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Krzysztof Sielski

ORCID ID: 0000-0001-6637-7642

Jan Kochanowski University in Kielce

E-mail: ksielski@ujk.edu.pl

**“Frozen” Valorization of Judges’ Salaries in Poland
in the Light of Europe Union Legal Standards**

Keywords: Rule of Law, Judicial independence, commensurate remuneration, lack of valorization, “freezing” the valorization of judges’ salaries

Słowa kluczowe: Państwo prawa, niezawisłość sędziowska, adekwatne wynagrodzenie, brak waloryzacji, „zamrożenie” waloryzacji wynagrodzeń sędziowskich

Abstract

The material independence of judges is one of the essential guarantees of their independence and, at the same time, the proper functioning of the judiciary. Of course, one should not conclude from this that there is a simple relationship between independence and the material status of judges, nor should one presume a general prohibition on reducing judicial salaries. Undoubtedly, however, commensurate remuneration is permanently linked to the question of judicial independence. The aim of this article is to analyze premises of the permissibility of “freezing” adjustment of judges’ salaries in the light of international legal standards. The article is based on a specific factual situation, as in

2023, that basic salary adjustment for judges of common courts in Poland was “frozen” for the third year in a row.

Streszczenie

„Zamrażanie” waloryzacji wynagrodzeń sędziowskich w świetle unijnych standardów prawnych

Materialna niezależność sędziów stanowi jedną z istotnych gwarancji ich niezawisłości, a zarazem prawidłowego funkcjonowania wymiaru sprawiedliwości. Oczywiście nie należy z tego wyciągać wniosku o istnieniu prostej zależności między statusem materialnym sędziów a ich niezawisłością, ani zakładać generalnego zakazu obniżania wynagrodzeń sędziowskich. Niewątpliwie jednak istnieje pewien związek między poziomem wynagrodzeń sędziowskich a kwestią sędziowskiej niezawisłości. Celem niniejszego artykułu jest analiza powyższego związku, a zwłaszcza przesłanek dopuszczalności „zamrażania” waloryzacji wynagrodzeń sędziowskich w świetle międzynarodowych standardów prawnych. Artykuł powstał na kanwie konkretnego stanu faktycznego, gdyż w 2023 r. doszło w Polsce, po raz trzeci z rzędu, do „zamrożenia” waloryzacji wynagrodzenia zasadniczego sędziów sądów powszechnych.

✱

I. Introduction

The material independence of judges is one of the essential guarantees of their judicial independence¹. This has been repeatedly emphasized by the CJEU.

¹ See in particular: P.H. Russell, *Towards a General Theory of Judicial Independence* [in:] *Judicial Independence in the Age of Democracy Critical Perspectives from Around the World*, eds. P.H. Russell, D.M. O’Brien, Charlottesville and London 2001, pp. 1–24, M.H. Redish, *Judicial Independence and the American Constitution. A Democratic Paradox*, Stanford University Press 2017, pp. 54–60, A. Zieliński, *Niezawisły, bezstronny, właściwy...* [in:] *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*, eds. A. Bodnar, A. Płoszka, Warszawa 2020, pp. 249–269 and Constitutional Tribunal Judgment of 4 October 2000, file ref. no. P 8/00, in which the Court states that: “The system of judicial remuneration [...] is an essential element of the judicial system [...] it is not an individual privilege of a judge, but one of the basic guarantees of the proper functioning of the administration of justice”.

In its 2018 judgment in the Associação Sindical dos Juizes Portugueses case² (ASJP) it stated that the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint [...]. Like the protection against removal from office of the members of the body concerned [...], the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence³.

The above-mentioned judgment was ground-breaking. Indeed, before it was issued, it had been argued sometimes that the organization of the system of justice was an internal matter of the Member States, beyond the competence of the EU. In the ASJP judgment, the Court took a different view. It presented the concept of the so-called essential guarantees of judicial independence, rooting it in Art. 19(1) TEU, and then stated that one of these guarantees was the right to adequate remuneration. In the light of the above judgment, any infringement by Member States of these essential guarantees constitutes a violation of Treaty law. As Pech and Platon point out, the importance of this judgment lies in the fact that it “essentially establishe[d] a general obligation for Member States to guarantee and respect the independence of their national courts”⁴. Of course, one should not conclude that there is a simple correlation between independence and the material status of judges, nor should one propose an overall prohibition on reducing judicial salaries⁵. Undoubtedly,

² CJEU Judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117. See also: J. Jaskiernia, *Funkcje Konstytucji RP w dobie integracji europejskiej i radykalnych przemian politycznych*, Toruń 2020, p. 536 et seq.

