

COUNTERSIGNATURE OF THE PRESIDENT OF THE
COUNCIL OF MINISTERS AND THE CORRECTNESS
AND EFFECTIVENESS OF AN ANNOUNCEMENT ON THE
NUMBER OF JUDGE VACANCIES IN THE SUPREME COURT
AND THE SUPREME ADMINISTRATIVE COURT BY THE
PRESIDENT OF THE REPUBLIC OF POLAND. A FEW
REMARKS ON THE LEGAL NATURE OF AN OFFICIAL ACT
OF THE PRESIDENT OF THE REPUBLIC OF POLAND
AND THE SCOPE OF HIS PREROGATIVES

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Summary. Appointing judges by the President of the Republic of Poland has been regulated in the Polish Constitution as one of the essential powers of the Head of State. It is therefore that “necessary power” to ensure the continuity of the functioning of the judiciary.

The procedure for the appointment for the office of a judge of the Supreme Court or the Supreme Administrative Court also includes the announcement by the President of the Republic of Poland about the judge vacancies in the Supreme Court or the Supreme Administrative Court. On the occasion of the characteristics of the very act of announcement, also the question of the requirement for the President of the Republic to obtain a countersignature from the President of the Council of Ministers (Prime Minister) arises. The literal wording of Art. 144, sect. 2 of the Constitution of the Republic of Poland seems to prejudge that all official acts of the President of the Republic, except those referred to in Art. 144, sect. 3 of the Constitution, require the signature of the President of the Council of Ministers to be valid. Although these rules seem quite clear at the level of the linguistic analysis of the provision in question, their practical application raises serious doubts.

Key words: separation of powers, judicial power and executive power, official act, prerogative of the President of the Republic of Poland, announcement of the number of judge vacancies

In accordance with the principle of separation of powers expressed in Art. 10 of the Polish Constitution,¹ which determines the shape of the political system of the state and the nature of the relationship between its bodies, the relations between various authorities (legislative, executive, judicial) are based on a system of mutual “checks and balances” designed to guarantee their cooperation and equilibrium. This means equipping each authority with powers that allow them to effectively interact with the other. The separation of powers is not absolute, as individual bodies are not independent elements of the political system of the state.

¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946 [henceforth cited as: Polish Constitution].

In fact, they constitute a single construct as part of which they are required to cooperate in order to ensure the integrity and efficiency of public institutions. However, the principle of separation of powers assumes a special way of determining the relationship between the judiciary and the other authorities [Florczak–Wątor 2019]. They must be based on the principle of “separateness.” This is so because the Polish Constitution stresses that the courts and tribunals constitute a separate power and shall be independent of other branches of power (Art. 173). This distinctiveness is manifested in the exclusive power of that branch to definitively decide on individual cases of a judicial type, that is on the rights and obligations of legal entities. The basic guarantee of that distinctiveness is independence of judges and independence of courts² [Garlicki 2003, 78]. However, the distinctiveness and independence of the courts must not lead to the elimination of the mechanism of necessary balance between the authorities, since such a requirement arises directly from Art. 10 of the Polish Constitution.³ Those mechanisms are intended to prevent concentration of power and abuses of state power, thereby guaranteeing that the scope of powers of each of them are respected, and to provide the basis for the stable operation of the mechanisms of the democratic rule of law. They are supposed to ensure the exercise of power in accordance with the will of the Nation and while respecting the freedom and rights of the individual.⁴

An important element of the mechanism of balancing and constricting the judiciary power is the power of the President of the Republic of Poland to appoint judges [Weitz 2016, 1045–1046; Sułkowski 2008, 54].⁵ The distinctiveness of the judiciary concerns primarily the implementation of its fundamental, jurisdictional function. This is so, because as regards the administration of justice, there is a total prohibition on interference by the legislative and executive authorities in the activities of courts and tribunals.⁶ On the other hand, the creation of the personal composition of the third power is part of the mechanism of balancing powers under the principle of separation of powers. An important element of this process is the powers of the President of the Republic of Poland (Art. 179 of the Polish Constitution), and his systemic role in this respect is of fundamental importance for the assessment of the legal nature and significance of appointment to the office of judge.⁷ At the same time, it should be pointed out that this power is limited in such a way that it is not the President of the Republic of Poland, but another con-

² Cf. judgement of the Constitutional Tribunal of 14 April 1999, K 8/99, OTK 1999, No. 3, item 41; judgement of the Constitutional Tribunal of 19 July 2005, K 28/04, OTK–A 2005, No. 7, item 81.

