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POLAND *VERSUS* THE BASIC EU PRINCIPLES OF THE RULE OF LAW

POLSKA A UNIJNE ZASADY PRAWORZĄDNOŚCI

Summary: The employment law and social policy of the European Union, analyzed from the perspective of the Republic of Poland, reveal a serious difference between the views of Polish state authorities and EU institutions on employment and social security matters regulated by national labour law provisions in force in the RP. The CJEU ruled that the RP failed to fulfill the obligations resulting from the membership in the EU. The state authorities of the RP are trying to undermine this concept as part of the "reform of the judiciary". They do not pay attention to its core, which is the limitation of state sovereignty in matters relating to the autonomy of judges and the independence of courts, but contest the interference of EU institutions in matters relating to the organization of the judiciary.

Keywords: autonomy of judges**,** independence of judiciary, rule of law, voluntary self limitation of state sovereignty

Streszczenie: Prawo pracy i polityka społeczna Unii Europejskiej analizowane z perspektywy Rzeczypospolitej Polskiej ujawniają poważną różnicę pomiędzy poglądami polskich organów państwowych i instytucji UE na sprawy zatrudnienia i zabezpieczenia społecznego regulowane przez krajowe przepisy prawa pracy obowiązujące w RP. TSUE orzekł, że RP nie wypełniła zobowiązań wynikających z członkostwa w UE. Władze państwowe RP starają się podważyć tę koncepcję w ramach „reformy sądownictwa". Nie zwracają uwagi na jej sedno, jakim jest dobrowolne ograniczenie suwerenności państwa w sprawach dotyczących autonomii sędziów i niezawisłości sądów, ale kwestionują ingerencję instytucji unijnych w sprawy dotyczące organizacji sądownictwa.

Słowa kluczowe: autonomia sędziów, dobrowolne samoograniczenie suwerenności państwa, niezawisłość sądownictwa, rządy prawa

Abbreviations

AG	-	Advocate General
CEU	-	Commission of the European Union
ChFR	-	Charter of the Fundamental Rights

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CJEU	-	Court of Justice European Union
ChLL&SS	-	Chamber of Labour Law and Social Security
CT	-	Constitutional Tribunal
DCh	-	Disciplinary Chamber
EU	-	European Union
LHE&S	-	Law on Higher Education and Science
LC	-	Labour Code
MJ	-	Ministry of Justice
NCJ	-	National Council of the Judiciary
OJ EU	-	Official Journal of the European Union
OJ RP	-	Official Journal of the Republic of Poland
RP	-	Republic of Poland
UR	-	United Right
SAC	-	Supreme Administrative Court
SC	-	Supreme Court
TEU	-	Treaty of the European Union
TFEU	-	Treaty on the Functioning European Union

Consolidated Version of the Treaty of the European Union and the Treaty on the Functioning European Union, OJ EU 2012/C/326/01
Charter of Fundamental Rights of the European Union, OJ EU 2021/C326/02

INTRODUCTION

The employment law and social policy of the European Union (EU), analyzed from the perspective of the Republic of Poland (RP), reveal a serious difference between the views of Polish state authorities and EU institutions on employment and social security matters regulated by national labour law provisions in force in the RP. The ruling Polish political parties of the 'United Right' ('UR') have implemented a fragmented reform of the judiciary. That reform changed the stability and long-term practice of the profession by Supreme Court (SC) judges. Limits for the retirement of judges have been shortened after the judges have reached a lowered retirement age different due to gender (women 60, men 65). The state and political authorities tried to introduce privileged employment conditions and award special benefits to judges also employed in the same time as academic teachers. They changed the procedures for hiring new judges, accepted the principle of unequal treatment of employees of the judiciary in official employment relations and introduced new rules of disciplinary liability of judges for service torts resulting from various reasons. They have even been used legal structures violating the principles of equal treatment of judges in labour relations. For the last few years, it can be observed that the constitutional basis of Polish society, formulated according to the model of the French philosopher of politics and lawyer Charles-Louis Montesquieu, is starting to falter. What seemed to be guaranteed by the principle of check and balances in a democratic state ruled by law has become impossible to achieve in the RP ruled by 'UR'. Deviation from the principle of the separation of powers, limiting it or "giving it a façade character, that is, reducing it to the level of a certain ideal that is not implemented in practice, leads to a situation already known to us from history, that is to the concept of