³ ASJP [44]–[45].

⁴ L. Pech, S. Platon, *Judicial Independence Under Threat: The Court of Justice to the Rescue*, “Common Market Law Review” no. 55 (6), p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607788 (20.4.2022). See also: A. Torres Pérez, *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence.*, “Maastricht Journal of European and Comparative Law” no. 27(1), pp. 105–119, <https://doi.org/10.1177/1023263X19892185> (1.3.2023) and M. Krajewski, *Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma*, “European Papers” 2018, vol. 3, no. 1 (European Forum, 30 May 2018), pp. 395–407, <https://doi.org/10.15166/2499-8249/218> (1.03.2023).

⁵ See AJSP [27]–[52]. This is also pointed out by Jacquelyn Veraldi and Stéphanie Laulhé Shaelou: “The ‘commensurate remuneration’ rule does not necessarily prohibit the reduction of

however, adequate remuneration has been linked to the issue of judicial independence. Consequently, any attempts by the legislative and executive powers to interfere with the principles behind the level of remuneration of judges should also be examined from the perspective of possible violations thereof.

This article is based on a particular factual situation: in 2023 the valorization of the salaries of judges in Poland has been “frozen” for the third year in a row. We aim to demonstrate that the freezing violates the European legal standards of judicial independence. In order to accomplish this, the relevant European (especially CJEU case-law) and the Polish regulations have been analyzed.

II. EU legal standards

As mentioned above, the material independence of judges is one of the ‘essential guarantees’ of judicial independence. Let us recall some cases presented before the CJEU to clarify this issue.

First of all, the ASJP judgment of 27 February 2018 should be recalled. As already mentioned, the Court presented therein a “concept of ‘essential guarantees’ of judicial independence [which] appears able to substantively determine whether a given measure affecting the judiciary infringes Article 19 TEU”⁶, and further states that commensurate remuneration constitutes one such guarantee.

The case concerned the permissibility of reducing the salaries of Portuguese judges due to the financial crisis that many European countries were facing at the time. With Law No. 75/2014 the Portuguese Parliament temporarily reduced the salaries of public sector employees (including, among others, judges), justifying the decision by the need to eliminate the excessive budget deficit. The ASJP, which is a judges’ association acting on behalf of the members of the Tribunal de Contas (Court of Auditors), challenged the provisions of this

the remuneration of a judge or the judiciary more generally”. J. Veraldi and S. Lahlé Shaelou, *The Substantive Requirements of Judicial Independence in the EU: Lessons from Times of Crisis*, “EU-POP JMMWP” 2021, no. 1, p. 7, <https://cadmus.eui.eu/bitstream/handle/1814/72058/EU-POP-JMMWP-1-of-2021.pdf?sequence=1> (20.04.2022).

⁶ J. Veraldi and S. Lahlé Shaelou, *op.cit.*, p. 4.

law before the CJEU, claiming that they violated the principle of judicial independence. The CJEU did not share this position, citing three main arguments which, in the Court’s view, legitimized the reduction in judges’ remuneration in this case. Firstly, the salary-reduction provisions “were adopted because of mandatory requirements linked to eliminating the Portuguese State’s excessive budget deficit” (Nb 46). Secondly, “salary-reduction measures provided for a limited reduction of the amount of remuneration, up to a percentage varying in accordance with the level of remuneration” (Nb 47); and furthermore these measures “were applied not only to the members of the Tribunal de Contas (Court of Auditors), but, more widely, to various public office holders and employees performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary” (Nb 48). The Court also considered the fact that “the salary-reduction measures [...] were temporary in nature” (Nb 50). Taking this into account, the Tribunal found that although the “level of remuneration commensurate with the importance of the functions [judges] carry out constitutes a *guarantee essential* to judicial independence” (Nb 45); nevertheless “the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance program, from being applied to the members of the Tribunal de Contas (Court of Auditors)” (Nb 52).

