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ANALYSIS OF THE RULES FOR APPOINTING AND DISMISSING VISITING JUDGES IN THE COMMON COURTS OF THE REPUBLIC OF POLAND

Introduction

According to Art. 37 of the Act of 27 July 2001 – Law on the Organization of Common Courts (consolidated text: Dziennik Ustaw [Journal of Laws] of 2024, item 334; hereinafter referred to as: LOCC), activities within the scope of internal administrative supervision may be entrusted by the president of the court to¹, among others, a visiting judge. A visiting judge in an appellate court is appointed by the president of the appellate court, and in a district court – by the president of the district court, for a period of four years, from among judges with at least seven years of experience as a judge in general. Before appointing a visiting judge, the president of the relevant court seeks the opinion of the Minister of Justice, who, when issuing the opinion, also takes into account organizational considerations, in particular the need to appoint a visiting judge in a given court. If the Minister of Justice does not issue an opinion within thirty days from the date of presenting the intention to appoint a visiting judge by the president of the relevant court, the opinion is deemed positive (Art. 37d LOCC). A visiting judge may also be a retired judge who does not have the right to adjudicate².

¹ According to J. Mrożek, the delegation referred to in Art. 37 of the Act on Common Courts is described as a “delegation order – sui generis authorization for performing specific tasks related to internal administrative supervision, such as inspections or audits”. J. Mrożek, *Kontrola i nadzór administracyjny w sądownictwie powszechnym*, Warszawa 2022, p. 320.

² K. Chmielarz, *Administracja sądowa. Ministerialny model zarządzania i administrowania sądami powszechnymi*, Warszawa 2024, Legalis.

Activities within the Scope of Internal Administrative Supervision

A visiting judge performs current activities within the scope of internal administrative supervision through: 1) the right to review court activities; 2) requesting explanations; 3) demanding the rectification of deficiencies; 4) presence at a non-public hearing. Based on the court president's order, as needed, a visiting judge may conduct court inspections (Art. 37b § 2 point 1 LOCC and Art. 37c LOCC) as well as audits of the court or division (§ 6 of the Regulation of the Minister of Justice of 20 December 2012 on Administrative Supervision over the Administrative Activities of Common Courts; hereinafter referred to as: ASOAAACC).

In literature, "inspection" is defined as the control of the assessed unit by direct insight into its operation, leading to the formulation of a general assessment of the inspected unit and control over the tasks assigned to it. Inspections of court divisions are appropriately conducted by visiting judges in the court: 1) appellate, holding the position of an appellate court judge; 2) district, holding the position of an appellate court judge or district court judge; 3) regional, conducted by visiting judges holding the position of a district court judge or regional court judge. Furthermore, Art. 37c § 4 LOCC stipulates that a visiting judge cannot inspect a court division if they are a spouse, relative, or in-law of one of the judges or court assessors assigned to the division, or if they have a legal or factual relationship with one of the judges or court assessors that may raise reasonable doubts about the visiting judge's impartiality. It is worth noting that the court president and the division head are notified of the planned inspection at least thirty days before it is carried out (Art. 37c § 6 LOCC). The inspection notice specifies: 1) the inspected court division; 2) the start date of the inspection; 3) the visiting judge(s) entrusted with conducting the inspection. During the inspection, the visiting judge may convene a meeting to discuss the issues under inspection, which the court president may attend. The inspection report is prepared within 30 days of the inspection's completion and presented to the court president responsible for conducting it. A copy of the report is delivered to the president of the inspected court and the judges mentioned in § 1 point 4. Within 21 days of receiving the report copy, the president of the inspected court and, through them, the judges mentioned in § 1 point 4, have the right to submit written comments and objections to the report's content.

In contrast, an audit of the court or division is limited to the control (analysis) of a specific actual state (problem). The audit, as provided in § 6 para. 1 in fine ASOAAACC, indicates its ad hoc nature, which is applied "as needed". Supervisory plans may also include conducting audits. When conducting an audit according to the supervisory plan, the court president must be notified, and in the case of a division audit, the division head must also be notified at least 14 days

before it is carried out. Judicial practice indicates that audits are conducted by visiting judges, who, by the way, are the only entities authorized to conduct inspections (see Art. 37c § 2 3 LOCC). For entities authorized to conduct audits, there is no such regulation in LOCC, which does not mean that a judge cannot conduct such an audit due to *iudex inhabilis*, as such exclusion does not apply³.

