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**Subordination of a judge to the Constitution and laws
in the exercise of their office**

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The Constitution of the Republic of Poland (hereafter: *the Constitution*) has entrusted the Judiciary with the specific task of hearing cases presented by individuals. Its operation includes overseeing the manner in which laws are written and applied. In practice, this can lead to a relationship between authorities influenced by conflict and mutual rivalry. For the Legislative and Executive, this creates a risk of taking actions that weaken systemic and legal positions of the courts. These actions may adopt a variety of forms and can involve various actors with supervisory, control, management, or disciplinary powers.

Regulations of a technical nature, involving administrative issues and the working organization of courts may negatively influence judicial independence and lessen its conformity to Constitution and laws. Such threats acquire particular significance when these regulations are applied arbitrarily or even intentionally.

Judicial power has limited means of protection against such interferences. Regarding the Executive, judicial power is essentially deprived of a means of protection – as a general rule, its decisions cannot be subjected to judicial review.

This raises the following questions:

- (1) How should we define the term “*exercise of authority*” in the context of a judge?
- (2) What meaning should be given to the principle of a judge’s conformity with Constitution and the Law?
- (3) How should the relationship between these principles be defined?
- (4) How does the principle of a judge’s adherence to the Constitution and laws affect his or her constitutional and legal obligations? Does such adherence apply outside the process of adjudication by a judge?

A deeper reflection on these questions provides insight into the complex relationship between judiciary and other powers, making it possible to draw a red line of permissible interference in the functioning of the courts. It also provides a means to more effectively seek measures to protect judges from attempts to limit their status.

In the *first* chapter, I consider the constitutional and legal position of the judiciary, its presumption of competence, and the competence core defined by the Legislator. As a starting point, I consider the *principle of separation of powers*, a supreme political system principle and a necessary element of a democratic state of law. The principle of separation of powers determines the relationship between authorities and imposes upon them a duty of mutual restraint and control. My considerations are supplemented by an examination of *Article 173* of the Constitution, which states that courts and tribunals are separate and independent bodies from other authorities. This representation, unique to the principles of separation of powers, is

further strengthened by requiring that the relationship between judicial power and other authorities be defined in terms of a *separation of judicial power*.

In the *second* chapter, I describe concepts employed by the Constitution and the Law that define tasks entrusted to judicial power, the courts, and which determine the status of judges and the guarantees granted to them. I focus on the concepts of *exercising office, deciding cases* and *legal protection tasks*. I further argue that the definition of the term “administrative action” raises numerous questions relating to its obscurity. In the doctrine of Constitutional Law, it is difficult to achieve a view that clearly indicates its material scope. The positions I have cited recognize, in principle, that a total separation of technical (“administrative”) activities from the administration execution of justice is not possible. I note that the possibility of separating these categories has been the subject of numerous judicial decisions by the Polish Constitutional Tribunal, which has not shared such doubts.

The *third* chapter begins by describing the relationship between the principle of a judge’s subordination to the law and the principle of judicial independence. In the following section, I consider the significance of judicial conformity to the Constitution and the laws, the justifications and nature of this relationship, and its material scope. I justify the judge’s total compliance with the Constitution based on the supreme legal force of the Constitution in the legal system and the unambiguous assignment of a legal function to it by the Legislature. I present the relationship between the Constitution and EU law, which does not modify or abrogate the principle of a judge’s compliance with the Constitution, but only supplements it with compliance with normative acts to which the Constitution attributes a higher legal force than ordinary laws. The subject of my attention is also the direct application of the Constitution, which is an obvious consequence of the superior legal force attributed to the Constitution itself. I refer to the dispute existing not only in the doctrine of Polish constitutional law, but also in the jurisprudence of the Constitutional Tribunal, the Supreme Court, and the Supreme Administrative Court, concerning the possibility of constitutional (incidental) control by the courts in the process of law application and, consequently, the possibility of deviating from the application of the primary legislative regulations and basing the decision on the norm of the Constitution. I also refer to the justification of the principle of a judge’s compliance with the law, which stems from the principle of the sovereignty of the nation and the special role of Parliament in its implementation. Particular attention is also paid to the presumption of constitutionality of the Law, which forms the basis of the Polish legal system, the foundation of the procedure for the control of its constitutionality and the justification of the principle of the judge’s adherence to the law.

