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THE ROLE OF THE SUPREME COURT IN ASCERTAINING THE VALIDITY OF ELECTIONS TO THE SEJM AND SENATE IN POLAND. OBSERVATIONS AGAINST THE BACKGROUND OF CHALLENGING THE STATUS OF SUPREME COURT JUDGES

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Abstract

The judiciary is one of the basic functions of the state. In Poland, it is based on Article 10 of the Constitution of the Republic of Poland, which stipulates the separation of powers. The essence of this separation of powers in a democratic state is not the isolation of authorities from one another, but their mutual cooperation and mutual inhibition. Therefore, the formulation of allegations against one of the authorities has tangible consequences for the other two, so when formulating these accusations, firstly, it is necessary to have evidence to support them, secondly, far-reaching consequences must be taken into account, and thirdly, it is necessary to maintain a kind of moderation which, instead of radicalising positions, will bring a consensus closer to resolving the various disputes. The perspective of the recent years of observation of the political scene, but also of the academic scene, shows that much more often in the indicated spaces there are criticisms and accusations than proposals for solving the problems affecting the contemporary judiciary, and this is all the more important because without the efficient functioning of the judiciary, the other two authorities remain 'inoperative'. A tangible example of this was the 2023 Sejm and Senate elections. Criticism of Supreme Court judges appointed after 2017, and the negation of the functioning of the Chamber of Extraordinary Control and Public Affairs (however, this issue will only be outlined due to the framework of the study), have led to the fact that, in the opinion of those negating the status of the Supreme Court judges and the indicated Supreme Court Chamber, there was actually 'no' body appropriate to determine the validity of the elections, and let us recall that, according to the Constitution of the Republic of Poland, this body is exclusively the Supreme Court. Based on the above, the following statement will be devoted to showing the influence of the Supreme Court on the determination of the validity of elections in Poland and, in parallel, the dangers that are associated with the negation of the existence of judges and judicial bodies.

Keywords: *crisis in the judiciary, Supreme Court, elections, status of judges*

1. Introduction

From 2017 until May 2024, a dispute based on the rule of law in Poland was ongoing between Poland and the European Commission. Its backdrop was a series of laws concerning the judiciary in Poland, and it obtained a particular facet in relation to the Constitutional Tribunal and the Supreme Court. In relation to the latter, the essence of the ongoing dispute was, and still is, questioning the legality of the Supreme Court Chambers and the status of Supreme Court judges appointed after 2017. The broad overtones of this dispute, both domestically and internationally, have very wide-ranging consequences that do not occupy much space in public but also in academic discourse, and paradoxically they are relevant to the assessment of the state of democracy and the rule of law in any country, not only in Poland. The first of the problems related to questioning the legality of the appointment of judges is the question of the legality of the rulings issued by them. For, assuming that judges appointed after 2017 were to be removed from office by statute (we are talking about the legal version, not by a resolution that does not have the force of universally binding law in Poland), then, in parallel, any judgments issued by them on the basis of Article 45(1) of the Polish Constitution[1], which includes the right to a court, and the improper composition of the court would have to be declared null and void by operation of law. Of course, in the space of political discourse, the idea has emerged that, by law, the rulings issued by judges whose statuses remained undermined should be left in force. However, I dare say that such a solution, based on international law, is meaningless, as the European Convention on Human Rights and its Article 6[2] binding on Poland would remain inexorable in this respect. If the court was improperly staffed, this premise cannot be cured on the basis of parliamentary action. Another very dangerous issue is the matter of fuelling anarchy, a state of iniquity and uncertainty in the legal

[1] Constitution of the Republic of Poland of 2 April 1997 U. of 1997, no. 78, item 483.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, OJ. 1993 no. 61 item 284.

system, resulting in a loss of confidence in the judiciary. This situation has led to the fact that, in practice, suspects and criminals are more likely to ask their defence lawyers whether a judgment can be 'overturned' by which judge rules than what punishment they might get.

However, these consequences of undermining the status of judges are something that Poland is only just beginning to grapple with and will continue to grapple with over the coming years, as the effects of such behaviour are definitely far-reaching. Nevertheless, one of the consequences of undermining the status of judges, including judges of the Supreme Court, came to light much sooner than expected, namely on the occasion of establishing the validity of elections to the Sejm and Senate at the end of 2023. And it is the last of the presented consequences of undermining the status of judges including SN judges that will be analysed in this speech. This is because in Poland the Supreme Court is the only body authorised to determine the validity of elections, including elections to the Sejm and Senate. The questioning of the status of Supreme Court judges has led to a situation in which another discourse has begun as to the legality of the Supreme Court's determination of the validity of parliamentary elections. This discussion has been abandoned in both academia and journalism. Nevertheless, in this article, the consequences of challenging the status of Supreme Court judges with regard to the determination of the validity of elections will be approached. In recent years, far-reaching accusations have been made, both in science and in journalism, about the system of law, the authors of which, 'fighting for the rule of law', in the author's opinion, have failed to take into account the far-reaching consequences of undermining the status of Supreme Court judges, which lead, on the one hand, to the impossibility of establishing the validity of elections with all the consequences this entails and, on the other hand, to a loss of public confidence in the judiciary. The key methods used in the work will be dogmatic-legal as well as theoretical-legal.

2. Undermining the Status of Judges

In 2017, the European Commission initiated the Article 7(1) procedure of the Treaty on European Union[3] against Poland challenging through a number of laws related to the judiciary, including those concerning the Constitutional Court, the Supreme Court, the ordinary courts, the National Judicial Council or the public prosecutor's office, and Poland's compliance with Article 2 of the Treaty regarding 'respect for the rule of law'. In its communication, the Commission stressed that it does not claim the right to determine how Poland will determine the model for its judicial system, but that this choice must be made with respect for the rule of law, which is one of the cornerstones of the functioning of the European Union. With the initiation of the Article 7 procedure, Poland has also been referred to the Court of Justice of the European Union (CJEU) on the basis of Article 258 of the Treaty on the Functioning of the European Union, which states that

"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union"

[3] Article 7 TEU 'Where the Council identifies a risk of a serious breach by a Member State of the values of the Union.

