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## **The Evolution of the Institution of President's Prerogative Powers in the Polish Legal System**

**Keywords:** President, member of the Council of Ministers, Council of Ministers, authorities, countersignature, political system, prerogative, constitution, independent presidential competences, the head of the State.

**Słowa kluczowe:** Prezydent, członek Rady Ministrów, Rada Ministrów, władze, kontrasygnata, ustrój, prerogatywa, konstytucja, samodzielne uprawnienia prezydenta, głowa państwa.

### **Abstract**

The essay describes the concept and evolution of a countersignature and prerogatives of the President of the Republic of Poland. The countersignature is a special signature (a consent) of a member of the Council of Ministers which is necessary to validate the President's legal (official) act. Prerogatives are enumerated in a constitutional act as presidential competences, which do not require a signature of a member of the Government (a countersignature).

The author claims that the institution of independent presidential competences was invented by Polish lawyers and used for the first time ever in the Polish Constitution of 1935. Further, the author describes the evolution of the institution of a countersignature and prerogatives in the Polish political system. It is said that nowadays the number of independent competences does not have such significant importance as it is claimed in constitutional law and in reality prerogatives do not strengthen the political position of

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the President significantly. His/her power depends on whole relations between the authorities described in constitutional provisions.

### **Streszczenie**

#### **Ewolucja instytucji prerogatyw prezydenta w polskim systemie prawnym**

Autor w opracowaniu przedstawia istotę i rozwój instytucji kontrasygnaty oraz samodzielnych uprawnień Prezydenta Rzeczypospolitej. Kontrasygnata jest szczególnego rodzaju mechanizmem (podpisem właściwej osoby, z zasady członka rządu), który jest niezbędny do legalizacji aktu rządowego głowy państwa. Członek rady ministrów poprzez akt podpisania aktu prezydenta przejmuje za niego odpowiedzialność polityczną. Równocześnie akt rządowy głowy państwa jest nieważny do czasu opatrzenia go kontrasygnatą. Prerogatywy są to natomiast enumeratywnie wyliczone kompetencje prezydenta, które dla swojej ważności nie potrzebują współpodpisu członka rządu.

W publikacji autor podnosi tezę, że prerogatywy są owocem polskiego konstytucjonalizmu i zostały po raz pierwszy w historii wprowadzone do ustroju w Konstytucji kwietniowej z 1935 r. Ponadto w opracowaniu została przedstawiona ewolucja instytucji kontrasygnaty i powiązanych z nią prerogatyw w polskim systemie prawnym. Autor wskazuje, że współcześnie prerogatywy nie mają tak doniosłego znaczenia jak im się to przypisuje w nauce prawa ustrojowego i że w praktyce samodzielne uprawnienia głowy państwa wcale tak istotnie nie wzmocniają pozycji i funkcji prezydenta. Jego władza i status zależą od całokształtu postanowień ustawy zasadniczej, które definiują relacje pomiędzy organami państwa.

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The institution of a countersignature is typical of parliamentary systems in which the executive power is vested in the head of the state (a president or a monarch) and the government (the council of ministers). In such political systems heads of the state do not play a significant role; they usually represent states and do not hold strong power. The head of the State is independent of the Government and the Parliament and does not bear any political responsibility before these authorities. His/her legal (official) acts require a signature of a Minister to be validated (a countersignature). The countersignature is a classic institution which allows one to distinguish the parliamentary sys-

tem from the presidential system, because it can only exist in the conditions of dual executive<sup>2</sup>. A typical feature of parliamentary systems is the advantage of the Government over the head of the State. The countersignature is a mechanism which emphasizes this distinction.

The institution of presidential prerogatives as acts which do not require signatures of members of the Council of Ministers was created in the Polish legal system during the interwar period. This institution was introduced to strengthen the power of the head of the State. It was so attractive that other countries have adopted it into their political systems. Nowadays a countersignature and prerogatives are interpreted commonly as one combined mechanism of exercising power by the President. In this paper I present the origin, the evolution and the significance of prerogatives in the Polish political system in the 20<sup>th</sup> century.