Dogmatic and Legal Analysis

The tenure of a visiting judge, in a general and theoretical sense, constructs a certain state of legal certainty of action within a four-year time frame, with a stable personal composition, ensuring continuity in performing their function. The analysis of Art. 37d LOCC presents two positive prerequisites that a judge must meet to be appointed as a visiting judge, while not indicating any negative prerequisites that would exclude the possibility of applying for this function. The provision clearly specifies the four-year term of the visiting judge and does not impose any restrictions, meaning the possibility of reappointment for subsequent terms. It does not refer to the possibility of dismissal before the end of this period, indicating the legislator's intention for the function to be performed for the entire term and, as a rule, not to be shortened or extended during its duration. The nature of Art. 37d LOCC confirms that the legislator did not specify how the term of a visiting judge might be shortened. This thesis should be accepted, assuming that "tenure" means the full performance of the function of a visiting judge for the entire legally specified time, ensuring stability and continuity of administrative supervision. "Tenure" guarantees the certainty and independence of the functions performed by judges, which is crucial for legal certainty and the efficient functioning of the court. Additionally, tenure is an important element that protects the function of the visiting judge from arbitrary decisions and ensures that administrative supervision is implemented in a consistent and coherent manner⁴.

³ *Ibidem*.

⁴ The analysis of Art. 37 LOCC and Art. 105 LOCC allows for the assertion that the appointment of a visiting judge is not an appointment to hold an "office" or "position", but to perform the "function" of a visitor. In practice, it is often the case that judges serving as visiting judges, based on the court president's order under Art. 57ah § 1 and 2 LOCC, evaluate the qualifications of a candidate for a vacant judicial position. This does not mean that the evaluation conducted by the visiting judge is applicable within the framework of internal administrative supervision. Accepting the thesis that the evaluation of the qualifications of a candidate for a vacant judicial position falls within the activities of internal administrative supervision must be considered incorrect and contrary to the linguistic interpretation and *contra legem* of Art. 57ah § 1 and 2 LOCC. From the perspective of the analyzed issue, it is worth noting that the norms regulating the exercise of internal administrative supervision are contained in Art. 37–37e LOCC – see: K. Chmielarz, *Administracja sądowa...*

In contrast, Art. 105 § 3 LOCC explicitly outlines the conditions under which the term of retired judges serving as visiting judges can be shortened, allowing for the withdrawal of the function and their consent to perform it. This can only occur with a month's notice. Article 105 § 4 LOCC further specifies that a retired judge cannot serve as a visiting judge if they are running for the office of deputy, senator, councilor, or serving in state, municipal bodies, diplomatic, consular services, or in international and supranational organizations operating under international agreements ratified by Poland.

One must not overlook the fact that the court president has the competence to appoint a visiting judge, which is explicitly stated in the analyzed provision. The lack of a clear provision regarding the dismissal of a visiting judge indicates that the competence to appoint does not entail the competence to dismiss. According to the principle of legality⁵, it is required that each decision of the court authority (court president) is not arbitrarily modified and has a clear legal basis based on explicit provisions, which in the case of dismissal before the end of the term will not be met. Therefore, the administrative competences of the court president in this area are clearly defined and limited to avoid undermining the stability of administrative supervision.

From the constitutional principle of legality and the principle of a democratic state ruled by law⁶, it follows that if legal norms do not explicitly provide for the "competence" of a state body, this competence cannot be presumed, nor can the intention of the legislator be ascribed if not expressed. Competence provisions are subject to strict literal interpretation, and the presumption of encompassing matters not listed, for example, through teleological interpretation⁷, is not permissible⁸.

Moreover, the procedure for dismissal should be transparent and accountable, consistent with the rule of law and the principles of legal order⁹. From an axiological perspective, every decision of the court president must comply with the

⁵ Art. 7 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 with corrections and amendments; hereinafter referred to as: Constitution RP).

⁶ Art. 2 of the Constitution RP.

⁷ The teleological interpretation should align with the purpose that the legislator intended when creating the provision during parliamentary proceedings.

⁸ See Resolution of the Constitutional Court of 10.05.1994, W. 7/94 (Journal of Laws 1994, No. 62, item 264) and also Resolution of the Supreme Court of 14.10.2004, III CZP 37/04.

