STUDIA PRAWNICZE. Rozprawy i Materiały 2023, nr 2 (33)
STUDIES IN LAW: Research Papers 2023, No. 2 (33)
e-ISSN 2451-0807 • ISSN 1689-8052
DOI: 10.48269/2451-0807-sp-2023-2-003

Aleksandra Partyk
PhD, Andrzej Frycz Modrzewski Krakow University
orcid.org/0000-0003-3196-6601
apartyk@afm.edu.pl

Reconsidering a civil case in the same court composition when the decision making in the case may be problematic[1]

Introduction

The lofty concept stating that judgments pronounced in the name of the law should not be tainted by error does not always match reality. Judges are not infallible even if they tried each and every day to equal Dworkin's Hercules in adjudication. As E. Łętowska, Constitutional Tribunal of Poland judge emeritus, and K. Pawłowski pointed out, Hercules „is in every judge at least once in their life time, once in a while"[2]. Sometimes it happens so, however, that a judge makes a mistake which is spotted in the course of appellate review and as a result the court case is considered once again going back to its very beginning.

While more often than not judicial activities undertaken by the holders of judicial authority are characterised by the highest honesty and consideration, the decisions they pronounce are

[1] Preparation of the article was financed under the project *Motivational basis of law. Contemporary interpretation of Leon Petrażycki's theory* (grant: National Science Centre, Poland, 2019/33/B/HS5/01521).

[2] E. Łętowska, K. Pawłowski, *O prawie i o mitach*, Warszawa 2014, p. 154.

not always deemed correct in the course of the appellate review. There are also instances when because of an error or an oversight a decision issued by the court cannot withstand. Here the possibility to correct judgements by a court of higher instance – which examines decisions issued by courts – becomes of crucial significance. This is exactly the purpose which functioning of at least two-instance court proceedings serves. And so it is not very seldom when a higher instance court sees the need to issue a cassation judgment[3]. In such a situation court proceedings ought to be conducted again – starting from the very beginning – by the lower instance court.

Regarding the current state of legislation within Polish civil procedure a controversial regulation has been implemented according to which in such a situation, after the contested judgement is set aside, the case should – in principle – be adjudicated by the same judge (or judging panel)[4]. This is the problem I dedicate my study to. I will focus on the regulation functioning within Polish procedural law regarding civil proceedings. I will also point out the procedural aspects of adjudicating by the lower instance court after a decision to set aside the judgment is issued.

This problem can be analysed from various perspectives[5]. I will deliberate on whether adjudicating such cases does not become a source of discomfort for judges. I would also like an important question to be acknowledged, namely if a judge who has already

[3] A cassation judgment or decision (Polish: *wyrok kasatoryjny*) contrary to an amending judgment, which modifies a court decision issued previously (Polish: *wyrok reformatoryjny*), leads to the elimination (annullment, cancellation) of the previously issued judgment; it may result in the nessesity for the case to be heard again by the court of lower instance.

[4] This solution was introduced as part of a really substantial amendment to Polish civil procedural law which took place in 2019. Polish civil procedural law, similarly to other branches of law, is subject to constant modifications.

[5] Some controversies surrounding the regulation in question were previously discussed in my article: A. Partyk, *Should the same judge hear over again a case when it is referred back for reconsideration? Comments on new version of article 386 § 5 of Polish Civil Procedure Code*, "The Journal of Legal and Administrative Studies" 2019, no. 2, pp. 7–23. In the current paper I expand on some themes that were only mentioned in the 2019 paper.

decided on a case once should adjudicate it again, even if they have presented a particular evaluation of evidence, in the situation when taking the appellate court's recommendations into account the said judge is supposed to alter their previous findings.

Under Polish law the court hearing a case is bound by the legal assessment presented by the court of appeal. It is noted, nevertheless, that apart from such an assessment the reasoning presented by the court of appeal could include some formally non-binding guidelines concerning other matters, in particular regarding evaluation of evidence and findings of fact. And so a situation could take place when a judge who earlier presented a particular evaluation of the evidence in a case, is supposed to evaluate the evidence differently, contrary to their previous evaluation, yet in conformity with the court of appeal's expectations, when he or she re-examines the case. As considering the case again and pronouncing a judgment that takes into account the recommendations given by the court of appeal, the judge might issue a decision going against their believes which were previously pronounced. And this is what could make deciding such a court case particularly problematic for the judge.