The conception of personal independent acts of the head of the State, which did not require the consent of another authority, arose at the beginning of the creation of the Republic of Poland in 1918 in one of the first drafts of the constitution<sup>3</sup>. Finally, the legislator did not decide to realize those ideas and the concept itself. The first Polish Constitution<sup>4</sup> of the 20<sup>th</sup> century was a typical, very democratic legal act. It introduced a classical parliamentary system with the weak position and power of the President of the Republic. The head of the State was elected by the Parliament. Under Art. 44 of the Constitution – all his/her acts had to be signed by the Prime Minister and an appropriate Minister to be valid and it was members of the Council of Ministers who took responsibility for the act. The President did not bear any political liability before the Sejm<sup>5</sup>. This particular solution was borrowed from the French legal system where legal acts of the President required an agreement of a member of

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<sup>2</sup> A. Frankiewicz, *Kontrasygnata aktów urzędowych Prezydenta RP*, Cracow 2004, p. 13.

<sup>3</sup> See: A. Rakowska, *Kontrasygnata i prerogatywy Prezydenta w dyskusji ustrojowej poprzedzającej uchwalenie Konstytucji kwietniowej*, "Acta Universitatis Lodziensis. Folia Iuridica" 2009, No. 70, pp. 66–67.

<sup>4</sup> The Constitution of 17 March 1921 (Dz.U.RP No. 44, item 267). The text is published in Z.J. Hirsz, *Historia ustroju i prawa polskiego. II Rzeczpospolita*, Białystok 1994, pp. 76–88.

<sup>5</sup> The President bears the responsibility for treason, violating the Constitution and committing a crime before the Tribunal of the State. See A. Mycielski, *Polskie prawo polityczne. Konstytucja z 17. III. 1921 r.*, Cracow 1947, pp. 134–137; J. Zalesny, *Odpowiedzialność konstytucyjna w prawi polskim okresie transformacji ustrojowej*, Toruń 2004, pp. 72–79.

the Council of Ministers<sup>6</sup>. Solutions of the March Constitution of 1921 weakened the political position of the head of the State. The countersignature included all types of activity and all legal acts of the President<sup>7</sup>, which meant that while exercising the power, the head of the State was entirely dependent on Ministers. This construction of the President's competences prevented him/her from playing any important role in the political system<sup>8</sup>. It is significant that a countersignature was double. The President's act required two signatures of an appropriate Minister and that of the Prime Minister to be validated. A refusal of one of them rendered the President's act invalid. In practice, only few presidential competences did not require a countersignature. These included: designation and refusal to accept the Prime Minister's deposition, and the right to dissolve the Sejm of Silesia before the end of its term of office<sup>9</sup>. This practise was reasonable, justified and logical, but it was also criticized because of its unconstitutionality. Now it can be said that informal execution of the provisions of the March Constitution could be the beginning of legal formation of prerogatives.

The legal and political system based on the March Constitution was weak and required changes. Nowadays it is claimed that the regime proclaimed by the March Constitution, despite its theoretical and democratic values, failed<sup>10</sup>. The parliamentary system became distorted. Politicians and lawyers tried to improve and repair it. A serious amendment of the Constitution took place in 1926<sup>11</sup>. New provisions vitally strengthened power and a legal position of the head of the State, but they did not have any important influence on acts of the President who still needed the countersignature of two members of the Council of Ministers to validate his/her act. In

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<sup>6</sup> W. Komarnicki, *Polskie prawo polityczne (Geneza i system)*, Warsaw 1922, pp. 258–259. A similar statement was presented by A. Mycielski, op.cit., p. 138.

<sup>7</sup> A. Frankiewicz, op.cit., p. 51.

<sup>8</sup> Ibidem.

<sup>9</sup> J. Tarnowski, *Projekt nowej ustawy konstytucyjnej (z komentarzem)*, Cracow 1928, p. 30; Z. Witkowski, *Prezydent Rzeczypospolitej Polskiej 1921–1935*, Warsaw–Poznań–Toruń 1987, p. 133.

<sup>10</sup> D. Górecki, *Prezydent w Konstytucji Kwietniowej – oryginalność rozwiązania konstytucyjnego*, [In:] *Prawo konstytucyjne II RP. Nauka i instytucje*, ed. P. Sarnecki, Cracow 2006, p. 134.