The *fourth* chapter deals entirely with the administrative supervision of ordinary courts. I justify describing this issue in such a broad manner by its impact on the method in which a judge exercises his or her office and the real possibility of respecting *Article 178(1)* of the Constitution. The practice of influencing judges by exercising the means of *administrative supervision* has shown that granting a significant margin of control to those exercising it leads to a violation of judicial status. It enables a mechanism by which judicial activity is manipulated by sub-statutory acts, leads to illegitimate supervision of judicial adjudication, and creates dependencies between judges and their supervisors. I identify the actors and means of internal and external supervision. I address the insufficiency of the legal guarantees presently available to judges and the need to provide them with a proper judicial route in cases relating to illegal administrative supervision.

The *fifth* chapter focuses on the disciplinary responsibility of judges, which is one of the constitutional guarantees of judicial independence. Like administrative supervision, it is vulnerable a high level of manipulation. This necessitates restraint and caution while creating the legal framework of the responsible disciplinary body. I was led to this conclusion by the analysis of two separate disciplinary bodies, i.e., the one in force until February 14, 2020, and the authorities in force thereafter. A subject of separate attention, are the attempts made by the legislator to amend the last of these regulations, which partially fall under the topic of preventive constitutionality control.

The *sixth* chapter deals with the question of the establishment of a court by statute and the admissibility of a judicial assessment of the correctness of a judge's appointment. This issue has assumed considerable importance in connection with the "rule of law dispute" in Poland, requiring heightened consideration of the significance of a judge's subordination to the statute. It made it necessary to question whether a judge remains bound by such a law and how he or she should act when doubts arise regarding compliance with the Constitution.

This thesis argues that *Article 178(1)* of the Constitution guarantees judges' independence and subjection to the law while exercising office. This norm encompasses the entire adjudicatory process of a judge – all the activities qualified as the court's management of the proceedings preceding the issuance of a decision and undertaken to decide the case, regardless of their nature (ancillary, technical or administrative). The exercise of office also includes the exercise of judicial authority and the performance of all activities delegated to the courts, including "other tasks of legal protection," regardless of the definition adopted for this concept. All activities entrusted to judges by virtue of their status (which they perform as "judges") should be qualified as belonging to the exercise of office. It was the intention of the

system legislator that the guarantees of *Article 178(1)* of the Constitution should cover the widest possible sphere of his or her activity. A judge, while remaining the subject of disciplinary proceedings and administrative supervision measures, is under the protection of both institutions.

The analysis carried out in this manner proposes an answer to the questions posed in the main thesis. *Article 178(1)* of the Constitution establishes the principle that judges are bound by all acts of statutory rank, including regulations establishing disciplinary responsibility, and the system of supervisory measures. The Constitution does not provide for any generic exceptions to the general principle of judges being bound by the law. For as long as the presumption of a regulation's constitutionality is in force, a judge is obliged to obey it. The situation changes when the presumption is challenged, in which case the judge automatically adheres to the greater legal significance of the Constitution.

A judge subjected to the Constitution is obliged to consider the compliance of a statute with the Constitution not only during adjudication but also, to the same extent, during the exercise of his office. This must include not only the assessment of the regulation's compliance with the Constitution but also all normative acts that have a higher legal force than the primary legislative law, including ratified international agreements and EU law. If doubts regarding compliance are raised, the judge remains obliged to resolve them through the available legal means. Depending on the judge's decision, the nature of that doubt, its relevance, the factual situation, and the legal situation, including the ability of the Constitutional Tribunal to adjudicate, the judge is entitled to the same extent to raise a question of law as to whether he or she is entitled to individually deviate from the application of the law and to rule directly on the basis of the Constitution. This statement refers entirely to the regulation of disciplinary responsibility and administrative supervision measures.

It should be noted at this point that the supervisory measures applied to judges and the disciplinary proceedings initiated against them are not a private, individual matter of a judge. Indeed, they may affect the entire judicial community and have a "chilling effect" on it, disrupting the real possibility of exercising office in compliance with *Article 178(1)* of the Constitution. This leads to the creation of an atmosphere of fear and pressure on the judiciary and, therefore, the restriction of judges' activity, both in the sphere of social life and during the administration of justice. Examples of this kind have been appearing in the Polish constitutional reality since 2015 and have led to the distortion of many institutions of administrative supervision. This situation has a direct bearing on the sphere of individual rights and freedoms. Indeed, their status is dependent on the availability of a judicial route and the fairness of the

judicial process. Judges working in such conditions, not being certain of their own constitutional position, are not independent. Consequently, they do not guarantee the realization of the right to trial by an independent and impartial court, and thus do not properly protect the rights and freedoms of other individuals. The threat to the judge's constitutional and legal position should be assessed as a threat to the status of the individual. This leads us to the conclusion that ensuring proper standards for judges in the exercise of their office is important not only from the point of view of the principle of separation of powers but, above all, from the point of view of the relationship between the State and the individual.

Prepared by Katarzyna Grabarczyk on June 20, 2024.