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**JUDGMENT OF THE COURT OF JUSTICE  
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– SELECTED COMMENTS**

**Abstract**

The changes introduced into the judiciary system within the last few years have actually led to the infringement of the principle of a tripartite division of power – Poland is inclining towards authoritarianism. The Constitutional Tribunal affected by formal changes and (partially) filled with persons who cannot guarantee independence – has ceased to perform their constitutional functions and ensure the constitutionality of laws long time ago. The “reforms” have already had impact on the judiciary authority, i.e. the courts. The above-described situation alerted the international opinion, thus, apart from the individual countries, many international organisations have also voiced their concerns. From among of the aforesaid organisations, the European Union (EU) is responsible for the key task. The changes in the structure of the Supreme Court and National Council of the Judiciary have become the subject of the preliminary procedure addressed to the Court of Justice of the European Union. In response thereto, the European Court of Justice located in Luxembourg stated that the cases concerning judges may not be tried by the

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<sup>1</sup> Joint cases C-585/18 *A.K. versus the National Council of Judiciary*, C-624/18 and C-625/18 *C.P. and D.O. Versus the Supreme Court*, ECLI:EU:C:2019:982.

court which is not independent or unbiased. The preliminary procedure is based on conciliation, which guarantees uniform application of Community law in all Member States. Therefore, it is always the national court that is responsible for the final resolution of the case. In the analysed case, it is the Supreme Court.

**Keywords:** preliminary procedure, Court of Justice, principle of unity, Supreme Court, National Council of the Judiciary

## Introduction

The judiciary reform that has been implemented for several years now affected the state's institutional foundations and pushed Poland towards anti-democratic and authoritarian country.<sup>2</sup> The changes, which affected the judiciary authority, were reasoned by the need to expedite court proceedings, enigmatic will of the sovereign, and necessity to introduce and maintain social benefits (e.g. 500+). I think that the opinion of prof. W. Osiatyński, according to which the country is convinced about the overriding weight of economic and social goals, achieved at the expense of the rights of the individual and characterised by the socialist concept of law is (sometimes) also valid today.<sup>3</sup>

The purpose of this paper is to show that the changes that have consistently been implemented in our country since 2015, including those that affected the National Council of the Judiciary and allowed to establish the Disciplinary Board at the Supreme Court violate the principle of a tripartite division of power and destroy the Polish judiciary system. The so created concept

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<sup>2</sup> I am aware of the fact that every authoritarian system is – as a matter of principle – also anti-democratic, but, since the party which currently holds the reins of power wants to make us believe that this is the will of the “sovereign” and that the will of the majority justifies infringement of a social agreement, such as the Constitution, I have decided to invoke this opinion. One of the main arguments justifying the infringement of the Constitution of the Republic of Poland is the concept of the so-called will of the majority, which has already been mentioned herein a number of times, as well as referring to such changes (e.g. replacing three legally appointed judges of the Constitutional Tribunal with three “imposters”) as democratic. However, the contemporary understanding of the concept of “democracy” means the will of the majority, but with the guarantee that the minority rights are respected and appropriate standards followed. The infringement or lack of the principle of a tripartite division of power are the characteristics of each authoritarian system.

<sup>3</sup> See: Osiatyński, W., *Prawa człowieka i ich granice*, Kraków 2011, pp. 236–238.

of diarchy with indirect or even servant judiciary authority deprives Poland of essential characteristics of a democratic state under the rule of law, which observes the laws. Therefore, it may lead to Poland's exclusion from the group of the most important international organisations and significantly weaken the country's position on the international front. The analysis of judicature presented in this article was mainly supported by the dogmatic and legal method and comparative method. The main thesis is based on the statement that the changes affecting the National Council of the Judiciary and Supreme Court mean not only the violation of the Constitution of the Republic of Poland, but also the Community regulations.

The amended acts related to the Third Estate and unprecedented repressive act (i.e. "muzzle law"),<sup>4</sup> preceded by prior disassembly of the Constitutional Tribunal as well as activities of particular authorities breach many principles and provisions of the Constitution of the Republic of Poland.<sup>5</sup> In particular, the following principles are specifically violated: tripartite division of power, autonomy and independence of courts, legalism of the formal state under the rule of law, compliance with international law, and the principle of equality, including the prohibition of discrimination. What is more, the following human rights are also breached: presumption of innocence, right to fair proceedings or freedom of speech.<sup>6</sup> The current government, parliamentary majority and President of the Republic of Poland consistently and continuously infringe also the foundations of the Community law, also by challenging the decisions issued

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<sup>4</sup> The Act of 20 December 2019 – the Law on the System of Common Courts, the Act on the Supreme Court and certain other Acts, Dz.U. (Journal of Laws) of 2020, item 190.

<sup>5</sup> The Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 1997, No. 78, item 483, as amended.

