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THE IMPACT OF JUDGES' DELEGATIONS ON THE RIGHT TO A FAIR TRIAL²

DOI: <http://dx.doi.org/10.12775/TSP-W.2022.004>

Date of receipt: 17.10.2022

Date of acceptance: 22.12.2022

Summary. The aim of this paper is to analyse the impact of delegations of judges on the right to a fair trial and public hearing of a case by a competent, autonomous, impartial and independent court, guaranteed in Article 45 par. 1 of the Constitution of the Republic of Poland. Although the issue of admissibility of entrusting the Minister of Justice with the competence to delegate judges has already been discussed in the doctrine and judicial decisions, the introduction of significant changes in the scope of functioning of the judiciary, as well as the recently established practice of delegating judges by the Minister of Justice justify the necessity of re-analysing this subject matter. Deliberations herein lead to a conclusion that delegation of judges may be a mechanism of depending the court on the executive, whereas, the participation in the judicial panel of a judge delegated by the Minister of Justice casts doubt on the court's attributes of competence, autonomy, independence and impartiality.

Keywords: delegation of a judge, the right to a fair trial, the Minister of Justice, independence of a court, independence of a judge.

Wpływ delegowania sędziów na realizację prawa do sądu. Celem niniejszego artykułu jest analiza wpływu delegowania sędziów na realizację prawa do sprawiedliwego i jawnego rozpatrzenia sprawy przez właściwy, niezależny, bezstronny i niezawisły sąd, zagwarantowanego w art. 45 ust. 1 Konstytucji Rzeczypospolitej Polskiej. Chociaż problem dopuszczalności powierzenia Ministrowi Sprawiedliwości kompetencji do delegowania sędziów był już wcześniej podnoszony w doktrynie i orzecznictwie, to jednak wprowadzenie istotnych zmian w zakresie funkcjonowania wymiaru sprawiedliwości, jak również ukształtowana w ostatnim czasie praktyka delegowania sędziów przez Ministra Sprawiedliwości uzasadniają konieczność ponownego przeanalizowania tej problematyki. Rozważania podjęte w artykule prowadzą do wniosku, że instytucja delegowania sędziego może być mechanizmem uzależnienia sądu od władzy wykonawczej, zaś fakt zasiadania w składzie sędziowskim sędziego delegowanego przez Ministra Sprawiedliwości poddaje pod wątpliwość atrybuty sądu w postaci jego właściwości, niezależności, niezawisłości oraz bezstronności.

Słowa kluczowe: delegowanie sędziego, prawo do sądu, Minister Sprawiedliwości, niezależność sądu, niezawisłość sędziego.

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² This article constitutes an extended version of a paper presented at the 9th Polish-Italian colloquium titled 'Human rights in the Face of Challenges of Modern Times: Polish and Italian Experiences', which was held on 1-4 September 2022, in Lublin.

1. Introduction

The issue of admissibility of entrusting the Minister of Justice with competence to delegate judges had already been signalled in the doctrine and judicial decisions. In 2007, the institution of delegating a judge was also the subject of control of the Constitutional Court which in the judgement of 15 January 2009, in the case with file no.: K 45/07³ held that this regulation is compliant with the Constitution of the Republic of Poland⁴. Although, the decision of the Constitutional Court was at that time criticised (see e.g. Sarnecki, 2009; Jakimko, 2009), for some time it limited the debate in the doctrine on the constitutionality of entrusting the Minister of Justice with a competence to delegate judges. As of the issuance of the aforementioned judgement, there have been, however, significant changes in the functioning of the judiciary, whereas the recently established practice of delegating judges by the Minister of Justice resulted in reopening the discussion on this subject matter⁵.

It is particularly argued that judges' delegations may be used to attempt to influence the judiciary, interfere in judicial decisions (Kowalski, 2021), and, in consequence, also constitute a threat to the effective exercise of the right to a fair and public hearing of the case by a competent, autonomous, independent and impartial court (the right to a fair trial), guaranteed in Article 45 par. 1 of the Constitution of the Republic of Poland. Therefore, the new circumstances justify re-analysing the impact of the institution of delegating judges on the exercise of the right to a fair trial in the Polish legal system.

