
The Commander-in-Chief* in the Command-and-Control System According to Polish Regulations and De Lege Ferenda Postulates

Submitted 04/08/21, 1st revision 24/08/21, 2nd revision 15/09/21, accepted 30/09/21

Malwina Ewa Kołodziejczak¹

Abstract:

Purpose: The aim of the research is to characterize the role and position of the Commander-in-Chief of the Armed Forces in the Republic of Poland in command-and-control system, including the appointment procedure and functioning afterwards.

Design/Methodology/Approach: During research the author uses the method of legal and comparative analysis, and structural and functional analysis, as well as the method of synthesis, deduction, and reduction. However, the method of interpretation is also important, which make it possible to interpret legal. Due to the nature of the topic, the author uses elements of the concept - descriptive and improving, functional and modelling as well as diagnostic and functional.

Findings: The main hypothesis refers to the assumption that the role and place of the Commander-in-Chief of the Armed Forces in the Republic of Poland is regulated to a limited extent, because the current legal provisions do not treat this matter in a comprehensive manner. The result is doubts as well as existing gaps in the law (both extra legem and intra legem). The Commander-in-Chief should take and play the leading role and place. Therefore, considering experience of other states and the available tools and means, considering the changes at the constitutional level, the assumption was made that the President of the Republic of Poland should be Commander-in-Chief.

Practical Implications: In this paper the author describes contingencies that may give rise to the appointment of the Commander-in-Chief and analyses the provisions of the Commander-in-Chief's functioning in peacetime and in wartime and presents some hypothetic solutions.

Originality/Value: Politicians, decision-makers and academics have been discussing the role of the Commander-in-Chief of the Polish Armed Forces in Poland for several years. Currently, efforts are underway to develop and implement new comprehensive legal basis for position and role of the Commander-in-Chief and to streamline the existing regulations through the amendments of relevant legal acts. In this context, it is pertinent to reflect on the role that the Commander-in-Chief would play during a war or under martial law as well as in the case of acts of terrorism and cybersecurity threats.

Keywords: Commander-in-Chief, war, martial law, security, command-and-control system.

ASJC: Law 3308, Social Science, Safety Research 3311.

Paper Type: Research in Security Studies and Law.

¹Ph.D., Assistant Professor in the Institute of State Security at the War Studies University; and Ph.D., Candidate in law at the Cardinal Stefan Wyszyński University, Faculty of Law and Administration, ORCID: 0000-0002-2624-4009; malwina.e.kolodziejczak@gmail.com;

1. Introduction

Traditionally, it was the emperor or the king, who served as commander-in-chief and strategist. During Poland's history, the role of king as the commander-in-chief was unique, because he was the most important person in country. Nowadays, many countries still delegate the functions of the commander-in-chief to the head of the state or the government. However, in Poland for several years there has seen a debate both on the precise role of the Commander-in-Chief of the Armed Forces and on who the person performing this function should be.

The Commander-in-Chief of the Armed Forces according to the 1997 Constitution of the Republic of Poland is a constitutional body. Therefore, tasks, competences, powers of the Commander-in-Chief, as well as his position and role should not raise any questions. But doubts still occur. The Commander-in-Chief of the Polish Armed Forces is appointed in two situations, during wartime and when martial law is introduced. As expressed in the Constitution of the Republic of Poland, the President of the Republic of Poland appoints the Commander-in-Chief of the Polish Armed Forces "for time of war" (*The Constitution of the Republic of Poland*, JL of 1997, art. 134 par. 4). In this situation, the appointment of the Commander-in-Chief by the President is mandatory although it must be requested by the Prime Minister first.

In turn, under martial law, the President may appoint a Commander-in-Chief at the request of the Prime Minister. Martial law² can be introduced by the President of the Republic of Poland at the request of the Council of Ministers: "*in the case of external threats to the State, acts of armed aggression against the territory of the Republic of Poland or when an obligation of common defense against aggression arises by virtue of international agreement*" (The Act of 29 August 2002 - *Martial law and the competence of the Commander-in-Chief and his subordination to the constitutional authorities of the Republic of Poland*, JL of 2017).