"Finally, on 29 May 2024, the procedure under Article 7 of the EU Treaty against Poland was terminated[4]. Over the course of these seven years, with regard to the issue at hand, one of the main problems has been the questioning of the status of the judges of the Supreme Court (another questioning of the status of entire Chambers of the Supreme Court, but for the sake of the framework of this paper, this issue will only remain outlined). It was primarily based on two interrelated issues[5]. On the one hand, the fact that the way in which judges are elected has changed. It is worth recalling at this point that

[4] On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State concerned and, acting in accordance with the same procedure, may address recommendations to it. The Council shall regularly examine whether the grounds for making such a determination remain valid. 2. The European Council, acting unanimously on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may, after having called upon a Member State to submit its observations, determine that there has been a serious and persistent breach by that Member State of the values referred to in Article 2. 3. Following a determination under paragraph 2, the Council, acting by a qualified majority, may decide to suspend certain rights deriving from the application of the Treaties to that Member State, including the voting rights of the representative of its Government in the Council. In so doing, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations incumbent on that Member State under the Treaties shall in any event remain binding on that State. 4. The Council may subsequently decide, acting by a qualified majority, to amend or repeal measures taken pursuant to paragraph 3 in the event of a change in the situation which led to their establishment. 5. The voting rules which, for the purposes of this Article, apply to the European Parliament, the European Council and the Council are laid down in Article 354 of the Treaty on the Functioning of the European Union. Treaty on European Union Current legal status: 03.06.2024, OJ 2004.90.864/30 – Treaty on European Union. https://www.gov.pl/web/sprawiedliwosc/zakonczenie-procedury-z-art-7-traktatu-o-ue-wobec-polski

[5] An additional strand of the reform carried out became the shortening of the term of office of the members of the NCJ in office in 2017, which was the subject of a ruling by the NCJ, see *Judgment Żurek v. Poland,* 16.06.2022, Chamber (Section I), Application no. 39650/18, M.A. Nowicki, *przedwczesne zakończenie kadencji członka krajowej rady sądownictwa – obszerne omówienie wyroku europejskiego trybunału praw człowieka (i sekcja) w sprawie żurek v*. polska 'Palestra' 2022, no. 9, p. 101 et seq.; M. Szwed, Dopuszczalność ustawowego przerwania kadencji członków sędziowskich Krajowej Rady Sądownictwa w składzie wynikającym z ustawy z 8 grudnia 2017 r. w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka, *Przegląd Prawa Konstytucyjnego* 2023, no. 6 (76), p. 97 et seq.

judges in Poland are appointed by the President of the Republic of Poland on the proposal of the National Council of the Judiciary. The latter is a collegial body of 25 members consisting of 15 judges, 6 representatives of the parliament, a representative of the President of the Republic of Poland, the Minister of Justice, the First President of the Supreme Court and the President of the Supreme Administrative Court. The key change that took place in 2017 was the transfer of the competence to elect the 15 judicial members of the NCJ from the judicial community, to the political community – the Sejm but importantly, applying Article 11, Article 2. of the Act of 12 May 2011 on the National Council of the Judiciary , a candidate for a member of the National Council of the Judiciary may be proposed by a group of at least:

1. two thousand citizens of the Republic of Poland who are at least eighteen years of age, have full legal capacity and enjoy full public rights;
2. twenty-five judges, excluding retired judges[6]. Opponents of such a solution pointed to a violation of the principle of the tripartite division of power and politicisation of judges[7], accusing it of amending constitutional provisions by statute[8]. In turn, supporters of the newly introduced regulation pointed to the contradiction of the previous solutions with the constitutional principle of equality in terms of the marginalisation, in the election process of the members of the NCJ, of the representation of judges of common courts; and stressed the necessity to simplify the election process[9]. After seven years, the allegations directed towards the reform of the NCJ have not quietened down, and they are manifested in the questioning of the status of judges, including the judges of the Supreme Court, which is relevant to the present

[6] Act of 12 May 2011 on the National Council of the Judiciary

[7] K. Skotnicki, Problem konstytucyjności składu obecnej Krajowej Rady Sądownictwa w Polsce, *Acta Universitatis Lodziensis Folia Iuridica* 2020, no. 93, p. 47 et seq.

[8] R. Piotrowski, Konstytucyjne granice reformowania sądownictwa, *Kwartalnik Krajowej Rady Sądownictwa* 2017, no. 2 , pp. 28-29.

[9] Druk No. 1423, Government bill on amendments to the Act on the National Council of the Judiciary and some other acts, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1423.

statement, leading in 2023, to a kind of stalemate in the discourse on the determination of the validity of parliamentary elections[10].

In relation to the changes made, the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, which the European Court of Human Rights found, was filled as not a dependent and not an independent court. The case concerned two judges, Monika Dolińska-Ficek and Artur Ozimek, who, after receiving negative recommendations from the National Council of the Judiciary on judicial promotions in 2017 and 2018, appealed to the Supreme Court, and the Extraordinary Control and Public Affairs Chamber rejected their complaints. The designated judges filed a complaint with the ECtHR. The ECtHR, based on the lack of independence and independence of the IKN of the Supreme Court, found a violation of Article 6(1) (right to a fair trial) of the European Convention on Human Rights. [1] The Court argued that the changes made to the law 'This constituted a fundamental irregularity that adversely affected the entire process and undermined the legitimacy of the Chamber of Extraordinary and Public Review of the Supreme Court, which heard the applicants' cases. The Chamber was therefore not an 'independent and impartial court established by law' within the meaning of the European Convention' (…). 'Since the violation of the applicants' rights had its origin in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and legislative authorities to interfere directly or indirectly in the procedure for the appointment of judges, (…) prompt remedial action by the Polish State is needed'[11].