a unified state power"[1]. This article outlines legal issues that have never been encountered by people interested in the law and judicial authorities in the RP. Previously that country was perceived as an EU Member State, and not only a common market partner[2]. The author presents the views of the highest judicial authority of the EU - the Court of Justice (CJEU) and some EU institutions: the Commission (CEU) and Advocates General (AG) of the CJEU on matters in which they are involved in relations with the RP. The author focuses on some of the fundamental issues – equality, the rule of law and the independence of judges. All of them are the fundamental values that EU Member States authorities must uphold. Those values and rules must be used by EU Member States towards citizens on an equal principles. The author presents an experiment, i.e. inherently risky actions initiated by the Polish authorities and carried out under the Polish law of the judiciary.

DIFFERENTIATION IN THE AGE WHEN JUDGES ARE TRANSFERRED TO THE "RETIREMENT STATE"

The Constitution of the Republic of Poland of 2 April 1997 in Art. 180 sec. 1 guarantees judges non-removal from their positions. In addition to independence, the stability of employment of judges is a guarantee of the independence of courts which are - as defined in the Constitution of the Republic of Poland - "an authority separate and independent from other authorities" (Article 173). The previous, amended Act on the SC established the principle of retiring a judge after reaching the age of 70. The regulations in force at that time awarded the judges the right to continue to hold their post for no longer than up to reaching an age of 72 years. The currently binding act of 8th December 2017 on the SC[3] – it significantly lowers the retirement age of SC judges. It also grants the President of the RP the arbitrary right to consent twice for the next three years to continue performing the judicial services to be held by a SC judge. It makes the independence of judges dependent on the uncontrolled decision of the President RP. The demands of the 'UR' representatives to retire also the judge who held the office of the First President of the SC were inconsistent with the Polish 'basic Law' – the Constitution. This is because Art. 185 of that legal Act provides that such person enjoy full stabilization of employment during the six-year term of office, regardless of the achieved age.

On 5th November 2019, the CJEU ruled in the first thesis of the judgment C-192/18[4] that the RP, by introducing a different retirement age for common court judges, SC judges and prosecutors, violated the principle of ensuring equal opportunities and equal treatment of women and men specified in the provisions of the primary[5] and secondary[6] European

[1] A. Wróbel, *Warto chronić państwo prawa. Cykl wywiadów Krzysztofa Sobczaka z prof. Andrzejem Wróblem poświęconych Konstytucji, prawu, legislacji i polityce* (It is worth protecting the rule of law, a series of interviews by Krzysztof Sobczak with prof. Andrzej Wróbel, devoted to the Constitution, law, legislation and politics), Warszawa 2017, p. 137 ff.

[2] See more on that issue – A.M. Świątkowski, *Reforma wymiaru sprawiedliwości (Justice reform*), Kraków 2022, *passim*.

[3] OJ RP, 2018, item 5.

[4] Judgment of the Court (Grand Chamber) of 5 November 2019 EC/RP, C-192/18, ECLI:EU:C:2019:924.

[5] Art. 157 TFUE.

