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**Examination of impartiality and independence towards judges after polish judiciary reform.**

**Key words:** judicial system; right to a fair trial; judicial independence; crisis of the rule of law; exclusion of a judge

It is of utmost importance for the establishment of a democratic state under the rule of law that citizens have access at all times to a fair trial having the attribute of legitimacy (inviolability). It is generally acknowledged that the constitutional right to fair trial (art. 45 of the Polish Constitution)[[1]](#footnote-1) understood as such is guaranteed in the reality by an independent judiciary represented by impartial and independent judges. For obvious reasons, the discussed requirements of the right to a fair trial apply to both the structures of the ordinary judiciary (most importantly, the Supreme Court) and the administrative judiciary. Indeed, the 'third authority' in general plays an extremely important role for citizens in a state governed by the rule of law. The ordinary judiciary, on the one hand, settles disputes arising from private law obligations[[2]](#footnote-2) and, on the other hand, decides on the application of criminal sanctions against individuals who clearly violate the sphere of human rights[[3]](#footnote-3). Administrative courts control the actions of public administration and eliminate from the legal system acts of law application which are incompatible with laws and the constitution[[4]](#footnote-4).

The guarantees of maintaining the attributes of impartiality and independence among judges are shaped both systemically and within the framework of individual court procedures: civil (covered by the Code of Civil Procedure[[5]](#footnote-5)), criminal (regulated by the content of the Code of Criminal Procedure[[6]](#footnote-6)) and court-administrative (regulated by the Law on Proceedings before Administrative Courts[[7]](#footnote-7)). In each of the aforementioned acts, the legislator has provided for a number of circumstances in which a judge may be excluded from adjudicating a case due to their attitude towards the participants in the proceedings. The exclusion of a person from the adjudicating panel in a given case may occur by operation of law (the so-called *iudex inhabilis* institution), at the request of the parties to the proceedings (*iudex suspectus*) or at the request of the judge himself.

In recent years, there has been a growing political and legal debate in Poland about whether judges adjudicating within the judiciary still meet the requirements of being impartial and independent and, consequently, whether there are grounds to declare the entire proceedings conducted by them invalid due to a violation of the constitutional right to a fair trial. We are primarily referring here to the contestation of the status of the judges who are subject to the opinions of the National Council of the Judiciary, the composition of which was shaped after the enactment of the controversial Act of 8 December 2017 amending the existing Act on the National Council of the Judiciary[[8]](#footnote-8), which provides that it is the Sejm that elects from among the judges of the Supreme Court, common courts, administrative courts and military courts fifteen members of the Council for a joint four-year term of office. In view of the above, the regulations on the exclusion of a judge began to be used as a legal tool to remove persons commonly recognized by so-called 'neo-judges' from issuing judgements in cases pending before the courts.

However, the application of the institution of *iudex inhabilis* and *iudex suspectus* in the described form was negatively assessed by the Constitutional Tribunal, which stated that it is unconstitutional to hear a motion for the exclusion of a judge due to the defectiveness of the appointment of a judge by the President of the Republic of Poland at the request of the National Council of the Judiciary functioning in its current form (i.e. after the December 2017 reform)[[9]](#footnote-9). The law passed on 9th June 2022 on the initiative of the President of the Republic of Poland, which amended the provisions of the following acts: on the System of Common Courts[[10]](#footnote-10); on the System of Administrative Courts[[11]](#footnote-11); on the Supreme Court[[12]](#footnote-12) and on the System of Military Courts[[13]](#footnote-13) by adding the possibility to examine the independence and autonomy of judges, was intended to prove to be a specific way to alleviate the systemic dispute in the Polish judiciary. As is clear from the wording of the explanatory memorandum to the aforementioned bill, "The purpose of this institution is to provide participants in judicial or administrative court proceedings with procedural guarantees that there are no doubts as to the impartiality and independence of the judge adjudicating the case" [[14]](#footnote-14).

How, then, is the new procedure for the exclusion of a judge shaped?

In order to answer this question, a particular assumption should be made in order to systematize the course of further argument. As mentioned earlier, the examination of judicial impartiality and independence was introduced in parallel in all laws regulating the system and shape of the judiciary in Poland. Due to the fact that the implemented provisions are almost identical in each of the Acts, the author cites the provisions of the Law on the System of Common Courts. Following this assumption, the scope of application of the discussed regulation should first be characterized in terms of subjects and objects. In considering the definition of the set of persons who are entitled to apply for an impartiality and independence test, it is worth emphasizing that the legislator clearly indicated the general principle of the unquestionability of the status and role of judges by the courts and other public authorities. An exception to this rule has been introduced only for individuals-participants in judicial proceedings (called according to the requirements of the procedure in question) and only under the material conditions designated by the law. Thus, as follows from the wording of Article 42a §3: "It is permissible to examine a judge's fulfilment of the requirements of independence and impartiality taking into account the circumstances surrounding his or her appointment and his or her conduct after his or her appointment (...) if, in the circumstances of a particular case, this may lead to a breach of the standard of independence or impartiality affecting the outcome of the case taking into account the circumstances of the eligible person and the nature of the case.