2. Delegation of judges by the Minister of Justice – legal grounds and basic allegations

According to Article 77 par. 1 of the Act of 27 July 2001 – the Law on the Common Courts System⁶, the Minister of Justice can delegate a common court judge, upon his or her consent, to perform duties of a judge or administrative activities in other common court – equivalent, lower, and, in particularly justified cases, also higher, considering the rational use of common court staff and the needs resulting from the workload of particular courts⁷.

³ Judgement of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009/1/3.

⁴ Journal of Laws of 1997, No. 78, item 483, as amended and corrected; hereinafter: 'the Constitution of the Republic of Poland'.

⁵ Recently, the Ombudsman entered in the proceedings pending before the Constitutional Tribunal; in the case with file no.: SK 42/22, initiated by a constitutional complaint, in which the plea of non-compliance of Article 77 par. 1 of the Law on the Common Courts System with Article 45 par. 1 of the Constitution of the Republic of Poland was raised. The Ombudsman claimed the validity of the raised complaint i.e. the unconstitutionality of Article 77 par. 1 of the Law on the Common Courts System. As on the day of preparing this paper, the case has not yet been resolved by the Constitutional Tribunal.

⁶ Consolidated text of the Journal of Laws of 2020, item 2072, as amended; hereinafter: 'the Law on the Common Courts System'.

⁷ According with Article 77 par. 1-3 of the Law on the Common Courts System, a judge of the common court can also be delegated by the Minister of Justice to other institutions, such as: the Ministry of Justice (or other organisational unit subordinate to the Minister of Justice or supervised by him), the Chancellery of the President of the Republic of Poland, an office providing services to the minister relevant for foreign affairs, the Supreme Court and the administrative court. The Minister of Justice can also delegate a judge, upon his or her consent, to perform duties at the Office of the National Council of the Judiciary, to perform duties or conduct training at the National School of Judiciary and Public Prosecution, as well as to perform duties at an international judicial non-governmental organisation.

Delegating a judge by the Minister of Justice is not limited in terms of territory (it covers the territory of a whole country) and can be executed for a specified period of up to 2 years or for an unspecified period of time, thus, it is also not limited in terms of duration (it can even be for a lifetime). Moreover, the Minister of Justice is entitled to recall a judge from delegation at any time - without notice and the need to justify his or her decision.

In the scope of criteria, on the basis of which, the Minister of Justice can delegate judges, legal provisions only specify general guidelines while underlining the necessity to take into consideration 'a rational use of the common courts staff' and 'needs resulting from workload of particular courts'. As a consequence, the decision regarding delegation to another court, as well as recall of the judge from such delegation, is of a discretionary nature and *de facto*, due to the blanket nature of the guidelines, it remains at the discretion of the Minister of Justice. In fact, the law does not provide for giving an opinion or other forms of co-decision of the judicial authorities or the judicial self-government regarding delegation of a judge (Kowalski, 2021).

Decisions of the Minister of Justice concerning delegation of judges are not subject to judicial control. It is confirmed by the judicial decisions of the Supreme Court⁸ and the Supreme Administrative Court⁹, in the view of which, the decision on delegating a judge, as well as recalling him or her from such a delegation, does not constitute an administrative decision, but is an act of internal management in the scope of judicial administration and is aimed at the implementation of the human resources policy in the judiciary. Therefore, it is an act of an organisational nature, aimed at meeting staffing needs. At the same time, internal matters of the judicial administration are not subject to any regulations of administrative proceedings, since they do not concern the judge's status as a citizen. Thus, the act of a delegation or recalling from a delegation is not subject to the cognition of administrative courts (see: Mazurczak – Jasińska, 2014)¹⁰.