<sup>6</sup> Furthermore, the cases of M. Kamiński or K. Parchimowicz should also be mentioned here. The acquittal of M. Kamiński, the minister and coordinator of special services, before the decision of the court of second instance was issued led to a situation when it was the President of Poland and not the court who decided about the guilt. The above-mentioned case may not be considered legal, since the presumption of innocence is not only the human right, but also unqualified right. What is more, the right to fair proceedings was also substantially limited. The disciplinary proceedings initiated against the prosecutor and president of the *LEX SUPER OMNIA* Association of Prosecutors, due to the fact that he openly talked about the infringement of the Constitution constitute a significant breach of the freedom of speech.

by the EU authorities.<sup>7</sup> Illegal activities of particular authorities and their repercussions received wide coverage on the international arena. Many countries expressed their concerns about the situation in Poland, including such international organisations, as, among other things: The United Nations (UN), the Council of Europe, the Organisation for Security and Co-operation in Europe, and finally the European Union. From the very beginning of the so-called “reform”, the European Union has been involved in an enhanced dialogue with the Polish authorities (even though, at some point, it became a monologue) and has undertaken numerous activities with two fundamental objectives: to ensure compliance with the Community legal norms and remedy the situation (which encourage Poland to start observing the rule of law and international regulations once again) as well as to prevent current violations. The example of accomplishment of the first objective may be the fact that Poland has eventually decided to abandon (under the pressure of the EU) their discriminatory regulations concerning the retirement age of judges. The second objective was also reached by preventing further devastation of Białowieża Forest (it was possible thanks to the decision issued by the Court of Justice of the European Union to stop deforestation<sup>8</sup>). The Białowieża case was examined in the context of the rule of law<sup>9</sup> and potential pecuniary penalty for non-implementation of the interim measures was based on the significant EU value pursuant to Article 2 of the Maastricht Treaty – Rechtsstaat.

On 19 November 2019, in response to the preliminary procedure of Polish courts, the European Court of Justice in Luxembourg took another step forward to protect the rule of law in wide context. When providing response according to

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<sup>7</sup> A good example may be the well-founded opinion of the Commission issued pursuant to Article 258 of the Treaty on the Functioning of the European Union, signed in Rome on 25 March 1957 (codified version), Official Journal of the European Union C 202, 7/06/2016, 47–390 (TFUE) regarding Białowieża. Due to failure to comply with the aforesaid opinion, the case was referred to the Court of Justice of the European Union, pursuant to Article 260 TFUE, and the decision was issued, according to which the Republic of Poland breached the Treaty obligations. Furthermore, by virtue of Article 7 of the Treaty on the Functioning of the European Union, signed in Maastricht on 7 December 1992 (codified version), the infringement proceedings have been pending against Poland for several years already, Official Journal of the European Union C 202, 7/06/2016, 13–390 (Maastricht Treaty) regarding serious infringement of EU values. Article 7 of the Maastricht Treaty – colloquially referred to as the “nuclear option”, as it may cause the suspension of certain rights under the EU treaties – has been enforced for the first time against Poland.

<sup>8</sup> Case C-441/17 *European Commission versus Poland*, ECLI:EU:C:2018:255.

<sup>9</sup> See: Ziętara, D., *Zasada praworządności jako fundament Unii Europejskiej*, “Prawo Europejskie w Praktyce” 2019, No. 5/6 (179/180), pp. 15 et seq.

the preliminary procedure of the Supreme Court, the European Court of Justice examined the issues related to the infringement of the principles of autonomy, independence and impartiality of judiciary authorities. While analysing such issues and making the decision, the Court of Justice of the European Union used the preliminary procedure format stipulated in Article 267 TFUE<sup>10</sup> – the conciliatory means, whose main purpose is to ensure the uniform application of Community law.

### **Preliminary procedure**

The preliminary procedure is one of the oldest legal institutions referring to both the Community and EU law. The origin of the aforesaid procedure dates back to the first Founding Treaty<sup>11</sup> establishing the European Coal and Steel Community in 1952, which still remains in force, without many amendments, as part of the Treaty of Lisbon.<sup>12</sup> Its existence under the EU's legal system is a typical effect of absorption or, in other words, adoption of the national instrument. The EU preliminary procedure has been inspired by the French complaint filed with the Council of State (Conseil d'État). Similar institutions of law are present in many other countries, including common law countries, i.a: the United States of America. In the Polish legal system, a legal question that a common court may direct to the

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<sup>10</sup> Article 267 TFUE:

The Court of Justice of the European Union is competent to adjudicate in preliminary proceedings regarding:

- a) construction of treaties;
- b) effectiveness and construction of acts passed by various institutions, bodies or organisational units of the European Union.

In the event when the question with respect thereto is raised before the court of one of the Member States, the court may address the Court of Justice, at their sole discretion, to provide a reply to such question if the court believes that the decision is essential to make the judgement.

If the aforementioned question is raised in the case pending before the national court, whose decisions are not subject to appeal according to domestic law, such court shall file the case with the Court of Justice.

