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Inadmissibility of Judicial Control over Decisions of the President of the Republic of Poland Concerning the Appointment of Judges in the Case – Law of Administrative Courts

Keywords: appointment of judges, prerogatives, administrative court control, principle of the separation and balance between powers
Słowa kluczowe: powołanie sędziów, prerogatywy, kontrola sądowo administracyjna, zasada podziału i równowagi między władzami

Abstract

The study presents the position of administrative courts relating to the issues of presidencial prerogative related to the appointment of judges. For years now, administrative courts have been consistent in not recognizing their competence to adjudicate in matters regarding President`s decisions concerning the appointment of judges. The arguments of the courts can be divided into several groups: 1) those connected with prerogatives and non-inclusion of the President among the organs of public administration, 2) those referring to the principle of the separation of powers, 3) those regarding the way the President`s decisions are classified. It is flagging out a certain new trend in the case-law of administrative courts, relating the classification of certain activities of President of Republic of Poland as activities of public administration in a functional sense.

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Streszczenie

Niedopuszczalność sądowej kontroli postanowień Prezydenta RP w sprawie powołania do pełnienia urzędu na stanowisku sędziego w orzecznictwie sądów administracyjnych

W opracowaniu przedstawione zostało stanowisko sądów administracyjnych odnoszące się do problematyki prezydenckiej prerogatywy związanej z powoływaniem sędziów. Sądy administracyjne konsekwentnie od lat nie uznają swojej właściwości do orzekania w sprawach związanych z postanowieniami Prezydenta dotyczącymi powołania do pełnienia urzędu na stanowisku sędziego. Argumenty sądów można podzielić na kilka grup: 1) związane z prerogatywą oraz brakiem zaliczenia Prezydenta do organów administracji publicznej, 2) odwołujące się do zasady trójpodziału władzy, 3) dotyczące sposobu zakwalifikowania postanowienia Prezydenta. Zasygnalizowana także została pewna nowa tendencja w orzecznictwie sądów administracyjnych dotycząca klasyfikacji pewnych czynności Prezydenta RP jako działalności administracji publicznej w znaczeniu funkcjonalnym.

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I. General Introduction

The key role in considerations about the admissibility of conducting an administrative court control of the decisions made by the President of the Republic of Poland on the appointment of judges is played by the constitutional set-up of this presidential competence[2]. The said impact can be evaluated on two levels – in the sphere of creating a personal structure of the judicial power, and in the realm of the implementation of the systemic rules which, according to the Constitution, are guarded by the President of the Republic of Poland.

Article 179 of the Constitution of the Republic of Poland vests the right of the appointment of judges in the President of the Republic of Poland. The President, however, does not nominate judges on his own discretion as in order to appoint a given person it is indispensable for them to be included in

[2] J. Marszałek-Kawa, D. Plecka (eds.), Dictionary *of Political Knowledge*, Toruń 2019.

the motion submitted by the National Council of the Judiciary. The process of appointment by the President requires cooperation of both of these state organs. Moreover, none of the mentioned bodies is in a position to substitute one another in carrying out the tasks entrusted to it – neither may the President replace the National Council of the Judiciary in issuing opinions and evaluating candidates running for the office of a judge, nor may the National Council of the Judiciary, in substitution of the President, appoint a given person as a judge. As prescribed by the Constitutional Tribunal in its ruling as of 23 June 2008, Case No. Kpt 1/08, "these are different acts which refer to the exercise of different competences". The authority of the President to appoint judges, in the light of the Art. 144 para. 3 subpara. 17 of the Constitution, was established as a prerogative. This is of key importance for defining the role and significance of the appointment act issued by the President of the Republic of Poland, as well as for the possibility to challenge it before other organs, especially judicial ones. The fact that the Prime Minister is not required to countersign a judicial appointment act proves that the President is autonomous in his decisions concerning judicial appointments. At the same time, it strengthens the independence of the judiciary itself and that of persons performing functions therein vis-à-vis the second organ of the executive power, i.e. the Council of Ministers. The Constitutional Tribunal and administrative courts would repeatedly stress that "it is of significance for the functioning of the President in this respect [the appointment of judges] that in the light of the Art. 144 para. 3 subpara. 17 of the Constitution, the competence of the President stipulated in the Art. 179 of the Constitution is regarded as a personal authority (prerogative) of the President (and thus as: the sphere of his exclusive discretion and responsibility) and that the President shall be the supreme representative of the Republic of Poland" (Art. 126 para. 1 of the Constitution). The systemic role of the President as specified in the Art. 126 para. 1 of the Constitution, is of major importance in the evaluation of the legal nature and the significance of the act of appointment as a judge. Another important factor is that of non-specification of the features of an official judicial appointment act by the laws regulating the system of courts and the status of judges covered by the scope of the appointment acts performed by the President. The constitutional formula of "the President's decision" being published in the Official Gazette of the Republic of Poland "Monitor Polski" strips the