The legal regulation outlined in this manner attracts plenty of allegations in the doctrine. First of all, it is indicated that the dual role of the Minister of Justice simultaneously holding in the Polish legal order the office of the Prosecutor General, due to his or her unlimited and uncontrolled competence to delegate judges, violates the principle of the separation of powers stipulated in Article 10 of the Constitution of the Republic of Poland. Delegation of a judge is, in fact, decided by the executive authority and not by the judicial authority. Therefore, 'the constitutional autonomy and separateness of the judiciary is blurred' (Dąbrowski, 2014, p.

⁸ Resolution of the full panel of the Supreme Court of 14 November 2007, BSA I-4110-5/07, OSNC 2008/4, item 49.

⁹ Judgement of the Supreme Administrative Court of 18 October 2013, I OSK 320/13, LEX no. 1391544; see also: decision of the Voivodeship Administrative Court in Warsaw of 18 March 2020, VI SA/Wa 456/20, LEX no. 2956966.

¹⁰ The author indicates that the decision of the Minister of Justice in cases related to delegation of a judge has the characteristics of an administrative decision. Also the Ombudsman indicates the necessity to cover with judicial control decisions of the Minister of Justice on delegating judges and recalling them from such a delegation in view of a threat to the constitutional principle of judicial independence. See: the procedural writ of the Ombudsman of 24 March 2020 concerning entering in the proceedings pending before the Voivodeship Administrative Court in Warsaw, in the case of recalling from delegation judge Paweł Juszczyzyn. <https://bip.brpo.gov.pl/sites/default/files/Pismo%20procesowe%20%20do%20WSA%2C%2024.03.2020.pdf> [access: 18.12.2022].

10)¹¹. Thus, in this context, it is postulated to entrust the competence to delegate judges with a judicial authority.

Secondly, it is underlined that vesting the Minister of Justice with competence to delegate judges constitutes a circumvention of exclusive rights of the President of the Republic of Poland to appoint judges. The Constitution of the Republic of Poland does not provide for the possibility of assigning these rights to any other public authority. It should be indicated that the delegation constitutes an interference in the employment place (seat) of the judge, which is included in the essence of judicial power exercised by him or her¹². Place of employment is a specific court (area of jurisdiction), where the judge exercises jurisdiction¹³. The President of the Republic of Poland¹⁴ appoints a specific court by, on the one hand, indicating a place of employment and, on the other hand, specifying the territorial scope of jurisdiction of a given judge. In consequence, the judge has the right to exercise entrusted jurisdiction only in the scope specified in the act of appointment. Delegation of a judge, in essence, leads therefore to interference in the scope of his or her jurisdiction originally set by the President of the Republic of Poland.

Thirdly, it is signalled that the possibility of delegating judges by the Minister of Justice also constitutes a threat to the effective exercise of an individual's right to a fair and public hearing of the case by a competent, autonomous, independent and impartial court. This issue is going to be discussed in the further part of the paper.

3. The right to a fair trial in the systemic aspect

The right to a fair and public hearing of the case by a competent, autonomous, independent and impartial court is guaranteed both on the basis of the national law, as well as international and European law – in Article 45 par. 1 of the Constitution of the Republic of Poland, Article 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950¹⁵ or Article 47 of the Charter of Fundamental Rights of the European Union¹⁶.

As indicated in the doctrine and judicial decisions, the constitutional right to a fair trial is of a complex nature and includes the following elements:

- 1) the right of access to a court, i.e. the right to start a procedure before a court,
- 2) the right to a proper forming of a judicial procedure in compliance with the requirements of justice and openness,
- 3) the right to a judicial decision, i.e. to obtain a binding resolution of a given case, as well as

¹¹ This aspect is also underlined by Kamiński (2022) and Kowalski (2021).

¹² Pursuant to Article 55 par. 3 of the Law on the Common Courts System, while appointing to hold the office of a judge, the President of the Republic of Poland indicates the place of employment (seat) of the judge.

¹³ Judgement of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009/1/3.

¹⁴ Pursuant to Article 179 of the Constitution of the Republic of Poland, judges are appointed for an unspecified period of time by the President of the Republic of Poland upon the request of the National Council of the Judiciary. Appointment of a judge constitutes a presidential prerogative, therefore it does not require a countersignature of the President of the Council of Ministers (Article 144 par. 3 point 17 of the Constitution of the Republic of Poland).