If the question is raised in the case pending before the national court with respect to a person deprived of liberty, the Court of Justice shall issue their decision in the shortest time possible.

<sup>11</sup> The Treaty establishing the European Coal and Steel Community (ECSC) signed in Paris on 18 April 1951, in: Gelberg, L. (ed.), *Prawo międzynarodowe i historia dyplomacji*, Vol. III, Warszawa 1960, pp. 401–440.

<sup>12</sup> The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed in Lisbon on 13 December 2007, Official Journal of the European Union C 306, 17/12/2007, 1–271, (TL).

Constitutional Tribunal constitutes the preliminary procedure.<sup>13</sup> Pursuant to Article 267 TFUE, the preliminary procedure (also referred to as the “preliminary ruling”) allows to decide on the effectiveness and interpretation of the EU law. Even though the European Court of Justice located in Luxembourg may interpret both ‘primary’ and ‘secondary’ legislation, it may only adjudicate on the effectiveness of the secondary legislation. The effectiveness of the treaties (or the entire treaty law) is the exclusive domain of Member States. Any potential examination of this issue and other issues related to the compliance of the treaties with the constitutions of Member States is entrusted with the national constitutional judiciary. It is also an important argument in the dispute over EU Member States’ sovereignty. In other words, the sovereignty of those Member States that agree to undertake certain EU obligations shall not be in any way affected. Nonetheless, coming back to the main theme of my considerations, it must be noted that from the very beginning the most important function of the preliminary procedure was to ensure uniform construction of the EU law in all Member States. The unity of effectiveness and implementation of the EU law is one of the most significant guarantees protecting the autonomous legal order of the European Union and the European Union itself.

### **Essence of preliminary procedure**

The effectiveness or, in other words, co-existence of two legal orders leads to the situation, in which the judiciary authority must examine issues related to external Union law. Such decentralisation of the EU law, which assumes the inclusion of the national authorities in the Union proceedings brings potential risk of radically different decisions in the same or very similar cases.<sup>14</sup> The aforesaid differences could appear not only in particular Member States, but also in various courts of one of the Member States. The preliminary procedure blocks incorrect interpretation of the EU law, i.e. the interpretation that could be made only on the basis of internal methods and standards. Therefore: “the proceedings to issue the decision according to the preliminary procedure are considered neither an action nor a complaint. It is a form of collaboration between a national court, before which such proceedings are pending, and the Court of Justice. The proceedings

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<sup>13</sup> For more information, see: Kubryk, K., *Postępowanie w sprawach wydawania orzeczeń wstępnych w świetle przyszłego rozszerzenia Unii Europejskiej*, in: Mik, C. (ed.), *Wymiar Sprawiedliwości w Unii Europejskiej*, Toruń 2001, pp. 194 et seq.

<sup>14</sup> See: Emmert, F., Morawiecki, M., *Prawo europejskie*, Warszawa 1999, p. 227.

are aimed at ensuring uniform application of the EU law in all Member States and efficient legal protection.”<sup>15</sup> In light of the above, the preliminary procedure constitutes a safeguard mechanism ensuring the unity of its implementation and preventing the creation of the national schools of interpretation of the EU law.<sup>16</sup> “(...) The institution of the preliminary procedure is a special ‘clamp’ which provides the application of the EU law in the Member States.”<sup>17</sup>

The preliminary procedure is a special and temporary procedure, which allows to make a break in the proceedings pending before the national court. On the basis of the response given by the Court of Justice of the European Union, the aforementioned proceedings may be continued and the national court has the ‘last word.’ In the case of *Pasquale Foglia vs Mariella Novello*,<sup>18</sup> the European Court of Justice located in Luxembourg showed that the compliance with the Community (Union) law while interpreting and implementing the treaties shall be a common domain of the EU and national judiciary powers. In the decision issued even earlier in the case of *Rheinmühlen-Düsseldorf*,<sup>19</sup> the European Court of Justice stressed that due to the sensitive nature of the preliminary procedure, it provides the laws established on the basis of the Treaties with the characteristics of a common law and ensures unitary effect in all Member States. The European Court of Justice also pointed out that the national courts must ensure full enforceability of the Union (Community) law, which would not be possible if there were any legal loopholes in the EU (Community) legal system. The preliminary procedure is one of the measures preventing such legal loopholes.

## Questions of the Supreme Court

The preliminary procedure was referred to the European Court of Justice in Luxembourg due to the situation of three judges (from the Supreme Court and the Supreme Administrative Court), after the entry into force of the new Act on

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<sup>15</sup> Rosiek, P.K., Szpunar, M., *Postępowanie przed Trybunałem Sprawiedliwości i Sądem I Instancji Wspólnot Europejskich. Aspekty praktyczne*, Warszawa 2005, p. 76.