³ Judgement of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK–A 2009, No. 1, item 3.

⁴ Cf. judgement of the Constitutional Tribunal of 14 April 1999; judgement of the Constitutional Tribunal of 15 January 2009; judgement of the Constitutional Tribunal of 27 March 2013, K 27/12, OTK–A 2013, No. 3, item 29; judgement of the Constitutional Tribunal of 7 November 2013, K 31/12, OTK–A 2013, No. 8, item 121.

⁵ Cf. decision of the Supreme Administrative Court of 9 October 2012, I OSK 1883/12, Lex no. 1269634; decision of the Supreme Administrative Court of 7 December 2017, I OSK 857/17, Lex no. 2441401.

⁶ Judgement of the Constitutional Tribunal of 8 November 2016, P 126/15, Lex no. 2143104.

⁷ See decision of the Constitutional Tribunal of 23 June 2008, Kpt 1/08, OTK–A 2008, No. 5, item 97.

stitutional organ of the state that has the exclusive right to present candidates for the appointment of a judge [Ereciński, Gudowski, and Iwulski 2002, 146]. This is intended to ensure an appropriate balance between the appointment powers of the President of the Republic of Poland and the principle of the independence of the judiciary.⁸ As a result, the provision of Art. 179 of the Polish Constitution is considered in the case law as a complete norm when it comes to defining the powers of the President of the Republic of Poland concerning the appointment of judges, as it regulates all the necessary elements of the nomination procedure. Thus, the constitutional legislature has set an impassable framework for the legislature as regards the statutory regulation of the procedure of appointing judges by the President of the Republic of Poland.⁹

According to Art. 126, sect. 1 of the Polish Constitution, the President of the Republic of Poland is the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority. The exercise by the President of the Republic of Poland of the function of “the supreme representative of the Republic of Poland” has a universal dimension in the sense that this function is exercised by the President of the Republic of Poland both in external and internal relations, and also regardless of circumstances, place and time.¹⁰ This is the basic function of the President of the Republic of Poland, which means that the President is the guardian of all constitutional processes in the State, and as the head of state, he exercises powers necessary for the operation of each authority. Appointing judges by the President of the Republic of Poland has been regulated in the Polish Constitution as one of the essential powers of the Head of State. It is therefore that “necessary power” to ensure the continuity of the functioning of the judiciary [Granat 2019, 336; Frankiewicz 2004, 125–26]. Possible violations of this power go against the “competence core” of the powers of the President of the Republic of Poland determined by the principle of separation of powers,¹¹ which in turn leads to the crossing out of the principle of separation of powers and the obligation expressed in the preamble to the Polish Constitution to mutually respect the scope of constitutional tasks of state bodies, their powers and respect for the dignity of offices and their holders, mutual loyalty, and acting in good faith.¹²

The procedure for the appointment of a candidate for the office of a judge of the Supreme Court or the Supreme Administrative Court also includes a crucial initial action, namely the announcement by the President of the Republic of Poland about the judge vacancies in the Supreme Court or the Supreme Administrative Court. On the occasion of the characteristics of the announcement, also the

⁸ Decision of the Supreme Administrative Court of 9 October 2012, I OSK 1883/12, Lex no. 1269634.

⁹ See judgement of the Constitutional Tribunal of 5 June 2012, K 18/09, OTK–A 2012, No. 6, item 63; decision of the Supreme Administrative Court of 9 October 2012.

¹⁰ See decision of the Constitutional Tribunal of 20 May 2009, Kpt 2/08, OTK–A 2009, No. 5, item 78.

¹¹ Judgement of the Constitutional Tribunal of 19 July 2005.