President`s official act in its external form of the requirement of providing reasons behind a personnel-related"[3]. Lack of Prime Minister`s signature on the official act regarding the appointment of a judge issued by the President should be regarded as a way to boost the independence of the judiciary from the government and organs subordinated to it. As the Constitutional Tribunal observed in its judgment of 5 June 2012, Case No. K 18/09, the "requirement of a countersignature would afford to the Prime Minister the right to veto the candidatures proposed by the National Council of the Judiciary"[4].

The appointment of judges by the President, under the Constitution of the Republic of Poland, can also be viewed from the perspective of the legitimization of judges to implement the administration of justice on behalf of the sovereign. For the sovereign in the Republic of Poland does not have a direct impact either on proposing judicial candidates nor on the appointment of judges. There is no stage in the process of the appointment of judges at which citizens could present their opinions about the candidates to the office of a judge. Candidates to the office of a judge are not granted direct democratic legitimacy by the sovereign to implement, on their behalf, the administration of justice. Whereas all the court decisions are issued "in the name of the Republic of Poland". The position of judges within the system of government results from Art. 10 of the Constitution, which sets out the principle of the separation of and balance between powers while judges should be viewed as a "personal substrate" of one of the cooperating powers. This means that as representatives of one of the powers they are obliged to exercise this power in the name of the sovereign[5]. Hence, the democratic legitimacy to the exercise of judicial power by judges, in the name of the sovereign, should be sought precisely in the way they are appointed. The judges are appointed by the Presi-

[3] Ruling of the Constitutional Court of 23 June 2008, Case No. Kpt 1/08, Judgement of the Constitutional Court of 5 June 2012, Case No. K 18/09, ruling of the Province Administrative Court in Warsaw of 22 February 2008, Case No. II SAB/Wa 8/08, ruling of the Province Administrative Court in Warsaw of 29 December 2016, Case No. II SA/Wa 1652/16, ruling of the Supreme Administrative Court of 7 December 2017, Case No. I OSK 857/17.

[4] L. Garlicki, *Komentarz do art. 179 Konstytucji*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Warsaw 1999–2007.

[5] P. Sarnecki, *Zagadnienia samorządu sędziowskiego*, [in:] *Ratio est anima legis. Księga Jubileuszowa ku czci Profesora Janusza Trzcińskiego*, ed. J. Góral, Warsaw 2007, p. 469; ruling of the Supreme Administrative Court of 9 October 2012 Case No. I OSK 1874/12.

dent of the Republic of Poland who constitutes the "head" of the statehood, being the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority (Art. 126 para.1 of the Constitution). President`s autonomous decision to appoint a given person as a judge constitutes a kind of sharing by the President of his democratic legitimacy to exercise power on behalf of the sovereign – the President, elected in universal and direct elections, entrusts a judge, through the act of appointment, with the administration of justice in the name of the sovereign. Thus, "the President who impersonates the supreme dignity of the state and the majesty of the Republic of Poland, by entrusting a judge with the judicial power, legitimizes it in the name of the People by whom he was elected"[6].

II. Inadmissibility of Control over President's Appointment Decisions in the Case – Law of Administrative Courts

The issue of inadmissibility of judicial control over President's decisions concerning the appointment of judges was repeatedly a subject of consideration by administrative courts.

