**The process of appointment of Polish Supreme Court judges since 2017**

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# **Introduction**

The Polish Supreme Court, as the highest court in Poland, serves as the final arbiter of legal disputes and interpretations of law. Its decisions have a binding effect on lower courts and can have far-reaching implications for legal precedents and the application of law throughout the country. Therefore, it is important to ensure that the process of appointing judges is lawful and uncontroversial - a thorough and transparent appointment process helps safeguard against political interference or influence, ensuring that judges are selected based on merit, qualifications, and judicial temperament rather than partisan considerations. However, since 2017, the upper-mentioned appointment matter, has been sparking a lot of controversy in Poland, not only among the lawyers and scholars, but also among the general public, being the flashpoint of street protests. This matter is regulated both by Constitution and the acts, in addition to internal regulations of the Supreme Court. Before 2017, there has been an Act on the Supreme Court in force since November 23rd, 2002, but on September 26th, 2017, a new project has been submitted to Sejm (legislative body in Poland) by the governing Law and Justice Party, as a part of judiciary reform laws set. The project has been vetoed by the President of the Republic of Poland and after some amendments, the bill has been passed in Sejm on December 8th, changing the process of appointment both of judges and the First President of the Supreme Court. Since then, beside its controversy, it has been a subject to many revisions and amendments (20 in total), often motivated by *ad hoc* needs of the ruling party. Therefore, conducting this research is of paramount importance – the literature of subject scarcely addresses the entirety of the subject matter, which is of great significance concerning the principles of judicial independence and the rule of law.

# **Constitutional regulation**

The Constitution of The Republic of Poland[[1]](#footnote-1) regulates the matter in Chapter VIII, ‘Courts and Tribunals’, particularly in articles: 179 (*Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary*) and section 3 of the Article 183 (*The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court*). Although the articles are structurally short and concise, its interpretations have generated a significant amount of commentaries and interpretative judicial decisions, including those by the Supreme Court and CFEU, which demonstrates its complexities and potential areas of dispute.

According to the Article 179, the President cannot perform activities constituting the exercise of the power to express opinions on candidates for judicial office granted to the National Council of the Judiciary, and so, the National Council of the Judiciary cannot appoint a judge. Consequently, it is not constitutionally permissible to appoint a person to a judicial office who was not indicated in the National Council of the Judiciary's proposal.[[2]](#footnote-2) Such a solution implements the idea of cooperation between the executive, judicial and legislative authorities, as well as the postulates indicated in the Preamble to the Constitution and eliminates the discretionary freedom of the political factor in making this decision. The Constitution does not indicate specific conditions (material or formal) that must be met when exercising this competence in this article, however, other articles may limit its scope.[[3]](#footnote-3) The issue that has been discussed the most is the problem of obligatory character of acceptance of the National Council of Judiciary’s proposal by the President. Concisely, The National Council of the Judiciary's proposals may be rejected by the President, but only if they would be incompatible with the principles that the Constitution entrusts him to uphold - making sure the Constitution is followed, protecting the state's sovereignty, and striving to ensure that its territory is inviolable and indivisible.[[4]](#footnote-4) Moreover, the because the appointment of the candidate listed in the National Council of the Judiciary's application is to be for an unlimited period of time, as per Article 179 of the Constitution, the act of selecting a judge cannot be of a timely character.[[5]](#footnote-5)

The section 3 of the Article 183 pertains to the First President of the Supreme Court and does not encompass the broader category of ordinary judges, defining strictly two issues: the First President’s way of election and their term. The President of the state has the prerogative to appoint one of the proposed candidates, nevertheless the General Assembly of the Judges of the Supreme Court is the body required by the Constitution to present at least two candidates to the head of state for the position of First President of the Supreme Court.[[6]](#footnote-6) The time frame for the appointment of the Supreme Court's first president has not been stated in this article; nonetheless, considering the need to maintain the office's operations, this should happen shortly following the candidates' appropriate proposal by the General Assembly.[[7]](#footnote-7) Moreover, the President of Poland cannot, under no circumstances, remove the acting First President of the Supreme Court.[[8]](#footnote-8) Concerning the term, while some of the comments[[9]](#footnote-9) permit the potential of constraints in this regard, the constitution does not expressly forbid the re-appointment of the same individual for another and consecutive terms of office. The need for stability of the term of office of the First President of the Supreme Court does not allow neither for direct nor indirect shortening of this term of office, e.g. by influencing the retirement age of judges[[10]](#footnote-10), which includes the person holding this office, which will be the case discussed below.