<sup>16</sup> See: Kenig-Witkowska, M.M. et al., (eds.), *Prawo instytucjonalne Unii Europejskiej*, Warszawa 2019, p. 440.

<sup>17</sup> *Ibidem*.

<sup>18</sup> Case 244/80 *Pasquale Foglia v. Mariella Novello*, ECLI:EU:C:1981:302.

<sup>19</sup> Case 166/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle Für Getreide und Futtermittel*, ECLI:EU:C:1974:3.

the Supreme Court and the National Council of the Judiciary. According to the new regulations, the judges aged 65 and over are obliged to make a declaration whether they wish to keep their position<sup>20</sup> and obtain the consent of the President of the Republic of Poland. Otherwise, such judges shall be forced to retire. The required declaration was only made by the judge from the Supreme Administrative Court, but the National Council of the Judiciary expressed negative opinion with respect thereto, hence, the case was closed. Two judges from the Supreme Court stated that, in compliance with the no-retroactivity rule, their situation is subject to the provisions of the previous act, pursuant to which they may hold office up to 70 years of age. Furthermore, they were older than 65 years of age before the aforesaid act entered into force. The judges appealed to the Chamber and the Labour Law and Social Security at the Supreme Court, showing, among other things, that the above-described situation was unacceptable according to Directive 2000/78 (Article 2 sec.1),<sup>21</sup> which forbids discrimination, and Article 47 of the Charter of Fundamental Rights of the European Union,<sup>22</sup> which ensures the right to effective remedy and fair trial. The<sup>23</sup> right to fair trial<sup>24</sup> – mentioned in

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<sup>20</sup> The Act of 16 November 2016 amending the Act on retirement pensions and other pensions from the Social Insurance Fund and certain other acts, Dz.U. (Journal of Laws) of 2017, item 38, Articles 7, 8 and 26.

<sup>21</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L 303, 02/12/2000, 16–22.

<sup>22</sup> Article 47 of the Charter of Fundamental Rights: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Charter of Fundamental Rights of the European Union, Official Journal of the European Union L 202, 02/12/2000, 389–405.

<sup>23</sup> The Charter of Fundamental Rights of the European Union, Official Journal of the European Union L 202, 02/12/2000, 389–405. *Universal Declaration of Human Rights of 10 December 1948*, in: Przyborowska-Klimczak, A., *Prawo międzynarodowe publiczne. Wybór dokumentów*, Lublin 2006, p. 134–138. International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 and signed in New York on 19 December 1966, Dz.U. (Journal of Laws) of 1997, No. 38, item 167 – appendix. European Convention for the Protection of Human Rights and Fundamental Freedoms adopted in Rome on 4 November 1950, Dz.U. (Journal of Laws) of 1993, No. 61, item 284, as amended.

<sup>24</sup> More information on the right of fair trial in different legal systems is in: Połatyńska, J., *Prawo do rzetelnego procesu sądowego*, in: Koba, L., Waclawczyk, W. (eds.), *Prawa człowieka. Wybrane zagadnienia i problemy*, Warszawa 2009, pp. 212 et seq.



the Charter of Fundamental Rights of the European Union, Declaration of Human Rights, Covenant on Civil and Political Rights, and Convention on Human Rights – has special status in the Luxembourg’s system. In the opinion of former Advocate-General of the Court of Justice,<sup>25</sup> P. Léger, the above-mentioned right is consubstantial to the entire legal order of the European Union (Community).<sup>26</sup> Apart from the regulations included in the Charter of Fundamental Rights, the right was also construed in the secondary legislation and decisions issued by the Court of Justice of the European Union.<sup>27</sup> The generational personal right to fair trial is also provided for in Article 45 sec. 1 of the Constitution of the Republic of Poland,<sup>28</sup> in a manner referring to the most important provisions included in the international treaties. The interpretation of law by international judiciary authorities significantly improved its implementation in Poland. At this point, I may also mention the decisions of the Strasbourg Court issued with respect to the excessive duration of the proceedings before Polish courts, which resulted in the introduction of the systemic solutions reducing the duration of the proceedings in Poland.<sup>29</sup>

The Chamber and the Labour Law and Social Security proved their jurisdiction, since the Disciplinary Board – which is responsible for such issues – has not been established yet. The Supreme Court also stated that the special circumstances, under which the judges were supposed to be appointed for the Disciplinary Board, raise serious doubts as to their impartiality and autonomy. The issue of changing the method for appointing judges to the National Council of the

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<sup>25</sup> At that time – the European Court of Justice.

<sup>26</sup> See: Léger, P., *Le droit à un recours juridictionnel effectif*, in: Sudre, F., Labayle, H. (eds.), *Réalité et perspectives du droit communautaire des droits fondamentaux*, Bruxelles 2000, p. 200.

<sup>27</sup> More information in: Sozański, J., *Prawa Człowieka w Unii Europejskiej*, Warszawa–Poznań 2013, p.76, and Sozański, J., *Ogólne zasady prawa a wartości Unii Europejskiej (po traktacie lizbońskim) – studium prawnoporównawcze*, Toruń 2012, pp. 481 et seq.