As part of my research work recently I have conducted several interviews with judges. Most of them spoke anonymously. The conversations related to topics from the interface between law and psychology, in particular to judges' intuition and emotions which accompany adjudicating[6]. In the paper I will present selected statements given by these judges regarding the issues surrounding adjudicating a case after the judgment was set aside by a court of higher instance. The vast majority of statements presented in this article come from interviews which were part of a research project called 'Emotions in adjudication'[7]. 6 judges and one trainee judge (Polish: *asesor sądowy*) participated in these

[6] See also: *eadem*, *Czy sędziowie mają intuicję? Przyczynek do rozważań o sędziowskich mechanizmach decyzyjnych*, Sosnowiec 2023.

[7] The research was conducted during February and March 2022. More information and analyses are presented in the article: *eadem*, *Sędziowie o emocjach – rozważania w świetle badań empirycznych*, [in:] *Emocje i motywacja w prawie. Wybrane aspekty*, red. J. Stanek, Kraków 2022, pp. 41–73.

conversations[8]. My interlocutors hear civil cases. One of them adjudicates in a court of appeal[9].

For the purpose of this article I will focus on the question related to the evaluation of the regulation in the light of which after a judgment is set aside the case is considered again by the court composed of the same individuals. When I asked myself this question some time ago, I wanted to find out how different judges may comment on this issue. That led me to embark on my empirical research which I will expand on later. Before I do that, however, I will present concise information on Polish legal regulations regarding civil court cases.

Basic regulations regarding hearing appeals in civil cases

Under Polish law from the perspective of adjudicating civil cases the act of 17th November 1964 Polish Civil Procedure Code[10] [hereinafter: CPC] is of crucial significance. The Polish legislator stipulated that civil procedure is a two-instance procedure. One can file an appeal against a decision of the first instance court (a regional or a district court) with a district court or a court of appeal. The court of appeal examines not only the appeal, but also the court case itself. Pursuant to art. 386 § 2 CPC once the invalidity of the proceedings is recognized the second instance court sets aside the ruling which was contested, revokes the proceedings to the extend they are affected by invalidity and refers the case back to the first instance court for it to be heard once again. Furthermore, the second instance court may set aside the judgment under appeal and hand the case back for it to be heard again if the first instance if the court failed to recognize the merits of the case or when deciding the case requires conducting the entire evidentiary hearing (art. 386 § 4 CPC).

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8 The research comprised dozens of anonymous surveys as well, this article does not discuss them, however.

9 The judges I spoke to adjudicate in different courts.

10 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. z 1964 r., nr 43, poz. 296 ze zm.).

De lege lata pursuant to art. 386 § 5 CPC once the judgment is set aside and the case is referred to be adjudicated again, the case is heard by the same judges unless it is not possible or would result in an excessive delay to the proceedings. This regulation came into force on the 7th of November 2019. Under previous legal circumstances once a judgment was set aside and the case was referred to be heard again it was imperative that the case be adjudicated by a different judge or judging panel. And so when the case was heard again it was decided by a panel comprising individuals who did not hold well-formed opinions on the matter. Nowadays, however, things are different. Such a case is to be – in principle – adjudicated by the very judge (or judges) who decided it previously and whose decision was set aside. Under current legal circumstances the legislator only as an exception allows for a situation when a different judge adjudicates the case. It is acceptable when it is impossible for the case to be heard by the panel composed of the same judges or it would result in an excessive delay to the proceedings.

