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Independence of judges as a constitutional principle of the judiciary

(Niezawisłość sędziowska jako konstytucyjna zasada wymiaru sprawiedliwości)

SUMMARY

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Structurally, the work is divided into three parts, which in turn are divided into chapters, which are then divided into subchapters.

The first part of the work, entitled "Origin and the concept of judicial independence", contains two chapters. The first one has a historical dimension, while the second concerns the concept of judicial independence.

Part II of the dissertation contains considerations on the guarantees of judicial independence, starting with systemic guarantees, then procedural guarantees, and ending with the National Council of the Judiciary as the body safeguarding independence. The systemic guarantees include: the procedure for the appointment of judges, judicial immunity, permanence of the judge's profession (irremovability and non-transferability), apolitical character of a judge, remuneration and working conditions corresponding to the dignity of the office and the scope of duties, the shape of disciplinary responsibility, retirement status. In my opinion, procedural guarantees include: transparency of court proceedings, free assessment of evidence, secrecy of deliberations and voting, exclusion of a judge from adjudicating in a specific case. An important, even fundamental, guarantee of judicial independence is the existence of an independent National Council of the Judiciary as a body which, by definition, is to guard this principle. In the chapter devoted to the National Council of the Judiciary , I describe the origins of its creation, the competence and conduct of the National Council of the Judiciary , as well as the composition, with particular emphasis on the changes of 2017 regarding the election of judges by the Sejm to the Council, and formulate *de lege ferenda* postulates, which in my opinion will restore and improve the constitutional the role of the National Council of the Judiciary .

Part III of the work is devoted to the limitations of judicial independence. In chapter I, I describe the procedural limitations of independence, which include: being bound by the guidelines of the appellate court in a given case, being bound by a judgment of a court adjudicating in separate proceedings, judicial supervision of the Supreme Court and the Supreme Administrative Court and being bound by the interpretation of law contained in the jurisprudence of the Court of Justice of the European Union and the European Court of Justice Human Rights. Chapter II is devoted to administrative supervision over the courts, which I see as a threat to the implementation of judicial independence.

The analysis carried out allowed for the formulation of many conclusions and postulates, included in the individual chapters of the work. The most important of them should be presented here.

The formation of the principle of judicial independence took place as a result of a process that began in antiquity and was associated with the development of the idea of impartiality and justice in judging. Then, during the Enlightenment, the concept of separateness of the judiciary was developed, which led to the strengthening of the judiciary at the expense of the royal power. The concept of judicial independence appeared in the 18th century and was initially associated with the need to create conditions for judges to adjudicate impartially, on the basis of the law and in a manner free from any influence. Despite 300 years since then, the conceptual core of independence has retained its relevance. In the 19th and 20th centuries, independence as a systemic principle became the fundamental standard of the right to a fair trial implemented in every law-abiding state.

In Polish constitutional law, the principle of judicial independence appeared for the first time in the March Constitution of 1921, based on the idea of the separation of powers, where the judiciary became separate and independent. The essence of independence was seen in the fact that the legislative and executive powers could not exert any influence on judicial decisions, and a judgment could only be changed by way of an appeal as a result of appeals. Judicial independence in the sense of the system was significantly limited as a result of the adoption of the April Constitution in 1935, which broke with the principle of the separation of powers in favor of the principle of state uniformity and abandoned the provision that judges were subject only to statutes. In the period of the Polish People's Republic, judicial independence was only a facade. Despite its inclusion in the constitution, it was not implemented in reality. Independence was perceived as a tool to fight the enemies of the socialist system, and judges as members of the state apparatus. Certain changes referring to the realization of real independence took place in the second half of the 1980s as a result of the amendment of the act regulating the judiciary system. However, it was only the political transformation initiated in 1989 with the amendment to the Constitution of the People 's Republic of Poland that was a breakthrough in this regard. Subsequent political and legislative changes, until the adoption of the Constitution in 1997, were aimed at making the judiciary the foundation of a democratic state ruled by law, and independence as a real guarantee of the constitutional right to a court.

The analysis of the origins of judicial independence allows us to formulate the conclusion that the regulation of the principle of the separation of powers, together with the principles of independence of courts and judges, in constitutional acts, does not guarantee the fulfillment of the objectives of this regulation. Ensuring the functioning of the principle of independence of courts and judges means not only the need to adopt such solutions in the law, but also the development of appropriate guarantees that will ensure the implementation of these

principles. The absence of such guarantees or their non-compliance makes independence merely a fiction. The main threat that leads to the limitation of independence is related to the administrative supervision of the courts by the Minister of Justice. The powers of the Minister in this respect since Poland regained independence have repeatedly led to the removal from the profession or to disciplining judges "inconvenient" to the executive, i.e. those who criticized the current legislative changes regarding the judiciary or those whose judgments did not meet the expectations of the state apparatus - and thereby undermining the independence of the judiciary.

The nature of judicial independence has a multifaceted dimension. Independence can be examined and assessed from the perspective of: the principle of the state system, the powers and duties of a judge, and the subjective right of an individual to an independent court. Judicial independence as a systemic principle and an element of the individual's right to a court is aimed at creating conditions that will lead to the proper administration of justice by allowing the judge to make impartial decisions in a manner consistent with the law and his own convictions, free from any direct or indirect pressure . The main function of independence is the implementation of the constitutional right to a fair trial, as well as other fundamental values and constitutional principles, including the implementation of the rule of law and social justice (Article 2 of the Constitution). In general, judicial independence is responsible for the proper functioning of the judiciary.

