen Rechtsprechung (J. Bader/M. Funke-Kaiser/S.Kuntze/J.v. Albedyll), Heidelberg, C.F. Müller Verlag, 2007, p. 413.

[53] See Judgement of the Federal Administrative Court of 8 February 1977, Case file no. 5 C 71.75.

[54] R.P. Schenke, *op. cit.* (2016), p. 637.

in the event when the judge was only carrying out mechanical auxiliary activities or acted in the body itself, but had no influence on the administrative proceedings.[55]

4.3 Conditions for the disqualification of a judge in the German CCP

As mentioned above, regulations pertaining to the disqualification of a judge by virtue of law are set out in art. 41 et seq. of the German CCP, referenced to in Section 54 of the German CACP. According to the said provision, a judge is disqualified by law from exercising judicial office: 1) In all matters in which he himself is a party, or in which his relationship to one of the parties in the proceedings is that of a co-obligee, co-obligor, or a party liable to recourse; 2) In all matters concerning his spouse or former spouse; 2a) In all matters concerning his partner or former partner under a civil union; 3) In all matters concerning persons who are or were directly related to him, either by blood or by marriage, or who are or were related as third-degree relatives in the collateral line, or who are or were second-degree relatives by marriage in the collateral line; 4) In all matters in which he was appointed as a legal representative or as an attorney assigned to one of the parties by the court, or in which he is or was authorised to act as a statutory representative of one of the parties; 5) In all matters in which he is examined as a witness or expert; 6) In all matters in which he participated at a prior level of jurisdiction or in arbitration proceedings, unless this concerns judicial activities under legal assistance; 7) In all matters concerning court procedures of excessive duration, if he participated in issuing an order which had influence on the duration of the proceedings, which is the subject of the procedure; 8) In all matters in which he assisted in mediation proceedings or in any other out-of-court conflict resolution procedures.[56]

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[55] Seq., Verwaltungsrecht. VwVfG/VwGO/Nebengesetze (ed. M. Fehling, B. Kastner, (publ.) R. Strömer, Edition no. 3 2013, NOMOS, Baden-Baden, p. 1782.

[56] The said provision reads in German as follows: "Ein Richter ist von der Ausübung des Richteramtes kraft Gesetzes ausgeschlossen: 1. in Sachen, in denen er selbst Partei ist oder bei denen er zu einer Partei in dem Verhältnis eines Mitberechtigten, Mitverpflichteten oder Regresspflichtigen steht; 2. in Sachen seines Ehegatten, auch wenn die Ehe nicht mehr besteht; 2a. in Sachen seines Lebenspartners, auch wenn die Lebenspartnerschaft nicht mehr besteht; 3. in Sachen einer Person, mit der er in gerader Linie verwandt oder verschwägert, in der Seitenlinie bis zum dritten Grad verwandt oder bis zum zweiten Grad verschwägert ist oder war; 4. in Sachen, in denen er als Prozessbevollmächtigter oder Beistand einer Partei bestellt oder als gesetzlicher Vertreter einer Partei aufzutreten berechtigt ist oder gewesen ist; 5. in Sachen, in denen er als Zeuge oder Sachverständiger vernommen ist; 6. in Sachen, in denen er in einem früheren Rechtszug oder im schiedsrichterlichen Verfahren bei dem Erlass der angefochtenen Entscheidung mitgewirkt hat, sofern es sich nicht um die Tätigkeit eines beauftragten oder ersuchten Richters handelt; 7. in Sachen wegen überlanger Gerichtsverfahren, wenn er in dem beanstandeten Verfahren in einem Rechtszug mitgewirkt hat, auf dessen Dauer der Entschädigungsanspruch gestützt wird; 8. in Sachen, in denen er an einem Mediationsverfahren oder einem anderen Verfahren der außergerichtlichen Konfliktbeilegung mitgewirkt hat."