As it appears from the reasoning to the draft of the act amending the Polish Civil Procedure Code, the amendment to art. 386 § 5 CPC will result in that "the consequences of mistakes in the form of additional workload will be suffered by the same judge who made the mistake – what firstly, should be considered as fair, and secondly, will be a motivation to carry out the proceedings diligently"[11]. The above solution may therefore be treated as some inconvenience intended by the legislator for the judge who pronounced a decision which was later set aside. This solution, nevertheless, has been subject to criticism across literature. M. Michalska-Marciniak, for instance, pointed out that "the institution was used to achieve goals which have little to do with the essence of the problem of shaping up the composition of the first instance

[11] Reasons for the draft of the Act of the 13th of July 2019 on amendments to the Act: Civil Procedure Code and other selected acts (Polish: Uzasadnienie projektu ustawy z 13 czerwca 2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw).

court"[12] once a court of appeal decides that a judgment is subject to setting aside and the case is referred back to be reheard. Since the composition of the court is supposed to guarantee independence and impartiality.

What is crucial is that pursuant to art. 386 § 6 CPC the legal assessment presented in the reasoning for the decision of the second instance court is binding both for the court to which the case was referred and for the second instance court should it hear the case again. It does not apply, though, when legal or factual circumstances have changed or if the Supreme Court in a resolution adjudicating a legal problem expressed a dissimilar legal opinion. Here a statement by T. Wiśniewski needs to be quoted, saying, "binding courts of both first and second instance regarding rehearing cases was limited solely to the legal opinion expressed in the reasoning for the second instance court judgement"[13]. Following the decision of the 13th of January 2016 by the Court of Appeal in Warsaw, I ACa 154/15 one should point out that a legal assessment is a legal opinion issued by the second instance court and constitutes the so-called 'judgement on the law' (Polish: *osądzenie co do prawa*).

Being bound by a legal assessment does not mean, however, that while adjudicating the case again the lower instance court content themselves with legal considerations only. More often than not evidentiary proceedings are carried out. And although under the current legal circumstances the court rehearing the case is not directly bound by the recommendations from the higher instance court regarding the methodology of running the proceedings, such a situation cannot be ruled out.

Since as T. Wiśniewski remarked:

> for if, for instance, the court of second instance, allowing the appeal, admit that the plaintiff is right, that the facts established by the court of

[12] A commentary on art. 386 by M. Michalska-Marciniak, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian. Tom I i II*, red. T. Zembrzuski, Warszawa 2020, Lex/el.

[13] A commentary on art. 386 by T. Wiśniewski, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 2, *Artykuły 367–505(39)*, red. *idem*, Warszawa 2021, Lex/el.

> first instance are not in compliance with the material gathered during the proceedings or that the facts important for adjudication were not established by the court of first instance, they simply indirectly stimulate conclusions regarding further steps. One could therefore expect that the court of first instance, respecting the opinion delivered by the court of appeal, most probably will align the evidential proceeding with this opinion, although there were no clear instructions in this regard[14].

And so it needs to be emphasised that theoretically what binds the court of first instance while it hears the case again is the legal assessment conducted by the court of appeal. In practice, though, such a legal assessment does not take place in a vacuum. One of the crucial actions of the court in the course of the adjudication process is subsumption of legal regulations to the actual state that has been established. Obviously, situations may occur when the court of appeal accepts the findings of facts established by the court of first instance as entirely correct, yet it finds some infringement of substantive law regulations or procedural shortcomings resulting in the invalidity of the proceedings. The crux of the matter, though, is that in a situation when the mistake was exclusively related to substantive law the court of appeal in principle will not issue a decision setting aside the judgment, but rather a decision amending the judgment, as the court of appeal applies appropriate substantive law *ex officio*. Situations in which violation of solely the substantive law could lead to a cassation judgment are not common. It might happen when, for instance, it was groundlessly assumed that a claim had fallen under the statute of limitations – without arranging further checks regarding the matter – while the court of appeal establishes that the claim was not time-barred. On the other hand, in a situation when the court of second instance decides on the invalidity of a proceeding and sets aside the contested judgment, the court in principle will not present any legal opinion and will limit the motives for its decision when explaining why the invalidity of proceedings occurred. Whereas in practice the situations when a cassation decision is issued occur when the merits of the case were not determined or

[14] *Ibidem*.

when the evidentiary hearing needs to be conducted in its entirety. Such grounds for setting aside a judgment issued by a lower instance court in principle are by nature connected with the lack of acceptance by the court of appeal for the established findings of fact, especially in the light of a different evaluation of evidence. Therefore, in practice issuing a cassation judgment involves assuming by the court of second instance that the first instance court evaluated the evidence incorrectly or that the evidence needs to be supplemented by the first instance court[15].