# **Regulation from the Act of November 23rd, 2002 on the Supreme Court**

The procedure and criteria for the appointment, responsibilities, retirement, and delegation of judges within the Polish Supreme Court were outlined in Articles 21 to 33. On the National Council of the Judiciary's proposition, referring to the Constitution, the President of Poland appoints judges to the Supreme Court. Polish citizenship, moral character, legal education, competence, good health, and pertinent work experience are among the requirements for appointment. The number of judicial positions in the Supreme Court is limited by the President on the advice of the General Assembly of Supreme Court Judges. Applications for open judge seats must be submitted by qualified candidates within 30 days of the announcement. The nominees are presented to the appropriate chamber of the Supreme Court by the First President of the Court after reviewing their applications and evaluating their qualifications. For each open post, the General Assembly of Supreme Court Judges votes to choose one or two candidates, and the First President subsequently submits the names of the selected candidates to the National Council of the Judiciary (Krajowa Rada Sądownictwa, later referred to as NCJ). Judges must take an oath of office before assuming their duties. Judges may be removed from their positions by retirement, disqualification, resignation, criminal conviction, or other causes. Judges retire at the age of 70, with the option to continue serving until the age of 72 upon request and with the necessary health certification. Judges may also retire voluntarily at earlier specific ages (60 for women and 65 for men) or after meeting certain tenure requirements. Accordingly to the Constitution, the President of the Republic of Poland appoints one of the Supreme Court's current justices to serve as the First President of the Court for a six-year term.

# **Regulation from the current Act on the Supreme Court**

## **Judges**

The President of the Republic of Poland appoints judges to the Supreme Court from among nominees submitted by the National Council of the Judiciary. The qualifications for applicants to the Supreme Court for judge posts are outlined accordingly to the act from 2002 and The Polish Constitution; they include criteria such as a Polish citizenship, 40 years of age, moral character, legal education, competence, good health. Candidates must also meet any special conditions set down for Supreme Court judges, such as adhering to ethical norms or possessing particular legal competence. Each individual meeting the criteria may apply for the position. The NCJ carefully assesses applicants, taking into account their ethical standing, professional achievements, and legal experience. The NCJ subsequently chooses a group of applicants that it believes are qualified to be appointed to the Supreme Court and recommends them to the President of Poland. After reviewing the NCJ's recommendations, the President, who has the final say in appointments, selects judges from the list of suggested candidates. The nominees are legally appointed as Supreme Court judges by the President following their selection, applying the procedure mentioned above. Judges must take an oath of office before assuming their duties and may be removed from their positions by retirement, disqualification, resignation, criminal conviction, or other causes.

