The principle of equality as a challenge to the democratic rule of law

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***Abstract*— In legal science, the constitutional idea of equality is considered from two perspectives: formal and material. Proper realisation and protection of this constitutional value, therefore, involves not only the requirement to apply the law in accordance with the principle of equality before the law but also to enact the law so as to achieve a state of equality in the law. Detailed definitions have been developed of both components of the idea of equality. In substantive terms, the principle of equality and the prohibition of discrimination have been closely linked to the idea of social justice, which was to have a corrective effect on the understanding of the principle of substantive equality, by setting the appropriate criterion for its differentiation. The article shows that although the constitutional value in question has an established meaning in legal science, it is still a challenge for the rule of law. The study points to example areas of legal regulation that still require full harmonisation with the principle of equality.**

Keywords— idea of equality, formal equality, substantive equality, prohibition of discrimination, rule of law, principles of social justice.

I. INTRODUCTION

The idea of equality, as a value and principle of the political system, has been present in Polish legal consciousness almost since the dawn of our statehood. Its wording has been different under particular Polish constitutional acts which, consequently, gave rise to different meanings of the term (Kołodziejczy 1990; Falski 1997; Buszko 1986: 434-435; Skrzydło 1997: 48-51). The current legal understanding of the idea of equality has been definitely influenced by the jurisprudence of the Constitutional Tribunal, especially the Tribunal's decisions from the period of political transformation at the turn of the 1980s and 1990s.

II. THE ORIGINS OF MEANING OF THE IDEA OF EQUALITY

The line of jurisprudence that developed at that time assumed that constitutional equality should be considered from both formal and material perspectives, i.e. as equality before the law and equality in law, respectively. In this way, the review of constitutionality of legal norms was shifted from the level of the application of law to the level of lawmaking (Garlicki 1998: 65), and, at the same time, definitions of both types of equality developed. Formal equality means the requirement of equal application of a legal norm to all parties in an identical or similar factual situation. Substantive equality, on the other hand, means a requirement to give such content to legal norms that they form in an equal (similar) manner the legal situation of equal (similar) subjects (Decision of the Constitutional Tribunal of 24 October 1989, K.6/89, OTK ZU 1989, No. 7) and the prohibition of discrimination of an individual on any grounds (Decision of the Constitutional Tribunal of 26 May 1986, U.1/86, OTK ZU 1986, No. 2; Decision of the Constitutional Tribunal of 5 November 1986, U.5/86, OTK ZU 1986, No. 1, p. 14). It should be added that the Constitutional Tribunal formulated a working definition of the principle of equality and the prohibition of discrimination back in the period of the People's Republic of Poland, assuming, under Article 67(2) of the Constitution of the People's Republic of Poland of 1952, that equality in law "consists in the fact that all subjects of law (addressees of legal norms), characterised by a given essential (relevant) feature to an equal degree, are to be treated equally. Thus, according to the same measure, without any discriminatory or favourable differentiation. Fundamental, but not exhaustive features, on grounds of which one may not

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differentiate between citizens in legal terms, are listed in Article 67(2) of the Constitution. Equality also implies acceptance of different treatment by the law of different subjects (addressees of legal norms), because equal treatment by the law of the same subjects in a certain respect generally implies different treatment of the same subjects in another respect" (Decision of the Constitutional Tribunal of 9 March 1988, U.7/87, OTK ZU 1988, No. 1, p. 14). At the same time, the Tribunal resolved that the nine anti-discriminatory features listed in Article 67(2) were merely an exemplary and not an exhaustive list, and explained that this provision, as compared to other provisions expressing the constitutional principle of equality of rights (Articles 19(3), 68, 78, 81, 95-96 of the Constitution of the People's Republic of Poland), was drawn up in a general, directional manner, and as such did not exhaust the content of substantive equality and the prohibition of discrimination. In consequence, it was held that this provision presupposed "the existence also of other, unspecified factual states in view of which it was not allowed to differentiate the rights of citizens at all (e.g. electoral rights, cf. Articles 95-96 of the Constitution) or it was allowed to differentiate between them, provided, however, that this did not violate the fundamental criteria referred to in Article 67(2) and the social and class nature of the Polish People's Republic in general, as specifically defined in Articles 1 and 4-5 of the Constitution of the Polish People's Republic." (Decision of the Constitutional Tribunal of 5 November 1986, U.5/86, OTK ZU 1986, no. 1, p. 14).