Various aspects of independence are distinguished in the literature. The most common are the positive and negative aspects. In the first approach, independence means that a judge is subject to the Constitution and statutes, as well as his or her own conviction. On the other hand, independence in the negative sense means the elimination of pressure on the judge, which could affect the content of decisions made by him. The doctrine also mentions the subjective and objective aspects of independence. The first of them defines the inner feeling of a judge who, while exercising his office, must be convinced that he is free from any influence and pressure, both direct and indirect. The objective aspect, on the other hand, refers to the public's perception of the judge's actions. Despite the widespread recognition that judicial independence is an existing concept, it has been given various definitions that can be grouped. The first group concerns the definition of independence based on a set of elements in which this principle is cloaked. The second group of definitions of judicial independence includes definitions formulated in a uniformly specific manner, referring to the person of a judge in terms of the grounds for administering justice. The third group of definitions of judicial independence indicates the understanding of independence as the relationship between the judge and other

entities, including state authorities, in the adjudication process. The definitions formulated so far in the literature and jurisprudence are homogeneous. None of these terms explains the concept of "independence" comprehensively. In my opinion, when attempting to develop a definition of judicial independence, a descriptive definition of an analytical nature should be built, rather than a synthetic definition. This will allow for a comprehensive approach to the aforementioned principle. In the descriptive definition I have developed, I indicate its systemic character, elements and guarantees that it has been covered with. In this way, I draw a precise line when the conditions of independence are respected and when this principle is violated.

One of the elements of judicial independence is that a judge is bound by the Constitution and statutes. This binding defines the limits of judicial power. The principle of independence does not preclude the judge from being subordinated to the law. The scope and manner of application of this right depends on the importance of a given provision. The constitution stipulates that a judge is bound by the Constitution and statutes. However, when it comes to acts of a lower order than the statute, the judge's subordination to them is of a different nature. When settling a specific case, the judge has the right and duty to examine whether the provision of a sub -statutory act to be applied is consistent with a higher-order act. If it is found that there is inconsistency, the judge has the power to refuse to apply this provision or to refer a question of law to the Constitutional Tribunal. On the other hand, when a judge has reasonable doubts as to the compliance of a statute with an act of a higher order, he is obliged to submit a legal question to the Constitutional Tribunal based on its competence under Art. 188 points 1-2 of the Constitution. However, there are two exceptions to this rule, when a judge will have the power to refuse to apply an unconstitutional provision of a statute without referring to the Tribunal. The first will concern the obvious, unquestionable unconstitutionality of certain regulations, which deprives them of the presumption of constitutionality. The second case will occur when the Constitutional Tribunal will not be able to examine a given case effectively and legally.

Other elements of judicial independence – the internal independence and conscience of a judge are factors that determine the actual independence of a judge. On the other hand, the determinant of independence and conscience is the high moral level that a judge should represent. The internal independence of the judge should lead to a decision being made in a manner that is free from the views and prejudices of the judge on a specific subject relevant to the case under consideration. The judge's conscience, on the other hand, is the basis for sentencing, along with the law. In this context, conscience becomes an instrument for applying the law. Against the background of the issue of the judge's conscience, the issue of the judge's

conscience clause appears - a concept separate from the conscience clause in a general sense. The judge's conscience clause means the possibility of refusing to issue a ruling in a situation where the provisions of law applicable in a given case are in opposition to elementary moral principles that are accepted by the majority of society or are inconsistent with the judge's standards of equity based on democratic values. It is different in the case of judicial disobedience. In such a situation, the assessment of the legal norms applicable in the case boils down to compliance with natural law, i.e. with the norms resulting from human nature, which are permanent and unchangeable (e.g. the right to dignity, the right to life, etc.). The result of judicial disobedience is the refusal to apply positive law and the application of natural law instead. Both the judge's conscience clause and judicial disobedience lead to the implementation of judicial independence in the aspect of conscience, which becomes a tool for applying the law or refusing to apply it and refraining from issuing a decision or issuing it based on natural law. At present, in connection with the Constitution of 1997 in force in Poland, based on the principles of a democratic state ruled by law and containing a wide catalog of civil rights and freedoms, as well as due to international treaties binding Poland, including EU and convention law, there is no need to stop refrain from issuing a decision invoking the judge's conscience clause or recourse to natural law by way of judicial disobedience, but it is enough to base the decision directly on the provisions of the Fundamental Law, or treaty law, EU secondary law or Convention law, which at their core are compatible with natural law .

Impartiality towards the participants in the proceedings is also closely related to the principle of independence. Both impartiality and independence are essential features of a court as a dispute resolution body. They are also guarantees of the constitutional right to a court. Listing these two principles side by side clearly indicates the intention of the legislator to isolate two independent principles, but related in terms of content and institution, in the sense that any breach of impartiality must mean a breach of independence, and each breach of independence is equated with a breach of impartiality. Violation of one of these rules will always lead to disruption of the other. Judicial impartiality consists in the fact that the judge is guided by objectivity, not creating a more favorable situation for any of the parties or participants in the proceedings, both during the case pending before the court and adjudication. Therefore, it treats the participants of the proceedings equally. However, the attitude of an impartial judge must be manifested, also outside pending cases, in such a way that it shapes the image of an impartial court in the public awareness. It is not enough for a judge to feel impartial (subjective impartiality). It should also ensure that no reasonable doubts as to its impartiality will arise

(objective impartiality), which is important from the point of view of creating the image of the justice system.