⁹ Cf. the mechanism for dismissing court visitors by court presidents within six months from the effective date of the 2017 amendment, in courts under their jurisdiction, based on an arbitrary act of will without providing reasons, facilitated by the episodic (one-time) exception specified in Art. 17(1) of the Act of 12 July 2017, amending the Law on the System of Common Courts and certain other acts (Journal of Laws of 2017, item 1452) – see: M. Dąbrowski, J. Szymanek, M.M. Wiszowaty, J. Zaleśny, *Niezależność sądów i niezawisłość sędziów*, Warszawa 2020, p. 159; D. Mazur, *Sędziowie pod specjalnym nadzorem, czyli „wielka reforma” wymiaru sprawiedliwości* [in:] *Konstytucja. Praworządność. Władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*, eds. Ł. Bojarski, K. Grajewski, J. Kremer, G. Ott, W. Żurek, Warszawa 2019, p. 279.

principle of justice and ancillary praxeological values, such as reliability and efficiency. It is also necessary to adhere to the highest ethical standards, considering the principle of the common good. The measures employed by the court president must be proportional to the goal, meaning that the dismissal of a visiting judge should be a last resort, applied only for important reasons. The principle of legal certainty and the stability of public functions also indicates that a visiting judge should perform their function for the full term, which is crucial for ensuring the stability of administrative supervision over the activities of courts.

The requirement to seek the opinion of the Minister of Justice before appointing a visiting judge underscores the importance of this function and indicates that this process is not merely a formality, which further supports the argument for tenure stability. The absence of a similar requirement for dismissal suggests that the legislator did not envisage the possibility of dismissing a visiting judge before the end of the term, which further supports the argument for maintaining the stability and continuity of this function.

Systemic and Functional Interpretation

In the process of legal interpretation, one must consider linguistic, systemic, and functional aspects, which must align with the normativity of the legal text and the methodological principles of interpretation¹⁰.

In the law governing the organization of common courts, the absence of a specific provision regarding the dismissal of a visiting judge before the end of the term indicates that such a possibility was not envisaged by the legislator. Therefore, Art. 37d LOCC should be interpreted in a way that ensures its internal coherence and logic.

The functional interpretation of Art. 37d LOCC indicates that visiting judges are experienced (at least seven years of service) and that their appointment process is transparent and consulted with the Minister of Justice, thereby ensuring the independence and stability of the visiting judge's function, which is crucial for proper administrative supervision. Dismissing a visiting judge before the end of the term could lead to destabilization of the court's administrative structure. It would be an abuse without basis in the analyzed provision to apply an interpretation assuming that since the court president can appoint, they can also arbitrarily dismiss a visiting judge. Referring to the analyzed provision, applying the argumentum *a contrario* interpretation¹¹, the following conclusions can be drawn:

¹⁰ See: L. Morawski, *Zasady wykładni prawa*, Toruń 2010, *passim*; M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012, *passim*.

¹¹ In the context of systemic interpretation, the argumentum *a contrario* should be applied cautiously to avoid results that are contrary to the logic of the legal system and the general principles of law.

1. Since the provision states that “a visiting judge in an appellate court is appointed by the president of the appellate court, and in a district court – by the president of the district court”, it can be inferred that other court presidents (e.g., the president of a regional court) do not have the authority to appoint a visiting judge.
2. The provision states that “a visiting judge must have at least seven years of experience in the position of a judge”, thereby implying that judges with less experience cannot be appointed to this position.
3. Since “the court president is required to seek the opinion of the Minister of Justice before appointing a visiting judge”, it should be inferred that an appointment without this opinion is inadmissible and may be deemed unlawful.

The literal, systemic, and functional interpretation of Art. 37d LOCC leads to the conclusion that the court president does not have the authority to dismiss a visiting judge before the end of their four-year term. Such an interpretation is consistent with the principles of legal certainty and stability of public functions.