<sup>28</sup> Article 45 of the Constitution of the Republic of Poland sec. 1 Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

<sup>29</sup> See: Florczak, A., Bolechow, B. (eds.), *Prawa i wolności I i II generacji*, Toruń 2006, p. 143. The cases, during which the issue of the excessive duration of the proceedings before Polish courts was analysed, include, among other things, the following: European Court of Human Rights, *Kukówka & Wende v. Poland*, complaint no. 56026/00, 24 September 2007, European Court of Human Rights, *Wawrzynkiewicz v. Poland*, complaint no. 73191/01, 17 February 2007, European Court of Human Rights, *Zwoźniak v. Poland*, complaint no. 25728/05, 13 November 2007.

Judiciary was of key importance.<sup>30</sup> In compliance with the provisions of the Constitution of the Republic of Poland and established practice – the judiciary organisations should be responsible for appointing members of the National Council of the Judiciary. Meanwhile, the new regulations introduced the so-called support letters. 25 judges or a group of 2000 citizens were supposed to provide their support, which is a flagrant breach of the provisions of the Constitution.<sup>31</sup> During the work on the Constitution promulgated in 1997, one of the considered variants of the structure of the Board assumed that the “Sejm” of the Republic of Poland had to appoint four members, but not from the group of members of parliament or senate, but from the group of law professors. Such professors were to be represented in double by the national representation of law faculties.<sup>32</sup> However, the idea to appoint judges to the National Council of the Judiciary in a manner other than by selection made by the judiciary organisations has never occurred. Both the archetype and final provisions of the Constitution prove the advantage of the judges appointed to the National Council of the Judiciary in a non-political way. The governing coalition continues to promote the concept of the “democratic control of courts” (whose one of the factors was supposed to be the support of candidates for the National Council of the Judiciary), forgetting that the appropriate form of controlling courts in the democratic country under the rule of law, where the principle of a tripartite division of power prevails, is to entrust the responsibility for passing acts – based on which the courts make judgements – to the Parliament. Even the Constitutional Tribunal, which has the power to repeal acts, may not establish their own laws to substitute the repealed acts. What is

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<sup>30</sup> The decision that the judiciary organisations were supposed to appoint judges to the National Council of the Judiciary did not raise any controversy. On the other hand, the issue that was widely discussed was the choice of persons to be appointed by the “Sejm” and “Senat” of the Republic of Poland. One of the propositions assumed that both chambers of the Parliament “should select the candidates out of the group of law professors, represented in double by the national representation of the university faculties of law”; Chruściak, R., Osiatyński, W., *Tworzenie konstytucji w Polsce w latach 1989–1997*, Warszawa 2001, p. 319.

<sup>31</sup> Article 187 of the Constitution of the Republic of Poland sec. 2. Fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; The Constitution does not stipulate that the judges could be chosen by organisations other than the judiciary organisations. It is also explicitly stressed that the term used is “choice” not “recommendation”. Additionally, the commentary to the Constitution by prof. B. Banaszak or prof. W. Skrzydło include the opinion about the “democratic appointment of judges”. See: Banaszak, B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 925; Skrzydło, W., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Kraków 1999, p. 199.

<sup>32</sup> Chruściak, R., Osiatyński, W., op. cit., p. 319.

more, other important criteria applying to the judiciary include education and age. Therefore, it is apparent, or even a truism, that the decisive factor determining the decisions issued by the Supreme Court must be – apart from high morale – excellent knowledge and not the desire to please politicians or certain groups of citizens.

The Supreme Court also noticed that the changes introduced by the Act of 8 December 2017 (and some other acts), according to which the judges could be appointed to the National Council of the Judiciary not by the General Assembly of Judges, but by “Sejm”, do not only breach the principle of a tripartite division of power (as already mentioned), which is essential for the existence of the democratic state under the rule of law, but also the European and international standards. Other organisations have already mentioned the above standards,<sup>33</sup> among other things, in the following documents:

- recommendation of the Committee of Ministers of the Council of Europe no. CM/Rec (2010)12 of 17 November 2010 (on independence, efficiency and responsibilities of judges),<sup>34</sup>
- opinion of the Venice Commission no. 904/2017 [CDL-AD(2017)031] of 11 December 2017,<sup>35</sup>
- opinion of the Consultative Council of European Judges (CCJE) no. 10(2007) of 23 November 2007 (on the Council of the Judiciary at the Service of Society).<sup>36</sup>

In their argumentation, the Supreme Court paid special attention to the following facts regarding different formal and material aspects (hence, the establishment and operations of the National Council of the Judiciary):

- the selection process of new members of the National Council of the Judiciary was non-transparent and questionable as regards the compliance with the binding provisions of law,
- new members were not represented at all levels of the judiciary (as many as 12 judges were recruited from the district courts and there was not

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<sup>33</sup> The Supreme Court invoked the aforesaid documents in the preliminary procedure. The Court of Justice of the European Union referred to the documents in section no. 41.