¹² Decision of the Constitutional Tribunal of 20 May 2009.

question of the requirement for the President of the Republic to obtain a countersignature from the President of the Council of Ministers arises. This problem concerns the need to decide whether the announcement referred to in Art. 31, sect. 1 of the Act on the Supreme Court¹³ in conjunction with Art. 49 of the Law on the System of Administrative Courts¹⁴ has the character of an official act and, if so, whether it falls within the prerogative of the President of the Republic of Poland under Art. 144, sect. 3, point 17 of the Polish Constitution and whether it requires a countersignature of the Prime Minister.

Pursuant to Art. 31, para. 1 ASC, also applicable *mutatis mutandis* under Art. 49 LSAC, the President of the Republic, having consulted the First President of the Supreme Court, announces in the Official Journal of the Republic of Poland “Monitor Polski” the number of judge vacancies to be taken up in the various chambers of the Supreme Court (or the Supreme Administrative Court). In the common sense, the term “announces” means: formally “informs, notifies the public” about judicial vacancies. This announcement is a precondition for the procedure initiating the implementation of the Prerogative of the President of the Republic of Poland under Art. 144, sect. 3, point 17 of the Polish Constitution.

There is doubt as to whether the announcement of judicial vacancies should be classified as an official act of the President of the Republic within the meaning of Art. 144, sect. 1 and 3 of the Polish Constitution, or whether it is a technical act of the President of the Republic which does not require countersigning. When analysing the concept of the official act of the President of the Republic, as well as the meaning and scope of countersignature, it should be pointed out that, in principle, the traditional view of the understanding of official acts of the President of the Republic is presented, in which such acts include legal acts issued in writing, implemented by the President of the Republic in the exercise of the constitutional and statutory powers conferred on him, and having legal effects. Accepting such a thesis, it is assumed, in an original and at the same time non-classical way, that an individual act with legal effects is also a legal act [Rakowska 2009, 217; Sokolewicz 1996, 54; Opaliński 2011, 138]. When classifying the actions taken by the President of the Republic, they include also those which are not his official acts and therefore do not require a countersignature, which does not affect their validity and effectiveness [Opaliński 2011, 136]. The literature also presents the position distinguishing official acts of the President of the Republic and such official activities that are not official acts. The constitutional feature of the latter is the lack of sovereign nature [Sarnecki 2000, 50–51].

Countersignature creates an important platform for cooperation between executive authorities. On the one hand, it is a technical activity consisting of making the appropriate signature of a member of the government on an act of the head of

¹³ Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2019, item 825 as amended [henceforth cited as: ASC].

¹⁴ Act of 25 July 2002, the Law on the System of Administrative Courts, Journal of Laws of 2019, item 2167 as amended [henceforth cited as: LSAC].

state, which is a condition *sine qua non* for its validity. On the other hand, it causes the systemically important legal effect of releasing the head of state from responsibility for the act and placing it on the countersignature. These two elements, commonly recognised as constitutive features of countersignature, determine its specificity, making it an original institution, unlike any other. The established scholarly opinion points out that a literal approach to the countersignature requirement in any situation could lead to paralysis of the functioning of the State. This will be particularly the case in the event of a conflict between the government and the head of state. This leads to the conclusion that the catalogue of prerogatives should be interpreted as broadly as possible and that the use of the so-called derived powers, which fall within or continue to fall within the core competence of the President of the Republic of Poland, should be allowed, as well as the use of the so-called analogous powers [ibid.]. Therefore, a possible recognition that the President of the Republic of Poland needs the countersignature of the President of the Council of Ministers for the announcement of vacant judicial posts to be valid would lead to the conclusion that in practice, each subsequent stage, including above all the act of appointment itself, which is the prerogative of the President of the Republic of Poland, would depend on obtaining the signature of the President of the Council of Ministers. This, in turn, would contradict the sense of defining the institution of the election and appointment of judges in the manner laid down in Art. 179 of the Polish Constitution.