The freedom of expression of a judge is also important for the implementation of judicial independence. It is different in nature from the freedom of expression of non-judges. Judges should be restrained and avoid expressing their views or showing emotions. On the other hand, when it comes to matters of the administration of justice, judges have far-reaching freedom in expressing their opinions in this matter. This is not only their entitlement, but also their obligation, in particular when the postulated changes affect basic civil rights and constitutional principles. Since the maintenance of independence may sometimes require a judge to exercise his or her right to freedom of expression, the effective exercise of this right should be ensured in light of the correlated obligation on the limits of expression. If judges feared sanctions for defending independence, this threat would have a "chilling effect" which would be in direct conflict with the duties and responsibilities of judges to uphold independence. In assessing whether an interference with a judge's freedom of expression was necessary in a democratic society and proportionate to the legitimate aim pursued, the judge's responsibility to respect judicial independence should be a relevant factor.

The prerequisites for the actual existence of the principle of judicial independence are systemic and procedural guarantees. The notion of a guarantee of judicial independence should be understood as creating conditions for judges that prevent them from influencing the content of court decisions from the outside (on the part of public authorities and third parties) and from within the structure of the judiciary (on the part of judicial authorities, e.g. presidents, heads of departments, self-government judge) with the possibility of adjudicating on the basis of the law and one's own conscience. The systemic guarantees include: the procedure for the appointment of judges, judicial immunity, permanence of the judge's profession (irremovability and non-transferability), apolitical character of a judge, remuneration and working conditions corresponding to the dignity of the office and the scope of duties, the shape of disciplinary responsibility, retirement status. On the other hand, procedural guarantees, in my opinion, consist of the following principles: openness of court proceedings, free assessment of evidence, secrecy of deliberations and voting, exclusion of a judge from adjudicating in a specific case.

The tool for shaping the judiciary power in the form of appointing judges has been entrusted to the National Council of the Judiciary and the President. From the perspective of shaping the procedure for appointing judges, it is of decisive importance that judges' positions include persons with appropriate qualifications and character traits. It is about entrusting the functions of the judiciary to people who will not betray independence and will have the

appropriate qualifications to effectively administer justice. Unfortunately, the current statutory solutions and practice do not serve this purpose. This practice applies, inter alia, to a situation where the head of state, without a valid reason indicated in Art. 124 sec. 2 of the Constitution and refuses without justification to appoint a person indicated by the National Council of the Judiciary, which creates the risk of unjustified pressure on other candidates or judges (with regard to their promotion) regarding a specific behavior approved by the President. Another negative phenomenon is the appointment by the President to the positions of judges of persons proposed by the National Council of the Judiciary, who, as a result of changes in the method of selecting its members, do not meet the requirements of independence from the legislative and executive authorities, which determines the defectiveness of the appointment procedure. It is worth emphasizing, however, that the mere appointment by the head of state at the request of the National Council of the Judiciary and taking the oath does not mean that the candidate effectively becomes a judge.

Another guarantee of judicial independence - judicial immunity is intended to ensure the freedom of judges from unjustified pressure on their activities in the administration of justice. From this point of view, immunity serves not so much the judges themselves as the interests of the accused citizens in exercising their right to a court, especially when their opponent in the trial is a public authority. However, judicial immunity cannot lead to a situation where judges are not held criminally responsible for their crimes. Therefore, judicial immunity must, on the one hand, guarantee the protection of the judge against harassment and, on the other hand, enable legal control of his actions and omissions. From this point of view, Polish constitutional and statutory regulations regarding the discussed institution should be assessed positively. Judicial immunity is not absolute, and its waiver requires a ruling by an independent disciplinary court in appropriate proceedings in which the guarantees of criminal procedure are maintained, not less than those provided for the suspect.

The principle of permanence of the judge's profession as a systemic guarantee of judicial independence implies that a judge should perform the functions of the judiciary in the court where he has his place of service and which was indicated in the act of appointing the President. At the same time, this place determines the scope of the judge's jurisdiction in the exercise of his judicial power. A judge is supposed to have a sense of stability and be aware that if his or her activities "disappear" to the executive authorities, he or she will not be deprived of office or transferred to another seat of the court or to another judicial position by means of retaliation. Therefore, the principle of permanence of the judge's profession consists of the principles of irremovability and non-transferability. Although irremovability and non -transferability

determine the stability of the judge's profession, they formulate separate guarantees with different characteristics and regulations at the systemic and statutory level. Nevertheless, they aim at the same goal – to ensure the independence of the judge in the performance of his functions. Deviations from the principle of irremovability and non-transferability may be justified only by the impossibility of a judge's performance of his/her official duties due to his/her health condition or loss of authorization to continue holding the office as a result of strictly defined behaviors constituting a betrayal of the office. In the case of non-transferability, this also applies to changes in the organization of the judiciary. All these considerations should be interpreted in accordance with the overriding principle of proportionality. Both the irremovability and non-transferability of a judge complement judicial independence and are a prerequisite for the proper functioning of this constitutional value.