[10] K. Sobczak, P. Rojek-Socha, Senat już pracuje nad nowelą ustawy o Sądzie Najwyższym, http://kielce.seirp.com.pl/wp-content/uploads/2023/01/Senat-ju%C5%BC-pracuje-nad-nowel%C4%85-ustawy-o-S%C4%85dzie-Najwy%C5%BCszym.pdf

[11] Case ETHR of 2021-11-08 DOLIŃSKA-FICEK I OZIMEK vs Poland (Case no 49868/19 i 57511/19), *https://etpcz.ms.gov.pl/searchetpc/$N/$N/$N/$N/$N/$N/$N/$N/datapublikacji/ascending/70*

3. The validity of Sejm and Senate elections by the Supreme Court

To show the issue of the undermining of the status of the Supreme Court judges with regard to the determination of the validity of parliamentary elections, it is first necessary to show the role that the Supreme Court has in the issue at hand[12]. In detailing the above, Article 101.1 of the Constitution of the Republic of Poland stipulates that the validity of elections to the Sejm and the Senate shall be established by the Supreme Court, and paragraph next that the voter shall have the right to lodge a protest with the Supreme Court against the validity of the elections on the principles laid down by law. The provisions of the Law of 5 January 2011 shall respond to the provisions of the Constitution. Electoral Code[13]. One of its most important elements is that in Poland there are no specific requirements related to the dependence of the validity of elections on the voter turnout. Therefore, it should be assumed that the fundamental premise for determining the validity of the elections is their lawfulness, which (following the provisions of Article 101(1) of the Constitution of the Republic of Poland) has been divided into two stages: in the first, election protests are decided, and in the second stage, the validity of the elections to the Sejm and Senate[14]. It is not possible to elaborate on the first stage without providing a terminological and functional presentation of the election protest. Hence, it becomes necessary to approximate the characteristics of this institution. In the light of the jurisprudence, it should be considered as the most significant, against the background of other instruments of legal control, aspect of the electoral action. It is a means of citizen's reaction to perceived inconsistency of the action with the legal provisions on voting,

[12] This issue has been discussed more extensively, B. Stępień-Załucka, Sprawowanie wymiaru sprawiedliwości przez Sąd Najwyższy w Polsce, Warsaw 2016.

[13] Law of 5.1.2011. Electoral Code, (Journal of Laws 2011, No. 217, item 1281). (Hereinafter as the Election Code).

[14] J. Kuciński, Demokracja przedstawicielska i bezpośrednia w III RP, Warsaw 2007, p. 98. See also M. Jarentowski, Zmiana systemu wyborczego do Senatu RP 2011, PSejm 2011, No. 4, p. 33 et seq.

determination of voting results or election results, or the commission of an offence against elections[15]. By lodging a protest, a citizen not only protects his/her electoral rights, but also acts in the public interest, contributing to the elimination of phenomena or actions that are not in compliance with the law[16], which in doctrine is the basis for assuming the dual-functionality of this instrument. Thus, on the one hand, it is a tool to protect the interests of a political group or an individual voter – disapproving of the election result and seeking to undermine it[17]. On the other hand, it is a means of protecting the rule of law of the electoral process or, in other words, protecting the state or public interest[18], in which its broader and more legitimate dimension is manifested. From the juxtaposition of the above functions, the question arises as to whether the election protest is 'merely' a transfer of the electoral struggle to the judicial forum? In Senetra, he writes that this is exactly the case – the protest, is another stage of electoral struggle[19]. However, attention should also be paid to the purpose of the protest. Indeed, it is this very purpose, which is to decide whether the election was conducted in accordance with the law (and thus whether the composition of the given body elected by universal suffrage was in line with the will of the voters), that seems to prevail over the electoral struggle. This is all the more so since the power to decide the protest is vested in the Supreme Court, i.e. the court enjoying the highest trust and authority in the state, which guarantees that the protest proceedings taking place with the participation of the parties, based on the adversarial principle, will be conducted in the most thorough manner possible. As is the evidentiary procedure, which in this way achieves the highest possible degree of

[15] A. Rakowska, Postępowanie w sprawach z protestów wyborczych, PiP 2010, No. 3, pp. 62-63.

[16] The resolution SC (7) – Administrative, Labour and Social Insurance Chamber of 25.8.1993, III SW 1/93, OSNCP 1993, No. 11, item 187.

[17] W. Senetra, Materialnoprawne przesłanki protestów wyborczych, [w:] Sąd Najwyższy '93. Opracowania sędziów Sądu Najwyższego dotyczące interpretacji ustawy z 28.5.1993 r., Ordynacja wyborcza do Sejmu RP i ustawy z 10.5.1991 r. – Ordynacja wyborcza do Senatu RP w zakresie rozpoznawania protestów wyborczych i podejmowania uchwał w sprawie ważności wyborów, Warszawa 1993, p. 52.

[18] A. Żukowski, System wyborczy, do Sejmu i Senatu, Warsaw 2004, pp. 156-157.

[19] W. Senetra, Materialnoprawne przesłanki, [w:] Sąd Najwyższy '93, p. 52 and n.

professionalism, eliminating controversies arising from politically tinged protests[20]. Hence, the protest cannot be viewed solely from the perspective of a tool for electoral struggle, much more important is its role in protecting the meaningfulness of voters' participation in elections by the Supreme Court[21]. Procedurally, an election protest is simply a pleading. Hence, as A. Józefowicz emphasises, it must contain a specific name and legal meaning and allegations of statements or motions. Moreover, like any pleading addressed to a court, it must also be subject to other formal requirements, such as proper identification of the name and surname of the person lodging the protest, the address of the person lodging the protest or his/her attorney, except that in this case, a document of authorisation to act on behalf of the principal – the protestor – is additionally attached[22]. And as it is an action directed against the validity of the election, it may be lodged only after the fulfilment of the electoral act. Although this should not be read as requiring the rectifier to have fulfilled this electoral act, which is discussed in more detail below, as it is a matter of mere temporal location. This means that as long as the vote has not taken place, it cannot be determined whether the election was valid or not, due to the lack of the subject matter of the protest, as required by the Code[23]. The grounds for lodging a protest pursuant to Article 82 par. 1 of the Election Code may be: I. the commission of an offence against the validity

[20] R. Zych, Weryfikacja ważności wyborów na urząd Prezydenta RP, [in:] Wybory i pozycja ustrojowa Prezydenta w wybranych państwach świata, ed. by R. Zych, Toruń 2011, p. 151.