2. Brief Methodology

It seems that the issue of appointment and functioning of the Commander-in-Chief of the Polish Armed Forces has been settled. However, problems arise when it comes to the interpretation of the rules, both to the Commander-in-Chief himself, his position, the moment of appointment and the procedure itself, as well as the manner and the basis for determining the legal grounds for time of war or martial law. Therefore, the subject of research was the office of the Commander-in-Chief of the Polish Armed Forces, legal basis and procedure for his appointment, and its role and place in the command-and-control system of the Republic of Poland, including the legal and organizational conditions of his further functioning.

²*Martial law is one of three the extraordinary measures, others being state of emergency and state of natural disaster (The Constitution of the Republic of Poland, JL of 1997, art. 228).*

Research puzzle presented above makes it possible to distinguish the main research problem, aim and hypothesis. The main research question of this paper is: What is and should be the role of the Commander-in-Chief of the Armed Forces in command-and-control system and in what direction should the changes be heading? The paper also attempts to analyse the following problems:

1. What are the legal conditions for the appointment and functioning of the Commander-in-Chief of the Armed Forces and whether these are sufficient for this body to be able to perform the functions entrusted to it effectively?
2. What is the role of the Commander-in-Chief of the Armed Forces in all conditions (peace, crisis, war) of the functioning of the state?
3. What concept of *de lege ferenda* postulates can be proposed so that the Commander-in-Chief of the Armed Forces would fulfill its desired role and be able to carry out tasks?

Therefore, the aim of this paper is to characterize the role and place of the Commander-in-Chief of the Armed Forces in the Republic of Poland in command-and-control system, including the appointment procedure and functioning afterwards. The paper also aims to present proposals for changes that should take place so that the Commander-in-Chief could fulfill its role of an important constitutional body.

The main hypothesis refers to the assumption that the role and place of the Commander-in-Chief of the Armed Forces in the Republic of Poland is regulated to a limited extent, because the current legal provisions do not treat this matter in a comprehensive manner. The result is doubts as well as existing gaps in the law (both *extra legem* and *intra legem*). The Commander-in-Chief should take and play the leading role and place. This body should be permanent, not functioning *ad hoc*. It would be necessary to specify directly who could be appointed as a Commander-in-Chief.

Therefore, considering experience of other states and the available tools and means, considering the changes at the constitutional level, the assumption was made that the President of the Republic of Poland should be Commander-in-Chief. Also, it should be mentioned, that functions of the Commander-in-Chief in wartime or martial law period are specified. The problem arises in other areas - *inter alia* - terminology. For the functioning of the Commander-in-Chief, it is important to clarify the key phrases, such as for period of war and martial law, which determine the possibility of his appointment.

The main theoretical method of research is the analysis of sources, including legal acts and literature. In connection with the collection of several scientific facts from the border of many disciplines (security, law, political science, etc.), Author uses the method of synthesis, deduction, and reduction, which is allowing to extract and merge the results. At the same time, Author uses the synthesis of the research

method to develop applications and proposals for solutions. Conceptual analysis and criticism of sources have great importance in the research. The method of analysis allows to indicate the changes that took place in terms of the appointment and functioning of the Commander-in-Chief.

On the other hand, the use of the method of analysis and logical and cause-effect construction, the methods of generalization and abstraction, as well as deductive and reductive inference make it possible to indicate repeatable features, eliminate irrelevant features, and find specific dependencies about the problem under study. Conclusions obtained using the above methods made it possible to separation and consolidate the results obtained during the research, which in turn led to the proposition of conceptual solutions indicating the role and position of the Commander-in-Chief in the command-and-control system of the Republic of Poland.

