

THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

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Abstract. To define the nature of the Polish President's prerogative to appoint judges requires the analysis of the abundant case-law of courts and tribunals, including those enjoying international status. If the constitutionality of the National Council of the Judiciary and its competence are questioned, the role of the President of the Republic of Poland in the procedure of nominating a person as judge should never be perceived as a merely formal one. In this situation, the President of the Republic of Poland must independently carry out a substantive assessment of candidates because he is no longer bound by the conclusions from the formal request of the National Council of the Judiciary in this respect. Examination of the validity or effectiveness of the constitutional act of appointment of a judge by the President of the Republic of Poland, and the resulting constitutional relationship between the judge and the Republic of Poland, continues to be inadmissible in any proceedings before a court or other state body.

Keywords: National Council of the Judiciary; prerogative; President of the Republic of Poland; appointment of judges

1. THE ESSENCE OF THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

It is quite astonishing that the prerogative of the President of the Republic of Poland to appoint judges has not been thoroughly studied, especially given the importance of this legal institution. All in all, this is a legal institution that implies the appointment for a post of judge, so it affects the very foundations of judicial power. The "post of judge" is to be understood here as the performance of a judicial function, that is the exercise of the power to issue judgments on behalf of the Republic of Poland (*officium iudicis*).¹ The judge is a public officer performing the judicial and other tasks entrusted, equipped with the power of sovereign and authoritative resolution of legal disputes [Ereciński, Gudowski, and Iwulski 2009, 182]. Although reflection on this issue is primarily of a practical nature, it must

¹ See decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19, OSNKN 2020, No. 3, item 17.

always be accompanied by a theoretical dimension. Of course, the theoretical dimension focuses mainly on determining the nature of the prerogative of the President of the Republic of Poland to appoint judges. The starting point is then the analysis of the case-law, recently very abundant, of courts and tribunals, also those of international status.

First, it seems necessary to emphasize that the prerogative of the President of the Republic to appoint judges is rooted in constitutional regulation.² In this context, it should now be noted that the President of the Republic of Poland is undoubtedly an independent (and not auxiliary) constitutional state body, with its own attributed competences, exercised in its own name, on its “own account” and under its own responsibility [Sarnecki 2000, 53]. This competence should therefore be understood as a set of authorisations and at the same time responsibilities to take specific actions and to do so generally on an exclusive basis [ibid., 35]. The classification of competences of the President of the Republic of Poland is based, as a rule, on substantive criteria and formal criteria. In applying the substantive criteria, the following competences are usually distinguished: activities as the highest representative of the State and activities as the guarantor of the continuity of power, while the use of formal criteria leads to distinguishing the competences exercised independently, exercised on request, dependent on a countersignature, exercised in agreement with other state authorities [ibid., 52-53]. Therefore, the prerogative of the President of the Republic to appoint judges is a competence that relates both to the activity as the highest representative of the State and to some extent of guarantor of the continuity of power, and a competence exercised independently, at the request of another authority (the National Council of the Judiciary) and independent of a countersignature.

The fact that judges are appointed through the exercise of a prerogative by the President of the Republic of Poland strengthens the guarantee of their independence.³ Since the President embodies the highest national dignity and majesty of the Republic of Poland, by granting judges judicial power he also legitimises this power on behalf of the nation by whom he has been elected in accordance with the most important principles of democracy.⁴ Thus, the crucial element for the effectiveness of entrusting a specific person with judicial power by appointment to the post of a judge is the democratic legitimacy of the person performing the act, as set out in the constitutional

² See Article 143(179) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended). For the English translation of the Constitution, see: <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm> [accessed: 04.12.2022].

³ See resolution of the Supreme Court of 28 January 2014, ref. no. BSA I-4110-4-4/13, OSNC 2014 No. 5, item 49.

⁴ Ibid.

procedure, especially when it stems from direct election to the office of President of the Republic of Poland.⁵ Consequently, the President of the Republic of Poland, when appointing a judge, provides the latter with the necessary democratic legitimacy, but also legitimises the entire judiciary, which necessarily directly serves the implementation of the principle of the democratic rule of law.⁶ It is therefore obvious to everyone that the act of appointment of a judge by the head of State constitutes a manifestation of the sovereign power of the Republic of Poland.⁷ Consequently, the appointment of a judge is ultimately an expression of the sovereign competence of the head of State.⁸

