LEGAL DISPUTE OVER THE CONSTITUTIONALITY OF POLISH REGULATIONS AND THEIR EFFECTS AFTER THE AMENDMENT OF THE PROVISIONS ON REACHING THE RETIREMENT AGE BY THE JUDGES OF THE POLISH SUPREME COURT

Andrzej Marian Świątkowski*

Abstract: *The Constitution of the Republic of Poland clearly states in article 180 (1) that "Judges are irremovable". Irremovability, next to independence, is a guarantee of impartiality of courts, defined in the Constitution of the Republic of Poland as "a separate authority, independent of other authorities" (Article 173). The previous Act on the Supreme Court of 23 November 2002 also established the rule of retirement of a judge after reaching 70 years of age. On 4 July 2018, the Act of 8 December 2017 on the Supreme Court came into force. It lowers by five years the age at which judges of the Supreme Court retire (leave service) (Article 37 § 1). The age after reaching which there occurs an automatic - at the will of the legislature - change in the status of the judge from active status to the state of non-performance of duties may be legitimately called a "retirement age". The executive and political power again obtained legally accepted influence on the selection of judges. This scenario is again being implemented by the currently ruling political party and state authorities, legislative and executive.*

Keywords: *Constitution, independence, retirement age, Supreme Court judges*

I. INTRODUCTORY NOTE

For more than a year there has been a dispute between the ruling government and ruling party on one part, and the opposition and progressive community of legal practitioners on the other part, concerning the Polish justice system. Under the pretext of increasing social control over the justice system, the urgent need to improve the functioning of courts and the need to remove from the justice system dishonest judges or those connected with the previous political system, the government of the Republic of Poland and the political party "Law and Justice" aims to subordinate courts and judges to the executive authorities – the President of the Republic of Poland, the Minister of Justice and the legislature – currently the ruling parliamentary majority.

Personnel changes were made in the Constitutional Tribunal, the National Council of the Judiciary of Poland and in the Supreme Court. All judges of the Supreme Court, including the First President of this Court, whose constitutional term of office expires in 2020, were forced to retire after reaching the age of 65. The composition of the new Supreme Court was supplemented by the politicised National Council of the Judiciary.

The new Supreme Court has been authorised, among others, to amend in a special procedure the final judgments passed in the last twenty years. The authority to change the

* Professor Dr. Hab. Andrzej Marian Świątkowski, Jean Monnet Professor of European Labour Law and Social Security Law, Jesuit University Ignatianum, Kraków, Poland

stabilised judicature has been granted to the "social factor", lay judges who have no subject-matter preparation to make legal assessments and make different final decisions on the most important and complicated legal issues so far resolved by the most experienced and qualified professional judges of the Supreme Court.

In order to subordinate the judges to state power, the Supreme Disciplinary Chamber was established in the Supreme Court. One of its tasks is to adjudicate on disciplinary matters of judges who – according to the executive power – have committed offenses in the service. Judges of the Disciplinary Chamber, dominated by former prosecutors, are not subject to the authority of the supreme supervisor, i.e. the First President of the Supreme Court. They also receive remuneration 40 percent higher than the remuneration of other judges of the Civil, Criminal and Labour and Social Security Chamber of the Supreme Court.

The opposition accuses the state authorities and the ruling political party that the proposed and partly implemented ideas of changing the justice system in Poland are contrary to the fundamental principles of a democratic rule of law. In particular, opponents of court reform claim that:

- the election of judges by politicians threatens the independence of the judiciary;
- the application of the mechanism of expiration of the official employment relationship of judges following the lowering of the retirement age below the previously applicable 70 years for the currently adjudicating judges of the Supreme Court – is contrary to the constitutional principle of irremovability expressed in Article 180 (1) of the Constitution of the Republic of Poland.
- the termination of the term of office of the First President of the Supreme Court due to the lowered retirement age is unacceptable taking into account the explicit wording of Article 183 (3) of the Constitution of the Republic of Poland which provides that "the first President of the Supreme Court shall be appointed by the President of the Republic of Poland for a six-year term of office from among candidates presented by the General Assembly of the Supreme Court".[1]

According to specialists, theoreticians and practitioners in the field of constitutional law and labour law, the changes made so far by state authorities (legislative and executive) in the Polish justice system collide with the Montesqieu's concept of division of power, the spirit of the law and good practice.[2] According to the author, the lowering of the retirement age, resulting in termination of the official employment relationship of judges, is contrary to the principle of non-retroactivity and the legal culture prevailing in modern civilised European countries.