¹⁵ Journal of Laws of 1993, No. 61, item 284, as amended.

¹⁶ Official Journal of the EU C 303 of 2007, of 14 December 2007, as corrected.

4) the right to a proper forming of a system and position of authorities examining cases¹⁷. The latter is of a systemic dimension. Exercising the right to a fair trial requires all cases to be examined by the courts indicated in the Constitution of the Republic of Poland, to which it is possible to assign attributes of competence, autonomy, independence and impartiality. A failure to meet any of the above characteristics means that a given authority will not be able to be recognised as a court pursuant to Article 45 par. 1 of the Constitution of the Republic of Poland (Tuleja, 2021).

A competent court means a court adjudicating in a proper panel and in compliance with its substantive, material, territorial and functional competence (Sanetra, 2011, p. 13-14)¹⁸. Autonomy means separating the judiciary from the impact of other authorities on the process of adjudication in terms of organisation and function. Independence is usually recognised in two aspects. In the internal aspect it refers to the inner conviction of a judge that while making decisions he follows only the law and their own conscience. In the external aspect, it concerns creating conditions for making decisions, in which an external observer is convinced of the judge's independence, including his or her impartiality with regard to the participants of the proceedings, autonomy with regard to non-judicial authorities (institutions), as well as autonomy from the influence of political factors. Whereas, impartiality requires the judge to be objective in the course of pending proceedings and making decisions, while not favouring any of the parties to the proceedings¹⁹.

4. Practical issues related to delegating judges by the Minister of Justice

Recently, delegating judges to higher instance courts has become more and more frequent, despite the fact that the law allows such a delegation only in 'especially justified cases'²⁰. This phrase has such a general character that it may be subject to almost any interpretation by the Minister of Justice. Although delegation of judges should take into account 'a rational use of the common courts staff' and 'needs resulting from workload of particular courts', it is hardly possible to state that the statutory guidelines are of a specific nature. The analysis of a legal regulation in this scope leads to the conclusion that, in essence, it is of a blanket nature, which allows the Minister of Justice to delegate a judge in almost any case and at any time.

A lack of sufficient and objective criteria of delegating a judge in many cases may raise doubts concerning the actual motives of such a promotion, especially when a judge is delegated to adjudicate in a court of a higher instance. It should be noticed that legal provisions do not prevent delegating a district court judge - the lowest level in terms of a hierarchy, up to two instances higher, i.e. directly to the appellate court that is a court of the highest level in the common courts system. As a result of such a delegation, a judge adjudicates as an appellate instance in cases he or she has never dealt with before as a *meriti* court (Kowalski, 2021, p. 36).

¹⁷ This element of the right to a fair trial was underlined by the Constitutional Tribunal in the judgement of 24 October 2007, SK 7/06, OTK-A 2007/9/108.

¹⁸ Sanetra indicates that the concept of a competent court can be understood threefold – first of all, a court which, according to procedural regulations, is in a given case competent materially, territorially and functionally; secondly, a court which adjudicates in a competent panel i.e. in a panel specified by procedural provisions; thirdly, a court which adjudicates in compliance with its substantive competence. Substantive competence is understood as examining cases, which due to their type, belong to the competence of a given category of courts.

¹⁹ Judgement of the Constitutional Tribunal of 24 October 2007, SK 7/06, OTK-A 2007 No. 9, item 108.

²⁰ It is noticed, among others, by Kowalski (2021).

In this context, delegation of judges to higher instance courts may also raise doubts regarding their substantive preparation to hold such a position. The position of a judge should, in fact, correspond with his or her professional qualifications and experience gained during a proper seniority.