The main difference between the two acts, and the reason of controversy, is the Article 37 of the Polish Supreme Court Act 2017, which changes the age of retirement of judges and consequently, enables new judges to take on the vacant positions. A Supreme Court judge becomes eligible for retirement at age 65, as per §1, not 70. A statement must be sent to the First President of the Supreme Court, who will then convey it to the President of the Republic of Poland, in order for female judges (only) to retire from the Supreme Court at the age of 60, according to §5. However, until November 21st, 2018, it was possible for a judge of the Supreme Court retires upon reaching the age of 65 to submit a declaration expressing their desire to continue their position no later than 6 months and no earlier than 12 months before reaching that age. Additionally, they must have presented a medical certificate attesting to their fitness to fulfill judicial duties, issued under the same standards as those for a judicial candidate. The President of the Republic of Poland must have granted permission for the judge to continue their position, and before doing so, may have seeked the opinion of the National Council of the Judiciary. The declaration and certificate are submitted to the First President of the Supreme Court, who forwarded them, along with their opinion, to the President of the Republic of Poland. The permission granted for continuation could last for a period of 3 years and was renewable no more than twice. Additionally, a judge who has obtained permission to continue their position may retire at any time after reaching the age of 65 by submitting a declaration to the First President of the Supreme Court, who then forwarded it directly to the President of the Republic of Poland. It was decided to alter the guidelines for retiring Supreme Court justices by a revision of the Act on November 21st, 2018. The 65-year-old age restriction was kept in place, however, judges were no longer able to request an extension of their tenure as active judges. It was agreed that judges who assumed the role of Supreme Court judge after the amending Act went into effect, that is, after January 1, 2019, would be subject to these restrictions. Judges who assumed their offices earlier should be subject to the provisions of Art. 30 of the 2002 (previous) Act on the Supreme Court. The regulatory framework concerning the terms of judges remains unchanged since 2018.

# **First President of the Supreme Court**

In comparison to the act of 2012, the legislation enacted in 2017 represents a significant evolution and expansion of the regulations governing the appointment of the First President of the Supreme Court in Poland. According to Article 12, the President of the Republic of Poland appoints the First President of the Supreme Court for a six-year term from among five candidates chosen by the General Assembly of Supreme Court Judges. The First President can only be reappointed once and will serve until retirement, transfer to retired status, or cessation of service as a Supreme Court judge. Article 13 grants the General Assembly the ability to suggest candidates for the position of First President from among active Supreme Court justices, ensuring a democratic and participatory selection process. The voting procedure in the General Assembly is governed by particular norms, such as the requirement of a minimum quorum and the use of secret votes.

Article 13a specifies what shall occur if a candidate for the position of First President has not been chosen in accordance with the established processes. The President of the Republic of Poland immediately appoints a Supreme Court judge to take over the duties of the First President. Within a week of this designation, the appointed judge convenes the Supreme Court's General Assembly of Judges to hold a new election for the position. The election, like the initial selection process, requires a minimum quorum, and voting processes adhere to the rules.

The regulations governing the terms of judges, described above, extend to encompass the position of the First President of the Supreme Court, accordingly to the Article 12 of the Act, which *expressis verbis* states that a person appointed to the position of the First President of the Supreme Court may hold this position only until he or she retires, is retired or the service relationship of a Supreme Court judge expires.

# **Controversies**

Although, as according to the Chancellery of the President of the Republic of Poland[[11]](#footnote-11), the proposed regulations were primarily aimed at simplifying the process of selecting candidates for the position of Supreme Court judge, ensuring the impartiality of the selection procedure, increasing the President of the Republic of Poland's involvement in the procedure for appointing Supreme Court judges, and ensuring judges' independence and impartiality in resolving court cases, they have been a subject of controversy due to the way of their application and its consequences. Due to a different regulation regarding the retirement age of a judge than the one formerly in force, the act provided for a transitional provision, according to which, within three months from the entry into force of the act, judges who are or will be 65 years old at that time retire state of rest.

The new retirement rules were critically assessed by the Court of Justice of the European Union. In the judgment of June 24th, 2019[[12]](#footnote-12), the Court found that: *On the one hand, by applying the provisions introducing a lowering of the retirement age of judges of the Supreme Court (Poland) to incumbent judges appointed to that court before April 3, 2018 and, on the other hand, by granting the President of the Republic of Poland a discretionary right to extend the active service of judges of that court after they have reached the newly determined retirement age, the Republic of Poland has failed to fulfill its obligations under Article 19 section 1, second paragraph, TEU.*