The courts' arguments refer predominantly to the set-up of President's competence to appoint judges as a prerogative and are focused on defining features of the presidential act. Especially an autonomous and discretionary character of prerogatives is stressed. In its ruling from 22 February 2008, Case No. II SAB/Wa 8/08, the Province Administrative Court in Warsaw adjudicated that the "term *prerogatives* is frequently associated with discretionary, very concrete powers of the Head of State, the implementation of which has a considerable impact in terms of relations with the organs of individual powers. At the same time, the Court underlined that the scope of presidential prerogatives has been shaped in a way which allows the President to exercise, in an autonomous manner, the tasks and competences which exceed the sphere of governmental activities (the executive sphere), and which are connected with the function of the President as an arbitrator, as well as with the impact upon the composition and the functioning of the executive or the ju-

[6] A. Frankiewicz, *Kontrasygnata aktów urzędowych Prezydenta RP,* Kraków 2004, pp. 125–126.

dicial power". This is clearly visible in the President's competence to appoint judges, which is included among the competences of political arbitration and the balance between powers[7]. Administrative courts have stressed, in this respect, the significance of Art. 126 of the Constitution. Pursuant to the Art. 126 of the Constitution, the President shall be the supreme representative of the Republic of Poland, the guarantor of the continuity of State authority, shall ensure observance of the Constitution, safeguard the sovereignty and security of the State, as well as the inviolability and integrity of its territory. Such status of the President with a simultaneous shifting of the burden of running day-to-day political affairs to the Council of Ministers – through establishing in the Art. 146 para. 2 of the Constitution the presumptive competence of the Council of Ministers in conducting the affairs of the State – makes the President more of an arbitrator than an organ in charge of the day-to-day policy of the state[8]. Therefore, the President's activities connected with the appointment of judges may not be construed as the sphere of public administration activities, since through his decision on the appointment of judges, the President "acts in his capacity as Head of the Polish State implementing the competences of arbitration and balancing of powers which consist in the shaping of the judiciary in the scope of its personnel composition. This, in the assessment of the Court [Province Administrative Court], goes beyond the sphere of activities covered by the public administration, the control over which is vested in administrative courts"[9]. A similar view was shared by the Supreme Administrative Court, which in its ruling of 9 October 2012, Case No. I OSK 1875/12 adjudicated that "the position within the system of government, defined in such a way, and further specified in the provisions of the Constitution of the Republic of Poland by the scope of competence of the President of the Republic of Poland, gives rise to the conclusion that in the exercise of his constitutional competences the President does not perform the tasks of

[7] R. Mojak, [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 1997, p. 336.

[8] Compare considerations by P. Sarnecki on the trends to classify the President of the Republic of Poland as representative of the so-called fourth power – P. Sarnecki, *Komentarz do artykułu 126 Konstytucji RP,* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 1, ed. L. Garlicki, Warsaw 1999, p. 15.

[9] Ruling of the Province Administrative Court of 22 February 2008, Case No. II SAB/Wa 8/08; similarly – ruling of the Province Administrative Court of 19 March 2008 r., Case No. II SAB/Wa 17/08.

public administration. The regulation of the constitutional competence of the President of the Republic of Poland to appoint judges (…) does not constitute an activity of public administration. The appointment of staff to the organs of the sovereign, such as judicial authorities, which adjudicate in the name of the Republic of Poland, does not constitute an activity of public administration". The Supreme Administrative Court also quoted the position it took in a different case related to the admissibility of judicial control over the act of the President construed as his prerogative, stating that "to the extent that the President of the Republic of Poland acts as Head of the Polish State, symbolizing the majesty of the State, its sovereignty, the fully discretionary power of the State goes beyond the sphere of administrative activity, hence it is not an implementation of public administration. It is therefore not subject to control by an administrative court". It is worth adding that also the Art. 60 of the Constitution of the Republic of Poland, which sets out the principle of equal access to public services, cannot, in the opinion of the Supreme Administrative Court, constitute a basis for introducing a court-administrative control over the acts of the President with respect to the nomination of judges, "as the Art. 60 of the Constitution of the Republic of Poland does not give rise to a claim addressed at organs representing the State, and thus not only at the President of the Republic of Poland, but also at the National Council of the Judiciary. The role of this regulation as a guarantee is demonstrated in the fact that it constitutes one of the criteria which ensures the proper implementation of the powers of state organs wherever such control finds its normative base (e.g. in proceedings concerning control of the NCJ resolutions). It does not, however, give rise to a norm which would justify the exercise of administrative court control over prerogatives of the President of Poland". The National Administrative Court has also reaffirmed its assessment of President's actions in respect to the appointment of judges in the decision of 27 January 2020, Case No. I OSK 1917/18, recognizing that the "power to appoint judges is a personal authority of the President whereas the Constitution does not know the right of subjective access to the judicial service. This, according to the Court, determines the impossibility to exercise control by administrative courts within the scope of acts governed by such procedure".