In this regard the court of appeal presents its line of reasoning in a written statement of reasons for its decision. It is obvious that the judge whose judgment was set aside and who is hearing the case once again familiarises themselves with the reasons presented by the court of appeal. Furthermore, the analysis of the motives included in the written reasons should be particularly thorough. In fact, it is hard to imagine that the court of first instance while hearing a case again could make findings of fact which would significantly differ from those presented by the court of appeal in the cassation decision. That is where the heart of the problem manifests.

Let us fully realise that while pronouncing the previous judgement the judge held a particular view on the case. It was included in the judgment which underwent a review by the higher instance court and was deemed incorrect. One needs to keep in mind that in different situations a judge whose decision has been set aside might share the view of the higher instance court or they might disagree with it.

The judge may agree with the court of appeal regarding a mistake that was made during the first adjudication on the case, and that the court proceedings need to be thoroughly supplemented. Such a situation could occur in particular when the court of first instance initially assumed that the plaintiff's claim was time-barred and next the court of second instance questions this assumption and finally the court of first instance agrees with that critical view.

[15] See also: wyrok Sądu Okręgowego Warszawa-Praga z 28.04.2021, VII Ua 19/20 [the decision of the District Court of Warszawa-Praga in Warsaw of 28.04.2021, VII Ua 19/20].

However, it may also happen that the opinion of the court of appeal is not shared by the court of lower instance in the meaning that various judges present contradictory visions of interpretation of regulations or carry out conflicting evaluations of the evidence in the case. Therefore, one cannot rule out the occurrence of cases during which a judge will be in fact obligated to adjudicate (while considering the case again) going against their initial stance. The opinion presented by the court of appeal might be unconvincing and unfounded in the judge's view. Their duty, nevertheless, will be to adopt the suggestions resulting form the deliberations of the higher instance court. In my opinion adjudicating such a case may therefore be a source of discomfort for the judge.

Making decisions by judges

Nowadays the so-called external integration of law which involves opening law to other realms and disciplines is of particular significance. Thus, it cannot be surprising that more and more studies refer to interdisciplinary problems, in particular those connected with psychological aspects[16]. Many publications come out whose authors or co-authors are psychologists and which refer to issues which are important for lawyers, especially for judges. Researchers pay attention in particular to how many factors may influence the decisions taken by judges. Those publications that refer to issues connected with emotions that play out in and outside the courtroom are particularly important[17]. As it raises no doubts that

[16] See e.g.: *Psychologia i prawo. Między teorią a praktyką*, red. E. Habzda-Siwek, J. Kabzińska, Sopot 2014; M. Najda, A. Rutkowska, D. Rutkowski, *Psychologia sali sądowej. Jak komunikacja i emocje wpływają na postrzeganie sprawiedliwości*, Bielsko-Biała 2021. At the same time, it is worth adding that the openness of lawyers to the achievements of psychologists can not be considered a novelty, as evidenced, for example, by the theses put forward by L. Petrażycki or the American realists. See for example: A. Partyk, *Czy sędziowie mają intuicję?*, *op. cit*., pp. 20–21, 34–42; J. Stanek, *Rosyjski realizm prawny*, Warszawa 2017.

[17] One cannot but mention the law and emotions movement at this point. The limited frame of this article does not allow, however, to expand on the topic of that movement.

court proceedings involve emotions experienced not only by the parties to court disputes[18]. Judges are brought under various types of pressure.

As A. Korzeniewska-Lasota and A. Sarnowska point out:

> although a judge tries to adjudicate independently, to make decisions in a manner free from any direct or indirect external pressures and impartially, that is independently of evaluations resulting from personal experience, stereotypes, believes or prejudices, […] they will never avoid this psychological, maybe often unconscious aspect[19].

And here I would like to pose a question: how can judges perceive the fact that they are supposed to adjudicate a case again once the decision they pronounced in that very case failed to be upheld by the court of higher instance?