Such an understanding of equality in the law became established in the jurisprudence of the Constitutional Tribunal when – under the Act of 29 December 1989 amending the Constitution of the People's Republic of Poland (Journal of Laws 1989 no. 75 item 444) – the democratisation of the Polish system took place. (Garlicki 1998: 62-64; Falski 2000: 53; Decision of the Constitutional Tribunal of 29 January 1992, K.15/91, OTK ZU 1992, part I, No. 8, p. 10; Decision of the Constitutional Tribunal of 20 December 1994, K.8/94, OTK ZU 1994, No. 43, p. 4). At that time, the Tribunal ruled that equality had the status of a fundamental principle, and that its subjective scope extended to all natural persons located on the territory of Poland and subject to the jurisdiction of its authorities (Decision of the Constitutional Tribunal of 20 October 1992, K.1/92, OTK ZU 1992, part II, No. 23). Moreover, the Tribunal ruled that constitutional equality also referred to parties other than natural persons. This meant that the principle applied to the assessment of regulations defining the legal situation of trade unions and, in turn, also of political parties. Nonetheless, it was permissible to differentiate the legal situation of trade unions according to the criterion of size, based on the prerequisite of 'representativeness'. The principle of equality then took the shape of the principle of proportional equality of opportunities (Decision of the Constitutional Tribunal of 11 December 1996, K.11/96, OTK ZU 1996). However, the Tribunal did not show readiness to go beyond this circle of subjects. Thus, it was concluded that Article 67(2) did not directly apply to the legal situation of municipalities (Decision of the Constitutional Tribunal of 28 March 1994, K.14/94, OTK ZU 1994, part I, No. 13; Decision of the Constitutional Tribunal of 17 October 1995, K.10/95, OTK ZU 1995, No. 3, item. 10; Decision of the Constitutional Tribunal of 9 January 1996, K.18/95, OTK ZU 1996, No. 1, item. 1), or to the situation of economic operators (Decision of the Constitutional Tribunal of 27 June 1995, K 4/94 , OTK ZU 1995, part I, No. 16). The opinion of the Constitutional Tribunal on the subjective scope of the principle of equality had not yet been fully formed at that time (Garlicki 1998: 65).

III. INTERPRETATION AND APPLICATION OF SUBSTANTIVE EQUALITY

From the perspective of protecting the interests of an individual, it is extremely important to legislate in line with the properly understood idea of equality in the law. The established line of jurisprudence requires that, when deciding about compatibility of a legal provision with the constitutional principle of equality, the fundamental part is to determine the essential (relevant) feature on grounds of which the legal situation of subjects (addressees) of a legal provision is differentiated. Only entities characterised by this very essential feature should be treated equally by the law, i.e. without differentiation, either discriminatory or favourable. In this way, the terms 'discrimination' and ‘favouring’ were distinguished from the concept of 'differentiation'. It was concluded that a breach of the principle of equality occurs only when a given differentiation has the features of discrimination or favouring (Garlicki 1998: 66). When, on the other hand, there are differences between 'particular subjects of law, and these differences are correlated to essential features, the scope of rights of the subjects may be different, and this cannot be viewed as violation of the constitutional principle of equality' (Rafacz-Krzyżanowska 1993). However, the Tribunal found that constitutional equality in law is not absolute. In certain situations it is possible to differentiate the legal situation of similar subjects. A necessary requirement for such differentiation is adequate justification. Only short of adequate justification a differentiation assumes the status of discrimination or favouring, respectively. The assessment of constitutionality of a differentiation in law is thus made through the prism of the legitimacy and fairness of the adopted qualification criterion for a given category of subjects of the legal norm (Oniszczuk 1998). The Tribunal emphasised that: "Any deviation from the precept of equal treatment of similar subjects must always be supported by adequately convincing arguments. These arguments must:

- first, be of a relevant nature, i.e. be directly related to the purpose and essential content of the provisions in which the reviewed norm is contained and serve to achieve this purpose and content. In other words, the differentiations introduced must be reasonably justified. They must not be made according to arbitrary criteria (decision of 12 December 1994, ref. K3/94, OTK 1994, part II, p. 141).
- second, be proportionate, i.e. the importance of the

interest sought to be served by differentiating the situation of the addressees of the norm must be in appropriate proportion to the importance of the interests that will be compromised as a result of the unequal treatment of similar entities,

- third, remain in some connection with other constitutional values, principles or norms justifying different treatment of similar subjects (e.g., decision of 23 X 1995, ref. K4/95, OTK in 1995, part II, p. 93). As already mentioned, one of such constitutional principles is the principle of social justice (Article 1 of the Constitutional Provisions). A differentiation of the legal situation of similar subjects is thus much more likely to be deemed constitutional if it is in compliance with the principles of social justice or serves to realise those principles. By contrast, it is deemed unconstitutional discrimination (favouritism) if it does not find support in the principle of social justice. In this sense, the principles of equality before the law and social justice overlap to a large extent." (Decision of the Constitutional Tribunal of 3 September 1996, K.10/96, OTK ZU 1996, No. 4, item. 33, p. 5-6).

It follows from the above that "The principle of equality has, within the framework of the Constitution, the rank of a general principle relating to the entirety of civil rights, freedoms and duties. Any restriction of the principle that does not follow from the pursuit of actual equality is inadmissible" (Decision of the Constitutional Tribunal of 24 September 1991, Kw. 5/91, OTK ZU 1991, No. 5, p. 5). This means that differences in the factual position or situation of the addressees of a given norm may justify certain differences in treatment even if their position or situation is deemed identical in legal terms. The aim of such provisions, however, should be to blur and not to deepen existing factual differences. The application of so-called compensatory discrimination by the legislator does not violate the principle of equality (Decision of the Constitutional Tribunal of 3 March 1987, P.2/87, OTK ZU 1987, No. 2). It is also permissible to apply so-called positive discrimination, consisting in active preference of certain groups, when it is necessary to achieve actual equality. The prohibition of favouring certain categories (groups) of subjects is not in conflict with “certain substantively legitimate social preferences based on the principle of justice” because "The principle of social justice requires the granting of certain preferences to such insured persons who were employed in particularly difficult working conditions, or in a special capacity, if their share of work could not be duly taken into account in the form of a higher benefit assessment basis, which depends on the level of remuneration (income). Specific preferences are also deserved by those insured persons who have been disabled due to accidents at work or occupational diseases, if the law does not provide for any special compensation for them. (...) Finally, the principle of social justice requires the protection of benefit recipients receiving the lowest or slightly higher benefits, even if the rules for calculating the assessment basis require that the benefits should be low. In this case, the principle of proportionality as an institution of social insurance, must be corrected in the light of the principle of justice, which is enshrined in the Constitution, realised by applying the rule of distribution according to needs and having regard to the redistributive function of social insurance" (Decision of the Constitutional Tribunal of 11 February 1992, K.14/91, OTK ZU 1992, No. 7, p. 36-37). This means that the principle of justice can modify or even define the principle of equality (Garlicki 1992: 56; Decision of the Constitutional Tribunal of 17 December1991, U.2/91, OTK ZU 1991, No. 10, p. 7-8).