The author, using the dogmatic method of interpretation of the Act on the Supreme Court adopted by a parliamentary majority entirely belonging to the ruling political party – "Law and Justice", lowering the "retirement age" of judges, causing the termination of official relations with the group of the most experienced judges, aims to demonstrate the unlawfulness of actions taken and continued in the justice system by the current govern-

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.] of 1997, No.78, item 483.

[2] ŚWIĄTKOWSKI, A. M. Pozakodeksowe przypadki wygaśnięcia stosunku pracy [Non-Labour Code cases of expiration of employment relationship]. *Palestra. Pismo Adwokatury Polskiej.* 2018, Vol. LXIII, No. 725, p. 5 ff.

ment and the ruling party. He does that by presenting the legal specifics of the concept of the "retirement age" of judges (part II), their irremovability in the period adopted in the previously applicable laws – the Constitution and the Act on the Supreme Court (Part III) and the obligations to declare the expiration of the official employment relationship with judges who have reached a lowered retirement age, not complied with by the President of the Republic of Poland (Part IV).

He shows the contradiction of the collective termination of official employment with the legal culture well established in the European Union (part V), the fundamental principle of the Polish legal system – *lex retro not agit* (part VI) and the use by the state, executive (government and president) and legislative authorities (the parliament and senate) of the presumption of compliance with the Constitution of an automatic retirement of the judge after reaching the "retirement age" (Part VII).

The author addresses the present text, being on the borderline of constitutional law, labour law and social security law, to the judges not approving the practice of "purge" in the Supreme Court who have "lost" the battle not only for the independence of the highest judicial authority, but above all for their own image of independent judges (part VIII).

II. "RETIREMENT AGE" OF JUDGES

On 4 July 2018, the Act of 8 December 2017 on the Supreme Court came into force.[3] It lowers by five years the age at which judges of the Supreme Court retire (leave service) (Article 37 § 1). The age after reaching which there occurs an automatic – at the will of the legislature – change in the status of the judge from active status to the state of non-performance of duties may be legitimately called a "retirement age". Lowering the "retirement age" by five years allows a judge to exercise his entitlement to social security benefits, which are, in principle, the equivalent of the universal pension benefits.

Judges and other public officials who are in service relationships have the right to protection of substantive rights in the field of social security. In the case of judges, those rights may be protected by Article 1 of Protocol No. 1 (Protection of property) to the European Convention on Human Rights. This follows from the obligation of a Member State to make contributions to a judges' social security scheme.[4] In the case of an individual who makes contributions to the social security scheme, creating entitlement to social benefit, the European Court of Human Rights has interpreted the right to those benefits as property right to certain assets used by the State for the payment of pension. Therefore, property benefits from state funds were protected as "proprietary interest" falling within the concept of "possessions". Therefore the State legislation must be regarded as generating a proprietary interest within the meaning of Article 1 of Protocol No. 1.[5]

[3] Journal of Laws [Dz.U.] of 2018, item 5.

[4] HEREDERO, A. G. *Social security as a human right. The protection afforded by the European Convention of Human Rights*. Strasbourg: Council of Europe Publishing, 2007, pp. 25–26.

[5] ECtHR judgment (Grand Chamber) in Stec and others v. the United Kingdom, decision of 6 July 2005, § 54.

Separate methods of financing such benefits do not deprive similarity of benefits financed from contributions of insured persons and benefits from funds accumulated by the State Treasury.[6] Both of these systems – the provision system in the case of judges and other civil servants and the general insurance system, derived from contributions under obligatory employment relationships, meet identical social needs. They replace income from work for people who, after reaching the statutory age, commonly referred to as the "retirement age", cease to be professionally active.