[21] K. Gołyński, Prawa wyborcze w praktyce, Helsińska Fundacja Praw Człowieka. Raporty, ekspertyzy, opinie, Warsaw 1995, p. 10.

[22] A. Józefowicz, Zakres przedmiotowy protestu przeciwko ważności wyboru Prezydenta RP, PiP 2000, no 9, p. 17.

[23] R. Zych, Weryfikacja ważności wyborów…, p. 148.

of the election, defined in Chapter XXXI of the CC[24], consisting in[25]: 1. drawing up lists of candidates or voters, omitting those who are entitled or entering those who are not entitled, 2) using subterfuge for the purpose of incorrectly drawing up lists of candidates or voters, minutes or other electoral or referendum documents, 3) allowing fraud in the acceptance or counting of votes, 4) surrendering an unused ballot paper to another person before the voting is completed or obtaining an unused ballot paper from another person for use in voting. (5) committing fraud in the preparation of lists of signatures of citizens submitting[26], 6) use of violence, unlawful threats or deception to obstruct the holding of a pre-voting assembly, the free exercise of the right to stand or vote, the voting or counting of votes, the preparation of minutes or other electoral or referendum documents[27], 7) the use of violence, unlawful threats or with the abuse of a relationship of dependence, influencing the manner of voting of an eligible person or forcing him/her to vote or preventing him/her from voting[28], 8) a person entitled to vote, accepting a pecuniary or personal benefit or demanding such a benefit for voting in a certain manner[29], 9) giving a pecuniary or personal benefit to a person entitled to vote in order to induce him/her to vote in a certain manner or for voting in a certain manner[30], 10) violating the provisions on the secrecy of the vote, against

[24] More on electoral offences: M. Szewczyk, Uwagi wprowadzające do Rozdziału XXXI KK z 1997 r.., [w:] Kodeks karny. Część szczegółowa, ed. by A. Zolla, Zakamycze 1999, p. 866 and in.; A. Marek, Kodeks karny. Komentarz, Warszawa 2006, p. 454 and n.; S. Zabłocki, O rozpoznawaniu przedmiotu ochrony prawnokarnej przy przestępstwach przeciwko wyborom i referendum, stypizowanych w rozdziale XXXI Kodeksu karnego, [in:] Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej (teoria i praktyka), Warsaw 2005, p. 387 and in. W. Kozielewicz, Przestępstwa przeciwko wyborom i referendum w pozakodeksowym prawie karnym – wybrane zagadnienia, *Prok i Pr*. 2001, No 10, p. 68; M. Jachimowicz, Przestępstwa z ustawy – Kodeks wyborczy, *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 2012, no 1, p. 16.

[25] Cf. Article 82 § 1(1) of the Election Code.

[26] Cf. Article 248 of the Criminal Code Act of 6.6.1997, (Journal of Laws 1997, No. 88, item 553).

[27] Cf. Article 249 of the CC.

[28] Cf. art. 250 CC

[29] Cf. art. 250 a § 1 KK; R. A. Stefański, Przestępstwo korupcji wyborczej (250a KK), Prok. i Pr. 2004, No. 4, p. 69 et seq.

[30] Cf. Article 250a § 2 CC; ibid. p. 69 et seq.

the will of the voter to know the content of his/her vote[31] or II. violation of the provisions of the Code relating to: 1) voting, 2) the determination of voting results, or 3) the results of the election, affecting the outcome of the election[32]. The above enumeration allows one to conclude that the grounds for filing a protest fall into two groups. And while the first one, relating to criminal offences, does not raise any major objections, the second one remains, similarly to the one under the previous electoral law, understated and thus debatable[33]. The issue relates to the relatively narrowly defined object of the protest, which includes the voting, the determination of the voting results or the determination of the election results. With that said, in academia, some claims consider the above enumeration to be closed, so that different violations of the Articles of the Ordinance, even if they had a significant impact on the outcome of the election, could not be the subject of an election protest[34]. While others point out that the article of the law should be understood in close connection with the Constitution of the Republic of Poland, which refers to a protest against the 'validity of the election', brought under the rules set out in the law. In view of this, the text of the law should be interpreted extensively to all the elements that make up the electoral procedure, rather than narrowly to the elements outlined in the law. Furthermore, it should be noted that the legislature cannot interfere with the kernel of the power granted to it by the system legislator, so in this case its task will be to indicate the formal conditions of protests in line with the essence of the Basic Law[35]. A compromise approach to the above claims is taken by Z. Szonert, indicating that the current regulation of the present issue is an optimal solution for reconciling the forms of control of electoral activities carried out by '*state electoral bodies,*

[31] Cf. article 251 of the CC.

[32] Cf. art. 82 § 1 para. 2 CC.

[33] The limitation of the grounds for protest was first applied in the 1985 Sejm election law. And although this solution was abandoned in the law of 7.4.1989, each of the subsequent laws already had it, 1993 and 2001.