Judges' stances

In order to answer this question, I am going to present a few statements given by judges with whom I conducted the above-mentioned interviews.

Firstly, I will focus on a statement given by one judge who talked about two cases in which they were supposed to issue judgments again because the first judgments were set aside by courts of appeal[20]. Regarding the first court case the decision to set aside the

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[18] For an extensive discussion see: M. Najda, A. Rutkowska, D. Rutkowski, *Psychologia sali sądowej*..., *op. cit.*, p. 65 et seq.

[19] A. Korzeniewska-Lasota, A. Sarnowska, *Psychologiczne i neuropsychologiczne aspekty podejmowania decyzji przez sędziów*, [in:] *Integracja zewnętrzna i wewnętrzna nauk prawnych*, cz. 2, red. M. Król, A. Bartczak, M. Zalewska, Łódź 2014, p. 182.

[20] The judge mentioned that from time to time even upon an amendment to the judgment they feel emotions when they does not agree with the judgment's modification. The judge described one of the compensation cases when a higher instance court modified the value of compensation due to be paid out to the party. In their opinion the court of appeal failed to see the party's suffering, even though it emanated from the case. Interview 1 from my research project *Emotions in adjudication* which was contected with the grant I mentioned in footnote 2; see: A. Partyk, *Sędziowie o emocjach*…, *op. cit*.

judgment was connected with the fact that the set of documents submitted by a party was not attached to the right court files. In such a situation the pronounced judgment needed to be set aside as the error did not arise from the actions of the party submitting the documents, it occurred at the court's end. The judge pointed out that the decision to set aside the judgment in such a situation was justified and that they had anticipated it. In the other court case the fact that the judgment was set aside was perceived by the judge differently. My interlocutor stressed that they considered a case against a consumer. The reason for which the judgment was set aside was – as the court of appeal assessed – too quick a completion of proceedings. The judge pointed out that they were to undertake particular actions and having completed them then the judge pronounced identical judgment anyway. The judge commented on the problem of adjudication while the case is considered again by the same judge. The judge pointed out that the reason for which the legislator supposedly decided on such a solution was that judges allegedly handle court cases in an improper manner. In their opinion such an argument is relevant concerning exceptions and not a rule. My interlocutor stressed that they had handled cases previously adjudicated on by other judges numerous times. The judge pointed out that those proceedings were conducted correctly, yet the court of appeal had a different opinion on the matter. The judge asked a rhetorical question as well, whether a judge who is supposed to adjudicate in a way which goes against their views will write a persuasive statement of reasons for the decision when they themselves are not convinced. In their opinion adjudicating on the basis of indications given by a court of higher instance could be unpleasant in some situations and that it even violates the independence and freedom of the judge's decision.

Another interlocutor, who is a court of appeal judge, remarked that it so happens that sometimes the necessity to set aside a judgment is connected with the fact that the proceedings were not conducted properly, they were conducted hastefully. The judge pointed out, nevertheless, that the regulation is supposed not to favour judges who run proceedings carelessly. The judge pointed out that guidelines issued by a court of appeal might present some difficulty

for the judge whose case was set aside. The difficulty might lie in the judge not only receiving information stating that they made a mistake, but also being given guidelines regarding the direction they should take when adjudicating. In their opinion such a situation is complicated psychologically[21].

Next judge spoke along those lines remarking that as much as they understand the intentions of the legislator – for judges to avoid concluding court proceedings prematurely – and yet, in their opinion this solution is improper. The instance when a judge previously adjudicated according to their own deep conviction, having evaluated evidence, legislation in force as of then, and now they are supposed to adjudicate against themselves: basing on the guidelines issued by the court of appeal. The judge added that many a time such a stance is presented categorically.

The judge remarked that they had not face the situation in their practice when they were to adjudicate in a court case after (their) judgment had been set aside. The judge made reference to the situation of their colleague – a judge who does not want to come to terms with the fact that they are supposed to adjudicate against themselves. The judge stressed that the situation when a judge adjudicates ignoring the guidelines is really risky and questionable. In their opinion – despite difficulties – one needs to come to terms with the situation and adjudicate according to the higher court's orders[22].