The legal provisions enacted by state institutions introduce a fundamental difference between property benefits from the social provision system to which judges and other public officials are entitled and the general (insurance) retirement benefits. In contrast to the provisions of the Pension Act of 17. 12. 1998[7] which guarantees pension entitlements to persons who meet the conditions for acquiring the right to cash benefits from the pension insurance of the Social Security Fund, the Act on the Supreme Court, currently in force and the previous one, provides that a judge of the Supreme Court becomes judge emeritus on the date when he reaches the age designated by the legislature. Under both the existing regulations and those previously in force, the age of ending the service ("retirement age") could be extended. The conditions and the period of this extension have changed. According to article 37 § 1 of the act currently in force, a judge retires at the age of 65. The President of the Republic of Poland may agree for a judge who has reached the "retirement age" to continue his service, if the judge, "not later than 6 months and not earlier than 12 months before reaching this age, makes a declaration of will to continue to take the position and presents a certificate stating that he is able, in terms of health, to perform the duties of a judge, the certificate to be issued on the terms specified for the candidate for a judge position". The President of the Republic of Poland may agree for the judge to continue to hold the office of the judge of the Supreme Court within 3 months from the date of receipt of the declaration, the certificate and the opinion referred to in § 1 and 2. Failure to give consent within the time limit referred to in the first sentence means that the judge will become judge emeritus at the age of 65 (Article 37 § 3). The consent referred to in § 1 is granted for a period of three years, no more than twice (Article 37 § 4). The currently binding Act on the Supreme Court does not regulate the legal grounds for the decision of the President of the Republic of Poland to extend or refuse to extend the period of performing official duties by a judge who has reached the "retirement age" and thus fulfilled the statutory condition for retirement. However, the most important thing is that by introducing the possibility for the President of the Republic of Poland to make an arbitrary decision, the legislature undermined the constitutional principle of irremovability of the judge in the period falling after reaching the retirement age shortened by five or ten years as compared to the previous provisions of the act on the Supreme Court.

[6] PIOTROWSKI, J. *Zabezpieczenie społeczne. Problematyka i metody* [Social security. Problems and methods]. Warsaw: Książka i Wiedza, 1966, p. 160 ff.; SZUBERT, W. *Ubezpieczenie społeczne. Zarys systemu* [Social insurance. Outline of the system]. Warsaw: PWN, 1987, pp. 294–295.

[7] Act on pensions from the Social Insurance Fund (Ustawa z dnia 17 grudnia 1998 o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych).

III. THE CONSTITUTIONAL PRINCIPLE OF IRREMOVABILITY OF JUDGES

The Constitution of the Republic of Poland clearly states in article 180 (1) that "Judges are irremovable". Next to independence, irremovability is a guarantee of impartiality of courts – defined in the Constitution of the Republic of Poland as "a separate authority, independent of other authorities" (Article 173). The previous Act on the Supreme Court of 23 November 2002 also established the rule of retirement of a judge after reaching 70 years of age. The legislature provided for an exception to this rule for those judges who declared to the First President of the Supreme Court the willingness to continue holding their position after reaching the retirement age and submitted a medical certificate on the capacity to perform the duties of a judge. Conditions listed in article 30 § 1 of the previous Act on the Supreme Court should be fulfilled not later than six months before the judge reaches the age of 70. In the case of submitting the above statement, the judge had the right to continue to hold his position – with the exception of management positions in the Supreme Court: chairman of the chamber or chairman of the department in the chamber – no longer than until reaching 72 years of age (Article 30 § 5). Thus, not the arbitrary decision of the state executive authority currently exercised by the President of the Republic of Poland, but solely the will of the judge, entitled to retirement, interested to continue the official employment relationship after reaching the statutory retirement age, was a decisive factor for extending by a maximum of two years the performance of duties under so-called active status of the judge. Noteworthy is the fact that no other state authority separate from the judicial authority has participated in the procedure of making the above decision. The then legislature took seriously the constitutional principle of division and balance of state authorities: legislative, executive and judicial. On the other hand, the situation of judges and courts was different under the Act on the Supreme Court of 20.9.1984, in force in the Polish People's Republic.[8] The Council of State, as a collective "head of state", appointed the full Supreme Court for a period of five years (Article 31.1). Prior to the appointment to the five-year term of office, the First President of the Supreme Court issued an opinion about the judges adjudicating in the previous term. In the case of submission of new candidates for judges, the First President of the Supreme Court was obliged to act in consultation with the appropriate heads of state central bodies, the Minister of Justice, the Minister of National Defence and the Prosecutor General of the Polish People's Republic supervising the work of the institutions from which candidates for the positions of Supreme Court judges came. The Constitution of the Polish People's Republic of 22. 7. 1952,[9] which was in force at the time, declared in article 53 the impartiality of judges. The only, very dubious, guarantee of this fundamental principle of the independent judiciary was the publicity of the examination of cases, which publicity could be excluded by the act. The executive and political power had a legally accepted influence on the selection of judges. This scenario is again being implemented by the currently ruling political party and state authorities, legislative and executive.