[34] J. Mordwiłko, Protesty wyborcze w świetle ordynacji wyborczej z 1993 r. do Sejmu oraz praktyka ich rozpoznawania, PiP 1995, no 1, p. 37

[35] L. Garlicki, [in:] Komentarz KRP, Warsaw 1999, V. I, art. 101, p. 5 and n.

social forms of control and judicial supervision'[36]. This is due to the fact that certain irregularities can be eliminated before the voting stage and subsequent stages. Hence, it seems that the intention of the legislator was to seek to remove the unlawful state as soon as possible with regard to its emergence. Hence it may be presumed that in relation to the activities related to the registration of candidates (registration of electoral lists), the registration of voters or the manner of conducting the election campaign (this situation would occur, for example, if the parliamentary candidates did not meet the requirements laid down by the passive electoral law or possible mistakes made by the election commissions during the registration of candidates, inclusion of unauthorised persons on the voters' list, provision of false data in relation to the counter-candidates during the campaign) a separate procedure was introduced allowing relative irregularities to be subjected to control before the voting day to the court or the State Election Commission through the possibility of filing a complaint or appeal (Art. 243 § 2 Electoral COde); only that sharing the above view is tantamount to accepting a limitation of the scope of the protest. This is because it is impossible to allow situations in which election protests would remain based on the same allegations as previous decisions of the court or the State Election Commission[37]. However, such a solution should be considered, as the validity of elections must be viewed in a broader context than just from the prism of voting, determining the results of voting or determining the results of the elections insofar as this will affect their validity. This does not mean, however, that the Supreme Court must decide all matters relating to elections (which is why the idea that some electoral issues should be decided even before the vote is taken remains valid). It should be within its competence to determine all irregularities affecting, which is worth

[36] Z. Szonert, Sądowa kontrola procedur wyborczych, wyników wyborów i referendów, [in:] Demokratyczne prawo wyborcze Rzeczypospolitej Polskiej (1990-2000), Warsaw 2000, p. 57 et seq

[37] This view is shared, inter alia, by J. Repel, Weryfikacja wyborów parlamentarnych w polskim prawie konstytucyjnym (Verification of parliamentary elections in Polish constitutional law), [in:] Przeobrażenia we współczesnym prawie konstytucyjnym (Transformations in contemporary constitutional law), ed. by K. Działocha, Wrocław 1995, p. 127; K. Gołyński, Prawa wyborcze w praktyce, Warsaw 1995, p. 16.

emphasising again, the validity of the elections as such, and thus the entitled person should have the right to determine these irregularities in the protest without limiting its scope, but provided that these irregularities harm the validity of the elections. In relation to Article 82 of the Electoral Code, there is another extremely important incongruity. It concerns the establishment and demonstration of a causal link between the offence or violation stipulated in the indicated article and its impact on the election result. Well, the canvass of the current regulation stands in opposition to the actual manner in which the validity of the election is determined. The arguments supporting this thesis are most fully presented by K. Gołyński. He points out that establishing this connection between the observed violations and the legitimacy of the election belongs exclusively to the body authorised to verify the election, and is not the task of the protesting party. Especially that at the initial stage of the procedure, which is the lodging of a protest, it is impossible to prove definitively the influence of the grounds of complaint on the final result of the election. It is only when the proceedings are conducted that any correlation in this matter can be revealed. This is all the more so since there is a significant disproportion in the resources available to a litigant compared to the Supreme Court to demonstrate such a correlation[38]. Therefore, this solution is to be regretted and an amendment of this regulation should be postulated in order to remove the dependence between the violation of the law or a criminal offence against the validity of the election and the course and outcome of the election proceedings[39]. The person entitled to lodge a protest against the validity of the elections on the grounds of committing the above offences or violations of the provisions of the Code concerning voting, the determination of voting results or election results by the competent electoral authority (the State Election Commission, the district electoral commissions and the district electoral commissions) is an elector whose name was included in the register of electors in one of the polling districts

[38] Ibid, p. 16.

[39] Ł. Buczkowski, Stwierdzenie ważności wyborów parlamentarnych i prezydenckich na gruncie Kodeksu wyborczego, [in:] Kodeks wyborczy. Wstępna ocena, Warsaw 2011, p. 218.

on the election day (Article 82 § 2 of the EC)[40]. The Constitution defines an elector as a Polish citizen who, on polling day at the latest, has attained the age of 18 years, who has not been deprived of public or electoral rights by a final court or State Tribunal decision and who is not incapacitated[41]. In relation to this, the eligibility of voters in individual electoral districts is somewhat narrowed, as a protest against the validity of the election in one of the electoral districts or against the election of a deputy, senator (or, by analogy, a member of the European Parliament, councillor or mayor) may be lodged by an elector whose name was included on election day in the electoral register in one of the electoral districts in the area of a given electoral district (Article 82(3) of the Code)[42]. Filing a protest does not depend on whether the protesting elector participated in the voting or not (this power is also vested in the chairman of the competent election commission and the election agent of 82 § 5 EC)[43]. Furthermore, he or she does not have to prove his or her legitimacy to lodge a protest. The possible need to demonstrate this connection to the electoral district depends on the individual decision of the Supreme Court in this respect. And it remains to be satisfied by at least

[40] Attention should be drawn to the jurisprudence of the Supreme Court; the decision. SC – Chamber of Labour, Social Security and Public Affairs of 13.12.2007, III SW 118/2007, OSNP 2008, No. 19-20, item 307,

[41] Por. Article 62(1) and (2) of the Constitution in conjunction with Article 25 § 1(1) of the State Tribunal Act and Article 10 § 1(1) of the Code of Civil Procedure.

[42] Relevant to this issue is the post. of the Supreme Court – Chamber of Administration, Labour and Social Insurance issued still under the rule of the previously binding law, of 6.11.2001, III SW 28/2001, OSNAPiUS 2002, No. 3, item 60, where in the operative part it was emphasised, in accordance with the provision of the law, that 'a person whose name on election day was not included in the register of electors in one of the electoral districts on the area of a given electoral district is not entitled to lodge a protest against the validity of the elections in that district.'