The literature also points out that an official act of the President of the Republic of Poland is an act that decides on something, and therefore contains a sovereign element, thus implementing one of the matters of state management, and produces legal effects. This leads to the conclusion that the President of the Republic of Poland may also undertake a number of activities that are not official acts [Kozłowski 2016, 705–707; Szczucki 2018]. It is also stressed that in the announcement on judge vacancies, the President of the Republic of Poland only states the actual number of vacant positions in the Supreme Court, and the number of positions in this Court, in its individual chambers, is set out in the regulations of the Supreme Court (in the Supreme Administrative Court respectively). This is different in the case of the Minister of Justice's announcement on judge vacancies in common courts, because in these announcements the Minister of Justice decides at the same time on the assignment of a given post to the court, and thus also on the number of positions in a given court. The scholars in the field express the view that the announcement of the President of the Republic of Poland on judge vacancies is an official activity, undertaken on the basis of Art. 31, para. 1 ASC, and not an official act of the President of the Republic of Poland [Szczucki 2018]. Therefore, during his term of office, the President of the Republic of Poland undertakes many activities which, despite their special form, do not constitute his official acts [Frankiewicz 2004, 104–106]. Such a thesis should be considered reasonable, since the President of the Republic of Poland, as a natural person, undertakes a number of actions and activities that cannot be attributed any

legal significance, let alone the nature of an official act, for which a countersignature of the President of the Council of Ministers would be required each time. It should be noted, however, that it is completely unjustified to refer to historical arguments concerning the possible requirement to countersign the announcements of the President of the Republic of Poland on judge vacancies, which are referred to in relation to the practice of countersigning President Aleksander Kwaśniewski's ordinances and orders by the Prime Minister, as they were adopted under other legislation and were based on a different legal basis. Such arguments appear in particular in the grounds for the Supreme Court's decision of 28 March 2019.¹⁵ The Ordinance of the President of the Republic of Poland on the determination of the number of judges and Presidents of the Supreme Court,¹⁶ issued on July 9th 1998, was countersigned by the Prime Minister, as was the earlier Ordinance of the President of the Republic of Poland on the determination of the number of judges and Presidents of the Supreme Court of 13 February 1996.¹⁷ The then applicable Art. 4, sect. 2 of the Act of 20 September 1984 on the Supreme Court¹⁸ stated that "The number of judges and presidents of the Supreme Court shall be determined by the President of the Republic of Poland at the request of the National Council of the Judiciary." In the light of the 1984 regulation referred to above, the President of the Republic of Poland, within the scope of his powers, decided "in a sovereign manner" on the number of vacant judicial positions in the Supreme Court, doing so rather inconsistently using various, unequal forms of normative acts (order and ordinance), issued under the same legal basis.

Pursuant to the current wording of Art. 31, para. 1 ASC, also applicable *mutatis mutandis* under Art. 1 LSAC, the President of the Republic, having consulted the First President of the Supreme Court, announces in the Official Journal of the Republic of Poland "Monitor Polski" the number of judge vacancies to be taken up in individual chambers of the Supreme Court, i.e. fulfils the formal obligation to inform. The "sovereign" element of determining the number of judges was transferred pursuant to Art. 4 ASC to para. 2 of the Rules of Procedure of the Supreme Court.¹⁹ The Rules of Procedure of the Supreme Court, unlike the announcement of judge vacancies in the Supreme Court, is of a normative character. The President of the Republic exercises his powers in it and it is to be countersigned by the President of the Council of Ministers. Pointing to the existence of the requirement to countersign an act of the same content and function of 1998, but not concerning the announcement of vacancies but the determination of the number of posts, cannot therefore constitute any argument for the need to countersign

¹⁵ III KO 154/18, Lex no. 2643256.

¹⁶ Journal of Laws No. 94, item 595.

¹⁷ "Monitor Polski" No. 12, item 135.

¹⁸ Journal of Laws No. 45, item 241.

¹⁹ See Ordinance of the President of the Republic of Poland of 29 March 2018, the Rules of Procedure of the Supreme Court, Journal of Laws item 660 as amended.

an announcement of the President of the Republic issued pursuant to Art. 31, sect. 1 of the current Act on the Supreme Court.