A similar view was presented by the next judge who pointed out that both judges and parties will be discontent with the fact that the same judge who previously voiced a particular belief is to adjudicate again. As adjudicating against oneself after pronouncing one's views is a problem, whereas for the parties it might be troublesome that the judge might be treated as a person who is already biased towards the case[23].

In the opinion of the other judge, the current solution is highly imperfect. The judge pointed out that the regulation is – in their view – unfair not only to judges but also to the parties. The judge

[21] *Ibidem*, Interview 2.
[22] *Ibidem*, Interview 4.
[23] *Ibidem*, Interview 5.

described a case in which they received for retrial a case in which they had previously ruled. The case was related to an accident. The judge assumed that the victim's testimony was completely unreliable, as the victim's description of the incident was untrue. Therefore, they dismissed a claim as it was not unjustified at all. The case was sent back for reconsideration by the court of higher instance. This is because the second instance court found that there were no grounds to question the injured party's version, and the amount of the benefit should be determined.

After the case was returned for retrial, the judge therefore faced a serious dilemma as to how they should handle the case. It was severely stressful for them to have to proceed against their own conscience in a situation where they completely disagreed with the view of the second instance court and found no basis, to award any compensation, but had to do so because they were bound by the view of the appellate court. At the same time, the judge described that it was finally possible to bring the dispute to an amicable conclusion, which the judge accepted with great relief.

In their view, the need to take into account the indications provided by the higher court may raise serious doubts[24].

Another judge spoke along those lines, too, describing adjudicating in such a situation as 'unpleasant', pointing out, however, that judges should accept that[25].

The regulation was assessed differently by a trainee judge whose perception of the fact that the judge is already familiar with the case was positive. They pointed out, though, that there might be a particular problem connected with the previously expressed belief which could be contrary to the directions given by a court of appeal[26].

Instead of a summary

Among the presented statements a view prevails that the current procedural solution is not well-aimed. It was highlighted that

[24] *Ibidem*, Interview 3.
[25] *Ibidem*, Interview 6.
[26] *Ibidem*, Interview 7.

the commented provision may cause discomfort in judges. Such a regulation might be regarded as standing in contradiction to the concept of judges' independence, if while rehearing a case they are forced to determine findings against their previous opinions.

The so-called confirmatory thinking needs to be mentioned here. This cognitive error consists in that we "search only for those arguments that support the previously taken decision and actions, in contrast with explorative thinking which consists in looking for arguments for and against, which means with the thinking that looks for the truth"[27]. It seems that if a judge has already adjudicated, and so they have expressed their view on the case in their decision and the reasons, when they hear the case later it can be particularly awkward to radically change the evaluations made previously.

One also needs to agree with an observation made by one of the judges interviewed by me, who said that a judge who conducts the case in a way that takes into account the suggestions given by the court of appeal, but with which they do not agree, may find it hard to justify their decisions. At this point I would like to refer to an observation made by one of the judges who I interviewed regarding the topic of judges' intuition. This judge pointed out that if a judge is fully convinced concerning the rightness of their decision it is easy for them to prepare reasons for such a decision. The situation is reverse, however, when the judge has doubts over what judgment should be pronounced in the case[28].

At this point let us turn our attention to the fact that thanks to the development of science we know that emotions are particularly important in the decision making process, which was stressed by A. Damásio when he proposed the Somatic-Marker Hypothesis[29]. Decision making is determined by the existence

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[27] M. Najda, A. Rutkowska, D. Rutkowski, *Psychologia sali sądowej*…, *op. cit*., p. 253.

[28] Interview 30, concerning the problem of judges' intuition, which I conducted in preparation for a publication, as part of the grant mentioned in footnote 2.

[29] A. Damásio, *Descartes' Error: Emotion, Reason and the Human Brain*, New York 1995.

of two systems of thinking, which was emphasised by D. Kahneman[30]. The achievements of these and many other thinkers who conduct psychological research should be taken into account by lawyers, and also by those who establish the law. Since the procedural law ought to take into consideration also the psychological factors connected with conducting proceedings and issuing decisions by judges.