[43] J. Galster, Prawo wyborcze do Sejmu i Senatu RP oraz status prawny posłów i senatorów, [in:] Prawo konstytucyjne, ed. by Z. Witkowskiego, p. 207. Against the background of the above enumeration of entities entitled to lodge a protest, it is worth noting that currently this right is not granted to election commissions (this solution was present in the law on the election of the President, Article 72(3)), K. Gołyński, Prawa wyborcze, p. 26 i n. Por. art. 152 § 1-3 EC. On behalf of the commission, its chairman and the election attorney act. Hence, on behalf of the district electoral commission the authorised person to act – to lodge a protest, will be the election commissioner.A. Rakowska, K. Skotnicki, Udział komisarzy wyborczych w rozpoznawaniu protestów wyborczych, Przegląd Wyborczy 2008, N 9-10, p. 29.

presenting a certificate that the applicant's name has been placed on the electoral register for the constituency concerned in accordance with the election date. At the same time, as already stated, the enforcement of the above requirement may be abandoned if the content of the protest unambiguously indicates the applicant's entitlement to lodge a protest in a specific district[44]. To conclude this topic, it should be recognised that the lodging of a protest is conditional on the fulfilment of a number of formal requirements (written form, meeting the deadline, proper formulation of allegations)[45], which are relatively challenging for an average voter. However, their fulfilment does not have to rest directly on the complainant. Indeed, on the basis of the CPC, the procedure for electoral protests provides for the possibility of appointing a professional representative who, upon receipt of the power of attorney, acts for the principal. Pursuant to Article 87 § 1 of the CCP, this may be, inter alia, an advocate, a legal adviser[46]. It is important to note that several persons may act jointly on a single protest. They then act under the relation of material co-participation. This means that each applicant has an equal right to lodge a protest based on the same factual and legal basis[47]. The protest should be submitted in writing to the Supreme Court within 7 days from the date of announcement of the election results by the State Election Commission in the Journal of Laws of the Republic of Poland. Posting a protest within this deadline in a Polish postal facility of a designated operator within the meaning of the Act of 23 November 2012. – Postal Law[48] is tantamount to filing it with

[44] A. Józefowicz, Zakres przedmiotowy…, p. 17.

[45] Cf. Article 241 of the Electoral Code.

[46] A. Józefowicz, Regulacja prawna protestu przeciwko ważności referendum konstytucyjnego, PiP 1997, No. 6, p. 24.

[47] A. Józefowicz, Regulacja prawna protestu przeciwko ważności referendum konstytucyjnego, PiP 1997, no 6, p. 24.

[48] Diary. 2012 item 1529

the Supreme Court is tantamount to meeting the deadline[49].It may also be filed by a voter residing abroad or on a Polish sea vessel. In this case, the deadline is deemed to have been met when the protest is lodged with the territorially competent consul or captain of the ship, respectively. However, its consideration is subject to the additional requirement of appointing a proxy resident in the country or a proxy for service resident in the country[50]. Significantly, the 7-day period is a mandatory time limit, hence its restoration is not permitted. The legislator thus imposes a special rigour on the protester, which is dictated primarily by the importance of the issue at stake – establishing the validity of the election, i.e. regulating one of the basic elements of a democratic state. It is also not insignificant that with regard to the indicated procedure – the determination of the validity of the election, there is a deadline of 90 days after the election day for the Supreme Court[51]. However, it is taken by the latter only after the examination of possible protests, hence the fulfilment of the resolution, with observance of the deadline, requires very efficient functioning of the Supreme Court[52]. The essential structural requirement for lodging a protest is to present or indicate evidence that actually supports the allegations made. Failure to meet it leads to the protest being left without further proceedings[53]. Thus, by definition, it is a matter of exercising the right to protest in a factual (justified) and responsible manner. After all, the applicable provisions of the Election Code strictly define the procedure of voting and determination of its results. At the same time, the conduct of the election in accordance with the election procedure means only that the

[49] B. Dauter, Ważność wyborów, [in:] Kodeks wyborczy, Warsaw 2014, p. 563; B. Naleziński, Formy demokracji bezpośredniej, [in:] Prawo konstytucyjne, ed. by P. Sarneckiego, Warsaw 2004, p. 212. See, Decision S.C. 21.september .1995., III SW 3/95; J. Buczkowski, Istota i gwarancje *wolnych wyborów* Przemyśl 1998, p. 121. R. Mojak, Instytucja Prezydenta RP w okresie przekształceń ustrojowych 1989-1992, Warsaw 1994, p. 168.

[50] Cf. Article 241 § 2 of the CodeWyb; Z. Szonert, Sądowa kontrola…, p. 58.

[51] A. Frydrych, M. Sobczak, Orzecznictwo Trybunału Konstytucyjnego w sprawach wyborczych, Toruń 2011, pp. 205-206.

[52] Statement SC (7) – Administrative, Labour and Social Insurance Chamber of 23.10.1995, III SW 8/95, OSNAPiUS 1995, No. 24, item 304.

[53] Cf. Article 241 § 3 in connection with Article 243 § 1 of the CodeWyb.

determined and then announced result of the vote is consistent with the votes cast. Consequently, any challenge to this principle cannot be made on the basis of lip-service, but is always conditional on the presentation or adduction of evidence. And not just any evidence, but such evidence that justifies the allegation of the protest, which is delimited by the limits of unlawfulness specified in the Election Code[54]. It is worth noticing that there is also a restriction in the form of inadmissibility of supplementing formal shortcomings of a protest. It refers not only to formulating allegations within the meaning of Article 82 of the Election Code, but also to failing to present or indicate evidence constituting the grounds for the protest, as well as formulating new allegations or changing them in the proceedings before the Supreme Court in the case of an election protest, unless such supplementation falls within the deadline for filing a protest[55]. At the same time, its lapse also does not prevent the submission of supplementary evidence[56]. The protest is heard by a panel of three judges under the non-procedural procedure[57]. It usually results in an order containing an opinion on the protest[58]. Its content should refer to the legitimacy of the allegations of the protest and, if confirmed, also an assessment of whether an offence against the election or a violation of the law. A participant in such proceedings is, in addition to the petitioner, the chairman of the relevant election commission or his deputy, as well as the Prosecutor General, which is a result of the fact that, in the event that a crime against elections is alleged in the protest, the Election Code obliges the Supreme Court to notify immediately about that fact the General

[54] Decision SC – Chamber of Labour, Social Insurance and Public Affairs of 5.12.2007, III SW 63/2007, OSNP 2008, No. 15-16, item 246.

