

CURRENT DEVELOPMENTS IN THE CONSTITUTIONAL SITUATION IN THE REPUBLIC OF POLAND

- (1) The rule of law in Poland has been systematically damaged by the number of legislative changes that have taken place over the last two years. Recent developments in the legal system mainly concern the Supreme Court. According to the new Act on the Supreme Court¹, 31 out of 83 judges of the Supreme Court retired on July 4th, 2018 including the First President of the Supreme Court, whose term of office is specified in the Constitution [expiration of the term of office based on age – according to the new provision, judges who turn 65 retire by virtue of the new Act].
- (2) On August 2nd, 2018 the Supreme Court asked CJEU for a preliminary ruling, whether the new laws on the Supreme Court are consistent with the principle of the independence of courts and judiciary, which is the principle of the EU law and the pillar of the rule of law.² The extended assembly of the Supreme Court asked CJEU five preliminary questions. The first question concerns interpretation of the provisions of Art. 2, Art. 4.3, and Art. 19.1 of the Treaty on European Union³, Art. 267 of the Treaty on the Functioning of the European Union⁴ and Art. 47 of the Charter of Fundamental Rights⁵ with respect to the principle of the irremovability of judges which, in the view of the Supreme Court, is always compromised when a national legislator decides to lower retirement age and enforce such new rules on judges against their will. The second question is related to the legal interpretation of the provisions of the Act on the Supreme Court which condition the possibility of further adjudicating by the judge on a permission of the representative of the executive power - the President [with a countersignature of the Prime Minister]. According to the Supreme Court, such regulation is irreconcilable with the understanding of the principle of the independence of judges and courts as followed by the CJEU and ECHR's judiciary.
- (3) The third question concerns the interpretation of the Directive 2000/78⁶ prohibiting discrimination on the grounds of age. The next question was asked in order to clarify how a national court should ensure the effectiveness of the Union's prohibition of age discrimination. The Supreme Court is of the opinion that the CJEU should declare that every adjudicating panel with a judge who turned 65 has a right to refuse applying the Act and adjudicate without the President's permission. The last question concerns the duties of the Supreme Court as an EU court in application of the safeguard measures [provisions of securing claims]. The Supreme Court raised the question regarding applying the institution of temporary suspension of provision on an national Act if such act is non compliant with the EU law - simultaneously the Supreme Court, in accordance with the foregoing judicature of the CJEU and the provisions of Polish law regarding securing claims [Art. 755§ 1 of the Code of Civil Procedure], suspended applying selected provisions of the Act on the Supreme Court, regarding retirement of the judges of the Supreme Court until CJEU makes a decision.
- (4) The President and the ruling party publicly stated that the action of the Supreme Court has no legal basis and therefore has no legal effect. On August 23th, 2018, the Prosecutor General filed a motion to the Constitutional Tribunal and asked the Tribunal to declare Art. 755§ 1 of the Code of Civil Procedure⁷, regarding the security of the claim, non compliant with the Polish Constitution in the

¹Act on the Supreme Court dated December 8th, 2017, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000005>, [access: September 19th, 2018].

²The Statement of the Supreme Court, http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=232-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach, [access: September 19th, 2018].

³The Treaty on European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>, [access: September 19th, 2018].

⁴The Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>, [access: September 19th, 2018].

⁵Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/charter/pdf/text_en.pdf, [access: September 19th, 2018].

⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>, [access: September 19th, 2018].

⁷ The Polish Code of Civil Procedure, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640430296>, [access: September 19th, 2018].

meaning established by the Supreme Court.⁸ The Supreme Court responded to the motion and stated that the proceedings before the Constitutional Tribunal should be discontinued due to the inadmissibility of the decision. In the opinion of the Supreme Court, the Prosecutor General motion is in fact a demand to review the compliance of the ruling of the Supreme Court with the Polish Constitution which is beyond the competence of the Constitutional Tribunal.⁹

- (5) Currently the National Council of the Judiciary is recruiting new judges to the Supreme Court. In the course of the proceedings more than 100 candidates were heard in three days.¹⁰
- (6) On August 30th, 2018 the Supreme Court again asked for a preliminary ruling. The Supreme Court asked the CJEU whether the EU law should be interpreted in the manner that the Disciplinary Chamber of the Supreme Court – [which will consist only of judges elected by the National Council of the Judiciary, the body, whose structure and manner of functioning does not guarantee independence from the legislative and executive bodies] is an independent court within the meaning of the EU law.¹¹
- (7) On September 4th, the Circuit Court in Łódź approached the CJEU with another question for a preliminary ruling and asked whether the changes in the Polish judiciary are consistent with Art. 19 of The Treaty on European Union, referring to the need to provide citizens with independent courts.¹² The Circuit Court in Łódź asked for a preliminary ruling with respect to the pending case between the city of Łowicz and the Treasury. The city is demanding a return of over PLN 2 million, which in 2005-2015 was spent on commissioned tasks - tasks that should be paid by the government in the city's opinion.
- (8) On September 6th, 2018 the Circuit Court in Warsaw also asked for a preliminary ruling and queried about an interpretation of the Art. 19 of the Treaty on European Union: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". The Circuit Court in Warsaw wants to know whether it should be interpreted in a way that the resulting obligation of Member States is against provisions that eliminate guarantees of independent disciplinary proceedings against judges in Poland through political influence on conducting disciplinary proceedings and creating the risk of using the system of disciplinary means to the political control of the content of judicial decisions.¹³
- (9) On September 17th, 2018 The European Networks of Councils for the Judiciary (ENCJ) at a meeting in Bucharest, by a majority (100 votes for, 6 against, 9 abstentions), decided to suspend the membership of the new Polish National Council of the Judiciary. Polish National Council of the Judiciary was deprived of voting rights and excluded from participation in ENCJ activities.¹⁴

⁸The Statement of the prosecutor General, <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/wniosek-prokuratora-generalnego-do-trybunalu-konstytucyjnego-3/>, [access: September 19th, 2018].

⁹The Statement of the Supreme Court, http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=232-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach, [access: September 19th, 2018].

¹⁰<https://www.tvn24.pl/przymusinski-konkurs-do-sadu-naiwyzszego-to-farsa-rozmowa-piaseckiego,867821.s.html> [access: September 19th, 2018].

¹¹The Statement of the Supreme Court, http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=236-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach, [access: September 19th, 2018].

¹²The Statement of the Circuit Court in Łódź, <http://www.lodz.so.gov.pl/pytanie-prejudycjalne-do-tsue.new,mq,121.html,858>, [access: September 19th, 2018].

¹³ The Statement of the Circuit Court in Warsaw, <http://bip.warszawa.so.gov.pl/artukul/452/293/dla-mediow>, [access: September 19th, 2018].

¹⁴ The Statement of the European Networks of Councils for the Judiciary, <https://www.ency.eu/node/495> [access: September 19th, 2018].