<sup>34</sup> *Judges: independence, efficiency and responsibilities. Recommendation CM/Rec(2010)12 and explanatory memorandum*. 2011, <https://rm.coe.int/16807096c1>. Accessed on: 5.02.2019.

<sup>35</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)-031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)-031-e). Accessed on: 5.02.2019.

<sup>36</sup> <https://rm.coe.int/168074744c>. Accessed on: 5.02.2019.

- any representative of the Supreme Court, courts of appeal and military courts),
- the entire period of operations of the National Council of the Judiciary was characterised by the complete absence of acts, where the Council would protect the autonomy of the Supreme Court, which – in light of the so-called “reform” and increasing legal chaos – was truly significant,
  - public criticism of the Supreme Court due to the preliminary procedure initiated thereby at the Court of Justice of the European Union (i.e. fulfilment of the Supreme Court’s obligation imposed by the provisions of the Treaty on the Functioning of the European Union) or collaboration with the EU authorities (in particular, the European Commission),
  - expressing negative opinions (without any justification) about the judges who wanted to apply – in compliance with the new regulations – for the right to hold their office.

The Supreme Court also mentioned special structure of the Disciplinary Board, which *de facto* gives it more power than the Supreme Court, filled with judges from other ‘bridgeheads.’ As a result, the Disciplinary Board is not autonomous, but superior – reduced to structure of the court over the court. It is composed of six prosecutors, two judges, two legal counsels, two research workers. Prior to their appointment, some of these persons were subject to executive power or – as of 2015 – acted upon its request or in accordance with its plan. What is more, the persons who do not meet the legal criteria of eligibility or committed disciplinary offences may be added to the above list of shortcomings.

### **Expedited procedure and proceedings before the Court of Justice of the European Union**

The motion of the Supreme Court was accepted in the proceedings conducted by the Court of Justice of the European Union, hence, the procedure was accelerated. In compliance with the regulations included in the Rules of the Court of Justice,<sup>37</sup> the date of hearing was set immediately. All interested parties were also notified forthwith. Additionally, the Court of Justice set the deadline for (potential) submission of written comments.

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<sup>37</sup> Rules of proceedings before the Court of Justice of 25 September 2012, Official Journal of the European Union L 265, 29/9/2012, 173, 26/6/2013, 217, 12/8/2016, 111, 25/4/2019, 316, 6/12/2019, Article 105 § 2 and 3.

The position of the broadly defined government side<sup>38</sup> may be understood as the intended play for time. After the first hearing on 19 March 2019, the National Council of the Judiciary submitted a motion for another hearing on the grounds that their representative was absent at the hearing in March and no written comments were provided. The Council also stressed the significance of the recent decision issued by the Constitutional Tribunal (issued immediately after the first hearing of the Court of Justice of the European Union), in which the Constitutional Tribunal considered the amended act on the National Council of the Judiciary compliant with the Polish Constitution.<sup>39</sup>

After the next hearing, which took place on 14 May 2019, the National Council of the Judiciary, Polish government and the Minister of Justice – General Prosecutor applied for reopening of the oral stage of the hearing. The government of M. Morawiecki stressed that they did not agree with the opinion of the European Union’s Advocate General announced after the oral stage of the hearing and explained that the arguments provided by the Advocate General required further discussion between the parties, which, of course, necessitated another hearing. At this point, it must be stated that the opinion of the Advocate General is not subject to any discussion and does not require the consent or stance of a given party. Furthermore, the Polish government suggested that the Court of Justice wrongly interpreted their own judicial decisions.<sup>40</sup> What is important, in the decision invoked by Poland with respect to the case of *Associação Sindical dos Juizes Portugueses*,<sup>41</sup> the Court of Justice emphasised both the role of independent judiciary authorities and their competence to evaluate such independence of judiciary authorities in a given Member State.<sup>42</sup> The National Council of the Judiciary also mentioned that they did not agree with the opinion of the Advocate General and

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<sup>38</sup> Therefore, the current National Council of the Judiciary shall also be treated as the government side. The reasons for that are not only linked to the appointment of judges in breach of the Constitution of the Republic of Poland, but also the fact that, contrary to the regulations in the Constitution, such judges represent only the position of the government, hence, violate the autonomy of courts and independence of judges.

<sup>39</sup> Decision of the Constitutional Tribunal of 25 March 2019, K 12/18, Dz.U. (Journal of Laws) of 2019, item 609.

<sup>40</sup> Case C-64/16 *Associação Sindical Dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.

<sup>41</sup> *Ibidem*.