Threats to the Rule of Law and Stability of the Legal System

1. **Violation of the Principle of Legal Certainty:** The rule of law is based on the principle of legal certainty, which ensures that legal provisions are clear, understandable, and predictable, and that all actions by state authorities comply with the law. Dismissing a visiting judge before the end of their term, despite the lack of an explicit provision allowing such action, undermines this principle. If the court president can freely interpret their authority to dismiss visiting judges, it creates a situation of legal uncertainty where individuals holding public functions may be exposed to arbitrary decisions and abuse of power.
2. **Violation of the Principle of Equality:** The principle of equality requires that all individuals be treated equally in similar situations. Arbitrary dismissal of visiting judges by the court president can lead to situations where decisions regarding the appointment and dismissal of judges are made based on subjective criteria rather than objective grounds provided by law. Such actions can be perceived as favoritism or discrimination against certain individuals, undermining the principle of equality.
3. **Political Influence and Abuse of Power:** Dismissing a visiting judge before the end of their term to achieve a temporary political goal constitutes a serious abuse of power and a threat to the rule of law and the stability of the legal system. Using the position of the court president to achieve political objectives threatens the independence of the judiciary and undermines public trust in public institutions. Such actions can be seen as an attempt to manipulate the court’s personnel composition to achieve specific political benefits, which is contrary to the principles of a democratic state governed by the rule of law.

4. **Undermining the Authority of the Judiciary:** The stability of the legal system relies on the authority and independence of the courts. Arbitrary dismissal of a visiting judge by the court president undermines the authority of the judiciary, as it shows that personnel decisions can be made based on subjective and political criteria rather than according to the rule of law. This can lead to a weakening of public trust in the justice system.
5. **Violation of Law and Continuity of Court Work:** A visiting judge plays an important oversight and supervisory role within the judiciary structure. Dismissing a visiting judge before the end of their term is a violation of the law and disrupts the continuity of their work, which can lead to organizational and administrative problems within the court. The lack of tenure stability for public functions may also discourage judges from taking on additional inspection duties due to fears of arbitrary dismissal decisions.
6. **Destabilization and Lack of Predictability in the Legal System:** If the court president dismisses a visiting judge before the end of their term without a clear legal basis, it creates a precedent that can lead to further destabilization of the process of dismissing judges. Other authorities may begin to adopt similar practices, leading to general chaos and a lack of predictability in the legal system.

Arguments Against the Possibility of Dismissal

1. **Tenure as a Principle of Stability:** Tenure is intended to guarantee the stability of functions and the continuity of administrative supervision in common courts. The provisions of LOCC do not provide for the shortening of the term, indicating that it should be carried out for the full four-year period, protecting the visiting judge from arbitrary decisions by the court president.
2. **Lack of Provisions Regarding Dismissal:** The provisions of the Act do not contain explicit grounds and procedures for dismissing a visiting judge before the end of their term. This legislative silence can be interpreted as the legislator's intention for the function to be performed for the entire term. The legislator, when defining the mode of appointing a visiting judge, does not establish a general principle of their dismissibility from this function. It assumes the permanence of this function during the term, only providing for the possibility of dismissing a retired judge from the function of a visitor in specified cases.
3. **Principle of Legality:** All actions of judicial authorities must comply with the principle of the rule of law, which means acting on the basis of and within the limits of the law¹². The lack of explicit provisions regarding the dismissal of a visitor before the end of the term means that the court president does not have such competence, as the law does not permit it. The act of dismissing a visiting judge

¹² The principle of legality requires that every decision of a judicial authority has a clear legal basis.

is not a simple reversal of the act of appointment based on the evaluation of the visitor's performance by the court president, but only a consequence of circumstances provided for in the law and concerning only a retired judge. Article 37d LOCC, which empowers the court president to appoint a visiting judge, does not provide a sufficient basis for dismissing them from such a function. If the legislator wanted to introduce circumstances enabling the dismissal of a visiting judge, it would do so in a clear and explicit manner, expressing it *expressis verbis*. Given that the legislator has not established separate provisions regarding the possibility of dismissing a visiting judge, assuming the rationality of the legislator's actions, it should be inferred that the appointment to this function is to last for the full term.

4. Effectiveness and Independence of Administrative Supervision: A visiting judge, performing a supervisory function, should be protected from unjustified dismissal, which is crucial for maintaining the effectiveness and independence of administrative supervision.
5. Opinion of the Minister of Justice: The appointment procedure requires obtaining the opinion of the Minister of Justice, indicating the need for consultation and cooperation between judicial and administrative authorities. The lack of such a requirement for dismissal suggests the absence of an intention to allow such actions without appropriate oversight.

Arguments for the Possibility of Dismissal

Presumption of Competence¹³: Since the court president has the competence to appoint, it can be argued that they also have the competence to dismiss a visiting judge, but only in cases of justified special circumstances, such as voluntary resignation¹⁴, severe illness preventing the performance of duties, or violation of the Constitution of the Republic of Poland and laws¹⁵. The difference in the nature of the grounds enabling dismissal affects the possibility of dismissing a visiting judge by the appointing authority.