Apoliticality as a necessary guarantee of maintaining the independence and impartiality of judges under Art. article 178 sec. 3 of the Constitution covers three aspects: the prohibition of belonging to a political party (nonpartisanship), the prohibition of belonging to a trade union and the prohibition of conducting public activity incompatible with the principles of independence of the courts and judges. Apoliticality is also related to the ban on holding a parliamentary mandate directed at judges (both in active service and retired) (Article 103(2) of the Constitution). The apolitical nature of judges is a necessary limitation of the rights and freedoms of a judge as a citizen due to the overriding values of judicial independence and impartiality, i.e. elements of the constitutional right to a fair trial (Article 45(1) of the Constitution). However, judges may conduct public activity by associating themselves, thus exercising the constitutional freedom specified in Art. 58 of the Constitution, and any restrictions in this respect must be assessed in accordance with the principle of proportionality in Art. 31 sec. 3 of the Constitution. In the context of the freedom of association of judges, judges' associations play a special role due to their *quasi* -trade union function. Their role is to protect the independence of the judiciary, the independence of judges and the defense of individual interests of judges. The limits to the exercise of the freedom of association by judges are the principles of the independence of the courts and the impartiality of judges. When the freedom of association conflicts with the cited principles, the judge should resign from participation in a given association or other organization. Therefore, a judge may engage in public activities only to the extent that it is possible to maintain public confidence in the politically neutral and impartial exercise of his office.

Guarantee of independence in the form of remuneration and working conditions for judges corresponding to the dignity of their office and the scope of their duties (Article 178(2)

of the Constitution) indicates that the working conditions and remuneration of judges are closely related to the administration of justice, and that the lack of an appropriate level of these elements significantly threatens the independence of the judiciary. It prevents judges from effectively fulfilling their functions. In a democratic state ruled by law, a well-functioning judiciary is a prerequisite for the functioning of the rule of law. It should be emphasized that the remuneration and working conditions of a judge should also create an objective image of the judge's social trust as a decisive factor in important aspects of citizens' lives. Their formation at the statutory level is to ensure, on the one hand, the dignified performance of the office, and, on the other hand, to correspond to the scope of the judge's duties. Despite the positive assessment of the statutory regulation on the remuneration of judges and their working conditions, the practice of the so-called "freezing" judges' salaries under the guise of "financial crisis". It threatens independence, especially since the savings on this account are not even a per mille of the annual state budget income. As far as the working conditions of judges are concerned, the practice of overloading judges with work, e.g. in the case of staff shortages in specific courts, or the requirements imposed by presidents of courts or heads of departments regarding informal setting of deadlines for cases handled, should be taken into account.

In order to maintain judicial independence, it is also necessary to introduce a separate form of disciplinary liability for judges. Due to the high requirements imposed on judges, both in terms of morality and professional preparation, the disciplinary responsibility provided for this professional group, apart from the repressive function, is intended to ensure an appropriate level of professional integrity and ethics of the judiciary and counteract potential negative behavior of judges, which lowers the prestige of the profession and cause a loss of authority of the judiciary. In addition, disciplinary liability also fulfills a guarantee function by preventing the abuse of official supervision in relation to a judge wishing to maintain independence. Therefore, it is necessary for judges to be held accountable only for acts indicated in the Act, in an appropriate procedure with guarantees of effective defense and the right to appeal against judgments, and before an independent court. A judge, while holding office, should not be afraid that he or she will be subject to disciplinary responsibility for the content of his/her professional decisions that do not meet with social approval or approval of other authorities. The guarantee function of disciplinary liability has one more aspect. It effectively prevents the abuse of judicial immunity by the judges themselves. It does not require the prior repeal of that measure. Changes in the disciplinary procedure for judges that have been taking place in Poland since 2017 violate the independence of judges. They do not guarantee a fair procedure and judgments issued by independent and impartial courts. First of all, there was a centralization of the

disciplinary procedure and an increase in influence on the disciplinary liability of judges of the executive authorities - the President and the Minister of Justice, who, by appointing "extraordinary prosecutors", gained the right to permanently initiate and conduct disciplinary proceedings against the same judge in the same case, contrary to the principle *of encore in dem* . Judicial self-governments have basically lost any influence on shaping the disciplinary procedure. An exemplary catalog of acts constituting disciplinary torts has also been extended with such behaviors and activities that may interfere with the matter of independence and cause defects in the issuance of court rulings. Practice shows that the new form of disciplinary responsibility is widely used by disciplinary prosecutors who prosecute judges solely for their rulings. There is a noticeable tendency to initiate proceedings against judges who publicly express their disapproval of changes in the judiciary. This is not only to discipline these judges, but also to show others what consequences they may face when they publicly criticize particular changes in the judiciary. Particularly serious allegations concerned the Disciplinary Chamber operating in the years 2018-2022, the status of which was questioned by the Supreme Court, the Court of Justice of the European Union and the European Court of Human Rights. This applies both to the status of the judges themselves appointed in their entirety in the procedure with the participation of the National Council of the Judiciary formed by an unconstitutional composition, as well as its special character expressed in far-reaching organizational, functional and financial autonomy. Although the Disciplinary Chamber was liquidated, its judgments remained legally valid, and its members were transferred to other chambers of the Supreme Court or retired.