I claim that the above should persuade the Polish legislator to amend the law and bring back the previously applied rule in the light of which when a case is to be reconsidered it is allocated to be heard by different judges. Following T. Romer, the Supreme Court of the Republic of Poland judge emeritus, and M. Najda I would like to emphasise that "a judge is not a clerk, but a depositary of power of a special kind, the power to administer law. The independence and the mind of a judge on one side, and the framework of law on the other side constitute two polar opposites that make the rule of law possible"[31]. For the rule of law not to remain a fiction legal regulations should be shaped up so that appropriate conditions for judges to adjudicate are guaranteed and in this context also the psychological realm of the thinking processes undertaken by judges needs to be taken into account.

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Abstract

Reconsidering a civil case in the same court composition when the decision making in the case may be problematic

According to art. 386 § 5 of Civil Procedure Code where the judgment is set aside and the case is referred to be re-examined, the court examines it in the same composition, unless it is not possible or it would

cause excessive delay in the proceedings. Such a provision is controversial as, in principle, the judge will have to conduct the same civil case again – even if they already gave judgement in the case.

The current regulation in which the same judge is to adjudicate in the case for the second time may be seen as inappropriate in view of the content of another legal regulation. According to art. 386 § 6 of Civil Procedure Code a legal assessment expressed in the statement of reasons for a judgment issued by the court of the second instance is binding on the court to which the case was referred and the court of the second instance in the case of re-examining the case. However, this does not apply to a situation when there was a change in facts or the legal situation, or when after the court of the second instance issued a judgment the Supreme Court of the Republic of Poland expressed a different legal assessment in a resolution settling a legal issue.

In the paper I pay attention to the regulation from the judges' perspective. I present some observations on the difficult role of a judge who is to pass the judgment in the case for the second time. I focus on the issue of psychological mechanisms relating to the reconsideration of a decision that has been challenged. The paper is partly based on the interviews with Polish judges.

Key words: judge, reconsidering a case, composition of a court, emotions in adjudication

Streszczenie

Ponowne rozpatrzenie sprawy cywilnej w tym samym składzie sądu, gdy podjęcie decyzji w sprawie może być problematyczne

Zgodnie z art. 386 § 5 Kodeksu postępowania cywilnego w przypadku uchylenia wyroku i przekazania sprawy do ponownego rozpoznania sąd rozpoznaje ją w tym samym składzie, chyba że nie jest to możliwe lub powodowałoby to nadmierną zwłokę w postępowaniu. Taka regulacja jest kontrowersyjna, gdyż jako zasadę przewiduje, że sędzia ponownie orzeka w sprawie cywilnej, jeśli wydał już w sprawie orzeczenie.

Obecna regulacja, zgodnie z którą ten sam sędzia ma orzekać w sprawie po raz drugi, może być postrzegana jako niewłaściwa z uwagi na treść innej regulacji prawnej. Na podstawie art. 386 § 6 Kodeksu postępowania cywilnego ocena prawna wyrażona w uzasadnieniu wyroku sądu drugiej instancji wiąże zarówno sąd, któremu sprawa

została przekazana, jak i sąd drugiej instancji przy ponownym rozpoznaniu sprawy. Nie dotyczy to jednak przypadku, gdy nastąpiła zmiana stanu prawnego lub faktycznego albo po wydaniu wyroku sądu drugiej instancji Sąd Najwyższy w uchwale rozstrzygającej zagadnienie prawne wyraził odmienną ocenę prawną.

W artykule zwrócono uwagę na regulację z perspektywy sędziów. Przedstawiono spostrzeżenia na temat trudnej roli sędziego, który ma wydać wyrok w sprawie po raz drugi. Skupiono się również na kwestii mechanizmów psychologicznych związanych z ponownym rozpatrzeniem zaskarżonej decyzji, która została zakwestionowana. Artykuł jest w części oparty na wywiadach przeprowadzonych z polskimi sędziami.
Słowa kluczowe: sędzia, ponowne rozpoznanie sprawy, skład sądu, emocje w orzekaniu