<sup>42</sup> For more information, see: Pustuła, D., *Naruszenie praw podstawowych jako przestępstwo odmowy wykonania ENA w kontekście zasad wzajemnego uznawania i zaufania między państwami członkowskimi UE*, “Prawo Europejskie w Praktyce” 2019, No. 1 (2) (175/176), p. 63.

demanded reexamination of their own opinion (the motion in that respect was filed after the deadline), but the arguments in this case were raised at the additional hearing in May. The representative of the Advocate General supported the position of both the government and the National Council of the Judiciary, and, trying to prolong the case, proposed new discussion of the old arguments. Subsequently, the representative accused the Court of Justice of misunderstanding, hence, wrong interpretation of their own judicial decisions, and demanded a possibility of providing the response to the opinion of the European Union's Advocate General, even though the treaties have never provided for such a possibility. According to I.C. Kamiński: the purpose of a well-founded opinion is to present the facts and the national and EU laws, crucial for the examination of the case, in an orderly manner. The opinion should include not only the comparative analysis of the legal systems of Member States, but also the arguments of democratic systems outside the European Union.<sup>43</sup> The advantage of an independent and single opinion is the fact that it ensures "(...) clarity, consistency and comprehensiveness as the material being prepared by an independent legal expert."<sup>44</sup> In fact, the Advocate General is responsible for presenting the case and their own solutions in an unbiased and independent manner.<sup>45</sup> The Treaty on the Functioning of the European Union imposes the same requirements on judges and advocates (i.e. unquestionable independence, qualifications to hold the highest court posts, recognised competence). What is more, the method of appointment of judges and advocates is identical (Article 253 TFEU), which additionally strengthens their position. When T.T. Koncewicz called advocates general the "artists of general law", he referred to the statement of R. Lecourt, long-term President of the Court of Justice: "The opinion, as the last barrier separating the arguments of both sides from their evaluation by the judges includes a useful summary of the whole court battle between the parties. It should be appreciated that an independent and expert voice analyses the case and positions of the parties. (...) Even though our meetings are held in the absence of advocates, their opinions are voiced through the presented arguments."<sup>46</sup>

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<sup>43</sup> See: Kamiński, I.C., *Wymiar sprawiedliwości we Wspólnocie Europejskiej. Praktyczny komentarz i przepisy*, Warszawa 2004, pp. 53 et seq.

<sup>44</sup> Ibidem.

<sup>45</sup> See: Barcz, J., et. al., *Instytucje i Prawo Unii Europejskiej*, Warszawa 2017, p. 183.

<sup>46</sup> Kocewicz, T.T., in: Brodecki Z. (ed.), *Europa sędziów*, Warszawa 2007, pp. 28–29.

## **Conclusions of the Court of Justice**

The position of the European Court of Justice located in Luxembourg was clear. First of all, the Court of Justice in Luxembourg showed that both the organisation and composition of the National Council of the Judiciary may be the subject of analysis by the Court of Justice of the European Union, since they have significant impact on the process of appointment of judges. The judges who perform service in Poland are also the EU judiciary, which results from special correlations between the EU and national legal orders. It was explicitly shown in the decision issued in the case of *Simmenthal*,<sup>47</sup> in which the EU legal order was considered a hierarchically higher component of the national legal orders.<sup>48</sup> On the other hand, the issue of independence of the Disciplinary Board is inherently related to the political conditions of the National Council of the Judiciary. With reference to the National Council of the Judiciary, the Court of Justice mentioned the following points that may raise doubts:

- interruption of a term of office of the former National Council of the Judiciary,
- increase of the number of members of the National Council of the Judiciary appointed under a strictly political procedure,
- uncertainty as to the reliability of the appointment of judges – members of the National Council of the Judiciary (concealment of support lists),
- appropriate exercise of constitutional competence,
- lack of efficient court control of the decisions issued by the National Council of the Judiciary.

As far as the Disciplinary Board is concerned, the Court of Justice of the European Union pointed out to the fact that the Board was composed of newly appointed judges only and its authorisation was beyond standard autonomy.

The interpretation of the provisions in Article 47 of the Charter of Fundamental Rights of the European Union and Article 9 sec. 1 of the Council Directive 2000/78/EC of 27 November 2000 show that they do not allow “the disagreements regarding the application of the EU law to be resolved solely by the body which is not autonomous and unbiased court within the meaning of the

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<sup>47</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SA*, ECLI:EU:C:1978:49.

<sup>48</sup> *Ibidem*.



first of the aforementioned provisions.”<sup>49</sup> This is the case when: ”(...) objective circumstances, in which a given body was established, its characteristics, and the method of appointment of its members may raise – in the opinion of entities – reasonable doubts as to the independence of such body of external factors, in particular direct or indirect influence of legislative and executive powers, and its neutrality towards the conflicting interests faced thereby, hence cause lack of undermine the trust that the judiciary authority should evoke among individuals in a democratic society.”<sup>50</sup> It must be noted that the conclusions were formulated in a manner typical for the Court of Justice of the European Union. On one hand, the conclusions provide grounds for appropriate judgement at the national level, but on the other – constitute a universal formula that may be applied in any Member State. The Court of Justice indicated that it is the Supreme Court that should finally determine whether the Disciplinary Chamber is an autonomous, independent court, enjoying the trust of citizens, which should be the case of every court in a democratic state under the rule of law.