Under the current legal regulation concerning the organization and functioning of the Supreme Court, M. Florczak–Wątor and T. Zalasinski included the announcement in the category of official activities of the President of the Republic. They considered that making such a decision was a new power of the President of the Republic, which did not fit within the prerogative of appointing judges. These authors also rejected the concept of derivative (analogous) acts as well as the concept of derived power falling within the prerogative of the nomination of judges by the President of the Republic of Poland. At the same time, however, they considered that the countersignature requirement for the Announcement of the President of the Republic of Poland on judge vacancies in the Supreme Court was contrary to Art. 10 and Art. 179 of the Polish Constitution [Florczak–Wątor and Zalasinski 2018, 135]. As regards the possible requirement to obtain a countersignature for the announcement on judge vacancies pursuant to Art. 31, sect. 1 ASC, an interesting view was expressed in the literature by O. Kazalska. She considered that the announcement on vacant judicial posts is of a technical nature, an official activity of the President of the Republic, but not an official act. This is so because when “announcing,” the President of the Republic of Poland fulfils the formal obligation to inform, and does not decide on anything. The arguments presented lead the author to a conclusion that there is no obligation to obtain a countersignature for the announcement. Furthermore, O. Kazalska also points to the possibility of constructing, within the prerogatives of the President of the Republic, derived powers as falling within the prerogative to appoint judges, while excluding the use of the construction of analogous powers [Kazalska 2018, 219–22]. It is worth noting that as regards countersignature, scholars of constitutional law have departed from a simple interpretative rule that any official act which is not expressly indicated in Art. 144, sect. 3 of the Polish Constitution is subject to countersigning. As the literature points out, this would paralyse in practice the possibility for the President of the Republic to carry out his tasks and functions [Kazalska 2018, 227; Kozłowski 2016, 705–707].

The scholars in the field mention a number of official acts of the President of the Republic of Poland which do not require a countersignature, and are not explicitly mentioned in Art. 144, sect. 3 of the Polish Constitution (exceptions to the principle of the obligation to countersign the official acts of the President of the Republic of Poland). These include e.g. the appointment by the President of the Republic of Poland of his representative to the National Council of the Judiciary pursuant to Art. 187, sect. 1, point 1 of the Polish Constitution [Kazalska 2018, 227; Opaliński 2011, 145–46]. It is argued that on the basis of a constitutional custom, no one questions the lack of a countersignature in such a case. Without countersignature, the representatives in the National Council of the Judiciary were appointed by the following Presidents of the Republic of Poland: A. Kwaśniewski, late L. Kaczyński, B. Komorowski, which would mean, under the strict

interpretation of the necessity of countersignature to propose their representatives in the National Council of the Judiciary, that this body was not properly staffed during the terms of office of these Presidents. The aforementioned Presidents of the Republic also appointed, without countersignature, the secretaries of state in charge of the National Security Office, or their representatives in the Polish Financial Supervision Authority. Likewise, the President of the Republic of Poland A. Kwaśniewski appointed without the countersignature his representatives to the Council of the Centre for Public Opinion Research. In the literature on the subject, it is also recognized that the appointment of the Senior Marshal by the President of the Republic of Poland does not require a countersignature, as it is a derivative power [Garlicki 2001]. It follows that the prerogatives of the President of the Republic of Poland include both the prerogative to issue official acts, literally listed in Art. 144, sect. 3 of the Polish Constitution, but also a number of other powers, including the legislative initiative of the President of the Republic of Poland to amend the Polish Constitution, the right to amend and withdraw bills as part of the presidential initiative, notification by the President of the Republic of Poland to the Marshal of the Sejm about the temporary impossibility of holding office. In this regard, it is justified to accept a doubt whether these powers are analogous powers and not the so-called derived powers. The scholarly opinion notes the possibility of constructing derivative powers within the prerogatives of the President of the Republic of Poland [Opaliński 2011, 138].²⁰

It should be added that in the light of Art. 24, para. 1 of the Act of 23 November 2002 on the Supreme Court,²¹ the announcement about judge vacancies in the Supreme Court was the responsibility of the First President of the Supreme Court. In this model of procedure, the President of the Council of Ministers could not block the initiation of the judge selection procedure; he was not entitled to a countersignature to such an act. Since the rational legislature changed the current model of conduct, by strengthening the powers of the President of the Republic of Poland, the introduction of a possible requirement to obtain a countersignature for the announcement of judicial vacancies, in the event of a conflict between the authorities – the Council of Ministers and the President of the Republic of Poland, would lead to the exclusion of the possibility of exercising the prerogative of the head of state in general.