[55] Cf. art. 243 § 1 of the Code of Civil Procedure. See also, respectively, post. SA in Katowice of 30.1.2003, I ACz 130/2003, OSA 2003, No. 11, item 52 p. 69.

[56] Decision SC – Chamber of Labour, Social Insurance and Public Affairs of 5.12.2007, III SW 63/2007, OSNP 2008, No. 15-16, item 246.

[57] This provision is not in opposition to the Constitution's statement that the validity of the elections to the Sejm and Senate is determined by the Supreme Court, as it is obviously intended to indicate only the subject matter jurisdiction of the court and not the personal composition of the court. Post. TK of 10.5.2006, Ts 6/2006, OTK ZU 2007, No. 2B, item 84.

[58] Cf. Article 242 § 1 of the EC, A. Józefowicz, Przesłanki prawne…, p. 3.

Prosecutor[59]. It is important to note that, in the case of a participant in a protest, this is the first and also the last stage in which that participant takes part. This is due to the fact that the Election Code provides for the participation of the author of the protest in such a capacity only in the first stage of the proceedings before the Supreme Court. In no way can the participation with such status of the voter in the proceedings, ending with the resolution on the validity of the election, be interpreted from the provisions of the law[60]. However, it is not always the case that the protest is recognised. There are situations in which it is left without further consideration. These include, covered in the above part of the study, failure to present or indicate evidence supporting the allegations made, as well as others such as, lodging a protest by an unauthorised person or a person who does not fulfil the conditions set out in Article 241 of the Election Code, or concerning a matter which the Code provides for the possibility of appealing to a court or the State Election Commission[61]. This order, due to the fact that it is issued by the Supreme Court in a non-procedural proceeding, is not subject to appeal, and no provision is made for appeals against it. Such a construction is the result of the fact that all decisions of the three-person bench of the Supreme Court, issued as a result of the proceedings in cases of election protests, are further subject to the assessment of the Supreme Court in the composition of the entire the Extraordinary Review and Public Affairs d, which, based on them, adopts a resolution deciding on the validity of the elections, which is already a further stage of the procedure[62]. Within its framework, the Supreme Court decides on the validity of the election and on the validity of the election of the MP (senator) against whom the protest has been lodged. This decision is made by the entire the Extraordinary Review and Public Affairs Chamber and takes the form of a resolution[63]. For its adoption, the Chamber has, in the light of the provisions

[59] Cf. art. 243 § 2-3 EC.

[60] R. Zych, Weryfikacja ważności wyborów…, p. 149.

[61] Cf. art. 243 § 2 EC.

[62] Decision SC – Chamber of Labour, Social Insurance and Public Affairs oof 22.3.2002, III AO 3/2002, LexPolonica no. 355671.

[63] J. Kuciński, Demokracja reprezentacyjna, p. 98; B. Naleziński, Formy…, pp. 212-213.

of the law (Article 244 § 2 of the q.v.), as well as the universally applicable interpretation of 16 June 1993, of the Constitutional Court, 90 days, which are treated as a deadline. This means that failure to adopt a resolution within this period results in the expiry of the power to declare the election valid[64]. Furthermore, these 90 days are in practice subject to slight but nevertheless abbreviated periods. These are dictated by the fact that the period is calculated not from the date of the announcement of the results by the State Election Commission, but from the date of the election. This meeting is held with the participation of the Prosecutor General and the Chairman of the State Election Commission, and its subject is, on the one hand, the election report submitted by the State Election Commission and, on the other hand, the opinions issued as a result of the examination of protests[65]. Both of the aforementioned grounds are taken into account in parallel. Together, they condition the resolution of the invalidity of the election or the invalidity of the election of a deputy, senator, which results in the simultaneous declaration of the expiry of the seats to the extent of the invalidity[66]. In such case, a re-election shall be held. The aforementioned resolution shall be immediately submitted to the President and the Speaker of the Sejm and then to the State Election Commission[67]. The adoption of a resolution on the invalidity of the election in a district or on the invalidity of the election of a deputy, senator shall result in the re-run and holding of the election, which this time shall be held exclusively on the national territory. The decision of the President issued in this respect to hold a re-run election or to take certain electoral measures shall be made public in the Public Information Bulletin and announced in the Journal of Laws of the Republic of Poland no later than on the 5th day after the date of announcement of the Supreme Court resolution. The State Election Commission publishes the results of the rerun elections or the results of the

[64] Statement TC of 16.6.1993 r., W 4/93, OTK 1993, No II, itm. 45; J. Galster, Prawo wyborcze, [in:] Prawo konstytucyjne, ed. by Z. Witkowskiego…, p. 207.

[65] Cf. Article 244 § 1 and 2; B. Szmulik, Pozycja ustrojowa Sadu najwyższego w Polsce, Warsaw 2009, pp. 333 et seq.

[66] A. Józefowicz, Przesłanki prawne…, p. 9 and n.

[67] Cf. art. 244 § 3-4 of the EC.

rerun election activities in an announcement, listing by name the persons who have lost their mandate as a result of the rerun elections or election activities, indicating the number of the electoral ward. The notice also contains the number and name of the list of candidates. Such a notice shall be published in the Journal of Laws of the Republic of Poland, made public in the Public Information Bulletin and sent immediately to the Speaker of the Sejm[68]. An analogous effect occurs when the Supreme Court adopts a resolution on the invalidity of an election; after its announcement in the Journal of Laws of the Republic of Poland, a new election is held to the extent of the invalidity[69]. Such solutions, according to A. Józefowicz, optimally ensure judicial control of the most important electoral activities. Thanks to this, individuals – voters can realise the right to a court guaranteed to them by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[70]. Moreover, as B. Szmulik also points out, they correspond to the assumptions of Article 25 of the International Covenant on Civil and Political Rights, the content of which ensures that every citizen of a state party to the Covenant has the right and opportunity, without any discrimination and without any unjustified restrictions, to participate in the management of public affairs directly or through freely chosen representatives, as well as to exercise the active and passive right to vote in fair elections held periodically, based on universal, equal and secret voting, guaranteeing the free expression of the will of the voters[71]. For the 2023 parliamentary elections, the Supreme Court received a total of 1177 cases registered as election protests. Of these: '– for 14, an opinion was expressed on the merits of the allegations and it was concluded that they remain without impact on the outcome of the election, – for 11 an opinion was expressed that the allegations were unfounded, – 1152 were left without further investigation due to non-compliance with formal

[68] Cf. art. 245 of the EC.