The issue surrounding the Supreme Court is inherently intertwined with the functioning of the National Council of the Judiciary (NCJ), primarily due to the pivotal role the NCJ plays in nominating judges to the Supreme Court. Consequently, any challenges or controversies regarding the legality, impartiality, or independence of the NCJ have direct implications for the composition and integrity of the Supreme Court. This interconnectedness stems from the fact that the NCJ is tasked with selecting and recommending candidates for judicial positions, including those within the Supreme Court, thereby exerting a significant influence on the judiciary's overall composition and decision-making processes. It is important to note that the Sejm terminated the terms of all of the NCJ members and established an entirely new council in accordance with the new Act on the National Council of the Judiciary, which has been passed around the same time in Sejm.[[13]](#footnote-13) This occurred despite the fact that the purpose of terms of office is to prevent the early removal of those holding positions of protection in the event that political power shifts. Consequently, the new, politicized National Council of the Judiciary (also called neo-KRS or neo-NCJ[[14]](#footnote-14)) assesses potential judges and submits applications to the president for their appointment; it also reviews retiree applications and used to agree to work for judges over 65 years of age. As a result of the neo-National Council of the Judiciary's nominations, the Supreme Court currently has a higher number of neo-judges than the properly appointed ones (the neo-NCJ has assigned more than a thousand judges to the legal system overall). This raises concern among authors and jurists regarding the legality of court decisions in which they partake, some of them are not regarding them as judges and view their decisions legally not valid.[[15]](#footnote-15)

In addition to legal doubts about the legal character of newly-appointed judges, there have been controversies regarding the appointment of the new First President of the Supreme Court. After First President Małgorzata Gersdorf's mandate ended in April 2020, Małgorzata Manowska was chosen by the Supreme Court to take over as her successor in May. Judges chosen in accordance with the new regulations (neo-judges, elected by neo-NCJ mentioned above) attended the General Assembly, making their election, according to most representatives of the legal doctrine, unlawful. Judges who were duly elected and scholars called attention to the process's inadequacies.[[16]](#footnote-16) In the end, the assembly chose judges, with Judge Włodzimierz Wróbel receiving the majority of votes. Nevertheless, the Assembly, led by non-judges, neglected to transmit the chosen candidates to the president, even though the Constitution mandates this in the above-mentioned Article 183. The President selected Małgorzata Manowska, himself. Since then, there has been a belief in the legal community that the First President of the Supreme Court was not duly appointed, which questions the status of her decisions as the First President.

This problem is validated not only by the fact that the Republic of Poland has violated its commitments under international law and by the guarantees owed to the parties involved in cases that are pending before the Supreme Court, but also by the fact that case resolution times are continuously getting longer, which is a problem of practical nature.[[17]](#footnote-17) The economy, the stability of legal transactions, the credibility of the Republic of Poland as a subject of international law, and the parties to the proceedings are all severely harmed by this situation.

In January 2024, a draft bill on the Supreme Court[[18]](#footnote-18) has been released as part of citizen-lawyer engagement process. This project literally states that the General Assembly of Supreme Court Judges must pass a resolution designating the candidates for the first president of the Supreme Court, who will then be presented to the President of the Republic of Poland. The project understands the need to regulate more issues *expressis verbis*, such as that the Presidents of the Supreme Court should continue in their roles for the duration of their terms in office. Moreover, in order to guarantee sufficient rotation in this role, the First President and Presidents of the Supreme Court may only be reappointed once, and terms of office cannot be consecutive. However, the project does not describe the status of neo-judges appointed by neo-NCJ and their decisions, leaving their status debatable.

# **Final remarks**

All things considered, the legal situation in the Supreme Court is highly controversial and leads to many questions in the public debate, legal uncertainties and complex practical implications of these changes. The evolution of legislation surrounding judicial appointments, particularly since 2017, has been met with considerable controversy, sparking public debates and protests. Although, as mentioned above, there are proposed model solutions to this problem, its complexity does not allow for an unambiguous and easy, widely-accepted answer to this problem. It is the hope not only of jurists and scholars, but also of the Polish society, that the issues surrounding the appointment process for judges and the First President of the Supreme Court are resolved transparently and in accordance with constitutional principles, fostering trust in the judiciary.

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