4.4 Conditions for the disqualification of a judge on a motion

Notwithstanding the obligation to disqualify a judge by virtue of law, Section 42 of the German Code of Civil Procedure provides for the possibility of judge recusal for fear of bias. Pursuant to Section 1 of the aforementioned provision, a motion may be filed both in the event when the judge is to be disqualified from his judicial functions by law and when there is a fear of bias. In accordance with Section 42 (2), a judge is disqualified for fear of bias if sound reasons justify a lack of confidence in his impartiality. Moreover, Section 42 (3) stipulates that both parties may move to disqualify a judge.[57]

It should be noted at this point that provisions of the German CACP only contain additional regulations pertaining to the notion of impartiality, apart from the general regulations resulting from the provisions of the German Code of Civil Procedure. The aforementioned **additional** regulations are included in Section 54 (3) of the German CACP. According to this provision, doubts about the impartiality are always justified when a judge or a lay judge represent the body whose legal interests may be affected by the proceedings.

4.5 Purpose of the regulation. Recusal of other participants in the proceedings

German doctrine stresses out that the institution of the disqualification of a judge results from the legal norms contained directly in the Basic Law.[58] It must be noted, though, that the German Basic Law does not directly stipulate that a court must be impartial and independent. The requirement of impartiality stems from the guarantee of the right to a fair trial in the court, set forth in Article 103 (1) of the Basic Law[59]. The principle of the state under the rule of law is mentioned in this context, as well as prohibition of lawlessness, referred to in Article 3 (1) of the German Basic Law and the right to be heard by a judge appointed under an act of law.[60] In accordance with the jurisdiction of the German Federal Constitutional Court, the German Basic Law requires that no citizen should appear before a judge who lacks impartiality in the settlement of a particular case.[61]

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[57] The said provision reads in German as follows: (1) Ein Richter kann sowohl in den Fällen, in denen er von der Ausübung des Richteramts kraft Gesetzes ausgeschlossen ist, als auch wegen Besorgnis der Befangenheit abgelehnt werden. (2) Wegen Besorgnis der Befangenheit findet die Ablehnung statt, wenn ein Grund vorliegt, der geeignet ist, Misstrauen gegen die Unparteilichkeit eines Richters zu rechtfertigen. (3) Das Ablehnungsrecht steht in jedem Fall beiden Parteien zu."

[58] R.P. Schenke, *op. cit.* (2016), p. 634.

[59] Grundgesetz für die Bundesrepublik Deutschland.

[60] Seq., Verwaltungsrecht. VwVfG/VwGO/Nebengesetze (ed. M. Fehling, B. Kastner, (publisher) R. Strömer, Edition no. 3 2013, NOMOS, Baden-Baden, p. 1779.

[61] See the Judgement of the German Federal Constitutional Court of 8 June 1993, Case file no. 1 BvR 878/90, published at https://www.jurion.de/urteile/bverfg/1993-06-08/1-bvr-878_90/and (consulted on 25.08.2017) and the Judgement of the German Federal Constitutional Court of 8 February 1967, Case file no. 2 BvR 235/64, published at https://www.jurion.de/urteile/bverfg/1967-02-08/2-bvr-235_64/?from=1%3A121958%2C0(consulted on 25.08.2017).

German legal doctrine also points out that the institution of judge recusal by virtue of law constitutes a necessary supplementation of the provisions pertaining to the judicial office, referred to in other acts of law.[62] The said regulations are considered to be a supplementation, because a judge is primarily required to exercise his office in accordance with the general legal requirements concerning the performance of the judicial office. The said requirements result both from the German Basic Law and from other acts, apart from the German Code of Civil Procedure.[63]

From the point of view of the German legal order, the purpose of judge disqualification is to ensure that a judge be appropriately detached from the case. This should also allow for the possibility to disqualify the judge who might be influenced by third parties.[64] A judge must always be impartial.[65] On the one hand, disqualification of a judge by virtue of law precludes a party from "easily" recusing the judge who may be inconvenient in the case. On the other hand, provisions of Section 41 of the German CCP order that a judge – being partial by human nature – should act impartially in the trial.[66] What is interesting, German doctrine underlines that if certain provisions of the law do not allow for the possibility of judge recusal, they are contrary to the German Basic Law.[67] This means that parties to any proceedings in the court must be equipped with the possibility of judge disqualification. Lack of such possibility should be considered contrary to the German Constitution.