IV. The principle of equality under the 1997 Constitution of the Republic of Poland

In the 1997 Constitution (Journal of Laws 1997, No. 78, item 483, as amended), the provision on equality was included in Chapter II 'Freedoms, rights and duties of man and citizen', in the subchapter entitled 'General principles'. Such location of the discussed value within the scheme of the Constitution is of fundamental importance from the point of view of indicating its importance. In literature (Labno 2006: 35), an opinion has been formulated for long about the internal hierarchy of constitutional norms and the special role of some of them for the purposes of interpreting the constitution. The rationale for recognising such special importance of certain norms is to be provided, among other things, by the scheme of the Constitution. The principle of equality qualifies among the constitutional values thus distinguished. It is treated as a 'norm taken outside the bracket' in which legal provisions on human and civil rights and freedoms are located (Tuleja 1997: 91). Within the scheme of the current Constitution of the Republic of Poland, equality is treated as a kind of 'principle of principles', penetrating all rights and freedoms (Sokolewicz 1993). Consequently, in the jurisprudence of the Constitutional Tribunal, equality continues to be qualified as one of the fundamental elements of the democratic state standard (Information on substantial problems arising from the activities and jurisprudence of the Constitutional Tribunal in 1997).

However, the constitution-maker has rephrased the principle of equality, clearly departing from the former wording of the corresponding constitutional provision. The provision of Article 32 reads: "Paragraph 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. Paragraph 2. No one shall be discriminated against in political, social or economic life on any ground whatsoever." Under the current formula of the prohibition of discrimination, the legislator no longer uses a catalogue of fundamental anti-discrimination criteria so that the provision cannot be interpreted as acquiescence to differentiating on any grounds not expressly listed therein. Thus, the prohibition of discrimination implies prohibition of such differentiation of the legal situation of an individual that can constitute discrimination. This does not mean, however, that the essence of the prohibition of discrimination has not been defined in the

Polish legal system. The core of the prohibition of discrimination can be found in Article 14 of the European Convention on Human Rights, which prohibits discrimination on grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The cited Convention and its Article 14, by virtue of Article 91 of the Polish Constitution, form a part of the internal legal order of the Republic of Poland. Violation of Article 14 of the Convention by the legislator may constitute grounds for challenging a statutory provision before the Constitutional Tribunal on the grounds of its unconstitutionality (Article 32 in connection with Article 9) (Garlicki 1998: 78-80).

The change in the wording of the constitutional principle of equality under the 1997 Constitution of the Republic of Poland has not affected its interpretation. The Tribunal upheld the previous line of jurisprudence, emphasising the fact that, in its current wording (Article 32), equality has been functionally linked to the principle of social justice (Article 2). However, the relationship between the principle of equality and the principle of justice is of a particularly complicated nature (Łukasiewicz 2004). This is because the concept of social justice cannot be interpreted in abstracto, without a reference to the principles and values set out in the Constitution itself, or beyond the limits set by the Constitution. It performs a corrective function, manifest, among others, in the setting of limits within which other constitutional principles can come to the fore. The formulation of this general clause by the legislator also prevents arbitrariness of judgements or imposition of a private vision of justice by the interpreters of constitutional norms. The principle of justice has a corrective effect on the principle of equality by setting the appropriate criterion for differentiation (Safjan 1999).

It is accepted that the principle of equality and non-discrimination can also be expressed in an individual right to equal protection, guaranteed above all by independent courts. This principle also offers a basis for a claim for protection whenever an individual or group of individuals is unjustly or unduly favoured. The guarantee provided under the discussed provision is unlimited in nature, which means that any action amounting to unjustified differentiation, whether in the political sphere or in the social or economic sphere, constitutes its breach. The prohibition of discrimination expressed in Article 32(2) is absolute in nature. Whenever a differentiation occurs without adequate justification, it is prohibited. The principle of equality and non-discrimination is also of an open nature. Anyone in relation to whom this principle has been breached may claim protection. For the sake of implementing the principle, it may be necessary to have a statutory preference for certain subjects in certain types of situation. The aforementioned principle of justice will play a major role in the introduction of such preferences (Boć 1998: 70-71).

The Constitution in force did not stop at expressing the idea of equality as a value and principle of the political system. Recognising its important role, the legislator made the duty to follow this principle more specific in many areas of human activity (Banaszak 1997). Thus, implementing the educational function under Article 33, as lex specialis to the general principle of equality, the legislator expressed the principle of equality between men and women. In the following constitutional provisions, the constitution-maker offered constitutional guarantees safeguarding the idea of equality in respect of: the citizens' right of access 'to public service based on the principle of equality' (Article 60), equality of elections, the right of the individual to equal access to the products of culture (Article 6), the principle of equality of churches and other religious associations (Article 25), the citizens' right of equal access 'to health care services financed from public funds' (Article 68(2)), the citizens' right of equal access to education' (Article 70).