It should also be noticed that a judge delegated to a higher instance court, by a decision of the Minister of Justice, receives a respectively higher remuneration, which doubtlessly constitutes an important factor influencing his or her financial situation. A change of the employment place of a judge is then related to a change in his or her position, on which, according to Article 91a of the Law on the Common Courts System, the amount of the judge's basic remuneration depends. Whereas, in the case of delegating a judge to an equivalent court, the judge is entitled to a functional supplement of a regional court inspector. Furthermore, if a judge is delegated to another location than the location in which his place of employment was hitherto situated and, at the same time, this location is not the location of his or her place of permanent residence, according to Article 77 par. 6 of the Law on the Common Courts System, during delegation period the judge is entitled to amounts compensating inconveniences due to the delegation, including:

- 1) the right to a free accommodation in conditions consistent with the dignity of their office or a reimbursement of the costs of residing in the place of delegation;
- 2) a reimbursement of costs of the first commute from the place of permanent residence to the place of delegation, the last commute from the place of delegation to the place of permanent residence and once a week commutes to the place of permanent residence and to the place of delegation²¹;
- 3) a lump sum to cover costs of commutes by local means of transport;
- 4) an allowance;
- 5) a reimbursement of costs incurred due to using vehicles constituting the property of the employee for business purposes,
- 6) a reimbursement of costs of everyday commutes to the location of delegation.

Given the fact that recalling from delegation remains within discretionary powers of the Minister of Justice, there is a potential risk that this power may constitute a manifestation of non-formalised assessment of the judge's activity and thus, depending on circumstances, become an instrument taking the form of an award or a punishment for activity performed within the held office (Zaleśny, 2020, p.214). Such situations recently took place in Polish systemic practice. For example, cases of recalling judges from delegation with regard to a reversal or non-application of a preventive detention against the expectations of the public prosecutor's office²² or with regard to the judicial control executed against political interests -

²¹ As a rule, pursuant to Article 77 par. 6a of the Law on the Common Courts System, a judge is not entitled to dues indicated in points 1 and 2 when the distance from the location in which the delegated judge has a place of permanent residence to the delegation location does not exceed 60 km. In such a case, the judge is, however, entitled to reimbursement of costs of everyday commute to the delegation location (Article 77 par. 6b of the Law on the Common Courts System).

²² In December 2019 the judge of the District Court for Warsaw-Śródmieście, Krzysztof Ptasiwicz was recalled from the delegation at the Regional Court in Warsaw directly after not taking into consideration the public prosecutor's motion for applying a preventive detention in the case with file no.: XVIII K 246/19. See: the letter of the Ombudsman of 13 January 2020 addressed at the Minister of Justice, file no.: VII.510.180.2019.CW, which is available in Polish, at:

the so-called letters of support for candidates to the National Council for the Judiciary²³. Therefore, it may be stated that the power of the Minister of Justice to delegate judges may, in some cases, constitute a kind of a tool to review their judicial decisions. Although recalling of a judge from a delegation does not revoke his or her judicial decision, it involves pressuring the judiciary, as it constitutes a type of a means of repression, since it is related not only to worsening of the judge's financial situation, but also disorganization of his or her hitherto professional and private life.

Given the above, it is difficult not to notice the delegated judge's dependence on the executive (Kowalski, 2021, pp. 39-40)²⁴. Delegation may be, in fact, related to the improvement of the professional and financial status of a judge. The wish to be promoted, to increase the prestige of a held position or improve financial situation may encourage judges to take attitudes and represent opinions compliant with the expectations and interests of environments on which the possibility of delegation depends. It is of a particular significance in the context of reforms of the judiciary that have been introduced since 2016 and which have contributed to deepening the constitutional crisis in Poland. Judges' acceptance of such reforms manifested by issuing judicial decisions may be potentially related to an attempt of gratification from the Minister of Justice in the form of delegating a judge to a court of higher instance.

The above observations lead to a conclusion that, in practice, the institution of a delegation of a judge may be a mechanism of depending the court on the executive, whereas, participation in the panel of judges of a judge delegated by the Minister of Justice casts doubt on the court's attributes of autonomy, independence and impartiality. On the one hand, the institution of delegation provides for a possibility for the executive to pressure a delegated judge and, on the other hand, in a wider perspective, is an example of depending the judiciary on the executive (Konieczny, 2016, p. 186 after:). Delegation entails a significant risk to the judge's independence, as while adjudicating he or she may take into consideration also his or her own interest – care for their career, position, financial situation, for fear of recalling him or her from delegation by the Minister of Justice in the case of making a judicial decision non-compliant with the latter's expectations.