Another guarantee of judicial independence – retirement indicates the special status of a judge who has ended the active exercise of his functions in a way other than resignation or removal from office. The special nature of this guarantee is dictated by the fact that the institution of retirement for judges has been regulated at the constitutional level and sets a certain standard for the legislator. The retirement of a judge is not an institution of general social security, but an institution of a special type of guarantee of the independence of a judge and which is a component of the principle of irremovability of a judge. The basic purpose of retirement is to ensure a decent life for a judge and his family also when a judge is not on duty. At the same time, it is a kind of compensation for the limitations of social, professional and public activity of a retired judge and the inability to undertake actions that may violate the dignity of the office (which may be associated with a disciplinary penalty in the form of deprivation of retirement status). The regime of retirement and the social entitlements derived from it are particularly justified as one of the guarantees of the proper functioning of the

judiciary. The right to retire is not a privilege of judges, but one of the guarantees of maintaining impartiality and the principles of independence and irremovability of a judge. The current statutory provisions on retirement should generally be assessed positively. The retirement procedure is characterized by clear and transparent rules, and judges are guaranteed judicial protection of their retirement rights. Retired status also ensures decent living conditions for judges after their professional activity ends – on better terms than those receiving pensions from the social security system. A negative assessment must be met with the differentiation of the retirement age of a judge due to gender, the introduction of a rigid retirement age limit for Supreme Court judges and entrusting the Minister of Justice with the right to create, abolish courts, determine their seat, areas of competence and scope recognized by not cases with the right to apply for the retirement of judges in the event of a change in the system of courts or changes in the boundaries of court districts.

The first of the procedural guarantees of judicial independence that I have analyzed is the openness of court proceedings expressed in Art. 45 sec. 1 of the Constitution. The principle of openness gives the public access to all court activities aimed at making a procedural decision. Therefore, the main addressees and beneficiaries of the principle of openness are the participants in the proceedings. However, it should be remembered that it is allowed to limit openness in the external aspect in order to prevent negative consequences related to, for example, a threat to public order, morality and the legitimate interest of the parties, participants in the proceedings or other entities. However, it should be remembered that regulations limiting external disclosure must meet the standards set out in Art. 31 sec. 3 and Art. 45 sec. 2 of the Constitution.

The principle of free assessment of evidence is a guarantee of the independence of the judge at the stage of evidence proceedings. Its purpose is to enable the court to make factual findings which are the basis for the decision. In the course of taking evidence, the risk of contradictions related to the evidence taken cannot be ruled out. The principle of free assessment of evidence contains directives that the judge must follow when assessing the credibility of evidence, so that this assessment is free and not arbitrary, and that it does not lead to errors in factual findings. The implementation of this principle therefore requires an individual approach in the assessment of evidence. It is unacceptable to use schemes and present an attitude characterized by automatism. The principle of free assessment of evidence allows the judge to make an assessment free from any influence, comprehensive, comprehensive, based on specific criteria, but with an individual approach and, above all, an assessment that should be explained to the participants of the proceedings in the justification of the decision.

Another procedural guarantee of judicial independence - the secrecy of deliberations and voting protects judges against possible interference by other entities, ensures peace and concentration, and facilitates making decisions in a manner consistent with one's own convictions. The principle of secrecy of deliberations and voting thus formulated, on the one hand, strengthens the independence of the judiciary and the independence of the judiciary, and on the other hand, excludes openness in relation to part of the proceedings. It should be assumed, however, that in this way, this rather delicate element of the judiciary process is prevented from being publicly displayed, thus counteracting social pressure, including pressure from the authorities on the shape of the decision issued . The principle of secrecy and deliberation guarantees the implementation of judicial independence by protecting the judge against peer pressure at the sentencing stage and favors making decisions based on the law and one's own conscience.

The last guarantee of independence discussed by me - the exclusion of a judge from adjudicating in a specific case allows the judge to evade participation in a case in which, for various reasons (e.g. family, social connections, etc.), he is unable to maintain internal independence. On the other hand, it also strengthens external independence. It allows for the exclusion of a judge in cases where his impartiality or independence may be undermined, i.e. the judge is internally convinced of his impartiality, but externally, in the opinion of the parties to the proceedings, his impartiality raises objections for objective reasons. Therefore, the institution of disqualification of a judge is considered a direct guarantee of impartiality and an indirect guarantee of independence. The current statutory regulations regarding the exclusion of a judge from adjudicating in a specific case are not free from defects. There are no regulations that take into account the principles of speed and efficiency of proceedings, e.g. it is not possible to close the hearing after submitting a request for exclusion before its examination, which makes it necessary to postpone the hearing, and there is no provision that would directly indicate the possibility of removing a judge for fear of violating his independence, without invoking the general premise *iudex suspectus* .

The next chapter is devoted to the institutional guarantee of independence - the National Council of the Judiciary, which was established as the guardian of the independence of judges and the independence of the courts. The Council for the Judiciary is a universal institution in the legal system of most European countries. Bodies with the status of councils for the judiciary differ from country to country in terms of composition and method of appointment. Their competences, however, in each case focus on supporting the judiciary in the context of protecting the independence of courts and judges. The idea of creating a judicial council in

Poland appeared in the 1980s. It was supposed to be an institution that would strengthen the principles of the independence of the courts and judges, violated during the People's Republic of Poland, and free the procedure for appointing judges from the supervision of the party apparatus. Finally, the first law in Poland regulating the powers, composition and operation of the National Council of the Judiciary was passed on December 20, 1989. The status of the National Council of the Judiciary was consolidated after the entry into force of the Constitutional Act of 17 October 1992, and the systemic position of the Council was strengthened in the Constitution of 1997, when the function of the Council as the guardian of the independence of the courts and judges was raised to the rank of a constitutional principle expressed in article 186 sec. 1. The new constitution, following the example of previous systemic regulations, was not limited to confirming the fact that the National Council of the Judiciary was granted a systemic rank and referring the rest to the act. The Constitution of 1997 regulates the composition and method of appointing members of the Council, competences in the form of participation in the appointment of judges, and the right to submit a motion to the Constitutional Tribunal on the constitutionality of normative acts to the extent that they concern the independence of courts and judges. At the same time, each successive ordinary act on the National Council of the Judiciary along with amendments led to strengthening the position of the Council in the context of its watchdog role.