<sup>11</sup> The statute of 2 August 1926 amending the Constitution of 17 March 1921 (Dz.U. 1926, No. 44, item 267).

this area serious changes were brought by a new Constitution which was passed in 1935<sup>12</sup>.

The Constitution of 1935 rejected the democratic parliamentary system and directed the Republic of Poland to an authoritarian conception of the State. Article 2 of the Constitution provided that the President of the Republic was the head of the State and was responsible only to history and God. All undivided and uniform powers were vested in the President. The other authorities were subordinated to the head of the State. He/she was supposed to control and coordinate executing powers by the other authorities in the execution of their powers. The political system was based on a strong position of the President<sup>13</sup>. The new Constitution significantly changed the conception of the countersignature. Article 14 sec. 1 repeated previous solutions and proclaimed that for its validity an official act of the President required a signature of the Prime Minister and an appropriate minister. The President was not responsible for his/her acts. Legal (official) acts did not require any signature of members of the Council of Ministers if they were prerogatives<sup>14</sup> (presidential personal competences). The Constitution enumerated prerogatives in its Art. 13 sec. 1 pkt. 1. The Constitution and the prerogatives considerably changed and strengthened the position of the head of the State. It is essential to notice that the countersignature was the main rule of the President's activity and prerogatives were exceptions<sup>15</sup>. Simultaneously, the Constitution did not state that members of the Council of Ministers were responsible for the President's acts before the Sejm. Such a solution was implemented in the Constitution of 1921. The basis of the conception of prerogatives was an assumption that there was a number of presidential decisions which should not be dependent on any member of the Government. Besides, nobody should bear responsibility before the

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<sup>12</sup> The Constitution of 23 March 1935 (Dz.U. No. 30, item 227). The text is published in Z.J. Hirsz, op.cit., pp. 203–217.

<sup>13</sup> D. Górecki, op.cit., p. 135.

<sup>14</sup> Stanisław Car was the first person who used a term “prerogative” with reference to the President's individual and independent act, [In:] *Istota i zakres władzy prezydenta Rzeczypospolitej Polskiej (tezy na Zjazd Prawników Polskich w Wilnie, “Palestra” 1924, p. 206.*

<sup>15</sup> It was called the restrictive enumeration system. See W. Komarnicki, *Ustrój państwowy Polski współczesnej*, Wilno 1937, p. 222. Stanisław Car was an author of such a conception idem, *Kontrasygnata*, [In:] *Na drodze ku nowej konstytucji*, ed. S. Car, Warsaw 1934, p. 115.

Sejm<sup>16</sup> for these acts, because this organ should not have any influence on contents and matter of these acts. As a result, the prerogatives strengthened presidential competences and power with reference to both the Council of Ministers and the Sejm. Prerogatives were supposed to allow the President to avoid political disputes over problems which were beyond the scope of the Government<sup>17</sup>. Independent competences of appointing and dismissing officials made him a real supervisor of the system. It made him/her the main creator of internal and external politics. He/she was able to solve disputes of others authorities and impose his/her point of view. The Government and its members were responsible before him/her and the President was able to made them to carry out his/her policy. In fact the President was able to recall the Council of Ministers. This institution significantly weakened the countersignature, because ministers were politically dependant on the President. The prerogatives made him/her the superior, independent and most important factor of the state. The lack of legal responsibility gave him/her almost unlimited power<sup>18</sup>. In 1939 at the outset of World War II President Ignacy Mościcki executed one of his prerogatives and appointed his successor, Władysław Raczkiewicz who held his post (of the President of the Republic) until June 1946<sup>19</sup>.

After the war the new constitutional act was established on 19<sup>th</sup> February 1947<sup>20</sup>. This act referred to solutions of the March Constitution of 1921. It means that the legislator returned to the conception of weak presidency. Hence, the Constitution of 1947 established the countersignature, but disposed of its exceptions. The next Polish Constitution of 1952<sup>21</sup> erased the institution of the President of the Republic<sup>22</sup>. The situation changed in 1989 when a seri-

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<sup>16</sup> S. Car, *Kontrasygnata...*, p. 113.