The institution of a judge's delegation may also raise doubts in the context of the attribute of the court's competence. As has been indicated above, interference in the place of employment (seat) of the judge as result of a delegation by the Minister of Justice is an

<https://bip.brpo.gov.pl/sites/default/files/Wystapienie%20do%20MS%20ws.%20cofnięcia%20delegacji%20sędziemu%20do%20Sądu%20Okręgowego%20w%20Warszawie%20C%202013.01.2020.pdf> [access: 18.12.2022].

²³ It concerns the case of judge Paweł Juszczyński, who in one of the examined cases asked the Chancellery of the Sejm of the Republic of Poland to submit a letters of support for members of the new National Council of the Judiciary. Thus, he applied the judgement of the Court of Justice of the European Union of 19 November 2019, stating that each court in Poland should investigate possibilities of examining court cases by judges nominated by the National Council of the Judiciary formed in compliance with the amendment of 2017. After his decision he was recalled by the Minister of Justice from delegation to the Regional Court in Olsztyn.

²⁴ Dependence of a delegated judge on the executive power is especially visible in criminal cases. Due to the fact that in the Polish legal order the Minister of Justice simultaneously holds the office of the Prosecutor General, as the supreme authority of the public prosecutor's office he is *de facto* the party to each proceedings before a court by public indictment. There are also cases, which are supervised personally by the Minister of Justice – as the Prosecutor General. In effect, he can have both the power over the public prosecutor and the delegated judge in a given criminal case, which can raise doubts regarding the impartiality of such a court.

interference in his or her scope of jurisdiction. If, however, a judge exceeds the scope of jurisdiction, he or she becomes a non-competent judge both pursuant to Article 45 par. 1 of the Constitution of the Republic of Poland, as well as provisions of the procedural law. Whereas, in practice there are situations, in which delegations of judges are often defective, which, in the end, causes the necessity to revoke their judicial decisions and repeat proceedings in cases they took part in.

The irregularities in judges' delegations have recently been discussed by the Supreme Court²⁵. It was noticed that in several cases examined by the Supreme Court, the panel of judges that issued the judgement included a judge delegated to perform judicial duties at another court for the period of performing a specific function (in this case – the president of the court). Meanwhile, pursuant to Article 77 par. 1 of the Law on the Common Courts System, the Minister of Justice can delegate a judge for a specified period of time, not longer than 2 years, or for an unspecified period of time. The term of office of the president of the court lasts 6 years (Article 26 par. 1 of the Law on the Common Courts System). While examining cases, the Supreme Court indicated that the term 'for a specified period of time' means the necessity of indicating a date (i.e. day, month, year) ending the period of performing by the judge duties at the court to which he or she has been delegated, thus the delegation of a judge 'for the period of performing the function of the president of the court' cannot be considered effective and, in consequence, is defective. In these cases, the judicial decisions issued with the participation of defectively delegated judges were revoked and submitted for re-examination, since it had been decided that the court had been unduly appointed, which constitutes an absolute ground for appeal under Article 439 par. 1 point 2 of the Act of 6 June 1997 – Code of Criminal Procedure²⁶. In another decision of the Supreme Court, the court panel was considered as unduly appointed to examine the case in a regional course by a single judge of the district court, delegated to perform duties in the regional court, but without the right to preside²⁷.

The situation is similar on the grounds of civil proceedings, where in compliance with Article 379 point 4 of the Act of 17 November 1964 – the Code of Civil Procedure²⁸, the basis for stating invalidity of the proceedings is provided for by the premise of court in composition contrary to the law. As has been indicated in judicial decisions, a person not authorised to adjudicate within the meaning of Article 379 point 4 of the Code of Civil Procedure is, among others, a judge that has no delegation to adjudicate at a given court at all, as well as a judge whose delegation does not meet statutory requirements conditioning the validity and effectiveness of the act of delegation²⁹.