[6] Art. 5 lit. „a" i art. 9 ust. 1 lit. „f" Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and

law treaties. In the second thesis of this judgment, the CJEU stated that by authorizing the Ministry of Justice (MJ) to decide on the continuation of the position of a judge in common courts after exceeding the newly introduced retirement age, the RP for the second time breached its obligations towards the EU formulated in Art. 19 paragraph 1, second paragraph of the TEU. Automatic lowering by the legislative authority of the retirement age of every judge without exception granted the executive authority - MJ the power to make uncontrolled decisions on the extension of further employment to some selected judges. Such rule and its application must have a negative impact on the decisions taken by some judges in disputed cases which they settle. The subject of legal protection in case C-129/18 is to convince citizens of the independence and impartiality of making substantive decisions by each judge examining disputed cases. It is equally important to convince the judge himself that he/she is exercising full freedom of decision-making in every case examined. According to the CJEU, everyone and everywhere (citizens of the RP and other interested entities and institutions, mainly judicial authorities in other EU Member States) cannot have reasonable doubts as to the independence and impartiality of judges[7]. The rules of conduct introduced by the Polish legal statutes in cases directly related to the length of service of judges who have reached the lowered retirement age, do not meet – according to the CJEU – the above requirements. Failure to specify the time limit within which MJ should decide to extend or refuse to extend the employment period, the inability of the concerned judge to control the negative decision of MJ contribute to the emergence, persistence and increase in the state of uncertainty as to the extension of the employment period of the judges concerned[8]. The combination of two instruments in one legal act: 1) a lowered "retirement age" for the retirement of judges and 2) granting the MJ, who supervises the administration of the judiciary, the right to make arbitrary decisions in matters relating to the employment of judges, caused reasonable doubts among EU lawyers whether the purpose of the new system was in fact to enable a representative of the state executive authority to retire senior judges appointed for the performance of duties by the previous authorities.

THE IDEA OF ADDITIONAL, LIFE-LONG EMPLOYMENT OF JUDGES IN HIGHER EDUCATION

The application of the principle of equal treatment in employment means that there is no discrimination in the form of differentiated treatment of judges - academic teachers and other teachers of higher education, who are not judges. In Article 18^{3a} § 1 of the LC it was clearly stated that employees should be treated equally in terms of entering into and terminating employment relationships and in other employment matters. In particular all employees ought to be treated on equal bases irrespective of the indicators of lawful conduct listed in this provision. This provision "does not contain a closed catalog of grounds for discrimination, but lists them as examples. The open catalog of these reasons allows it to be supplemented "[9]. This type of legal

women in matters of employment and occupation (recast), *OJ L 204, 26.7.2006, p. 23–36.*

[7] C-192/18, item 119.

[8] Ibid., item 123.

[9] A.M. Świątkowski, *Kodeks pracy. Komentarz (Labour Code. Commentary)*, Warszawa 2019, p. 97.

mechanism prohibits favoring judges – teachers working in higher education. Meanwhile, in the draft act – the Law on Higher Education and Science (LHE&S)[10], it was intended to cover judges employed by the Supreme Administrative Court (SAC), the SC and the Constitutional Tribunal (CT), who are academic teachers with special legal protection and to guarantee them lifelong employment in higher education. Article 121a sec. 1 LHE&S excludes formulated in Art. 123 sec. 1 points 1, 2 and section 2 of the LHE&S grounds for termination of the employment contract concluded with an academic teacher – judge: receiving a negative periodic assessment, taking up or performing additional employment without the consent of the rector of the university. This means the exclusion of these research and teaching staff - judges from the general and obligatory periodic assessment procedure in matters relating to the education and upbringing of students, participation in the education of doctoral students, conducting scientific activity, participation in organizational work for the university employing him and constant improvement of professional qualifications. Obtaining a negative periodic assessment makes it impossible for the rector of a university employing a judge to break the legal bond by notice in cases regulated by the provisions of the LC. Article 121a sec. 1 LHE&S it also prevents the university as an employer of an academic teacher from terminating the employment relationship with him without notice, pursuant to art. 52 of the LC. A judge – an academic teacher could - after the legislator implements this idea – cease performing basic employment, teaching and research duties. It would in fact remain outside the supervision of the employer.