3. The Key Definitions³

In legal acts as well as in the most important strategic documents in force in the Republic of Poland there is a multitude of formulations, with the multiplicity of different concepts causing inconsistency in their use. Absence of some legal definitions increase the problems associated with their understanding. This creates a situation in which through lack of regulations many opposite interpretations may emerge. In Polish legal acts most of the issues relate to the concept of "war", which has to be distinguished from the "state of war", "time of war" and, above all, the "martial law". The Constitution of the Republic of Poland has quite a few inaccuracies related to the use of these terms. Concepts such as "state of war", "time of war", but also "armed attack" and "aggression", albeit not referring to the same factual and legal situation, are used in different configurations. The correct interpretation is important because the constitutional expression "for a period of war" legitimizes the appointment of Commander-in-Chief of the Armed Forces or of an emergency court or an ad hoc procedure (Kołodziejczak, 2016, p. 92-94; Kołodziejczak, 2018, p. 39-50).

"War" is a term taken from public international law.⁴ Nowadays, war is banned despite still being one method of pursuing foreign policy. As experts in international law generally emphasize, war is the breach of peaceful relations between states and the launching of hostile actions, which involve an armed conflict (Bierzanek and Symonides, 2002; Shaw, 2008).

The disputable term used in Article 134 is "period of war" (*The Constitution of the Republic of Poland*, JL of 1997, art. 134 par. 4). The definition of "period of war" may give rise to doubt because, as already indicated, there are no legal regulations

³*In her research, the author has dealt with the definitions and presented some of the results in the following publications: Kołodziejczak, 2016, p. 92-94; Kołodziejczak, 2018, p. 39-50.*

⁴*More about war according to public international law.*

defining such a situation. It can be accepted that this concept is in opposition to time of peace and refers to actual military operations and events related to an armed conflict.⁵

The definition of “time (period) of war” should be identical with the definition of “war”, except for one element — this expression should refer to a period of actual warfare. Therefore, we cannot fully accept the view that this time can occur otherwise than during military operations between states. However, there is still no legal definition of “time of war”.

Due to the functioning of the legal definition of martial law, and indeed both - constitutional and statutory, this expression does not raise doubts and interpretation of many authors is similar. Some doubts occur in interpretation of the provisions regarding the procedure of introduction. Martial law is one of the extraordinary states that can be introduced by the President of the Republic of Poland at the request of the Council of Ministers “in the case of the external threats to the state, acts of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreement” (*Constitution 1997*, art. 229). Before the 2011 amendment, the statutory definition was similar. Then it was added that the external threat could also be caused by terrorist and cyberspace activities (*The Act of Martial law... 2004*, art. 2 par. 1), (Kołodziejczak, 2016, p. 92-94).

4. Functioning of the Commander-in-Chief in the Command-and-Control System

According to the Constitution “(...) *The President of the Republic of Poland, for a period of war, shall appoint the Commander-in-Chief of the Armed Forces on request of the Prime Minister (...)*” (*Constitution 1997*, art. 134 par. 4).

The topic gained significance especially in the context of the planned changes in the management and command system. The command-and-control system of the Polish Armed Forces gained a new legal and organizational framework on January 1, 2014. The reform of the command-and-control system has reopened the discussion about the importance of the time of war on the one hand, and the role of the Commander-in-Chief of the Armed Forces on the other. One of the main goals of the reform was to adapt the command organization to NATO standards and to introduce a unified command system in peace, crisis, and war. For this reason, the Commander-in-Chief would be preparing in advance for “H-hour” (Koziej, 2014). That is why it was so important to correctly define and interpret the expression “for the time of war”. But the problem is, can we appoint Commander-in-Chief before it – during normal functioning of the state or exactly “for time of war”...? Recently, the problem has

⁵*In Polish legal acts the following phrases are also used “armed attack” and “armed aggression”.*

been noticed by the legislature, with an amendment being introduced - currently the President decides, when the "time of war" starts: "In case of national defence [the President] decides, at the request of the Prime Minister, on the date at which time the war begins on Polish territory. The same procedure shall decide on the date at which time the war ends" (The Act *on the universal duty...* 2018, art. 4a; introduced by the Act *on amendment...* 2015, art. 1). Maybe such a solution could be considered as valid if a decision declaring war time relates to the act of appointment of the Commander-in-Chief. In the current legal framework president has to wait for a proposal from the Council of Ministers to issue a decision on the start of the "time of war", and subsequently at the request of the Prime Minister on the appointment of the Commander-in-Chief. Only then he will be able to appoint the Commander-in-Chief. In emergency where every hour might count, this schedule may hinder rather than to facilitate the operation. In turn, armed conflict is a broader concept of war – it also applies to organizations and that are not considered legally based entities!