In consequence, taking part in adjudication by a judge who has been defectively delegated constitutes an absolute ground for appeal on the grounds of the Polish criminal

²⁵ See: judgement of the Supreme Court of 25 May 2021, IV KK 70/21, OSNK 2021 No. 8, item 32; judgement of the Supreme Court of 21 July 2021, II KK 208/20, LEX no. 3207870; judgement of the Supreme Court of 09 September 2021, IV KK 384/21, LEX no. 3231828.

²⁶ Consolidated text of the Journal of Laws of 2022, item 1375, as amended; hereinafter: 'Code of Criminal Procedure'.

²⁷ Decision of the Supreme Court of 2 March 2009, V KK 319/08, OSNKW 2009 No. 6, item 49. A detailed analysis of the premise of undue selection of members of the court in the context of taking part in the adjudgment of the delegated judge is presented by Kosonoga (2018).

²⁸ Consolidated text of the Journal of Laws of 2021, item 1805, as amended; hereinafter: 'Code of Civil Procedure'.

²⁹ Decision of the Supreme Court of 28 February 2020, III CSK 225/19, LEX no. 3221336.

procedure (premise of undue appointment of the court – Article 439 par. 1 point 2 of the Code of Criminal Procedure) or a basis for invalidity of proceedings on the grounds of the civil procedure (premise of court in composition contrary to the law – Article 379 point 4 of the Code of Civil Procedure).

The same premise may also constitute the basis for preventive control in the form of a motion to recuse a defectively delegated judge from examination of the case due to failure to meet the attributes of Article 45 par. 1 of the Constitution of the Republic of Poland. In such a case, a judge is recused by operation of law from examining the case on the basis of Article 48 par. 1 point 1 of the Code of Civil Procedure (Kamieński, 2022, p. 44).

Moreover, the doctrine expresses the opinion that due to the numerous doubts raised against the possibility of delegating judges by the Minister of Justice, in particular, due to the risk of not having by the court, a panel of which includes a delegated judge, attributes of impartiality, autonomy and independence, a 'systemic defectiveness' of a delegated judge should be generally considered (Kamieński, 2020, p. 55). Adopting this opinion would mean that the premise of undue appointment of the court or the premise of court in composition contrary to the law would appear not only in the case of a defectively delegated judge, but in each case of a delegated judge participating in adjudicating. In fact, this position seems to be indirectly confirmed by Article 29 par. 5 of the Act of 8 December 2017 on the Supreme Court³⁰, according to which, it is admissible to examine fulfilment by a judge, delegated to perform judicial activities in the Supreme Court, requirements of independence and impartiality, taking into account the circumstances accompanying his or her appointment and his or her behaviour after appointment - upon a request of the party or participant in the proceedings before the Supreme Court, if, in the circumstances of a given case, it may lead to the violation of the independence or impartiality standard, affecting the outcome of the case with a consideration of circumstances concerning the party or participant in the proceedings as well as the nature of the case³¹.

It should be added here that in 2021, the issue of delegating judges by the Minister of Justice was also the subject of interest of the Court of Justice of the European Union (herein: 'CJEU') to which the Regional Court in Warsaw referred a preliminary ruling concerning compliance of the national law provisions with the European Union law in the scope, in which they vest the right to delegate judges with the Minister of Justice. As a result of the referred preliminary ruling, on 16 November 2021 the CJEU issued the judgement in joint cases from C-748/19 to C-754/19³², in which it indicated that the provisions of the European Union law prevent the regulation binding in Poland allowing the Minister of Justice to delegate judges³³.

³⁰ Consolidated text of the Journal of Laws of 2021, item 1904, as amended.

³¹ This provision was added under the Act of 9 June 2022 amending the Act on the Supreme Court of 15 July 2022 and has introduced the so-called test of independence and impartiality of a judge.

³² Judgement of the Council of Justice of the European Union of 16 November 2021 in joined cases from C-748/19 to C-754/19, ECLI:EU:C:2021:93.