2. THE MECHANISM OF THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

Moreover, the prerogative of the President of the Republic of Poland to appoint judges is in line with the principle of the tripartite division of powers, essentially based on the separation of the legislature, the executive and the judiciary. It certainly constitutes now an important element of the checks-and-balances mechanism within the public authority.⁹ At the same time, it should be further highlighted that the prerogative of the President of the Republic of Poland to appoint judges is of a sovereign nature and reflects mutual relations between the authorities and, more precisely, the balancing of the competences of the judiciary by the executive, including the President of the Republic of Poland [Weitz 2016, 1045-1046; Sułkowski 2008, 54]. Indeed, the separation and distinctiveness of the judiciary cannot lead to the abolition of the mechanism of necessary balances and checks within the public authority, since it relates almost exclusively to the implementation of the judicial function.¹⁰ As regards the judiciary, a total prohibition of interference of the legislative and executive authorities in the activities of the courts and tribunals has been introduced.¹¹ Therefore,

⁵ See decision of the Supreme Court of 9 June 2020, ref. no. I NO 37/20, Lex no. 3012330.

⁶ See resolution of the Supreme Court of 8 January 2020, ref. no. I NOZP 3/19, OSNKN 2020, No. 2, item 10.

⁷ See decision of the Supreme Court of 9 June 2020, ref. no. I NO 37/20.

⁸ See judgment of the Supreme Court of 10 June 2009, ref. no. III KRS9/08, OSNP 2011, No. 7-8, item 114.

⁹ See decision of the Supreme Administrative Court of 9 October 2012, ref. no. I OSK 1883/12, Lex no. 1269634.

¹⁰ See judgment of the Constitutional Tribunal of 15 January 2009, ref. no. K 45/07, Journal of Laws No. 9, item 57.

¹¹ See judgment of the Constitutional Tribunal of 8 November 2016, ref. no. P 126/15, Journal of Laws item 2201.

the appointment of the personnel of the judiciary may still be classified as a checks-and-balances mechanism within the public authority.¹²

Whenever a judge is appointed, it is a result of cooperation between two constitutional bodies, with the National Council of the Judiciary giving an opinion on the proposed candidate for judge and ultimately deciding whether to apply for his or her appointment, while the President of the Republic of Poland performs the act of appointing the judge in the form of a decision issued for an indefinite period of time.¹³ Thus, the President of the Republic of Poland may never appoint anyone, even if they meet the requirements for a candidate for judge, but only a specific person considered and proposed by the National Council of the Judiciary [Garlicki 2007a, 4]. As far as the status of the National Council of the Judiciary is concerned, it is a *sui generis*, independent and central state organ, whose competences are related to the judicial power, as it guards the independence of courts and judges.¹⁴ The exercise of the prerogative of the President of the Republic of Poland to appoint judges, despite the constitutional regulation involving cooperation with the National Council of the Judiciary, may not, however, reduce his position to the role of a “notary” solely confirming decisions taken elsewhere [Garlicki 2007b, 5; Ciapała 2018, 45].¹⁵ It is also worth noting that such cooperation does not rule out the independence of the President of the Republic of Poland in exercising the prerogative to appoint judges [Sarnecki 2000, 53].

Therefore, the President of the Republic of Poland does not have a merely approving role, but he may oppose any candidature in a situation where he finds that the appointment of a given person to the post of judge would be contrary to the constitutional values that he is directly empowered to protect.¹⁶ Therefore, the prerogatives of the President of the Republic to appoint judges comprise the right to refuse to accept the request of the National Council of the Judiciary, which becomes even an obligation if the acceptance would be contrary to the constitutional values he is required to protect [Ziółkowski 2013, 76].¹⁷ In the procedure of appointment to the post

¹² See resolution of the Supreme Court of 8 January 2020, ref. no. I NOZP 3/19.

¹³ See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21, Lex no. 3392867.

¹⁴ Cf. judgment of the Constitutional Tribunal of 15 December 1999, ref. no. P 6/99, OTK ZU 1999, No. 7, item 164.

¹⁵ See decision of the Constitutional Tribunal of 23 June 2008, ref. no. Kpt 1/08, OTK ZU No. 5/A/2008.

¹⁶ See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21.