Article 121a sec. 1 LHE&S does not exclude only the case of automatic termination of the employment relationship – of a judge of the CT, SC or SAC – of an academic teacher by the legislator. Except for the situations mentioned in Art. 124 points 1, 3, 4, 5 LHE&S the employer hiring an academic teacher who is a judge does not have any legal means enabling the termination of employment. Therefore, only a disciplinary penalty or the application of criminal measures due to a disciplinary offense or committing an act prohibited by the provisions of criminal law allows for the revocation of the lifetime protection of the durability of the employment relationship of an academic teacher – judge of the CT, SC, SAC. However, this sanction is not decided by the university rector, but by a disciplinary commission, criminal court or other competent public authority. Prior to the expiry of an employment contract concluded for a fixed period before to the entry into force of the LHE&S project, an academic teacher – judge would be subject to protection. This standard was to inform about the legislator's decision to automatically convert a fixed-term employment contract into a contract concluded for an indefinite period. Reaching the retirement age by an academic judge was also not supposed to justify the termination of his employment contract by the employer. In the case of academic teachers who are judges, retirement due to reaching the retirement age for judges, set out in separate regulations, was not to have legal consequences for the contractual employment relationship . The provisions of the LHE&S draft were to provide older academic teachers – retired judges – with the possibility of renewing, an employment contract with the current employer. It was planned that such a contract could be reconcluded with judge – academic teacher who, after reaching the statutory general retirement age (60 years – woman, 65 years – men), terminated his/her employment contract. Change in the retirement age in the currently applicable Act – would allow only academic teachers – retired judges unlimited,

[10] Consolidated text, OJ RP. 2021, item 478.

simultaneous use of retirement benefits and remuneration for work. The draft act in question did not introduce any restrictions on the use by an academic teacher – judge of the CT, SC, SAC of his universal and unlimited right to terminate an employment contract with or without notice in a situation regulated in Art. 55 § 1 of the LC (summary dismissal[11]). The above statement applies accordingly to the event of termination of the employment contract by agreement of the parties to the employment relationship. The legislator, introducing an atypical legal norm, aimed solely at guaranteeing to some of those employed in a dual capacity, academic teachers and judges, absolute protection of the employment relationship established with a university. The provision of art. 121a sec. 1 LHE&S also prohibits the employer from changing the "working conditions" of an academic teacher who is a judge of the CT, SC, SAC. The above prohibition, placed in the same normative unit in which the prohibition to terminate an employment contract was formulated, should be understood as an absolute prohibition on terminating and changing components of employment contracts. Defining the essential components of the employment contract listed in Art. 29 § 1 of the LC, the legislator uses the expression "working and pay conditions" which is a conceptual cluster. In the catalog of five legal terms used to distinguish "objectively significant" components of an employment contract, Art. 29 § 1 of the LC lists four necessary components of an employment contract that should be agreed upon by the parties to an individual employment relationship. These are: the type of work, place of work, remuneration for work corresponding to the type of work with an indication of the components of the remuneration and working time (Article 29 § 1 items 1-4 of the LC).

The list of components of the employment contract is not closed. As the legislator could not foresee what conditions were negotiated by the parties to the contracts constituting the basis for the employment of academic teachers who were judges of the CT, SC and SAC, it limited itself to listing in Art. 121a sec. 1 LHE&S.

The most important of the material components of the employment contract is the type of work. By prohibiting in art. 121a sec. 1 LHE&S draft to introduce changes in the working conditions agreed by the parties to the individual employment relationship, the legislator had to take into account not only the employment conditions, but also the corresponding terms of remuneration for the performance of a specific type of work. Therefore, it is not correct the thesis formulated in the request of the President RP to examine the admissibility of the amending notice in the part relating to the legality of the reduction of remuneration for the work of an academic teacher – judge of the CT, SC, SAC. Of this reason the conclusion drawn from it is doubtful that the provision of Art. 121a sec. 1 LHE&S may be situated as a *lex specialis* to art. 29 § 1 of the LC[12].