The National Council of the Judiciary is a constitutional body with diverse competences and a special position in relation to the legislative, executive and judiciary. At the same time, the Council is a body integrating and coordinating, at the constitutional level, the tasks of these authorities in the field of independence of courts and judges. Therefore, the National Council of the Judiciary considers itself to be a prejudicial supreme state authority, functionally related to the judiciary, although not constituting its element, capable of influencing the legislative and executive powers through the powers granted to it. The basic tasks of the National Council of the Judiciary as the "guardian of the independence of judges and the independence of the courts" include: assessing the correctness of the legislator's specification of the systemic position of the courts, assessing the actions of the executive in the field of undue pressure on judges by exercising competences related to their official status, determining whether the courts matters do not encroach on the competence of other authorities and whether these authorities do not encroach on matters reserved for the judiciary, determining whether courts adequately protect human rights through their decisions. Therefore, the watchdog role of the Council is not limited to influencing only the legislative and executive authorities, but also applies to influencing the judiciary. Apart from its systemic competences, the legislator has been left with a certain margin

of freedom to regulate the system, scope of operation, mode of operation and other powers that are to contribute to the watchdog role of the Council. The legislator did not fulfill these tasks without reservations. They concern the lack of a statutory appeal against the decision of the Council regarding the appointment to the office of a judge of the Supreme Court and the lack of withholding the application of the National Council of the Judiciary for the appointment of a judge until the appeals of other candidates for a given post of judge are considered, which makes it possible to appoint a judge by the President on the basis of an application of the Council, despite the fact that the case regarding the appeal against the resolution on this motion is pending. The above regulations infringe not only the rights of judges to a court (Article 45(1) of the Constitution), but above all the principle of judicial independence (Article 178(1) of the Constitution), which is a component of the right to a court that all citizens are entitled to and a value which is to be safeguarded NCJ (Article 186 (1) of the Constitution). They prevent judges from going to court with regard to their service status, which may result in unjustified pressure from the authorities that make decisions regarding this status, without the control of an independent court.

The composition of the National Council of the Judiciary is explicitly indicated in the Constitution. It has a diverse character and, moreover, the members of the Council cannot represent the interests of the authority to which they belong, but the interests of the Council in terms of the functions it performs. The rules for electing members of the National Council of the Judiciary from among judges, which have been in force since 2018, are particularly controversial and constitutional doubts. This concerns the introduction of a new procedure for the election of judges by the Sejm (previously, judges to the Council were elected by judicial self-governments), the introduction of a common term of office for all members of the Council and the shortening of the term of office of the existing members. The independence of the National Council of the Judiciary after the changes was questioned by the Supreme Court, the Court of Justice of the European Union, and the European Court of Human Rights. The National Judicial Council was also excluded from the ENCJ, of which it was one of the founders. Shaping the National Council of the Judiciary in an unconstitutional manner may have far-reaching consequences. They mainly concern the defectiveness of the appointment of judges with the participation of the National Council of the Judiciary formed as a result of the Act of 8 December 2017. In my opinion, the view that a judge appointed in a procedure with the participation of such a Council in each case determines the improper staffing of the court is too far-reaching. I believe that the appointment of a judge at the request of a defective National Council of the Judiciary does not in itself constitute a circumstance that may raise doubts as to

his impartiality, and therefore cannot be the basis for his exclusion, and thus does not automatically lead to the defectiveness of a judgment issued with the participation of such a judge **.** In each case when a case is examined by a judge appointed in the procedure with the participation of the Council after 2017, it should be determined to what extent the defective appointment of a judge leads to a violation of the objective aspect of independence and impartiality. This is not determined by the mere fact of being nominated at the request of the reformed National Council of the Judiciary , but by factors relating to both the person of a given judge and the position to which he or she has been appointed.

In view of the recent changes regarding the National Council of the Judiciary, which I assess negatively, there is a need to carry out a systemic reform of the statutory status of the National Council of the Judiciary - so that it really returns to the role of "guardian of the independence of courts and judges". In order to implement the above postulate, it is first necessary to return to the system of selection of judges by other judges, but under different rules. In my opinion, the postulate of representativeness of the community of judges of courts of all levels and of judges of all types of courts would be implemented by universal elections, where each judge would elect a member of the Council from among other judges with the option of choosing a judge from another court level, and representatives of other legal circles would also have the right to propose candidates, apart from judges and citizens. Another issue concerns the status of judges appointed with the participation of the National Council of the Judiciary in the composition formed after the changes in 2017. In my opinion, they were appointed incorrectly, and therefore their appointment acts should be considered invalid by operation of law. On the other hand, it would be reasonable to assume that they would be able to reapply for appointment to the previously defective position, however, without the guarantee of a positive assessment of their candidacy by the new Supervisory Board. Regarding judgments by judges appointed in a manner inconsistent with the Basic Law, i.e. with the participation of the National Council of the Judiciary constituted in an unconstitutional composition, I postulate to keep them in force. Participation in adjudication of the said persons should, however, be the basis for lodging an appeal, application or complaint for the resumption of proceedings within one year from the date of entry into force of the Act. The exceptions are the judgments of the Disciplinary Chamber of the Supreme Court (as an exceptional and special court, not empowered by the Constitution), which should be declared invalid by operation of law. The National Council of the Judiciary should also become the supreme body exercising external administrative supervision over the activities of the courts. In this regard, it should take over most of the duties of the Minister of Justice as a body with constitutional authorization to act for the independence

of the judiciary and judges, which cannot be said about the Minister of Justice as an organ of executive power.