Appointing the Commander-in-Chief under peaceful conditions, namely before "time of war" or without introducing martial law would not be in line with the Polish Constitution. Therefore, it was decided to establish a "candidate" - the person envisaged to be appointed the Commander-in-Chief during the war. The current rules, after amendment, introduced significant changes in the command-and-control system. The most important is feasibility to indicate a "candidate" before the time of war, when the Polish state operates (Michalski and Radomyski, 2020, p. 100-112) in peace (The Act *on the universal duty...* 2018, art. 5-point 1a). Indication of such a person aims on proper preparation of the chosen candidate to fulfil his tasks as Commander-in-Chief during the war. Interestingly, the designated person is preparing for the role of Commander-in-Chief, by the time of the effective appointment of the Commander-in-Chief or designation by the President another person provided for appointment to this position (The Act *on the universal duty...* 2018, art. 5a par. 1). Unfortunately, the interpretation of that article leaves no doubt that the Commander-in-Chief may be a different person than earlier indicated in the "act of appointment of the candidate".

5. The Problems of Functioning of the Commander-in-Chief

The procedure for appointing the Commander-in-Chief is also full of legal doubts (Kołodziejczak, 2016: 85-99). First, the request of the Prime Minister is a condition for further proceedings, but whether it concerns the mere fact of appointment or whether it contains the details of a specific person given by name, is unresolved issue. Secondly, it should be examined whether this act does not belong to the prerogatives of the President, for its validity there is no need for a countersignature of the Prime Minister who, by signing a given act, bears responsibility before the Sejm? Finally, is the proposal of the Prime Minister binding for the President of the Republic of Poland? During the war, the President of the Republic of Poland is obliged to appoint the Commander-in-Chief, but does he have to give absolute consent to the person proposed in the application?

It must be noted that there are no regulations or provisions indicating:

1. the criteria to be met by the Commander-in-Chief and the person expected to take up the position of the Commander-in-Chief;
2. the possibility of dismissal “candidate” and his resignation and resignation of the Commander-in-Chief (Mandyliś, 2013);
3. the subordination and relations, including those regarding connections of the Commander-in-Chief and the Minister of National Defense.

In the case of internal tensions, unrest or even non-international conflict, the Commander-in-Chief cannot be appointed (no legal basis involving external circumstances).

What is more, it should be stated that the provisions regarding ‘states of defence’, emergency states and other conditions of state security require revision and redrafting, with particular emphasis on the moment of appointing the Commander-in-Chief and his further functioning. However, one of the most important issues that have neither been solved nor discussed so far is the problem with procedure. What would happen if:

1. the President of the Republic of Poland does not agree to the proposed candidate by Prime Minister. Is he obliged to?
2. the Prime Minister and the President of the Republic of Poland do not reach a consensus regarding the necessity of the appointment of the Commander-in-Chief in martial law?
3. the Prime Minister refuses to apply for the appointment of the Commander-in-Chief during martial law?

6. The Postulates *De Lege Ferenda* of Functioning of the Commander-in-Chief

As can be implied from the arguments presented above, the procedure for appointing the Commander-in-Chief should also be simplified. All uncertain and disputable issues should be resolved by creating appropriate legal norms. Perhaps minor legislative changes that should apply to:

- clarifying the definition of the state of war, time of war, martial law and their relationship, and the moment of introduction;
- or abandoning the distinction between concepts and operating on the model of other countries' solutions only with strictly defined deadlines, e.g., armed attack, war (including time and state) and martial law;
- simplifying the procedure for appointing the Commander-in-Chief, including this act as the prerogative of the President;
- simplifying (and eliminating doubts) the procedure for introducing martial law;
- introduction of special alternative regulations, which would indicate what would occur if the Council of Ministers cannot meet and is unable to submit to the President a request for the announcement of war;
- introduction of special substitute regulations, which would indicate what would