A broad analysis on the impossibility of including the President of the Republic of Poland among the public administration organs was conducted by

the Supreme Administrative Court in its rulings of 7 December 2017, Case No. I OSK 857/17 and No. I OSK 858/17. While analyzing the position of the President within the system of government, the Court determined that "the President is not an organ of public administration within the meaning of Art. 5 §2 subpara. 3 of the Code of Administrative Procedure. The position of the President of the Republic of Poland is prescribed by the Constitution of the Republic. As a matter of fact, the Constitution includes the President among the organs of the executive power (Art. 10 para. 2 of the Constitution of the Republic of Poland). That does not imply, however, that the Head of State constitutes one of the organs of the public administration. The notion of executive power is broader than that of public administration and encompasses also: running the State policy, setting the directions for action, as well as the power to control and supervise. There is a good reason why the norm pertaining to the President of the Republic of Poland is enshrined in the Chapter V of the Constitution of the Republic of Poland entitled: The President of the Republic of Poland, rather than in Chapter VI bearing the title: The Council of Ministers and Government Administration. Moreover, it clear that there are no grounds whatsoever to treat the President of the Republic of Poland as a representative of the local government administration". Further in its analysis the National Administrative Court indicated that the possibility to regard a given organ as an administrative body in its functional meaning depends on the feasibility to "settle an administrative matter, i.e. the possibility, provided for in substantive administrative law, to specify in detail mutual rights and obligations of the parties to the administrative and legal relationship: an administrative organ and an individual entity not subordinated to that organ in terms of its organization". Simultaneously, the Court stressed that the possibility to include a given organ among the administrative bodies within the functional meaning in a situation in which this very organ is not an administrative body in the systemic understanding of the term, exists exclusively when the said organ "is competent to make a decision on the application of substantive administrative law and to establish, by virtue thereof, an individual norm"[10]. It is worth

[10] J. Borkowski, B. Adamiak, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2017, pp. 540–541.

noting, however, that lack of the possibility to include the President among the organs of public administration in the case-law of administrative courts stems from the principle of the separation of and balance between powers. According to the Supreme Administrative Court, "those acts of the President of the Republic of Poland which touch upon the judicial power should also be assessed considering the principle stipulated in the Art. 10 para. 1 of the Constitution of the Republic of Poland, which prescribes that the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers. (…) While noting that the final decision rests with the President of the Republic of Poland, one could describe this procedure [of appointing judges] as the implementation of the principle of cooperation between the executive, judicial and legislative powers. (…) This very cooperation is not merely a demand enshrined in the preamble to the Constitution of the Republic of Poland, but also, next to the separation of and balance between the powers, it constitutes one of the elements of the system-of-government rule formulated in Art. 10 para. 1 of the Constitution of the Republic of Poland"[11]. Hence, the final nature of presidential decisions concerning the appointment of judges ensures balance in the system of the separation of powers and counteracts domination by one single power. While establishing the principle of the separation of and balance between powers, the Lawmaker excluded the possibility of one power dominating over the other. According with the judiciary possibility to control, and thus to revoke, the judicial appointment acts performed by the President, would result, in practice, in the domination of the judicial power over other branches, and on the other hand, it would lead to self-cooptation of the judiciary since the final decision on who serves as a judge would be made precisely by the organs of this very power. One needs to bear in mind, however, that just like making presidential decisions regarding appointments subject to judicial control would upset the balance between powers, also the sphere of President's activity pertaining to judges could be reckoned as a public administration activity. In the mentioned decisions of 7 December 2017, the National Administrative

[11] Ruling of the Supreme Administrative Court of 7 December 2017, Case No. I OSK 857/17; ruling of the Supreme Administrative Court of 7 December 2017, Case No. I OSK 858/17.