The strict interpretation of the concept of prerogative is not applicable in practice and is not actually applied [Opaliński 2011, 137]. Under Polish constitutional law, there is no two-fold division of the President's official acts into those mentioned in Art. 144, sect. 3 of the Polish Constitution and those which require a countersignature. Nor can the view that the announcement requires a countersignature of the President of the Council of Ministers, because it does not fit in the catalogue of prerogatives of the President of the Republic, and at the same

²⁰ See also judgement of the Constitutional Tribunal of 23 March 2006, K 4/06, OTK-A 2006, No. 3, item 32.

²¹ Journal of Laws of 2016, item 1254 as amended.

time that the requirement of countersignature for the announcement of the President of the Republic of Poland on judicial vacancies in the Supreme Court is contrary to Art. 10 and Art. 179 of the Polish Constitution, as conferring upon the President of the Council of Ministers – through the institution of countersignature – the right to influence the initiation of the procedure, the final result of which is the nomination of judges of the highest judicial body in Poland. The obligation to obtain a countersignature violates the principle of separation of powers and the independence of courts and judges [Florczyk–Wątor and Zalański 2018, 135]. Such a position presumes an internal contradiction between constitutional rules and this thesis cannot be accepted. It would be contrary to the presumption of a reasonable and rational legislature, which cannot create an unsolvable conflict in the application of the law [Wronkowska 2003, 30; Opaliński 2011, 144]. Therefore, one cannot interpret every manner in which the President of the Republic is required to carry out the obligation of announcement in accordance with Art. 31 ASC as contrary to the Polish Constitution.

The requirement of the announcement should be classified as a statutory obligation of the President of the Republic, the exercise of which does not constitute any power or right of the President of the Republic, as these are implemented in the form of determining the number of judges of the Supreme Court in the Rules of Procedure of the Supreme Court, so the requirement is merely an information obligation under the Act. The legal effects that can be derived from this result only from the reaction to the announcement on judicial vacancies in the form of applications for vacant judicial posts.²² The question of the binding nature of legal effects only upon the submission of applications by applicants for a position in the Supreme Court and not with the very announcement of vacancies was also highlighted in the literature by O. Kazalska [Kazalska 2018, 239].

The literal wording of Art. 144, sect. 2 of the Polish Constitution seems to pre-judge that all official acts of the President of the Republic, except those referred to in Art. 144, sect. 3 of the Constitution, require for its validity the signature of the President of the Council of Ministers, who by signing the act is accountable to the Sejm. Although these rules seem quite clear at the level of the linguistic analysis of the provision in question, their practical application raises serious doubts. The findings of the scholarly opinion of constitutional law require a departure from those simple interpretative rules which would practically paralyse the capacity of the President of the Republic to exercise all the powers conferred on him in the light of Art. 126, sect. 1 of the Polish Constitution. His position is not limited to the performance of ceremonial functions, as the President of the Republic is an equal member of the executive authority in Poland [Sarnecki 2000, 53; Kozłowski 2016, 705–707].

To sum up, it should be stated that the announcement by the President of the

²² See the grounds for the dissenting opinion by Judge of the Supreme Court Wojciech Sych to the Supreme Court's decision of 28 March 2019.

Republic on the number of judge vacancies, published under Art. 31, para. 1 ASC, is not an official act of the President of the Republic of Poland within the meaning of Art. 144, sect. 1 of the Polish Constitution, which requires a countersignature of the President of the Council of Ministers. This is because it is another official activity that involves publishing (in the official journal “Monitor Polski”), in an authoritative manner, the information about the number of judge vacancies in the Supreme Court or the Supreme Administrative Court, initiating the procedure of selecting candidates for the position of judge of the Supreme Court or Supreme Administrative Court. It confirms the existence of a certain actual state: vacant judge positions, but does not lead to changes in the “employment” structure of the Supreme Court or Supreme Administrative Court. The act of announcement is the responsibility and not the power of the President of the Republic of Poland.