The facts were similar in the case of *Carlos Escribano Vindel v Ministerio de Justicia* (Vindel), which ended in the judgment of 7 February 2019⁷. Again, the reason for the reduction in remuneration was the financial crisis, this time in Spain. However, this case no longer concerned a professional group, but an individual – the judge of the Juzgado de lo Social no. 26 de Barcelona, Mr Vindel. Because of the similarity of the facts involved, the Court first repeated the reasoning of the ASJP case. Indeed, as in the Portuguese case, this one also involved a reduction in remuneration “because of the overriding need to remove the excessive budget deficit of the Member State concerned and provided for a limited reduction of the amount of remuneration, the percentage of which varies according to the level of remuneration” (Nb 67), and

⁷ CJEU Judgment of 07 February 2019, *Carlos Escribano Vindel v. Ministerio de Justicia*, Case C-49/18, ECLI:EU:C:2019:106.

judges were not the only professional group affected, as “the measures were applied [...] more widely, to various public office holders and employees performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary” (Nb 67). However, the Court then went on to create an additional standard – in reference to the ASJP case – for assessing the individual situation of a particular judge, in that it stated that the court should further determine “whether the level of remuneration received by Mr Escribano Vindel, after application of the salary reduction at issue in the main proceedings, is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment” (Nb 72). Finally, in this case the CJEU also did not find a violation of the principle of judicial independence.

As can be seen, the CJEU has created in the above judgments a kind of a “two-step test [which] can be considered an analytical framework for substantively assessing whether a given reduction of judicial remuneration is compatible with the essential guarantee of commensurate remuneration required by Art. 19 TEU”⁸. In the first step, it must be determined whether the reduction in remuneration is duly justified by circumstances of an objective nature (in the ASJP and Vindel cases, that justification was the need to remove the excessive budget deficit caused by the financial crisis), and in the second step, whether it affects the level of independence of the particular judge.

The CJEU judgment of 23 November 2021 in the IS case⁹ also requires a few words of comment. As a result of legislative changes made in Hungary in 2018, the level of prosecutors’ remuneration was radically increased, which led to an unprecedented situation – the remuneration of prosecutors exceeded that of judges belonging to the same grade and with the same length of service (the latter had remained unchanged for 15 years). Moreover, because of these changes the remuneration of judges became largely discretionary, as the right to decide on the allocation of prizes and bonuses (which are important elements of remuneration) was entrusted to the arbitrary discretion of court presidents and the President of the SJO (Supreme Judicial Office). In this context, the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hun-

⁸ J. Veraldi and S. Laulhé Shaelou, *op.cit.*, p. 8.

⁹ CJEU Judgment of 23 November 2021, IS, Case C-564/19, ECLI:EU:C:2021:949.

gary) made a preliminary reference to the CJEU, asking whether the fact that judges’ remuneration no longer corresponded to the dignity of the judicial profession (due to the fact that it was not indexed in connection with the high level of inflation and the increase in the level of average salaries in the country¹⁰) was compatible with the principles of judicial independence expressed in the TEU and the CFR (Nb 38(2a)). It should be noted that this case (unlike the ASJP and Vindel cases) was not about the reduction of judges’ salaries, but about the fact that these salaries lost the value of proportionality as a result of lack of valorization. Unfortunately, the Court found this question inadmissible. However, given the standards developed in the ASJP and Vindel judgments, it seems likely that the CJEU, if it had allowed the question, would have found a breach of Treaty law in this case.

III. The “freezing” of the valorization of judges’ salaries in Poland

Judges are the only professional group in Poland whose remuneration rules are set out in the Constitution. Pursuant to Art. 178(2), the remuneration of judges is supposed to correspond to the dignity of the office and the scope of their duties. The norm contained in this provision constitutes one of the material guarantees of judicial independence. It implies a positive obligation on the part of the state to ensure that judges are afforded material conditions in which they are effectively protected against any attempts at external pressures or persuasion, so that they can focus on the performance of their professional duties, particularly in the judicial sphere. Due to the vagueness of the terms used in this provision (“remuneration commensurate with the dignity of the office”, “remuneration commensurate with the duties of the judge”), one could arrive at the conclusion that the norm contained therein constitutes only a kind of programmatic postulate. However, this is not the case. The Constitutional Tribunal has repeatedly emphasized that “it sets, albeit in a vague manner, a certain necessary standard which must be respected by the

¹⁰ As Dániel G. Szabó points out “while in 2004 the basic pay for judges was 2.09 times higher than the average pay, in 2019 the ratio is only 1.23.” D.G. Szabó, *A Hungarian Judge Seeks Protection from the CJEU – Part I*, <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i> (27.04.2022).

legislator in shaping the system of judicial remuneration”¹¹. Thus, this provision is in fact “a control benchmark for the assessment of remuneration regulations, and in certain, particularly drastic, situations it may also become a basis for declaring these regulations unconstitutional”¹².