¹⁷ See judgment of the Supreme Administrative Court of 7 December 2017, ref. no. I OSK 858/17, Lex no. 2804297; decision of the Supreme Administrative Court of 26 November 2019, ref. no. I OZ 550/19, Lex no. 2733066.

of judge, the role of the President of the Republic of Poland cannot therefore be viewed in purely formal terms, even when we are dealing with the co-optation model of appointment to the post of judge, in which the decision is in fact made by the judges-composed part of the National Council of the Judiciary appointed by the judges themselves.¹⁸ Under this model, there have been situations where the President of the Republic of Poland has refused to appoint to the post of judge a candidate proposed by the National Council of the Judiciary, in an attempt to indicate that his role in the nomination procedure is not of a merely formal nature, albeit without justifying the refusal.¹⁹

If the constitutionality of the National Council of the Judiciary is questioned, along with the powers exercised by it, the role of the President of the Republic of Poland in the judge nomination procedure should never be seen only formally.²⁰ This concerns e.g. the independence of the National Council of the Judiciary, which has recently been challenged, though there is no basis for this in constitutional regulation,²¹ especially given that the National Council of the Judiciary cannot be identified as a court that must normally remain independent, which unfortunately has been the case.²² Consequently, the President of the Republic of Poland should have exercised his prerogative to appoint as a judge the candidate proposed by the National Council of Judiciary within the framework of the recognition objectively defined by the constitutional values, principles and institutions, and not by the request of the Council.²³ Thus, the President of the Republic of Poland must then carry out a substantive assessment of the candidates on his own, since he ceases to be bound by conclusions which result only from a formal proposal of the National Council of Judiciary in this regard.²⁴ Therefore, it would be too far-reaching and quite unconstitutional to assume that the President of the Republic of Poland could, by his action, correct the defects which arose as a result of the action of the National Council of the Judiciary, e.g. those relating to the choice made by the latter.²⁵

¹⁸ See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See judgment of the Court (Grand Chamber) of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982; judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21, *Journal of Laws* item 1852.

²² See Article 186(1) of the Constitution of the Republic of Poland.

²³ See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21.

²⁴ *Ibid.*

²⁵ *Ibid.*

3. THE NATURE OF THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

The nature of the President's prerogative to appoint judges is usually explained in a descriptive way. First of all, it should be noted that the act of appointing a judge does not require a countersignature of the Prime Minister, but needs a request from the National Council of the Judiciary, which restricts the freedom of action of the President of the Republic of Poland [Sarnecki 2000, 74]. Certainly, the act of appointment of a judge then ends the nomination procedure, which begins with the announcement in the Official Journal of the vacant judicial position. On the other hand, the essence of the appointment to the office of judge means conferring the right of jurisdiction, in other words granting the power to administer justice, because we are dealing with a kind of "investiture", an act of incorporation into the judiciary [Gudowski 1994, 19]. The appointment of a judge is undoubtedly an act of constitutional law which consists in staffing the judicial authority and is therefore carried out within the state apparatus.²⁶ In view of the foregoing, it may also be added that the appointment of a judge is not an individual act of application of the law, in particular it is not an act of public administration.²⁷ Naturally, the appointment of a judge is still permitted to be classified as an official act as it has constitutional grounds, but it is not required to provide reasons in any circumstances [Winczorek 2008, 299; Czarny 2009, 430].²⁸

The uniform case-law of national courts and tribunals further makes it possible to conclude that the examination of the validity or effectiveness of the instrument of constitutional appointment of judges by the President of the Republic of Poland, and of the resulting political relationship between the judge and the Republic of Poland, is not admissible in any proceedings before a court or any other state body.²⁹ This has already been directly confirmed by the case law of an international court, which considers the constitutional acts of the appointment of a judge by the President of the Republic

²⁶ See resolution of the Supreme Administrative Court of 9 November 1998, ref. no. OSP 4/98, ONSA 1999, No. 1, item 6; judgment of the Constitutional Tribunal of 27 May 2008, ref. no. SK 57/06, OTK-A 2008, No. 4, item 63 (Journal of Laws No. 96, item 621).

²⁷ See decision of the Regional Administrative Court in Warsaw of 24 January 2019, ref. no. VI SA/Wa 2287/18, Lex no. 2653544.

²⁸ Judgment of the Constitutional Tribunal of 23 February 2022, ref. no. P 10/19 (Journal of Laws item 480).

²⁹ See resolution of the Supreme Court of 8 January 2020, ref. no. I NOZP 3/19 – point 25 and the case-law of the Constitutional Tribunal, the Supreme Administrative Court and the Supreme Court referred to therein; judgment of the Constitutional Tribunal of 23 February 2022, ref. no. P 10/19.

to be not subject to judicial review.³⁰ In this context, it is even stressed that, in some cases, the possible absence of judicial review may not pose any problems in view of the legal requirements to be complied with an international court.³¹ The constitutional acts of the appointment of a judge were indirectly recognized as not subject to judicial review when the judge was appointed by non-democratic bodies (Council of State, President Wojciech Jaruzelski) or with the participation of an unconstitutionally composed body (National Council of the Judiciary before 2017), since the international court did not challenge, in principle, its independence and impartiality.³² And, finally, the international court did not agree to create a separate procedural measure, which does not exist in the national legal order but would allow to launch judicial review of constitutional acts of the appointment of a judge.³³