The draft law on judges and academic- teachers was not included in the adopted LHE&S. However, the unrealized legislative idea was an important signal to the outside world of the intentions

[11] In this case immediate termination of the employment relationship performed by the employee judge-academic teacher.

[12] Application of the President RP, Application under Art. 191 paragraph. 1 point 1 of the Polish Constitution to verify the compliance of: 1) Art. 121a of the Act of July 20, 2018 – LHE& S (OJ RP, item 1668, as amended) with Art. 121 paragraph. 2, first sentence and Art. 118 sec. 1 of the Constitution; 2) art. 121a paragraph. 1 and 2 of the Act of July 20, 2018 – Ibid. (OJ RP item 1668, as amended) with Art. 32 sec. 1, first sentence, of the Constitution; 3) art. 121a of the Act of July 20, 2018 – Ibid.(OJ RP, item 1668, as amended) with Art. 70. paragraph. 5 of the Constitution.

of the Polish state and political authorities. It was a harbinger of future problems, non-compliance included, of the RP with EU standards in relation to the judiciary and the rule of law.

PROCEDURES FOR HIRING JUDGES

Judges holding positions in the newly created Disciplinary Chamber (DCh) were appointed by the President RP. This chamber is formally part of the SC, but enjoys far-reaching financial and organizational autonomy. The appointment was made at the request of the newly modified constitutional institution – National Council of the Judiciary (NCJ). The legal basis were the provisions of the amending Act of December 8, 2017 on the NCJ and certain other acts[13]. The most important peculiarity of this law consists in the election of 15 members of the NCJ, judges elected by the lower chamber of the Polish parliament dominated by a coalition of 'UR'. Earlier members of the previous NCJ were directly elected by other judges representing not only district courts, but regional courts, courts of appeal and the SC. Therefore, they could not be considered subordinate members of a state institution - MJ and dependent to legislative, executive powers and political authorities. The above mentioned dependence of the NCJ on the legislative, executive and political authorities proofs that the institution established in such a way, indicating members of the constitutional authority, was transformed into an administrative/quasi-political institution dependent directly on the purely executive authority – MJ. The NCJ, whose members are usually administrative judicial institutions – presidents of lower kinds of courts (common, district and regional) courts selects candidates for the positions of all categories of judges – regional and appeal courts, SC and SAC. The NCJ have constant contact, first of all, with the judiciary community, but also with other representatives of the legal community, from among which candidates for judicial offices may be selected. For this reason, both the President RP and NCJ should be sufficiently independent of the legislative and executive authorities[14]. The NCJ plays a leading role in the nomination process. The above institution recommends a candidates for the highest office of judge of the SC. Thus, according to the CJEU, it is "*a sine qua non condition* for such a candidate to be appointed by the President RP"[15] . The decisions of the President RP are not subject to scrutiny. In the past an appeal against a resolution of the NCJ to the SAC (in the case of appointment to the position of a judge of the SC) enabled verification of the adopted resolution at least to the extent that allows the judicial authorities (SAC or SC) to establish that there has been no abuse of power, violation of the law, or committing an obvious error in the assessment of a candidate for the post of judge[16].

Therefore, due to the possibilities that could be used for the good of the case by the NCJ in the process of selecting independent and impartial candidates for judicial posts, it was understandable and justified not to eliminate an appeal against administrative decisions to appointment a judge. Meanwhile, the members of the currently operating NCJ are judges promoted by the MJ to managerial positions in the courts and representatives of the executive and legislative authorities representing the interests of the 'UR'.

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[13] OJ RP 2018, item 3.
[14] TSUE, Judgment of the Court (Grand Chamber) of 2 March 2021 A.B and Others v. NCJ, C-824/18, ECLI:EU:C:2021:153, item 125.
[15] Ibid., item 126.
[16] Ibid., item 128.