Polish legislator has regulated the rules of remuneration of judges in the act Law on the common courts system (Art. 91 et seq.)¹³. It is worth noting that in 2009 an amendment to that act¹⁴ entered into force, which significantly modified the rules for remunerating judges. Until then, the level of judicial remuneration was based on the so-called base amount determined each year in the budget act. Critics of that solution argued that it did not fully implement the model created in the Constitution (making the level of remuneration of judges excessively dependent on political decisions). Taking into account those critical remarks, in 2009 the legislator changed the method of remunerating judges. Currently, the basis for determining the basic salary of a common court judge in a given year is the average salary in the second quarter of the previous year announced in the *Monitor Polski* (Official Gazette of the Republic of Poland) by the Chairman of the Central Statistical Office, and if the average salary in the second quarter of the previous year was lower than the average salary announced for the second quarter of the previous year, the basis for determining the basic salary of the judge in the previous amount is adopted¹⁵.

As already mentioned, in 2023 the legislator “froze” the valorization of judicial salaries. According to Art. 8 of the act of 1 December 2022 on special measures for implementing the budget law for 2023¹⁶, in 2023 the basis for determining the basic salary of a judge is not the average salary but an arbi-

¹¹ Constitutional Tribunal Judgment of 4 October 2000, file ref. no. P 8/00.

¹² Constitutional Tribunal Judgment of 22 March 2000, file ref. no. P 12/98.

¹³ Act of 27 July 2001 Law on the common court system (Dz.U. 2020, item 2072, as amend.).

¹⁴ Act of 20 March 2009 amending the Act – Law on the common courts system and certain other acts (Dz.U. 2009, No. 56, item 459).

¹⁵ See art. 91 §1c, art. 91 §1d and art. 91 §2 of the Law on the common court system and the annex to the aforementioned act, which sets out the rates of basic remuneration for individual judicial posts and the multipliers used to determine the basic salary of judges.

¹⁶ Act of 1 December 2022 on special measures for implementing the budget law for 2023 (Dz.U. 2022, item 2666).

trarily indicated amount of PLN 5,444.42. The legislator did not provide any justification for this decision. A similar situation occurred a year earlier. According to Art. 8 of the Act of 17 December 2021 on special measures for implementing the budget law for 2022¹⁷, the average salary in the second quarter of 2020 (instead of 2021) increased by the amount of PLN 26 and was adopted as the basis for determining the basic salary of a judge in 2022. Also at that time, the legislator did not provide any justification¹⁸. In the Regulatory Impact Assessment (RIA) appended to the act it was only stated that the purpose of the proposed change was to “create a material legal basis allowing for efficient spending of funds and effective implementation of public tasks by the state, as well as reduction of certain state budget expenditures”¹⁹. For the record, let us add that an analogous situation took place a year earlier, but then the legislator explicitly indicated that “the need to freeze the salaries of persons (including judges and prosecutors)”²⁰ arose “in connection with the economic situation of the country caused by the COVID-19 epidemic”²¹. The acts “freezing” the valorization of judges’ salaries in 2022 and 2023 were criticized by, among others, the National Council of the Judiciary²² and judges’ associations. The main objection was the lack of justification for the chang-

¹⁷ Act of 17 December 2021 on special measures for implementing the budget law for 2022 (Dz.U. 2021, item 2445).

¹⁸ See: Explanatory Memorandum to the act on special measures for implementing the budget law for 2022, pp. 3–4, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/F7DC91C489A7919F-C125876100548B2D/%24File/1630-uzas.docx> (28.04.2022).

¹⁹ Regulatory Impact Assessment prepared on 27 August 2021 to the draft of the Act on special measures for implementing the budget law for 2022, No. in the list of works: UD199, <https://legislacja.rcl.gov.pl/docs//2/12350557/12811834/12811835/dokument518534.pdf> (19.04.2022).