The role of the President of the Republic of Poland as a guarantor of the continuity of State authority makes it necessary to define his prerogatives more broadly, which would manifest itself in the exemption from the countersignature requirement the powers that are similar or analogous to those contained in Art. 144, sect. 3, point 1 to 30. Even the adoption of the hypothetical assumption that the announcement by the President of the Republic of Poland about the number of judge vacancies is an official act of the President of the Republic of Poland does not entail the creation of a requirement for the President of the Council of Ministers to countersign, as an element of the power that is derivative, in the light of Art. 144, sect. 3 point 17 of the Polish Constitution, from the prerogative to appoint judges. It is assumed that the countersignature requirement should also be waived for activities of the President of the Republic of Poland that fall within, or are a “continuation” of a certain official act explicitly exempted from countersignature. Adopting, by analogy, the arguments used in other countries, such powers can be called “derived” [Granat 2002, 95–96]. It is irrelevant, however, that the announcement precedes the exercise of the prerogative, since the concept of derivative powers does not make its exercise dependent on the coincidence in time of the exercise of the prerogative itself, in particular on whether the derivative act takes place before or after the exercise of the primary prerogative.

Requiring a countersignature would be contrary to Art. 10 and Art. 179 of the Polish Constitution, i.e. the principle of separation of powers, and would constitute an unjustified interference by the President of the Council of Ministers and the Council of Ministers itself in a prerogative of the President of the Republic of Poland. It would also mean a specific “right of veto” of the Prime Minister against the decision of the President of the Republic of Poland²³ [Florczak–Wątor and Zalasinski 2018, 135; Kazalska 2018, 234]. Even assuming that all official acts of the President of the Republic of Poland should require countersignatures of the President of the Council of Ministers to be valid (they are official acts, the issuance of which is not a derivative power), no state body could, under constitutional

²³ As in the judgement of the Constitutional Tribunal of 5 June 2012.

provisions in force, undermine their effectiveness in a lawful manner, unless the presumption of validity of the presidential act was overruled by the Tribunal of State. Thus, in practice, the only responsibility of the President of the Republic of Poland for the lack of countersignature of the President of the Council of Ministers on the presidential official act would be, in part, the political responsibility, and only concerning the lack of re-election for a second term [Rakowska 2009, 11; Kozłowski 2016, 705–707].

REFERENCES

- Erciński, Tadeusz, Jacek Gudowski, and Józef Iwulski. 2002. *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*. Warszawa: LexisNexis.
- Florczak–Wątor, Monika. 2019. “Komentarz do art. 10 Konstytucji Rzeczypospolitej Polskiej.” In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Piotr Tuleja. Warszawa: Wolters Kluwer Polska. e-Lex.
- Florczak–Wątor, Monika, and Tomasz Zalański. 2018. “Opinia prawna w sprawie zgodności z Konstytucją obwieszczenia Prezydenta Rzeczypospolitej Polskiej z 24.05.2018 r., Nr 127.1.2018 o wolnych stanowiskach sędziego w Sądzie Najwyższym, wydanego bez kontrasygnaty Prezesa Rady Ministrów.” *Iustitia* 3:134–42.
- Frankiewicz, Anna. 2004. *Kontrasygnata aktów urzędowych Prezydenta RP*. Kraków: Kantor Wydawniczy Zakamycze.
- Garlicki, Leszek. 2001. “Komentarz do art. 109 Konstytucji RP.” In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, ed. Leszek Garlicki. Warszawa: Wydawnictwo Sejmowe. e-Lex.
- Garlicki, Leszek. 2003. *Polskie prawo konstytucyjne. Zarys wykładu*. Ed. 3. Warszawa: Wolters Kluwer Polska.
- Granat, Mirosław. 2002. “Opinia na temat konieczności kontrasygnaty aktu Prezydenta o wyznaczeniu Marszałka Seniora.” *Ekspertyzy i opinie prawne. Biuletyn Biura Studiów i Ekspertyz Kancelarii Sejmu* 1:91–99.
- Granat, Mirosław. 2019. *Prawo konstytucyjne. Pytania i odpowiedzi*. Ed. 9. Warszawa: Wolters Kluwer Polska.
- Kazalska, Olga. 2018. “Zwolnienie z konstytucyjnego wymogu kontrasygnaty – rozważania na tle niekontrasygnowanych obwieszczeń Prezydenta Rzeczypospolitej Polskiej o wolnych stanowiskach sędziów w Sądzie Najwyższym.” *Studia Iuridica* LXXVI:218–43.
- Kozłowski, Krzysztof. 2016. “Komentarz do art. 144 Konstytucji RP.” In *Konstytucja RP*. Vol. 2: *Komentarz do art. 87–243*, ed. Marek Safjan, and Leszek Bosek, 705–707. Warszawa: Wydawnictwo C.H. Beck.
- Opaliński, Bartłomiej. 2011. “Kontrasygnata aktów głowy państwa w polskim konstytucjonalizmie. Kontrasygnata w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r., część II.” *Ius Novum* 3:131–55.
- Rakowska, Anna. 2009. *Kontrasygnata aktów głowy państwa w wybranych państwach europejskich*. Toruń: Wydawnictwo Adam Marszałek.
- Sarnecki, Paweł. 2000. *Prezydent Rzeczypospolitej Polskiej. Komentarz*. Kraków: Kantor Wydawniczy Zakamycze.
- Sokolewicz, Wojciech. 1996. “Pomiędzy systemem parlamentarno-gabinetowym a systemem prezydencko-parlamentarnym: prezydentura ograniczona, lecz aktywna w Polsce i w Rumunii.” *Przegląd Sejmowy* 3:34–56.
- Sułkowski, Jarosław. 2008. “Uprawnienia Prezydenta RP do powoływania sędziów.” *Przegląd Sejmowy* 4:47–66.
- Szczucki, Krzysztof. 2018. “Komentarz do art. 31 ustawy o Sądzie Najwyższym.” In *Ustawa o Sądzie Najwyższym. Komentarz*. Warszawa: Wolters Kluwer Polska. e-Lex.