An explanation of the nature of the prerogative of the President of the Republic of Poland to appoint judges requires discussing its foundations. Undoubtedly, the systemic act of appointing a judge by the President of the Republic of Poland is rooted in the constitutional regulation [Czarny 2006, 79-88] since the appointment of a judge by the President of the Republic of Poland is based on the norms of constitutional law [Kijowski 2004, 6]. As a result, it creates the constitutional status of a judge, thus establishing an appointment relationship between the judge and the Republic of Poland [Czarny 2006, 79-88]. Of course, the act of appointing a judge by the President of the Republic of Poland cannot then be based on the norms of administrative law, because it does not fall within any of the legal forms of activity of public administration.³⁴ Moreover, there is no doubt that the act of appointing a judge by the President of the Republic of Poland is not based on the norms of civil law, because it is characterized by clear public-law inclinations. Hence, it can never imply the existence of a civil case, neither in the substantive nor in the formal sense.³⁵ In such a case, it cannot be stat-

³⁰ See judgment of the Court of Justice of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982 – paragraphs 133 and 145; judgment of the Court of Justice of 2 March 2021 *C-824/18 A.B. and Others v Krajowa Rada Sądownictwa and Others* ECLI:EU:C:2021:153 – paragraphs 122 and 128; judgment of the Supreme Administrative Court of 21 September 2021 ref. no. II GOK 10/18, Lex no. 3241781 – point 9.

³¹ See judgment of the Court of Justice of 2 March 2021, *C-824/18 A.B. and Others* ECLI:EU:C:2021:153.

³² See judgment of the Court of Justice of 29 March 2022, *C-132/20 Getin Noble Bank*, ECLI:EU:C:2022:235.

³³ See judgment of the Court of Justice of 22 March 2022, *C-508/19 Prokurator Generalny*, ECLI:EU:C:2022:201.

³⁴ See decision of the Regional Administrative Court in Warsaw of 24 January 2019, ref. no. VI SA/Wa 2287/18.

³⁵ See decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19.

ed, for example, that an appeal against a resolution of the National Council of the Judiciary is a separate type of civil action that could be effectively secured.³⁶ Under the legislation currently in force, there is no legal basis for the use of a security that would oppose the issuance by the President of the Republic of Poland of a constitutional act of appointment of a judge.³⁷

From the perspective of the nature of the prerogative of the President of the Republic of Poland to appoint judges, the principle of democratic state ruled by law must be mentioned. It should be emphasised at this point that it does not specify the manner in which judges are to be appointed, but rather requires them to be independent.³⁸ However, independence is not intrinsically linked to the manner in which a judge is appointed and should never be examined *ex ante* and *in gremio*, i.e. before the act of appointment of the judge by the President of the Republic of Poland has taken place, and regarding all judges as a whole.³⁹ This constitutional standard could not, of course, be replaced by interpretation guidelines based on international treaties, which were recently formulated by two international courts,⁴⁰ especially considering that they have been formulated so as to give the norms of international agreements also the character of imperative statements (orders and prohibitions) towards national courts.⁴¹ Admittedly, the defects in appointing a judge lead to the conclusion that the court composed of such a wrongly appointed judge is not a “lawfully established court”, which means that the prerogative of the President of the Republic to appoint judges is not directly questioned, but nonetheless entails a tendency towards depreciating it.⁴² Such approach was confronted by the national tribunal which generally found it inconsistent with the constitutional regulation.⁴³

³⁶ See judgment of the Supreme Administrative Court of 27 September 2018, ref. no. II GW 28/18, Lex no. 2566106; decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19.

³⁷ See decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19.

³⁸ See judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21.

³⁹ *Ibid.*

⁴⁰ See judgment of the Court of Justice of 6 October 2021, C-487/19 W.Ż, ECLI:EU:C:2021:798; judgment of the European Court of Human Rights of 8 November 2021 in the Case of Dolińska-Ficek and Ozimek v. Poland (Applications nos. 49868/19 and 57511/19).

⁴¹ See judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21.

⁴² See judgment of the Court of Justice of 6 October 2021, C-487/19 W.Ż, ECLI:EU:C:2021:798; judgment of the European Court of Human Rights of 8 November 2021 in the Case of Dolińska-Ficek and Ozimek v. Poland, Applications nos. 49868/19 and 57511/19.

⁴³ See judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21; judgment of the Constitutional Tribunal of 10 March 2022, ref. no. K 7/21 (Journal of Laws item 643).

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