At this point, it is worth noting an existing dissonance between the views expressed in the literature and in the jurisprudence of the Constitutional Tribunal. In legal science, it is argued that equality can and should be treated in terms of a subjective right understood as the right of an individual to be treated in a non-discriminatory manner by public authorities in the context of both the application of law (equality before the law) and lawmaking (equality in law) (Garlicki 2003: 12-13) On the other hand, the Constitutional Tribunal, when examining a constitutional complaint (Art. 79) alleging violation of a person's right to equal treatment, adopted a very limited concept of that right by concluding 'that a mere indication of a violation of the principle of equality is not a sufficient basis for a constitutional complaint. This is because the principle is of a constitutional nature and does not in itself constitute a source of subjective rights or freedoms. The constitutional principle of equality, on which the Constitutional Tribunal has repeatedly pronounced (cf. e.g. decision U.7/87, OTK in 1988, item 1, p. 5), provides that entities in the same or similar situation should be treated in the same or similar way. Equal treatment understood in this way is usually correlated to a certain subjective right, and in the context of constitutional rights and freedoms - to a subjective right of a public nature. The subject of a constitutional complaint cannot therefore be a violation of the principle of equality in itself, but a violation of the principle in connection with a specific constitutional subjective right. This view is confirmed in previous jurisprudence of the Constitutional Tribunal (e.g., cf. decision of 17 June 1998, ref. Ts. 48/98, OTK ZU No 4/1998, item 59, decision of 17 II 1999, ref. Ts 154/98, OTK ZU No 2/1999, item 34). (...) An opposite conclusion, allowing a complaint to be based exclusively on an allegation of a breach of the right to equal treatment, without indicating the right or freedom in respect of which there is a lack of equal treatment, would render it possible to assert, by way of a constitutional complaint, violated rights the assertion of which is explicitly excluded by the above-mentioned provisions. It should also be noted that basing a complaint exclusively on the allegation of a violation of the principle of equality would also allow one to seek, by way of a constitutional complaint, protection of rights that do not have the rank of constitutional rights. Hence, an allegation of violation by a given regulation of the principle of equality must be preceded by indicating the constitutionally protected right or freedom vested in the complainant in relation to which equality

should be preserved" (Decision of the Constitutional Tribunal of 2 February 2000, Ts 10/00, OTK ZU 2000, No. 3 item. 103, p. 487-488).

V. THE PRINCIPLE OF EQUALITY AS A CHALLENGE TO PUBLIC AUTHORITY

Against the background of this analysis, one may ask whether the implementation of the idea of equality is still a challenge for a state governed by the rule of law, such as Poland? In search of an answer to this question, already a brief analysis of the current legislation and the practice of applying the law reveals that it definitely is. Achieving full equality is still a challenge in many aspects of an individual's everyday life.