PRINCIPLES OF DISCIPLINARY LIABILITY OF JUDGES

The changes introduced during the rule of the current political coalition 'UR' in the Act – Law on the System of Common Courts[17], new provisions on disciplinary proceedings against judges of common courts, admits MJ, who also holds the office of General Prosecutor (GP) practically unlimited power in this regard. *De lege lata*, MJ is competent to: 1) appoint a disciplinary officer to conduct cases concerning judges of common courts; 2) undertake the explanatory proceedings by the disciplinary spokesman, and in the event of a refusal to initiate such proceedings, obligates this or another ombudsman to initiate disciplinary proceedings; 3) *ad hoc* appoint of another person to perform the function of a disciplinary spokesperson in a specific case; 4) designate of judges who will be entrusted with the duties of a disciplinary court judge at the court of appeal. The significant possibilities of exerting influence by the central administrative body managing the judiciary have been guaranteed by the new regulations granted to MJ, adopted by the current political party as part of the "good change" policy. As it is shown by the wording included in the amended legal acts, on the SC and on the system of common courts, definitions of possible offenses ("actions that may prevent or significantly impede the functioning of the judiciary"), which are the basis for imposing disciplinary penalties on judges are imprecise. Objections were also raised against the objectivity of the disciplinary proceedings undertaken. It is unacceptable that they could be conducted in absentia – despite the justified absence – of the persons concerned, the accused judge or his defense counsel. In such proceedings, disciplinary institutions may use evidence obtained in an illegal manner. Institutions dealing with disciplinary cases of judges do not provide any guarantees as to the duration of disciplinary proceedings. The recently enacted disciplinary regulations allow MJ to apply for the reopening of disciplinary proceedings if new circumstances come to light within five years of the cancellation or the issuance of the judgment. Courts submitting a request to the CJEU to answer the questions asked about the compliance of the above-mentioned aspects of Polish law with EU law are of the opinion that the current model of disciplinary proceedings is contrary to the principles of judicial independence and irremovability judges. The rules currently in force in the administration of justice are perceived by lawyers, in particular judges, as not adequate for securing the independent status of the judicial authorities and ensuring that judges have an appropriate, neutral and objective legal position in the judicial institutions, appropriate to the work they perform. The factual basis for the requests submitted to the CJEU by Polish courts for a reply on the legality of the provisions on disciplinary liability of judges under EU law was the uncertainty as to whether the courts of an EU Member State could use any legal institutions laid down by UE law without exposing themselves to disciplinary liability. Legal measures introduced by the state authority of the RP, in particular disciplinary liability of judges and its legal basis, are taken as a threat to the fundamental EU principle of the obligation to establish and apply measures necessary to ensure effective legal protection in areas covered by EU law. Therefore, a judgment by the CJEU declaring the inadmissibility of initiating an effective preliminary ruling procedure in accordance with the provisions of the TFEU should be carefully presented, explained and assessed. It means that Polish reform of the judiciary has been challenged by EU

[17] OJ RP 2018, item 23, 3, 5, 106, 138, 771, 848, 1000, 1045, 1443; Consolidated text: OJ RP 2020, item 2072.