[69] Cf. art. 246 of the EC.

[70] Cf. art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4.11.1950, (Journal of Laws No. 61/1993, item 284), A. Józefowicz, Rola sądów w kontroli czynności wyborczych, PiP 2001, no. 9, p. 43.

[71] Ibidem, p. 43; B. Szmulik, Pozycja ustrojowa…, pp. 334-335.

requirements, including in particular: – lack of signature of the protester, – failure to state the address of residence or PESEL number, – lack of formulation of the proposal concerning the validity of the election, – the protest was lodged by an unauthorised person, – the protest deadline was exceeded, – defective formulation of the allegations of the protest, – failure to substantiate the allegations"[72]. Based on the recognised protests and the report of the PKW, on 11 January 2024, the Supreme Court, composed of the entire the Extraordinary Review and Public Affairs Chamber, adopted a resolution in which it declared the validity of the elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland held on 15 October 2023[73].

4. Summary

The dispute within the judiciary, which has been ongoing since 2017, has led to the undermining of the status of the judges of the Supreme Court and the status of the Supreme Court's the Extraordinary Review and Public Affairs Chamber, which alone has the power to rule on the validity of the elections. Indeed, academics and journalists emphasised, firstly, that the judges appointed by the NCJ after 2017 are not judges and, secondly, referred to the significance of the CJEU judgment of 21 December 2023, which stated that 'the composition of the Supreme Court's the Extraordinary Review and Public Affairs Chamber is not an independent and impartial court previously established by law.' and that the Chamber in question as a court '(…) is not a court under European law, nor under Polish law, and should abstain from ruling. So we have a statutory deadline to declare the validity of the elections to the Sejm and the Senate, and therefore there is no possibility of shifting jurisdiction to another court by way of an amendment to the Electoral Code.

[72] https://odpowiedzialnapolityka.pl/sites/default/files/publikacje/wybory-parlamentarne-w-polsce-2023.-obserwacja-spoleczna-wnioski-i-rekomendacje-v.-1.pdf

[73] I NSW 1237/23, https://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=623-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach.

So, we have a situation where a non-court will rule on the validity of the elections"[74]. The Supreme Court, in turn, referring to the allegations in question, pointed out that the CJEU's decision, then, does not have any impact on the jurisdiction of the Supreme Court to rule on the validity of the elections, because in the case in question, it only ruled that the CJEU is not an entity entitled to make preliminary questions (…) and 'Electoral law, on the other hand, is completely outside the scope of the influence of EU law and there is no need to ask the CJEU to interpret this law in this respect'[75]. The result was a situation in which, for those denying the status of the judges and the status of the key adjudicatory chamber of the Supreme Court, there was no authority in the domestic system to determine the validity of the parliamentary elections. Such a situation is extremely dangerous. Firstly, because the negation of the status of judges leads in practice to the negation of the legitimacy of the election of the staff of state bodies, and secondly, it undermines the principle of a democratic state of law. This principle, is enshrined in Article 2 of the Constitution of the Republic of Poland and contains a whole series of sub-principles, including, inter alia, the principle of legal certainty, stability and security[76]. In other words, the negation of the legality of the status of the judges of the Supreme Court and the status of the Supreme Court's the Extraordinary Review and Public Affairs Chamber, leads to the impossibility of establishing the validity of the elections to the Sejm and the Senate. This means, in practice, that the state is unable to fulfil its basic functions, for, as Jellinek wrote, the state is population, territory and power. When there is an inability to fill a body by means of an inability to declare parliamentary elections valid, the rhetorical question arises in parallel – can one still speak of a state. Thus, it remains to be seen that the undermining of the status of judges

[74] K. Żaczkiewicz-Zborska, Ważność wyborów parlamentarnych ogłosi nie-sąd, https://www.prawo.pl/prawnicy-sady/waznosc-wyborow-oglosi-nie-sad,524674.html,

[75] Ibidem.

[76] M. Tabernacka, Pewność sytuacji jednostki w demokratycznym państwie prawnym, http://www.repozytorium.uni.wroc.pl/Content/79119/PDF/37_Tabernacka-M.pdfs.p. 506; J. Sozańska, Zasada demokratycznego państwa prawnego w polskiej praktyce prawnej, *KNUV* 2014; 4(42), p. 31, 33 and n.

goes much deeper than just an objection to a group of people appointed as judges after 2017. There is nothing behind the SN's inability to determine the validity of the elections – except pure anarchy. And it only remains to sum up that political infighting is one thing, comments and doubts about the appointment of judges or the status of the Supreme Court chamber are another, and it must be absolutely emphasised that everyone is entitled to his or her own views and convictions, but nevertheless in everything one should not lose sight of moderation and above all the long-term consequences of negation. Indeed, the negation of the legality of the appointment of SN judges has led to a situation in which the possibility of the functioning of the Polish state has been negated. Moreover, the dispute and the accompanying positions on the matter left a deep mark on statistics concerning public confidence in the judiciary, which stand at 40 per cent[77], and I dare say that this statistic was not changed by the Commission's decision to end the dispute (especially as this ending was not covered by practically any changes to the law in force), and will take many years to rebuild. In conclusion, the key question to ask is how to rectify the existing situation? Firstly, it seems most appropriate to seek a compromise and to stop further radicalising positions. Secondly, to focus on building trust in the justice authorities.

[77] M. Knotz, Aż 80 proc. Holendrów ufa swoim sądom, w Polsce to niewiele ponad 40 proc, https://www.prawo.pl/prawnicy-sady/zaufanie-do-sadow-w-holandii-80-proc-w-polsce-ok-40-proc,518033.html.

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