For example, in the literature (Przywora 2020: 166-181), despite the established jurisprudence of the Constitutional Tribunal, the question is still asked whether Article 32 of the Constitution, expressing the principle of equality, may constitute an independent review benchmark in cases initiated by a constitutional complaint, and research is conducted in this area. The analysis of recent jurisprudence of the Constitutional Tribunal leads academics to the conclusion that, according to the dominant view, Article 32 does not autonomously create subjective rights or freedoms of an individual and, as such, it does not constitute an independent review benchmark in cases initiated by a constitutional complaint. This opinion has, indeed, been adopted by the full composition of the Tribunal (Judgement of the Constitutional Tribunal of 24 October 2001, SK 10/01, OTK ZU 2001, No. 7, item. 225). However, in the most recent decisions a different view, allowing for such a possibility, is beginning to work its way (e.g. Judgment of the Constitutional Tribunal of 12.04.2011, SK 62/08, OTK-A 2011 No. 3, item. 22; Decision of the Constitutional Tribunal of 3.10.2019, Ts 50/18, OTK-B 2020, No. 5). However, such view has not been adopted in the full panel of the Constitutional Tribunal. Consequently, in accordance with the opinion expressed in the justification of the decision of 1.08.2019, Ts 45/18, only withdrawal from the previous position in a ruling passed by the full composition of the Constitutional Tribunal may provide grounds for concluding that the new interpretation of Article 32 constitutes an interpretative directive binding on subsequent panels of the Constitutional Tribunal (Przywora 2020: 166-181). The presented position of the Constitutional Tribunal effectively deprives the individual of a possibility to seek, before this body, protection of their rights and freedoms, in the context of equality and prohibition of discrimination, in all those cases in which such rights and freedoms are not constitutionalised under the Basic Law. Such a limitation of the guarantee of equality in the law, understood as a subjective right, is contrary to the standards of protection of human and civil rights applicable in democratic states. Contrary to appearances, there are many areas in which individual rights have not been constitutionalised. One such area is undoubtedly intellectual property, arising in the area of human creative activity.

The term 'Intellectual Property's negative space' has been coined in intellectual property law. The concept was formulated in 2006 by American researchers K. Raustiala and Ch. Sprigman and further developed by E. Rosenblatt in 2011. Since then, an entire theory has been developed on the basis of this term, recognising an area of human creative activity called 'IP without IP', i.e. one that, for historical, doctrinal or other reasons, is not covered by intellectual property law. The term is applied to the fashion and clothing design industries, to such areas of human creativity as culinary arts, street art, tattooing, magic tricks, martial arts, financial services, sports, but also stand-up comedy, typefaces, open source software, Wiki encyclopaedias and academic learning (Grzybczyk 2021). In the traditional view of copyright law, only such expressions of the effects of human creative activity are protected that have been established as a work in the understanding of copyright law. Consequently, an idea or concept and the like, that underlie the creation of a work, are not protected as such. In other words, the use of someone else's creativity in the areas of creative activity not covered by intellectual property law, as well as the expression of someone else's thoughts (and the ideas or concepts contained therein, as well as methods, procedures and principles of operation) in one's own words, as a rule will not constitute an infringement. In the absence of a relevant legal basis guaranteeing equal protection of intangible property created as a result of an individual's creative activity, the individual will be deprived of the possibility to protect his or her rights. In turn, the line of interpretation of Article 32 of the Constitution adopted in the jurisprudence of the Constitutional Tribunal deprives the individual of the right of access to the constitutional court. This undoubtedly violates the constitutional principle of equality, which, under Article 32 and Article 64 of the Constitution, guarantees equal legal protection of property, other property rights and the right of succession for all. In view of the above, as a postulate de lege fundamentali ferenda, the need can be identified for constitutionalising subjective rights of creators of intangible goods not covered by the existing systems of legal protection, that is under the codified intellectual property law, to the protection of their interests resulting from any creative activity. This could be done by supplementing the provision of Article 73 of the Constitution, which expresses individual freedoms in the sphere of artistic, scientific and educational (teaching) creativity, with a norm sanctioning such an individual right. The provision under analysis would then consist of two paragraphs, the first having the existing wording, formulating the individual's creative freedoms, and the second phrased as follows: 'Everyone shall be guaranteed the right to the protection of personal and material benefits deriving from any of his artistic, literary, scientific or educational activities. The intellectual property of creators of intangible goods shall be subject to equal legal protection for all.