institutions. The EC, pursuant to Art. 258 TFEU initiated proceedings against RP for a declaration of breach of obligations arising from the provisions of Art. 19 (1), first and second subparagraphs TEU, and Art. 276, second and third paragraphs TFEU. In the case of the EC v. Poland[18], the following charges were raised: 1) classification of the content of court judgments issued by Polish courts to the category of "disciplinary offense"; 2) lack of independence and impartiality of the DCh of the SC; 3) the discretionary power of the president of that chamber to appoint a competent judge and court to hear disciplinary cases of judges; 4) lack of procedural guarantees of judges - the right to defense, examination of the allegation within a reasonable time, the right to obtain legal advice and adherence to adversarial procedures ("equality of arms") in disciplinary cases – against whom an allegation of a professional misconduct; 5) depriving judges and / or limiting their powers to submit requests for a preliminary ruling by the CJEU. The CJEU ruled that the absolute requirement of judicial independence requires Member States to regulate the provisions on disciplinary liability of judges in such a way that the above-mentioned norms provide the necessary guarantees to avoid the risk of using the justice system to control the political content of judicial decisions. For this reason, the legal norms defining disciplinary offenses by judges and penalties imposed on them for non-compliance with the orders and prohibitions established by national law must be subject to strict supervision of a judicial authority, acting in accordance with an objective and generally accepted procedure guaranteeing trial persons the right to exercise the rights listed in Art. 47 and 48 ChFR. The authorities of each Member State should therefore ensure that each national judge has the rights to exercise judicial independence in all areas governed by EU law. The RP should guarantee to every judge brought up to disciplinary responsibility that decisions issued in disciplinary proceedings will be subject to review by an independent national judicial authority. In the case C-791/19, the CJEU ruled that the RP failed to fulfill the obligations resulting from the membership in the EU because: 1) it allowed for the recognition of the judgment issued by the adjudicating judge as a disciplinary offense; 2) granted the president of DCh the right to discretionary appointment of adjudication panels; 3) accepted violation by the disciplinary court of the right to defense of a judge against whom disciplinary proceedings were instituted; 4) did not respect procedural rules – conducted proceedings against the accused in absentia. Moreover, the CJEU ruled that the RP had failed to fulfill its obligations under Art. 267, second and third paragraphs, of the TFEU. In effect the right of courts to refer requests for a preliminary ruling to the CJEU was limited by the possibility of instituting disciplinary proceedings.

FINAL CONCLUSIONS

The executive branch argued that after reaching the "retirement age", every judge of the SC automatically retires. All judges retired, albeit not under the same conditions. The judge holding the constitutional function of the First President of the SC was notified that she had to resign. After the meeting with the President RP, the First President of the SC and the oldest judge, the President of the Chamber of Labour and Social Security (ChLL&SS) of the SC, was

[18] Order of the Court (Grand Chamber) of 8th April 2020 European Commission v Republic of Poland, Interim relief, C-791 R, ECLI:EU:C:2020:277; Judgment of the Court (Grand Chamber) of 15 July 2021 European Commission v Republic of Poland, C-791/19, ECLI:EU:C:2021:596.

appointed by the First President of the SC as a temporary deputy in the event of her absence. However at that time executive authority of the RP began to lean towards the concept that the Polish Constitution guarantees that the person holding the office of the First President of the SC will remain active until the end of the constitutional six-year term of office.

The combination of the reduced retirement age of judges with the right of MJ to extend the period of professional service raised justified doubts as to whether the purpose of the new system was in fact to allow the executive to terminate employment relationships with older judges.

Serious doubts have been raised regarding the legality of actions taken by the executive authorities due to the indications of discrimination against academic teachers who do not have the power to adjudicate in the CT, SC, SAC or who do not intend to work in the above-mentioned judicial institutions. The privileges of academic teachers - judges cannot be perceived as lawful, conscious and deliberate actions taken by the state authorities to provide equal professional opportunities. Proposed legal norm allowing for privileged treatment of judges must be assessed as directly discriminating against employees of any specific professional sector who are not additionally employed as judges.

Persons applying for judicial positions should have the right to appeal against the resolutions of the NCJ to refuse recommendation in favour to perform function of a judge at the one of the highest courts.