Conclusion

The dismissal of a visiting judge before the end of their term by the court president, when the provisions of LOCC indicate the absence of a clear competence

¹³ In the context of constitutional law, the concept of competence is inextricably linked to a specific set of legal norms that define the situations in which a state authority takes certain actions. These actions lead to a change in the legal situation of other entities to a defined extent.

¹⁴ The dismissal in the case of a judge's resignation has a declaratory character.

¹⁵ In the mentioned cases, the dismissal has a constitutive nature, as the court president, when dismissing, should assess whether the existing situation justifies the dismissal of the visiting judge.

norm regarding the dismissal of a visiting judge, poses a serious threat to the rule of law and the stability of the legal system. The tenure of a visiting judge fundamentally assumes continuity, and the expiration of the term is the natural way of ending the function. Any other methods are exceptional (for important reasons). The possibility of freely dismissing a visiting judge violates the principles of legal certainty, equality, and judicial independence, undermines the authority of the judiciary, and disrupts the continuity of court operations. Additionally, the abuse of power to achieve temporary political goals threatens the foundations of a democratic state governed by law and erodes citizens' trust in public institutions. To prevent such threats, personnel decisions in the judiciary should be made in accordance with the law and the principles of the rule of law, ensuring the stability and predictability of the justice system.

Generally, the function of a visiting judge expires with the end of their term or the moment the judge is dismissed from the visiting judge role. Although the law does not explicitly state that a visiting judge is appointed for a full term, it is erroneous to claim that the dismissal would primarily be justified by teleological and praxeological considerations. It would also be an oversimplification to equate the powers (competencies) of appointment with the powers of dismissal from positions, asserting that "if a given authority can appoint a person, it can also dismiss them at any time".

The provisions of LOCC envisage the competence to dismiss a visiting judge, but this only applies to a retired judge (not an active judge). Besides the aforementioned possibility of dismissing a visiting judge, the court president can only dismiss "for other important reasons".

In summary, visiting judges play a crucial role in the internal administrative supervision of common courts. Their actions must comply with the principles of independence, justice, and professional ethics. The process of dismissing visiting judges should be transparent and consistent with the constitutional principles of the rule of law. Interpretation of the provision, considering the principles of legal interpretation and relevant literature, indicates that a visiting judge should serve their function for the full four-year term. The absence of explicit provisions regarding dismissal before the end of the term and the principles of stability and legal certainty argue that the court president does not have the competence to dismiss a visiting judge before the end of their term without a clear legal basis. Any attempts at dismissal should be treated as a violation of the rule of law and can be challenged through appropriate legal procedures.

Given the legal cases of dismissing visiting judges by court presidents, it should be stated *de lege ferenda* that this issue should be regulated to clarify the provisions regarding the dismissal of visiting judges, to avoid interpretative arbitrariness and ensure the transparency of procedures.

Moreover, the analysis of the legal state of internal administrative supervision over the court's administrative activities allows us to conclude that disorganization

of court work through inaccurate and unjustified personnel decisions, including arbitrary dismissal of visiting judges, falls under the typification of “gross neglect of official duties” mentioned in Art. 27 LOCC, which may contribute to the dismissal of the court president before the end of their term.

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Summary

This publication contains a detailed study on the legal analysis regarding the appointment and dismissal of visiting judges, who play a crucial role in administrative supervision over the proper functioning of common courts. The article employs a dogmatic-legal analysis and applies systemic and functional interpretation. The study also includes a *de lege ferenda* conclusion.

Keywords: visiting judge, administrative supervision, court president

ANALIZA ZASAD POWOŁYWANIA I ODWOŁYWANIA SĘDZIÓW WIZYTATORÓW W SĄDACH POWSZECHNYCH RP

Streszczenie

Niniejszy artykuł zawiera szczegółowe opracowanie dotyczące analizy prawnej w zakresie powoływania i odwoływania sędziów wizytatorów, do których należy pełnienie istotnej roli w nadzorze administracyjnym nad prawidłowym funkcjonowaniem sądów powszechnych. Zastosowano analizę dogmatyczno-prawną oraz wykładnię systemową i funkcjonalną. Opracowanie zawiera również wniosek *de lege ferenda*.

Słowa kluczowe: sędzia wizytator, nadzór administracyjny, prezes sądu