Court quoted the position presented by A. Kijowski, namely that "the most important element of the legal status of judges is the public law relationship of the participation in the exercise of judicial power, which, according with the constitutional principle of the separation of and balance between powers (Art. 10 of the Constitution of the Republic of Poland), is opposed to the treatment thereof as a category of public administration"[12].

The third group of arguments pointed to by administrative courts, connected with non-inclusion of the President among the organs of public administration, which supports the thesis of inadmissibility of exercising judicial control over appointments of judges by the President, concerns the way such acts are classified. Administrative courts have been consistent in declining to regard them as administrative decisions or as other acts or deeds falling within the scope of public administration pertaining to rights or obligations arising under the provisions of law, and have classified them as the system-of-government acts. In its adjudications of 9 October 2012, Case No. I OSK 1874/12 and I OSK 1875/12, the Supreme Administrative Court ruled that there was no norm in substantive administrative law "which would be subject to an authoritative concretization. By the same token, there are no grounds to acknowledge a presumption, in this very subject, that matters need to be settled in the form of administrative decisions". In the opinion of the Supreme Administrative Court this results from: "firstly, non-existence of grounds allowing to include this sphere of activities in the realm of the public administration actions. Secondly, from the fact that neither the competence norm stipulated in the Art. 179 of the Constitution of the Republic of Poland nor Art. 55 para. 1 of the Act on the System of Common Courts give rise to a material and legal norm which would provide a basis for the determination of a right arising under the provisions of law". The same position was adopted by the Supreme Administrative Court also with regard to the mentioned rulings of 7 December 2017, adding that in his decision concerning appointments, the President "is not an organ of public administration, either in the system-of-government sense, nor within the functional meaning of the term".

[12] J. Kijowski, *Odrębność status prawnego sędziów Sądu Najwyższego,* "Przegląd Sądowy" 2004, No. 1, p. 18.

III. Conclusions

For years now, administrative courts have been consistent in not recognizing their competence to adjudicate in matters regarding President's decisions concerning the appointment of judges. The arguments of the courts can be divided into several groups:

- those connected with prerogatives and non-inclusion of the President among the organs of public administration,
- those referring to the principle of the separation of powers,
- those regarding the way the President's decisions are classified.

Nonetheless, at this point it is worth flagging out a certain new trend in the case-law of administrative courts. It emerged, for the first time, in the judgments of the Supreme Administrative Court passed as a result of an examination of a complaint against discontinuance of proceedings by the Province Administrative Court in Warsaw concerning the examination of claims lodged by the judges of the Supreme Court against the letters of the President aimed at setting the retirement date of the appellants[13]. In the referred ruling, the Court found that on the basis of the Supreme Court Act, the President "must be treated as an organ of public administration within the functional meaning of the term". At the same time, it was stated that the said solution "did not violate the constitutional and legal status of the President of the Republic of Poland as Head of the Polish State" and serves to guarantee to the appellants the possibility to exercise judicial control over the actions of the President within the scope of their legal status as judges of the Supreme Court[14]. Unfortunately, the Court failed to conduct a thorough analysis of the impact such classification of the President and his acts regarding judges would have on the position of judges, especially in the context of their public and legal status. Furthermore, the Court failed to assess what kind of influence such classification would exert on the balance-of-powers principle. It is also worth

[13] Ruling of 18 April 2019, Case No. II GZ 51/19; ruling of 18 April 2019, Case No. II GZ 60/19; ruling of 25 April 2019, Case No. II GZ 62/19.

[14] The position was repeated in the judgment of the Province Administrative Court in Warsaw of 6 November 2019, Case No. VI SAB/Wa 52/19, in the judgment of the Supreme Administrative Court of 30 September 2020, Case No. II GSK 295/20, and in the judgment of the Province Administrative Court in Warsaw of 29 September 2020, Case No. VI SA/Wa 309/20.

noting that in its judgments the Supreme Administrative Court highlighted that it was not challenging the so-far legacy in the area of case-law with regard to the inadmissibility of control over President's decisions pertaining to the appointment of judges.

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