- occur if the Council of Ministers cannot proceed and, in result, is unable to submit to the President a request for martial law;
- introducing under extraordinary circumstances the possibility of publishing the above provisions and ordinances in the Journal of Laws, when circumstances allow it, and abolish announcements and publications as a prerequisite for entry into force;
 - defining a clear division of tasks of the Council of Ministers and the President of the Republic of Poland in the area of security and defense;
 - increasing the role and establishing the competences of the Cabinet Council;
 - clarifying the criteria to be met by the Commander-in-Chief;
 - introduction of a deputy commander-in-chief in an emergency;
 - including the Commander-in-Chief, as well as the person envisaged to take up the position of the Commander-in-Chief (“candidate”) into the structure of Cabinet Council and the National Security Council (Kołodziejczak, 2021).

When these conclusions are compared with the concept indicated at the beginning of the article, in which the President would be the Commander-in-Chief, it can be stated that:

- the Commander-in-Chief works permanently, because it is the President who can convene meetings of the National Security Council, Cabinet Council, etc. on an ongoing basis;
- the procedure for appointing the Commander-in-Chief and any complications arising from this title are removed.

The idea to accept the President of the Republic of Poland as the Commander-in-Chief seems possible only after changes into Poland’s Constitution are to be made. The President has the tools and resources to carry out tasks that should belong to the Commander-in-Chief in permanent and continuous manner. Above all, it should be emphasized that war is this special, extraordinary time for the state and society. Therefore, it should be the President who is civilian, chosen by the nation, to guard the constitution, inviolability, and indivisibility of the territory of the Republic of Poland, and guarantee continuity of power state. By combining these two critical positions, he is the one who should take responsibility for the fate of the Republic of Poland.

7. Conclusion

According to the Polish law, the Commander-in-Chief shall be appointed in certain situations - for the duration of the war and in the martial law period. But in the second situation it is not obligatory. The current legislation, despite the increasing number of amendments, does not specify neither who would be appointed as the Commander-in-Chief, nor what position in the national management security system would actually be assigned to him/her or even whether his decisions would be binding for the President. It is widely acknowledged the Commander-in-Chief’s

statements and decisions in the field of state security and defense should be binding and definitive.

In a system full of legal procedures as national security (in particular – management level), it is important to ensure continuity of power, transparency of law and competences, and the effectiveness of procedures. All of them are essential to launch appropriate (extraordinary) state or declare a time of war/state of war. Therefore, it is necessary to emphasize urgency to introduce one-person national security management system in the event of war (Jakubczak 1991; Wróblewski 2000; Kitler 2011). At present, tasks and functions of individual organs are dispersed and unclear. Close cooperation between the President of the Republic of Poland and the Council of Ministers is a must, especially in such a special period as the time of war or martial law.

As it seems, the most important conclusions concern the proposed changes - simplification of the procedure of deciding on a time of war and introducing martial law, and prior increase of the time of defense readiness, and most of all the appointment of the Commander-in-Chief. At present, it might turn out that the procedure for appointing the Commander-in-Chief and introducing martial law is too time-consuming, because it requires the involvement of several authorities at various stages of the work. As W. Sikorski wrote in 1934 (!), and what seems to be extremely up to date current war predictions should have far more flexibility. For their purposeful determination, it would first be necessary to begin by specifying the probable and possible characteristics of the future armed conflict, while at the same time avoiding the danger that always implies closing within one hypothesis, even if the latter is as close as possible to reality” (Sikorski, 1934). Given the above, it should be noted that the current legislation does not give a clear answer either to the person in charge of the Commander-in-Chief of the Armed Forces, his position, and the procedure for his appointment.

That is why it is important to consider not only the changes in legislation but the change of concepts and as well as systemic changes. Perhaps, as a model of other states, it should be a person who is one of the most important state offices, not necessarily a soldier, who has a mandate from the society to exercise power, and thus supports and accepts critical decisions (Prokop, 2015: 281).