### Effects of the preliminary procedure

The decisions of the Court of Justice are binding upon the court that initiated the preliminary procedure,<sup>51</sup> which means that the Supreme Court shall be bound by the interpretation made in the decision issued in joint cases C-585/18,<sup>52</sup>

<sup>49</sup> Joint cases C-585/18 *A.K. versus the National Council of Judiciary*, C-624/18 and C-625/18 *C.P. and D.O. Versus the Supreme Court*, ECLI:EU:C:2019:982.

<sup>50</sup> *Ibidem*.

<sup>51</sup> See: Wyrozumka, A. (ed.), *System ochrony prawnej w Unii Europejskiej*, Warszawa 2009, pp. V–360.

<sup>52</sup> In case C-585/18, the following questions have been referred under the preliminary procedure: “1) On a proper construction of the third subparagraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], is a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear an appeal by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts (the National Council of the Judiciary), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?

2) If the answer to the first question is negative, should the third subparagraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?”



C-624/18 and C-625/18<sup>53</sup> on 19 November 2019 and shall undertake all the necessary actions to enforce the judgement. Failure of the court of a Member State to comply with the preliminary procedure shall not directly lead to the initiation of the proceedings by the Court of Justice of the European Union. Nonetheless, the above does not mean that the decision of the Court of Justice may be neglected by the Member State. Both the European Commission and other Member States may file a motion with the Court of Justice for determination of infringement of treaty obligations, pursuant to Articles 258 and 259 TFEU. By virtue of Article 260 TFEU, the Court of Justice may rule on the necessity to undertake appropriate measures ensuring enforcement of the judgement. Since Poland continues to flagrantly and persistently breach the treaty obligations, violate all standards related to the requirements of lawfulness and autonomy of the judiciary authority, and is the first Member State against which the proceedings for infringement of the core values of the European Union (Article 7 of the Maastricht Treaty) have been initiated, the Court of Justice of the European Union (after repeating the procedure) may charge a flat fee or cash penalty. They are considered definitive measures and, in practice, imposed very rarely. As the experience of other Mem-

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<sup>53</sup> In cases C-624/18 and C-625/18, the following questions have been referred under the preliminary procedure:

“1) Should Article 47 of the [Charter], read in conjunction with Article 9(1) of [Directive 2000/78], be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claim, that court – in order to protect the rights arising from EU law by ordering an interim measure provided for under national law – must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal has been lodged, on a chamber of that court which is not operational by reason of a failure to appoint judges to be its members?

2) In the event that judges are appointed to adjudicate within the chamber with jurisdiction under national law to hear and determine the action brought, on a proper construction of the third paragraph of Article 267 [third paragraph TFEU], read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], is a newly created chamber of a court of last instance of a Member State which has jurisdiction to hear the case of a national court judge at first or second instance and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the [(National Council of the Judiciary)], which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?

3) If the answer to the second question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?”.

ber States (including, among others, France or Greece) shows, the penalties are as painful as efficient. However, it should be noted that, generally, the courts of the Member States, their bodies and institutions observe the decisions issued by the European Court of Justice in Luxembourg. Such decisions also have impact on judicial decisions of other Member States. “The interpretation of the EU law by the Court of Justice is widely seen as the most authoritarian means for shaping and establishing the content of the EU law.”<sup>54</sup>

## **Conclusion**

When responding the above questions asked by the Supreme Court, which basically referred to the issue of legality of establishment of the National Council of the Judiciary as well as the autonomy and independence of the Disciplinary Board, the Court of Justice mentioned the premises negating the legality as well as autonomy and independence of both entities. Additionally, the Court of Justice stressed that the issuance of the final and binding decision in this case, pursuant to the Polish and EU laws, falls exclusively within the jurisdiction of the Supreme Court.

With the above in mind, it must be stated that the first step should be undertaken by the Supreme Court, which – despite being bound by the arrangements of the European Court of Justice in Luxembourg – shall independently resolve the issues relating to both the Disciplinary Board and the National Council of the Judiciary. Subsequent (legal and remedial) decisions shall be made by the bodies having legislative and executive power. On the other hand, the preliminary procedure, which is an example of successful absorption of the national legal instrument by the EU legal order, is of key importance not only in terms of the unity of implementation of such a law, but also the very existence and autonomy of the system itself. Questioning its validity or failure to comply with its provisions violates the EU legal order, thus, the Member State responsible for such actions or omissions puts itself outside the European Community.

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<sup>54</sup> Kenig-Witkowska, M.M., et al. (eds.), *op. cit.*, p. 499.

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