It should be also noted that provisions pertaining to the disqualification of a judge apply to most participants of judicial proceedings, for example, translators and interpreters, conciliation commissions, court executive officers, receivers, notaries and court appointed experts.[68]

4.6. Selected judicial decisions

When analysing judicial decisions issued by German courts, one may deduce a certain view of the way in which the discussed provisions are interpreted. On the one hand, it may be assumed that German courts refrain from the extensive interpretation of the norms concerning judge recusal by law.[69] On the other hand, they seem to consider motions to disqualify the judge for fear of bias, provided that

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[62] J. Schmidt, Verwaltungsgerichtsordnung. Kommentar., C.H. Beck 2014, Munich, p. 363.

[63] A. Baumbach/W. Lauterbach/J. Albers/P. Hartmann, Beckische Kurz-Kommentare, Zivilprozesordnung mit Fam. GG, GVG und anderen Nebengesetzen, Band 1, Edition no. 73. Munich 2015, Beck, p. 163.

[64] J. v. Albedyll, Verwaltungsgerichtsordnung. Kommentar anhand der höchstrichterlichen Rechtsprechung (J. Bader/M. Funke-Kaiser/S.Kuntze/J.v. Albedyll), Heidelberg, C.F. Müller Verlag, 2007, p. 406.

[65] J. Schmidt, *op. cit.* (2014), p. 366.

[66] A. Baumbach/W. Lauterbach/J. Albers/P. Hartmann, *op. cit*., p. 163.

[67] R.P. Schenke, *op. cit.* (2016), p. 634.

[68] A. Baumbach/W. Lauterbach/J. Albers/P. Hartmann, *op. cit.*, p. 164.

[69] Similarly in R.P. Schenke, *op. cit.* (2016), p. 635.

specific circumstances occur in this regard. For example, a violation of provisions concerning the obligation to disqualify a judge by law was identified, when one of the lay judges was formally authorised by a party to a court dispute to represent that party before the court, but did not actually carry out activities of representation. The authorisation to represent before courts was based on the professional authorisation granted by the management board.[70] In another decision, however, it was assumed that the judge could not be disqualified by law for the reason of being married to one of parties' attorneys. The Court decided the situation did not constitute the condition to disqualify the judge *ex lege*, but "only" created the possibility to disqualify the judge on a motion filed by a party.[71] Similarly, in its Judgement of 5 December 1980, the German Federal Court decided that a distinction should be made between judge's participation in the specific proceedings and his assistance in another proceedings, related to the original proceedings to a certain extent only. Thus, when the judge adjudicated in the case, in respect of which a petition for the declaration of invalidity was lodged, no conditions necessitating judge disqualification by law were determined.[72] In yet another judicial decision, the court stated there might exist conditions for judge recusal for fear of bias in the event when the judge refused access to case files, even though it was contrary to the provisions of the law.[73] Motion to disqualify the whole panel of judges was also considered possible in the event when there exist circumstances allowing to believe that persons adjudicating could act in cooperation.[74] In another decision, it was adjudicated that no condition for the disqualification of the judge by law existed in the event in which the judge who adjudicated in the case remained in an informal relationship with the judge issuing the decision in the prior level proceedings. It should be noted, however, that in that case, the court simultaneously found that reasons were identified which questioned judge's impartiality, and disqualified the judge from the proceedings.[75]

5. Conclusions

The comparison of Romanian, Polish and German regulations pertaining to judge disqualification in court-administrative procedure leads to a conclusion that there are some significant distinctions among those regulations. It is worth noticing that the Polish court-administrative procedure is the only one, out of the three

[70] See Judgement Bundessozialgericht of 5 August 1992, Case file no. 14a/6 RKa 30/91 - published in Neue Juristische Wochenschrift 1993, p. 2070.