References:

- Bierzanek, R., Symonides, J. 2002. *Prawo międzynarodowe publiczne*. Warsaw.
- Jakubczak, R. 1991. *Inne podejście do tworzenia systemu obronnego Rzeczypospolitej Polskiej*. *Mysł Wojskowa*, no 5, (556).
- Kitler, W. 2011. *Bezpieczeństwo narodowe RP. Podstawowe kategorie. Uwarunkowania*. System. Warsaw.
- Kołodziejczak, M. 2016. *The Commander-in-Chief in command-and-control system of the Republic of Poland*. *Journal on Baltic Security*, Vol. 2, Issue 1.
- Kołodziejczak, M. 2018. *Definitions and Legal Aspects of the Term “War” and the Related*

- Terms. *Roczniki Nauk Prawnych*, Vol. XXVIII, No. 4.
- Kołodziejczak, M. 2021. *Funkcjonowanie Naczelnego Dowódcy Sił Zbrojnych w Rzeczypospolitej Polskiej*. Warsaw.
- Koziej, S. 2014. *Reforma systemu kierowania i dowodzenia Siłami Zbrojnymi RP*. <https://www.bbn.gov.pl/pl/wydarzenia/4466>.
- Mandylyś, B. 2013. *Opinion on the Act amending the Act of 14 December 1995 – The Office of the Minister of National Defense and some other acts*. Print of Sejm, No. 390.
- Michalski, D., Radomyski, A. 2020. *Counting the Uncountable*. *Safety & Defense*, 6(2).
- Shaw, M.N. 2008. *International law*. Cambridge.
- Sikorski, W. 1984. *Przyszła wojna jej możliwości i charakter oraz związane z nim zagadnienia obrony kraju*. Warsaw.
- Prokop, K. 2015. *Konstytucyjne podstawy bezpieczeństwa narodowego – kilka uwag krytycznych*. In: *Współczesne oblicza bezpieczeństwa*, (eds.) E. M. Guzik-Makaruk, E.W. Pływaczewski, Białystok.
- Wróblewski, R. 2000. *System kierowania obroną państwa i zarządzanie w sytuacjach kryzysowych*. *Myśl Wojskowa*, 4(609).
- The Constitution of the Republic of Poland of 2 April 1997. *Journal of Law of 1997*, no. 78, item 483, as amended.
- The Act of 21 November 1967 – *Universal duty to defend the Republic of Poland*. *Journal of Law of 2018*, item 1459, as amended.
- The Act of 14 December 1995 – *The Office of the Minister of National Defence*. *Journal of Law of 2019*, item 196, as amended.
- The Act of 29 August 2002 - *Martial law and the competence of the Commander-in-Chief and his subordination to the constitutional authorities of the Republic of Poland*. *Journal of Law of 2017*, item 1932. *JL of 2004*, no. 107, item. 1135.
- The Act of 5 March 2015 on amendment of the act on the universal duty. *Journal of Law of 2015*, item 529.

Note:

**In Poland, the Commander-in-Chief calls Naczelnny Dowódca Sił Zbrojnych, and the President of the Republic of Poland is Supreme Commander (in Polish "zwierzchnik Sił Zbrojnych"), (according to the official translation of the Polish Constitution into English, vide: article 134 <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [02.04.2021]). In turn, in the new bulletin, the Defense Concept of the Republic of Poland, reverse phrases are used. For example, in the French Constitution, the term "le chef des armées" (Constitution of the French Republic, (Journal of Laws of 1958, no 234), article 15) is used in the context of the president's authority over the armed forces, which in English is translated as "commander-in-chief." The German Constitution avoids this expression at all, merely stating that during peace the federal defense minister gives orders and command to the armed forces (Federal Law of the Federal Republic of Germany, May 23, 1949, as amended) (BGBl. I S. 2248), Article 65a). In turn, which seems to be a very practical and action-facilitating solution, with the announcement of the siege, command of the armed forces and issuing orders to the chancellor (Article 115b). The English translation refers to "power of command". Interestingly, the US Constitution indicates that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States", (Constitution of the United States of America adopted on 17.09.1787, Article 2 sec. 2 paragraph 1, see: <https://constitutionus.com/>).*