- Weitz, Karol. 2016. "Komentarz do art. 179 Konstytucji RP." In *Konstytucja RP*. Vol. 2: *Komentarz do art. 87–243*, ed. Marek Safjan, and Leszek Bosek, 1045–1046. Warszawa: Wydawnictwo C.H. Beck.
- Wronkowska, Sławomira. 2003. *Podstawowe pojęcia prawa i prawoznawstwa*. Poznań: Ars Boni et Aequi.

KONTRASYGNATA PREZESA RADY MINISTRÓW A PRAWIDŁOWOŚĆ
I SKUTECZNOŚĆ DOKONANIA OBWIESZCZENIA O LICZBIE WOLNYCH STANOWISK
SĄDZIEGO W SĄDZIE NAJWYŻSZYM I W NACZELNYM SĄDZIE
ADMINISTRACYJNYM PRZEZ PREZYDENTA RZECZYPOSPOLITEJ POLSKIEJ.
KILKA UWAG O CHARAKTERZE PRAWNYM AKTU URZĘDOWEGO PREZYDENTA
RZECZYPOSPOLITEJ POLSKIEJ ORAZ ZAKRESIE JEGO PREROGATYW

Streszczenie. Powoływanie sędziów przez Prezydenta RP zostało uregulowane w Konstytucji RP, jako jedna z zasadniczych kompetencji głowy państwa. Jest to więc owa „kompetencja niezbędna” dla zapewnienia ciągłości funkcjonowania władzy sądowniczej.

Procedura powołania na urząd sędziego Sądu Najwyższego lub Naczelnego Sądu Administracyjnego obejmuje także czynność, jaką jest obwieszczenie Prezydenta RP o wolnych stanowiskach sędziego w Sądzie Najwyższym lub Naczelnym Sądzie Administracyjnym. Przy okazji charakterystyki samego aktu obwieszczenia, pojawia się również zagadnienie wymogu uzyskania przez Prezydenta RP kontrasygnaty Prezesa Rady Ministrów. Literalne brzmienie art. 144 ust. 2 Konstytucji RP zdaje się przesądzać, że wszystkie akty urzędowe Prezydenta RP, poza wymienionymi w art. 144 ust. 3 Konstytucji RP, wymagają dla swojej ważności podpisu Prezesa Rady Ministrów. Choć reguły te wydają się dość czytelne na poziomie analizy językowej komentowanego przepisu, to w wymiarze praktycznym ich stosowanie wywołuje poważne wątpliwości.

Słowa kluczowe: trójpodział władz, władza sądownicza i wykonawcza, akt urzędowy, prerogatywa Prezydenta Rzeczypospolitej Polskiej, obwieszczenie o liczbie wolnych stanowisk sędziowskich

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