²⁰ Explanatory Memorandum to the draft of the Act on special measures for implementing the budget law for 2021, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/FC7498BE-7C5A6669C12585F300444F9E/%24File/641-uzas.docx>, p. 3 (28.04.2022).

²¹ *Ibidem*.

²² See: opinion of the National Judicial Council of 10 September 2021 (WO 420.96.2021, UD199), <https://krs.pl/pl/dzialalnosc/opinie-stanowiska-uchwaly/1171-opinia-krajowej-rady-sadownictwa-z-dnia-10-wrzesnia-2021-r-wo-420-96-2021-ud199.html> (19.04.2022) and opinion of the National Judicial Council of 2 September 2022, <https://krs.pl/files/190/Dla-mediuw/1493/STANOWISKO-WS-WALORYZACJI-WYNAGRODZEN-SDZIOW-20220902.pdf> (14.02.2023).

es introduced and it was argued that cyclical, repeated “freezing” of the adjustment of judges’ salaries raises serious doubts of a constitutional nature.

IV. Conclusions

While sharing the perspective of critical arguments of a constitutional nature, in conclusion I wish to focus on the analysis of the compatibility of the provisions in question with EU legal standards. Above all, it seems that the provisions discussed here do not pass the two-step test created by the CJEU in the ASJP and Vindel cases. While it is true that the RIA indicates that the purpose of the provisions introduced is to “limit certain expenditures of the state budget” and that the limitations introduced by the provisions of the Act mentioned above did not only affect the judges of common courts, but significant doubts also arise with regards to the following issues:

whether the salary reduction introduced in Poland in 2023 through lack of valorization is of a “temporary nature”²³ if it took place for the third year in a row? It is true that in 2022 and in 2023 the legislator did not extend the original “pandemic freeze” and introduced a new one instead, but it seems that the purpose of this maneuver was only to preventively counter the accusation of a permanent reduction of judges’ salaries;

Is the purpose of the changes indicated by their proponent a duly justified one in the definition of the CJEU? It appears not, and it seems that the formulation used in the RIA – “the need to limit expenditure of the state budget” – does not meet the criteria set by the Court. Admittedly, in the ASJP case the purpose of the reduction in judges’ salaries was also to reduce state budget expenditure, but “the measures for the temporary reduction in the amount of public sector remuneration [were] based on mandatory requirements for reducing the Portuguese state’s excessive budget deficit [...] [and] those measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those requirements were imposed on the Portuguese Government by EU decisions” (Nb 14). In the case of the Polish acts of 2022 and 2023, such circumstances did not arise.

²³ ASJP [50].

Literature

- Jaskiernia J., *Funkcje Konstytucji RP w dobie integracji europejskiej i radykalnych przemian politycznych*, Toruń 2020.
- Krajewski M., *Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma*, “European Papers” 2018, vol. 3, no. 1 (European Forum, 30 May 2018), <https://doi.org/10.15166/2499–8249/218>.
- Pech L., Plato S., *Judicial Independence Under Threat: The Court of Justice to the Rescue*, “Common Market Law Review” 2018, no. 55 (6).
- Redish M.H., *Judicial Independence and the American Constitution. A Democratic Paradox.*, Stanford University Press 2017.
- Russell P.H., *Towards a General Theory of Judicial Independence* [in:] *Judicial Independence in the Age of Democracy Critical Perspectives from around the World*, eds. P.H. Russell, D.M. O’Brien, Charlottesville and London 2001.
- Szabó D.G., *A Hungarian Judge Seeks Protection from the CJEU – Part I*, <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i>.
- Torres Pérez A., *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence.*, “Maastricht Journal of European and Comparative Law” no. 27(1), <https://doi.org/10.1177/1023263X19892185>.
- Veraldi J., Lahlé Shaelou S., *The Substantive Requirements of Judicial Independence in the EU: Lessons from Times of Crisis*, “EU-POP JMMWP” 2021, no. 1, <https://cadmus.eui.eu/bitstream/handle/1814/72058/EU-POP-JMMWP-1-of-2021.pdf?sequence=1>.
- Zieliński A., *Niezawisły, bezstronny, właściwy...* [in:] *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*, eds. A. Bodnar, A. Płoszka, Warszawa 2020.