³³ The Regional Court asked the CJEU to investigate compliance of the regulation concerning delegation of judges by the Minister of Justice under Article 19 par. 1 second section in conjunction with Article 2 of the Treaty on the Functioning of the European Union (Journal of Laws of 2004, No. 90, item 864, as amended) and Article 6 par. 1 and 2 of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016, L 65, P. 1).

In the justification to its position, the CJEU underlined that the decision concerning delegation of a judge and the decision on recalling from such a delegation should be made on the basis of known criteria and should be duly justified. Due to the fact that recalling a judge from a delegation without their consent can cause consequences analogous to those related to disciplinary punishments, such a measure should be subject to judicial control in the procedure fully guaranteeing the right to defence.

Currently, national courts are bound with the judgement issued by the CJEU and thus are obliged to control the implementation of the right to an impartial and independent court guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union³⁴, with a consideration of the position included therein. In consequence, the national court is obliged to, upon a request of a party to the proceedings, investigate and state the existence of impartiality and independence (or a lack thereof) of delegated judge adjudicating in a higher instance court. As results from the newest judicial decisions of the Supreme Court, delegation of a judge to adjudicate in a higher instance court cannot, however, be considered as an absolute ground for appeal under Article 439 par. 1 point 2 of the Code of Criminal Procedure or a basis of invalidity of proceedings under Article 379 point 4 of the Code of Civil Procedure, if no personal reservations have been made indicating that examination of the case by the judge was burdened with any influences or suggestions of other persons that would lead to the violation of the standard of impartiality and independence. Therefore, there must be at the same time circumstances that in conjunction of the fact of such a delegation undermine the independence and impartiality of a judge. It may be, in particular, a set of circumstances related to the fact of delegation and behaviour of the judge, consequences thereof or reasons of accepting the delegation, especially a set of circumstances of a qualified nature resulting from the position of a given judge and his or her behaviour. According to the aforementioned judicial decision of the CJEU, the circumstances of a qualified significance include the fact of a simultaneous appointment of a delegated judge on the position of the president of the court or a disciplinary ombudsman, since it may lead to the belief that the delegation of a judge is related to the proper fulfilment of the administrative function, performance of which fully depends on the Minister of Justice³⁵.

5. Conclusions

In the current reality of judicature in Poland, delegating judges constitutes an actual threat to the exercise of the right of a fair trial in the systemic aspect. Taking part in adjudicating by a delegated judge may not only raise doubts with regard to the competence, autonomy, independence and impartiality of the court, but also creates the risk of a significant prolongation of the proceedings in the case of stating an absolute ground for appeal on the grounds of the criminal procedure or invalidity of the proceedings on the grounds of the civil procedure and, in consequence, reversal of a decision and submitting the case for re-examination. It questions compliance of the discussed regulation with the Constitution of the Republic of Poland.

³⁴ Official Journal of the European Union C of 2007, no. 303.

³⁵ See: decision of the Supreme Court of 16 May 2022, II KK 66/22, LEX no. 3438186; decision of the Supreme Court of 23 June 2022, IV KK 164/22, LEX no. 3370367.

De lege ferenda it should be postulated to amend the discussed regulation by entrusting the competence to delegate judges of the common courts with judicial authority. It could be done, for instance, in imitation of the solutions adopted in the administrative courts system. According to Article 13 par. 1 of the Act of 25 July 2002 – the Law on the Administrative Courts System³⁶, it is the President of the Supreme Administrative Court, that is, an authority situated in the judiciary's structure, who delegates to perform duties of a judge in the Supreme Administrative Court. Such a solution would secure the systemic independence and autonomy of the judiciary from other powers, thus rejecting the accusation of violating the principle of the separation of powers. Amendments in this regard should be at the same time accompanied by specifying clear criteria for delegating judges, submitting decisions on the delegation of a judge to a judicial control, as well as limiting the possibility of delegating the judge only to an equivalent or directly higher court.

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³⁶ Consolidated text of the Journal of Laws of 2022, item 2492, as amended.

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