The CJEU ruled in the case C-824/18 that despite the legislator's revocation of the right to appeal against the negative opinion of the NCJ, decisions taken by this body to refuse to present candidates to the President of the RP are legally binding. The appeals could not be based on possible allegations of incorrect assessment of the rejected candidate by the NCJ. This means that even in the hypothetical event of the contested decision being repealed, the initially rejected candidate will not have a chance to obtain the position for which he applied for. As the judging court the SAC may come to a conclusion that the judges indicated by the NCJ were not correctly appointed by the President RP to positions in the SC. However, the principle of the primacy of EU law over Polish law authorizing the SAC – as the referring court - to waive the application of the currently applicable provisions liquidating the institution of appeal do not allow originally rejected judges to obtain positions in the SC. National provisions which imply that national judges may be exposed to disciplinary proceedings due to referring to the CJEU for a preliminary ruling are not admissible. The documented threat of initiating such proceedings – if it meets the formal and legal requirements set out in the documents submitted to this court – is directed against judicial independence. It may therefore adversely affect the performance of the professional duties by national judges. The adjudication panel of the ChLL&SS of the SC, which referred questions for a preliminary ruling to the CJEU on 5th December 2019 issued a judgment in the first of these three cases. In the justification of this judgment published on December 20, 2019, the following theses were included: 1) the interpretation contained in the judgment of the CJEU of 19.11. 2019 is binding on every court and state authority in the RP; 2) the judgment of the CJEU sets an unambiguous and precise standard for assessing the independence and impartiality of a court in the RP and other EU Member States; 3) each court is obliged to check *ex officio* whether the standard provided for in the CJEU judgment is met in the case under examination; 4) in performing this duty, the adjudication panel ruled that the present NCJ is not an impartial and independent body from

the legislative and executive powers; 5) the adjudication panel of ChLL&SS of the SC did not recognize the DCh as a court in the light of EU law, and thus also within the meaning of national law. At the end of the above catalog of procedural and material and legal shortcomings ChLL&SS of the SC reminded the state authorities of the RP that by joining the EU, Member State approved the principle of primacy of EU law over national law. The above primacy of EU law over national law obliges each authority of the Member State to ensure full effectiveness of the EU law norms. This means that the courts of the Member States are obliged not to apply provisions of national law that are inconsistent with EU law. It is well-established in the legal order of the EU that the violation by the authorities of a Member State of one of the values listed in Article 2 TEU justifies lodging a complaint by the EC pursuant to Article 258 TFEU due to a failure by the authorities of a Member State to fulfill a specific obligation. The rule of law and the effectiveness of legal protection are included among such values. The changes introduced by the legislative and executive authorities of the RP to the provisions of the Acts on the SC and the NCJ disrupted the fundamental EU and constitutional guarantees of the rule of law, such as the irremovability of judges and the independence of courts.

Nowadays, the state authorities of the RP are trying to undermine this concept as part of the "reform of the judiciary". However, they do not pay attention to its core, which is the limitation of state sovereignty in matters relating to the autonomy of judges and the independence of courts, but contest the interference of EU institutions in matters relating to the organization of the judiciary. The EU policy in the field of EU justice is geared towards the achievement of the objective set out in Article 3 (1) TEU. The EU has a duty to guarantee its citizens an area of freedom, security and justice without internal borders (Article 2 (2) TEU). Therefore, in this study on employment law and social policy the emphasis should be placed on the Central-Eastern European perspective of some Member States' authorities in matters of work in social policy issues. The EC ought to make the state authorities of this region of Europe aware of the risks posed by the authorities of some Member States. The policy to make it difficult for the EU institutions to implement jointly agreed international priorities and values should be eliminated and prohibited in the future.

Bibliography

Świątkowski A.M, *Kodeks pracy. Komentarz* (Labour Code, Commentary), Warszawa 2019.

Świątkowski A.M., *Reforma wymiaru sprawiedliwości* (Justice reform), Kraków 2022.

Wróbel A., *Warto chronić państwo prawa. Cykl wywiadów Krzysztofa Sobczaka z prof. Andrzejem Wróblem poświęconych Konstytucji, prawu, legislacji i polityce* (It is worth protecting the rule of law, a series of interviews by Krzysztof Sobczak with prof. Andrzej Wróbel, devoted to the Constitution, law, legislation and politics), Warszawa 2017.