<sup>17</sup> A. Paszkudzki, *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1935 roku. Tekst. Komentarz*, Lwów–Warsaw 1935, p. 22.

<sup>18</sup> This solution was criticised by constitutional lawyers, see W. Komarnicki, *Ustrój...*, p. 252. And it was (is) claimed that it landed the political system in to the authoritarian system.

<sup>19</sup> See: W. Rostocki, *Stosowanie Konstytucji kwietniowej w okresie drugiej wojny światowej*, Lublin 1988, *passim*.

<sup>20</sup> Constitutional Act of 19 February 1947 on the system and scope of operation of the highest bodies of the Republic of Poland (Dz.U. No. 18, item 71).

<sup>21</sup> The Constitution of The Polish People's Republic of 22 July 1952 (Dz.U. No. 33, item 232).

<sup>22</sup> See: J. Ciapała, *Status ustrojowy Prezydenta jako głowy państwa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1992, No. 2, pp. 13–14.

ous amendment of the Constitution of 1952 was made<sup>23</sup>. This act restored the institution of the President and reinstated dual executive power. The amendment was supposed to partially introduced a democracy into the Polish political system. It initiated reforms which were to finish the communistic system in Poland. However, remains of this regime still remained in the system; for example, the conception of presidency was not entirely democratic. This institution was more an example of efforts supposed to slow down the changes. The position of the head of the State was very strong and was disproportionate to other organs of authority. The President was vested strong power in and was provided with competences which allowed him to control other organs of authority. There were no institutions which could politically control the President. Generally, the amended Constitution did not require any signature of a member of the Council of Ministers to validate presidential acts. Nevertheless, Art. 32 pkt. f, g provided that a statute shall define types of the President's important legal acts which required a countersignature of the Prime Minister. In theory, this conception could reduce the power of the President, but such a statutory act was never established. In practice, the President had executed his/her power without any permission (a signature) of the Prime Minister<sup>24</sup> until a new constitutional act entered into force in 1992. This construction was seriously different from the conception of a parliamentary system in which the countersignature defines relations between the Sejm, the President and the Council of Ministers. Between the years 1989–1992 nobody was politically responsible before the Sejm for the legal acts of the President<sup>25</sup>.

In 1992 the reform of the Polish political system was continued. Another constitutional act was established on 17<sup>th</sup> October 1992<sup>26</sup>. In the wake of the

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<sup>23</sup> The Act of 7 April 1989 on the Amendment of the Constitution of the Polish People's Republic (Dz.U. No. 19, item 101).

<sup>24</sup> R. Głajcar, *Ewolucja siły polskiej prezydentury w latach 1989–2009*, [In:] *Transformacja systemowa w Polsce 1989–2009. Próba bilansu*, eds. R. Głajcar, W. Wojtasik, Katowice 2009, p. 203; P. Momro, *Prezydentura gen. Wojciecha Jaruzelskiego w świetle teorii i praktyki zarządzania władczymi kompetencjami ustrojowymi*, "Annales Universitatis Paedagogicae Cracoviensis Studia Politologica" 2015, No. XIV, p. 75.

<sup>25</sup> R. Głajcar, op.cit., p. 203.

<sup>26</sup> Constitutional Act of October 17, 1992 on mutual relations between the legislative and executive power of the Republic of Poland and on local self-government (Dz.U. No. 84, item 426).



changes, a previous strong position and power of the President was weakened. The institution of a countersignature was finally restored. Article 46 of the Constitution provided that President's legal acts required a signature of the Prime Minister or an appropriate Minister to be validated. Article 47 introduced exceptions from this rule. The regime was more democratic and parliamentary shaped. Despite the reintroduction of the countersignature the President still retained strong power and was a serious political player. Competences which did not need a signature gave him/her an influence on implementing internal and external state policy. The Council of Ministers and ministers (in particular, of defense and of foreign affairs) were dependent on him/her. Enumerating prerogatives seemed to be a means which was established to limit the President's power. However, in the light of all constitutional provisions the practice of vesting power showed that the President was a strong and independent authority. The countersignature did not limit the President's power, because the council and minister were politically depended on him/her. Moreover, the President was able to dismiss the whole Council and was able to convene meetings of the Council of Ministers and chair the meeting. This competence could make the President become a leader of executive power, but the practice of exercising powers did not go in this direction. Members of the Council of Ministers were not responsible for approved presidential acts before the Sejm. The countersignature could be executed by the Prime Minister or an appropriate Minister. The Constitution did not require any cooperation of these entities. It strengthened the power of the head of the State, but it could lead to disputes in the body of the Council. It is said that the concept of the presidency was similar to French solutions (partly copied)<sup>27</sup>.