The procedure for conducting the test of impartiality and independence is also specific to the provisions on the exclusion of a judge. In contrast to the institution of iudex inhabilis, the test of fulfilment of the requirements of impartiality and independence may be conducted only at the request of an entity indicated by law (Article 42a §3 in conjunction with Article 42a §6 of the Law on the Common Court System). The motion must meet all the requirements of a pleading and, in addition, contain a request for a declaration that the judge adjudicating the case is not independent and/or impartial and, most importantly, an indication of the circumstances justifying the request together with evidence in support thereof (Article 42a §7 of the Law on the Common Court System). There is also a time limit for submitting the said motion, which is 7 days from the date of notifying the person entitled to submit the motion of the composition adjudicating the case. It is worth mentioning at this point that for the purpose of setting the aforementioned deadline, the rule of obligatory informing the parties about the composition of the court adjudicating the case at the time of serving the first pleading has been introduced (Article 42a §5 of the Law on the common Court System).

Another important peculiarity of conducting the impartiality and independence test is the two-instance nature of the proceedings guaranteed for both its participants, i.e. for the applicant (in this case, the general provisions on the exclusion of a judge contained in the individual procedural acts apply) and for the judge against whom the motion was filed. Indeed, as it follows from the wording of Article 42a §13, if the application is granted, the judge against whom it has been ruled that he or she does not meet the requirements of impartiality and/or independence may file a motion for reconsideration by the Supreme Court. The second-instance review shall take place with a panel of five judges drawn by lot from among the entire composition of the Supreme Court and shall result in either upholding the exclusion order or revoking it and dismissing the application.

The legal solution in question raises justified doubts both from a dogmatic and practical point of view. There is no doubt that the implementation of the new possibility to exclude judges into the laws regulating the system of the judiciary was meant to be a compromise solution to the growing crisis surrounding the state of the rule of law in Poland. On the one hand, the purpose of the amendment introducing the test of impartiality and independence was an attempt to put an end, once and for all, to the habit of participants in court proceedings (or their attorneys) raising allegations of the invalidity of proceedings based on the institution of *iudex suspectus* and *iudex inhabilis* against cases conducted by judges appointed by the new composition of the National Council of the Judiciary. At the same time, efforts have been made to ensure that it is possible to challenge the status of judges, but under completely different conditions from those set out in the various procedural laws.

Moving away from a consideration of the motivations driving the authors of the amendment, it is necessary to focus on the fundamental doubts regarding the assumptions of the impartiality and independence test. As indicated in the legislation, "It is permissible to examine judges compliance with the requirements of independence and impartiality (...) if, in the circumstances of a particular case, this may lead to a breach of the standard of independence or impartiality." While an examination of a judge's impartiality in a given case is not unusual and has been known since the beginning of modern judicial procedures, the attribute of independence is quite different. Indeed, judicial independence is a constitutional concept and consists primarily of independence from other public authorities and from political factors as well as independence in the exercise of functions[[15]](#footnote-15). It follows that fulfilment of the requirement of independence by a judge cannot be limited (unlike the attribute of impartiality) to the realities of a specific case, as it has a general dimension for the function exercised. Hypothetically, therefore, if an independence test is carried out in a single case and it is decided that the examined judge is not independent in the constitutional sense, it forces him or her to be removed from office altogether, as the decisions made with his or her participation do not realize the constitutional right to a fair trial. Therefore, one cannot simultaneously be independent in one case and fail to fulfil this characteristic in another.

Finally, it is also worth highlighting some procedural aspects related to the application of the provisions on the examination of a judge's impartiality and independence. Referring to the provisions on the exclusion of judges contained in the procedural laws, it can be said that the procedure for the exclusion of a judge for failure to meet the requirements of impartiality and independence appears to be much more complex and more difficult to carry out. It should be noted that while in the case of the application of the institution of *iudex suspectus*, the request for exclusion is subject only to plausibility or citation of facts that may affect the impartiality of the judge, in the case of exclusion on the basis of the laws regulating the judicial system, the applicant is obliged to substantiate their request. The legislator has set a time limit of only 7 days from the date of notification to the person entitled to submit the application of the composition of the court hearing the case for drafting the application and the statement of reasons. Once the application has been successfully filed and the case has been ruled on, both parties may have a remedy (the applicant has a complaint, while the excluded judge has a motion for reconsideration), which may also affect the application of this procedure in practice.

Summarizing the above considerations, it is reasonable to present conclusions on the analysis of the provisions on the examination of a judge's impartiality and independence. Firstly, there is no doubt that this institution arose in the face of a growing need for the status and assessment of the work of judges adjudicating within the Polish judiciary arising from a general crisis of the rule of law. This crisis meant that the existing procedural guarantees aimed at the full realization of the constitutional right to fair trial proved to be insufficient. However, the solutions implemented into the laws regulating the system of the judiciary in Poland turn out to be controversial and imperfect already in their assumptions. First of all, this concerns the singularity of the examination of judicial independence, which, on the one hand, should not be subject to evaluation at all due to the content of Article 178 of the Constitution, and on the other hand, should not be detached from the status of a person representing the judiciary in Poland. At the same time, in terms of testing judicial impartiality, it appears that introducing additional means of verifying it is not necessary in view of the provisions of procedural acts on the exclusion of judges from participation in cases, which have been in force for many years.

Leaving aside the general contradiction of the legal solutions presented, attention should also be drawn to the specific procedure accompanying the examination of judicial impartiality and independence. The procedure in this regard is undoubtedly extremely detailed and contains strict formal requirements, in particular: the need to substantiate (rather than make probable) the request for exclusion; the short time limit for drafting a pleading in this regard; and the specific avenue of appeal in the event that the request is granted. Bearing these factors in mind, it may be argued that they constitute a kind of barrier to the mass number of applications for exclusion based on the legal basis presented. However, assuming the constitutional concerns accompanying the legal norms in question, the general validity of their application should be considered.

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