I see the limitations of judicial independence in two aspects: procedural limitations and administrative supervision over the courts. The procedural limitations of judicial independence include: binding with the guidelines of the appellate court in a given case, binding with a judgment of a court adjudicating in separate proceedings, judiciary supervision of the Supreme Court and the Supreme Administrative Court, binding the interpretation of law contained in the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights .

The guidelines of higher courts are a well-established element of the principle of two-instance proceedings and a component of the system of appealing against judgments. The basic purpose of the guidelines is to issue an accurate, fair and just ruling and to avoid repeating previously identified errors, which guarantees the certainty and durability of the position once taken in the case. Such a solution favors the speed of proceedings, strengthens the certainty of legal transactions and influences the shaping of the authority of higher courts. The principle of being bound by the guidelines of the appellate court in a given case is therefore the implementation of the principles of appealability of judgments and two-instance proceedings expressed respectively in Art. 78 of the Constitution and in Art. 176 sec. 1 of the Constitution. These principles are a guarantee of the 45 sec. 1 of the Constitution, the right to a fair settlement of the case. Being bound by the guidelines of the appellate court constitutes a permissible limitation of independence by imposing a certain point of view on the judges adjudicating in the first instance through a specific interpretation of legal norms and other indications depending on the type of court proceedings. However, this limitation contributes to the implementation of other constitutional values that ultimately implement the citizen's right to a court. Being bound by the guidelines of the court of second instance does not limit independence to the extent that it could lead to a violation of Art. 45 sec. 1 of the Constitution. These exceptions are implemented only in the field of interpretation and application of the law and result from the essence of two-instance proceedings based on remediation and elimination of erroneous judgments. In the long term, they contribute to the uniformity of jurisprudence, and they also contribute to the speed of proceedings. Without a system of resolving legal disputes between courts of first and second instance, there would be chaos and disorder.

Another procedural limitation of judicial independence, i.e. being bound by a decision of the court adjudicating in separate proceedings, is also a significant limitation of the jurisdictional independence of the court as an autonomous shaping of factual and legal findings,

which are to be the basis for the court's decision on the subject of the trial. The principle of being bound by a decision of the court adjudicating in separate proceedings is undoubtedly a departure from the principle of free assessment of evidence and the court's findings made as a result. It also constitutes a limitation of the principle of judicial independence, a component of which is the independence of the court (but always within the framework of applicable law) in resolving factual and legal issues that arise in the case under consideration. However, the limitation of this independence, which is also a limitation of judicial independence, does not mean that the findings adopted by the court under the binding were made by a non-independent entity. This is because the findings of another court, whose judges also have the attribute of independence, are bound. The principle of being bound by a decision of a court adjudicating in separate proceedings constitutes an acceptable limitation of judicial independence. It protects the values that are components of the right to a fair trial and the principles of a democratic state ruled by law, such as the speed of proceedings and legal certainty, allows the court to refrain from making factual findings preceded by a proving process to a certain extent, and prevents the adoption of irreconcilable findings on the basis of the same facts. being the basis for decisions in at least two court proceedings.

Judicial supervision of the Supreme Court and the Supreme Administrative Court as a limitation of judicial independence serves to ensure uniform jurisprudence, i.e. that in similar cases in terms of legal issues, the courts should interpret the applicable standards in a similar way. In this way, entities in a similar legal situation will be treated similarly, which is conducive to the principle of equality. Judicial supervision therefore goes beyond the framework of finding a fair resolution of an individual case and also ensures the correctness of the process of applying and interpreting the law by performing the function of shaping the directions and content of jurisprudence. Judicial supervision in the scope of concrete interpretation results in binding this interpretation in a given case, while in the scope of abstract interpretation it puts pressure on the courts to direct the judgment in a manner consistent with the position contained in the resolution, under pain of the possibility of repealing or amending the judgment in the course of instance control measures. In this sense, judicial supervision is an exception to the general rule that a judge is subject only to the Constitution and the statute (Article 178 (1) of the Constitution). Judicial independence, however, cannot lead to a lack of control over jurisprudence in the context of preventing a violation of the law, removing its effects, or ensuring uniform jurisprudence in the field of judiciary supervision. The postulate of uniform jurisprudence is a consequence of respecting the principle of equality before the law, as well as the state of stability, certainty and legal security. In addition, judiciary supervision serves such

values as limiting the scale of incorrect judgments in practice by setting the direction of interpretation of a given legal norm. The weakening of independence at the expense of ensuring the uniformity of jurisprudence through the institution of judicial supervision measures is therefore legitimate and in the interest of citizens.