The situation changed after establishing the currently binding Constitution<sup>28</sup> in 1997. The new act has reconstructed the whole system and replaced the position of the President considerably. The head of the State is still elected in general elections and still is a part of executive power, but his/her influence on the activity of the Government has been reduced. Paradoxically, the number of prerogatives is bigger than in the previous Constitutions of 1992

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<sup>27</sup> J. Ciapala, *op.cit.*, pp. 25–26.

<sup>28</sup> The Constitution of the Republic of Poland of 4 April 1997 (Dz.U. No. 78, item 483).



or of 1935. Yet, contemporary independent competences do not strengthen the power and position of the President.

Under Art. 144 sec. 1 of the Constitution of 1997 all legal acts of the President require a signature of the Prime Minister to validate them. The Prime Minister takes political responsibility for their contents before the Sejm. Article 144 sec. 4 brings over 30 exceptions from the mentioned rule. It would seem that such a number of prerogatives strengthens the President's position; however, this assumption is incorrect. Despite a considerable number of prerogatives they are not very important. Most of them are obligations of the head of the State (e.g. proclaiming elections to the Sejm and to the Senate or summoning the first sitting of a newly elected Sejm and Senate) and the President does not have an opportunity to make any important decision. The President just executes his obligation without authorization (a signature) of the Prime Minister. Part of presidential prerogatives are executed at the request or upon the consent of other public authorities (e.g. proclaiming the holding of a nationwide referendum or appointing judges). In such situations the head of the State is supposed to cooperate with authorities other than the Prime Minister and does not act independently. Some of the presidential competences do not have ruling nature (e.g. delivering a message to the Sejm, to the Senate or to the National Assembly). They are prestigious, but not powerful. Part of the President's competences can be executed by other authorities (e.g. introducing legislation or making a referral to the Constitutional Tribunal). It means that an official act of the head of the State can be replaced by acts of others entities<sup>29</sup>.

Summarizing all presented points of view in this essay it is vital to mention a few conclusions. Nowadays the countersignature and prerogatives are characteristically of parliamentary systems. For instance, these mechanisms do not exist in the USA or in the Russian Federation. Originally, the invention of independent competences of the head of the State was to strengthen his/her power and position (see the Constitution of 1935). The number of prerogatives constantly increases; however, it does not significantly influence a position of the Polish President. It can be said that the situation is reversed.

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<sup>29</sup> M. Dąbrowski, *Znaczenie tzw. samodzielnych uprawnień prezydenta RP*, [In:] *Fundamentalne wartości i zasady ustrojowe. Model konstytucyjny a praktyka ustrojowa w Polsce*, eds. M. Paździor, B. Szmulik, Lublin 2016, pp. 104–105. The complete substantiation of the mentioned theses can be found in my cited publication (pp. 86–105).

The fewer prerogatives the head of the State had, the stronger the position and power of the President was. For example, the real power of the President between 1935–1939 was much more extensive than the power of the contemporary President of the Republic of Poland. Simultaneously, the number of prerogatives in the Constitution of 1935 was seriously lower. This statement brings three conclusions. Firstly, it must be indicated that the number of prerogatives does not have such an influence on the power vested in the President as it is mentioned in literature of the subject. Secondly, the real position of the head of the State is determined by much more complicated and sophisticated mechanism of a political relationship constructed by provisions of the Constitution. Thirdly, prerogatives are a typical institution of creating legal relations between organs of authority in parliamentary systems. They restrict the influence of the Government on the President's activity, particularly, in areas which are not connected with the exercise executive of power.

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