[71] Decision of the Higher Regional Court of Thuringia of 25 August 1999, published in Monatsschrift für Deutsches Recht. Zeitschrift für die Zivilrechts-Praxis, 2000, p. 540.

[72] See the Judgement of the German Federal Court of Justice of 5 December 1980, published in Neue Juristische Wochenschrift 1981, p. 1273.

[73] See the Judgement of the Federal Administrative Court of 25 July 1979, Case file no. 1 WB 161/77, published at https://www.jurion.de/urteile/bverwg/1979-07-25/1-wb-161_77_-1-wb-166_77/ (consulted on 25.08.2017).

[74] See the Judgement of the Federal Administrative Court of 5 December 1975, Case file no. 6 C 129/74, published at www.juris.de (consulted on 25.08.2017).

[75] See the Decision of the Federal Administrative Court in Bremen of 12 May 2015, Case file no. 2 B 40/15, published in Neue Juristische Wochenzeitschrift 2015, p. 2828.

analyses systems, which could be featured as fully autonomous. At the same time both the Romanian as well as the German regulations depend on a reference to their civil procedures. On a side note, a reference to the provisions of the civil procedure also existed in Poland, until 2004, when the current Law on Proceedings Before Administrative Courts entered into force.

The conducted research also gives reasons to believe that the legislators of the constitutional systems in the Constitution of Romania and Poland explicitly named guarantees of the autonomy ("niezależność") and the independence of the judges ("niezawisłość"), however, in case of the German Basic Law these guarantees are derived from the essence of the right to a fair trial in the court principle. There is a lack of the directly defined right to an impartial, independent court and judges in the German Basic Law. Nevertheless, the German system's difference has no bearing on the German judge disqualification institution, nor it provides for lower standards than the guarantees to an impartial court given directly in the Constitutions. As a consequence, the way in which the essence of the judge and court impartiality is construed in all these three systems is similar. When comparing the Romanian and Polish constitutional principles, it is worth noticing that they are alike, but not identical. The Polish law recognises three notions which are similar in meaning i.e. "niezależność" (independence of the court), "niezawisłość" (independence of the judges) and "bezstronność" (impartiality). As a result of the Polish and Romanian principles' comparison, we conclude that in Article 124 of the Constitution of Romania there are direct guarantees of impartiality, independence and being subject only to the law. This rule of being subject only to the law, which is stressed in the Constitution of Romania, has been named in the Polish Constitution as the independence of the judges (niezawisłość). As a part of this underlined importance of said principle, in light of the Constitution, the Polish judges are subject only to the Constitution and law. It means they have the right to disregard applying stipulations which are ranked lower that the acts. The Polish Constitution explicitly expresses the guarantee of the court's impartiality. In all three discussed systems the notion of the judge's impartiality is viewed in the light of the European Court on Human Rights (ECHR) jurisprudence which entails a distinction between the objective and subjective impartiality.

All three legal systems underline the importance of the regulations on the judge's professional status within the context of providing conditions for impartial adjudication. German legal literature also points out that the institution of judge recusal by virtue of law constitutes a necessary supplementation of the provisions concerning the judicial office referred to in other acts of law.

It is reasonable to claim that the catalogue of judge disqualification requirements by the virtue of law is similar in all three legal systems. All three systems provide for a disqualification by the virtue of law as well as due to a motion of a party to the trial. It is worth noticing that the Romanian and German stipulations regulate the issue of partners under a civil union. However, the Polish law does not touch on this at all. It is important that in all three systems the judge's impartiality is presumed and that his/her disqualification based on a party's motion requires proving

the contrary. The recusal due to a party's motion necessitates an adequate procedure. None of the analysed systems has a mechanism useful for subjective impartiality test, i.e. the ethical, moral, religious nor viewpoints are being verified in light of their possible impact on a particular case's decision. This might be considered as all of those procedures' weakness.

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