Binding the interpretation of law contained in the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights results in interference with the judicial independence of the national judiciary and the limitation of judicial independence in the context of freedom of interpretation of generally applicable law. However, this restriction is not of such a nature that it touches the core of independence and, consequently, is an illegal restriction. However, it is justified by other objectives, which have their basis in the constitution. They will be Art. 9 and Art. 91 of the Constitution in terms of being bound by an international agreement, which requires its direct application not only in the part covering the text of the legal act, but also in the scope of the jurisprudence of the international court, which in the process of interpretation fills these acts of international law with appropriate content. If national courts were not bound by the interpretation contained in the case-law of the Court of Justice of the European Union and the European Court of Human Rights there was no question of observance of supranational law, which is guarded by the above-mentioned tribunals. It would not be possible to exclude contradictions in the interpretation of EU and Convention law between national courts and tribunals, as well as between courts in individual countries. Moreover, in such a relationship, the independence of national judges "collides" with the independence of judges of international courts. The interpretation of EU and Convention law to which a national judge is bound is made by another judge who is also independent.

Since the adoption of the March Constitution of 1921, administrative supervision over the courts has been a serious threat to the independence of judges. Due to the fact that the judicial authorities have a specific organizational structure and are equipped with certain material and budgetary resources, there is a need to provide the courts with the necessary administration to perform their tasks. In turn, this administration must be subject to supervision in order to carry it out properly. However, supervision over the administration of the court may not infringe the separateness of the judiciary, in particular, it may not concern the judiciary and may not infringe the independence of the judiciary by extinguishing the pressure or interfering with the judge's activities aimed at issuing a ruling of a specific content. The concept of administrative supervision has not been precisely defined in legal acts. Administrative supervision covers two aspects. The first concerns the control of the supervisory body according to specific criteria. The second aspect, on the other hand, is related to the authoritative influence on the activities of the supervised body

by means of the indicated means specified in the provisions of law. In my opinion, the concept of "administrative supervision over the operation of courts" in the context of the definition developed by the doctrine of administrative law is not appropriate. It realizes that courts that have been provided with material and budgetary resources should be subject to some control in terms of their use. However, administrative supervision, due to its nature and authoritative interaction with elements of discipline, may violate the principles of independence of courts and judges. A more appropriate term in this regard is "management of the administrative activities of the courts", understood as planning and coordinating work, ensuring efficient operation, as well as ensuring relationships between managing and managed bodies. The Act – Law on the System of Common Courts divides administrative supervision over courts into internal and external supervision, indicating that the former is exercised by court presidents, while the latter by the Minister of Justice by the supervision service, which is made up of judges delegated to the Ministry of Justice. This form of supervision applies only to common courts. The supervision of the Minister of Justice does not cover administrative courts and the Supreme Court, where the President of the Supreme Administrative Court and the First President of the Supreme Court are responsible for supervisory functions, respectively. In fact, the structure of internal and external supervision over common courts makes the Minister of Justice the central supervisory authority. Court presidents exercising internal supervision are appointed by the Minister of Justice on the basis of discretionary criteria and may similarly be dismissed. The method of appointing and dismissing court presidents creates a sense of their dependence on the executive.

While the model of administrative supervision over the courts created by the legislator by entrusting it to the executive authority and the failure to clearly separate the administrative sphere from the judiciary sphere primarily violates the principle of independence of the judiciary, the measures of supervision over the courts are particularly dangerous for the independence of judges. Administrative supervision has become an attempt to manage the administration of justice, which we have been seeing since the adoption of the Constitution in 1997, when the means of supervision of court presidents and the Minister of Justice have been successively increased, now reaching a "critical mass". Many of these measures use unspecified phrases that allow for their free interpretation. They also lead to attempts to interfere with judicial decisions. They enter the judiciary sphere, which is reserved exclusively for judges making procedural decisions. The content of judicial independence is independence in relation to judicial and non-judicial bodies. The current regulations on administrative supervision measures do not guarantee this. Solutions in which the executive authority decides largely on

the personal matters of judges, the organization of their work and the structure of the courts are incompatible with Art. 10, art. 173 and Art. 178 sec. 1 of the Constitution.

In order to create a model of administrative supervision in a manner consistent with the principle of judicial independence, it is necessary to carry out its thorough reform. First of all, the supervision model should be abandoned in favor of the court management model, which should be implemented by a body located within the judiciary structure - e.g. the First President of the Supreme Court or a body situated outside the structure of the authorities and having constitutional authority to protect the independence of the courts and judges - that is, the independent National Council of the Judiciary. It is also necessary to create a clear and precise definition of administrative activities, or create an enumerative catalog of them, in order to legally separate the sphere of judicial administration from the judiciary sphere, due to the risk of both spheres interpenetration. Judicial administration tasks related to the administration of justice should be decentralized to the level of the president of the court, who, as a judge of a given court, has the best knowledge of the internal administration of that court. It is also necessary to increase the role of judges in appointing and dismissing court presidents and vice-presidents and members of the board of a given court. A judge should also have the right to object to an act of the management body which concerns him directly and limits his independence. In my opinion, such supervision would guarantee the independence of the courts and the impartiality of judges. The changes I propose lead to a reduction in the possibility of exerting influence on the judiciary by limiting the actually exercised executive power in this respect.

The analysis undertaken in the dissertation proved that there can be no rule of law without the guarantee of the independence of the judiciary and the impartiality of judges. The independence of judges is a necessary condition for the legal protection of citizens' rights. It is not a privilege but a duty for the judge to follow this principle in his work and for the public authority to ensure its implementation. All state institutions should contribute to strengthening independence, as it is the essence of the office of judge.