On the other hand, as far as the legislation the individual’s procedural rights in the sphere of protecting intangible assets in intellectual property lawsuits is concerned, attention can be drawn to the institution of joining the proceedings by a non-governmental organization. Under Article 61 of the Code of Civil Procedure, non-governmental organizations, within the

scope of their statutory tasks, may, at the consent of a natural person expressed in writing, bring actions on his/her behalf, and moreover, at the natural person's consent expressed in writing, may join him/her in pending proceedings at any stage thereof, including before the Supreme Court. However, such possibility is limited to a closed range of cases. These include actions for: 1) alimony; 2) protection of the environment; 3) protection of consumers; 4) protection of industrial property rights; 5) protection of equality and prohibition of discrimination through unjustified direct or indirect differentiation of citizens' rights and obligations. In violation of the constitutional principle of equality, an important category of cases has been left out of this catalogue. Instead of the term 'protection of industrial property rights', a broader term 'protection of intellectual property rights' should have been used. The relevant criterion used by the legislator when distinguishing the category of cases involving industrial property rights and creating the system of their protection was the need to protect the effects of human creative activity. The same criterion can be identified in the context of distinguishing and granting protection to effects of human creative activity under the copyright and related rights, and in a broader category of rights on intellectual property. Equality in and before the law requires that creators be afforded legal protection on equal terms. It therefore seems necessary to amend Article 61 of the Civil Procedure Code so as to extend its scope to all creators.

At the same time, the introduction of such an amendment will be consistent with the previous decision of the legislator to establish separate intellectual property courts within the structure of the judiciary, and to define intellectual property cases. Under Article 47989 of the Code, intellectual property matters have been catalogued, including cases for the protection of copyright and related rights, for the protection of industrial property rights and for the protection of other rights on intangible property (intellectual property cases), as well as cases for preventing and combating unfair competition, protecting personal interests inasmuch as they are used to individualize, advertise or promote an entrepreneur, goods or services, protecting personal interests in the context of scientific or inventive activity. Omission to amend the discussed Article 61 leads to unequal treatment of an individual, who, while attempting to protect his/her intangible property in a legal process, is deprived of the possibility of support by a specialised non-governmental organisation, e.g., a Foundation or an Association offering legal assistance to authors. Such an organisation, in particular, will not be able to join the individual in the proceedings before the Supreme Court.

Another challenge for the Polish legislator is to solve an institutional and, at the same time, systemic problem that has occurred, since 2018, in the nomination procedure of judges. This refers to judicial appointments involving the National Council of the Judiciary (hereinafter: KRS) in its composition following the 2017 Amendment Act (Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, Journal of Laws 2018, item 3). According to the well-established jurisprudence of the European courts, the CJEU and the ECtHR, the provisions of this Act led to the dependence of the KRS on the legislature and the executive, thus providing grounds for undermining the independence and impartiality of persons holding the office of judge (Barcz, Grzelak & Szyndlauer 2022; Supreme Court decisions of 13 April 2023, III CB 6/23). The rectification of this situation calls for an intervention of the legislator. However, this should be done with due respect for constitutional values and principles, including the principle of equality. When it comes to the proposals appearing in the public arena to adopt a statute that would offer a basis for the deposition of judges appointed in a partly defective procedure from their judicial office along with a basis for enforcing disciplinary liability against them through compulsory expression of active repentance (Przymusiński), such proposals should be definitely rejected as incompatible with the standards of the rule of law (the Venice Commission issued an opinion on the amendments to the regulation of the status of judges). This issue has become a subject of fierce disputes in Poland (Decision of the Supreme Court, Civil Chamber, of 16 September 2024, III CB 65/24). Upon examining this issue, the Supreme Court notes that a decision issued with the involvement of such a judge is invalid only "if the defect in the appointment process led, in specific circumstances, to a violation of the standard of independence and impartiality within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms" (Resolution of 3 combined Chambers of the Supreme Court (legal principle) of 23 January 2020, BSA I-4110-1/20). In addition, the Supreme Court questions whether there are a priori grounds for assuming "that any judge of a common court who obtained an appointment as a result of competition before the National Council of the Judiciary after 17 January 2018 does not meet the minimum standard of impartiality and, in each case, a court panel including such judge is unduly staffed within the meaning of Article 439 § 1(2) of the Code of Criminal Procedure." (Resolution of 7 judges of the Criminal Chamber of the Supreme Court of 2 June 2022, I KZP 2/22).

This matter requires careful analysis. It should be noted at the beginning that the Constitution, when it comes to independent prerogatives of the President of the Republic, exhaustively provides for his competence to appoint judges. They are appointed upon request of the KRS by the President for an indefinite period of time (Art.179). The Constitution also guarantees their irremovability from office except in case of deposition from office under a court ruling, and only in situations prescribed by law (art.180). These provisions qualify as the most important constitutional guarantees of judicial independence and judicial autonomy, as a standard of the rule of law.

The proposed normative solution, assuming collective enforcement of disciplinary liability, by operation of law, against judges nominated from 2018 onwards, directly opposes these constitutional guarantees and violates the principle of equality. It deprives judges of the right to a court (Article 45) and the right to initiate a procedure for their dismissal from

office with due respect to the constitutional provision of Article 180. Arbitrarily, these judges are also to be excluded from the protection offered by the principle of safeguarding the citizen's confidence in the state and the law developed under the rule of law clause laid down in Article 2. It should be emphasised at this point that the existing defective situation of the KRS, resulting in a breach of our country's obligations under Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, refers to the relationship between the state and other subjects of public international law in the context of a breach of Article 9 of the Constitution of the Republic of Poland. On the other hand, it does not literally contradict Article 186 of the Constitution, which does not specify the procedure for the appointment of the members of the KRS, a body composed of 15 judges elected from among the judges of the Supreme Court, common courts, administrative courts and military courts. This issue was commented on in the 'Urgent Joint Opinion of the Venice Commission and the Council of Europe's Directorate General for Human Rights and the Rule of Law on the draft law amending the law on the National Council of the Judiciary' of 8 May 2024 in the context of the planned exclusion, under this draft, from the election to the newly shaped KRS of all judges appointed or promoted under the defective procedure in question. This opinion stresses that in the lack of a procedure for individual assessment of the situation of such judges, the proportionality of the proposed solution can be questioned. At the same time, it is recommended to amend the Polish Constitution by specifying in its provisions a procedure for the election of the members of the KRS and their term of office, the main functions of the KRS and the forms of participation of civil society (para 86).

The presented issue should also be considered from the perspective of Article 65(1) of the Constitution, which guarantees everyone the freedom to choose and exercise their profession and to choose their place of work. The constitutional principle of equality guarantees the right to exercise this freedom to everyone. The objective scope of this freedom also includes the freedom to choose and exercise the profession of a judge, including in the period from 6 March 2018, when, following the actions of the legislator, on which an average judge or lawyer aspiring to become a judge had no influence, a partial defect arose in the procedure for the nomination of judges. It is impossible to assume, in accordance with this constitutional freedom, that in Poland, in the period from 6 March 2018 to the present day, access to the judicial profession is effectively closed and that all presidential judicial appointments are legally ineffective.

The above conclusions do not mean that it is impossible, in compliance with the Constitution and respecting the institution of presidential prerogative, to restore the state of compliance of the staffing of the courts, within the structure of the judiciary, with the Constitution and the international obligations of the Republic of Poland. These circumstances were pointed out by the Venice Commission in its most recent recommendation to Poland (Joint Opinion of the Venice Commission and the Directorate General for Human Rights and Rule of Law on European standards regulating the status of judges, adopted by the Venice Commission at the 140th Plenary Session, Venice, 11-12 October 2024).

It is necessary in the current situation to restore public confidence in the third power and to create guarantees for the systemic appointment of court compositions so as to meet constitutional requirements. This cannot be done otherwise than under a procedure laid down in statutory provisions for the verification if the partial defect in the nomination procedure has led to the appointment as judge of a person who did not guarantee impartiality in adjudication. General and abstract provisions of such statute should provide a basis for verifying whether a person holding the office of judge has betrayed the oath taken upon appointment and should therefore, in the situation specified in this Act and under a court decision (Article 180(2)), be removed from office. At the same time, the proposed statute should set a time limit for the initiation of this review procedure for persons appointed as judges or promoted after 6 March 2018 in a partly defective procedure, and stipulate that failure to initiate the procedure within this time limit means that a judge has not betrayed his or her oath and that his or her attitude warrants the standards of independence and impartiality in the exercise of his or her office. From that point onwards, the status of judges should no longer be questioned.

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