[8] Journal of Laws [Dz.U.] of 1984, No. 5, item 241.
[9] Journal of Laws [Dz.U] No. 33, item 232.

IV. THE DUTY OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO DECLARE THE DATE OF RETIREMENT

A *conditio sine qua non* for retirement of a judge of the Supreme Court is declaration of the date when a judge of the Supreme Court is transferred to the judge emeritus status. The above obligation is imposed on the President of the Republic of Poland by article 39 of the Act of 8 December 2017. The absence of the above declaration makes it impossible to change the legal status of a Supreme Court judge. Failure to comply with the above obligation should be interpreted as a tacit consent to the continuation of official duties and holding the position in the supreme judicial body for the maximum period of six years (two times a period of three years) as specified in article 37 § 4 of the aforementioned Act. Four maxims of Roman law, commonly known to lawyers: 1) *qui tacet consentire videtur*; 2) *qui tacet consentire videtur ubi loqui potuit ac debuit*; 3) *qui tacet not consentit, tamen verum est cum non negare*; 4) *qui tacet ubi loqui qui potuit consentire videtur*, more or less pointedly express this relationship between the obligation of action ordered by the legislature and the legal situation of a judge of the Supreme Court in special situations, to which retirement belongs. The conduct of the President of the Republic of Poland confirms this interpretation of the situation of the First President of the Supreme Court. He did not designate a judge to fulfil the duties of the current First President of the Supreme Court "transferred" on the basis of the unconstitutional Act of 8 December 2017. The provision of article 111 § 4 of the Act of 8 December 2017 obligates him, after dismissing the position of the First President of the Supreme Court, to entrust presiding of the Supreme Court to the judge of the Supreme Court indicated by him, until the time of appointment of the new First President of the Supreme Court. This means that he accepted the order issued by the First President of the Supreme Court still in office to appoint a judge designated by her, the oldest in terms of seniority of service, to temporarily replace her during her holiday leave and leave of absence in the performance of duties of the First President in matters related to the current management of the Supreme Court. In the opinion of some lawyers, the official act of the President of the Republic of Poland regarding the transfer of the Supreme Court's judge to the judge emeritus status requires the signature of the Prime Minister (article 144 (2) of the Constitution). This act was not mentioned in the catalogue of matters listed in Article 144 (3) of the Constitution. I do not share this opinion. In the case concerned regarding the status of the judge acting as the First President of the Supreme Court, the indicated provision only mentions the presidential official act of appointing the First President of the Supreme Court (paragraph 20). The Act on the Supreme Court of 8 December 2017 allows the President of the Republic of Poland to interfere in internal matters of the judiciary, threatening the independence of courts and impartiality of judges only during the period when a judge retires. I realise that the countersignature of the Prime Minister could be treated as an additional safeguard against the possible abuse of power by the executive state body appointed, inter alia, to perform the function of "the highest representative of the Republic of Poland and the guarantor of continuity of state power" (Article 126 (1) of the Constitution). However, it would constitute an interference of not one, but two representatives of the executive authorities, not mentioned explicitly in the act, in the situation prescribed by the analysed legal act - from the legislative authority.

In the case of the First President of the Supreme Court appointed - as stipulated in article 185 of the Constitution of the Republic of Poland - by the President of the Republic of Poland for the six-year term, reaching the "retirement age" during the term of office has no legal effect formulated in Article 37 of the Act of 8 December 2017. Argumentation of the representatives of the President of the Republic of Poland, that the First President of the Supreme Court is obligated under that law to retire and thus not to continue to perform duties of managing the Supreme Court is wrong due to the clear and understandable, and therefore not requiring interpretation, regulation of the term of office. Constitution of the Republic of Poland, authorises the legislative authority to determine the age at which judges retire (article 180 (4)). The Constitution was mentioned in the first place in the hierarchy of sources of universally binding law of the Republic of Poland (article 87 (1)). Not without reason, it has been traditionally and is still now treated as the most important legal act in the state and called the "basic law." It is a source of law in the Republic of Poland. It has an undeniable priority over other "ordinary" laws. It is the highest law of the Republic of Poland (article 8 (1)). It should be applied directly by courts and other public institutions applying the law (Article 8 (2)). Only the Constitution may release courts and other institutions applying the law from the obligation to apply it directly (article 8 (2)). Interpretation of article 183 (3) of the Constitution in connection with article 37 § 1 of the Act on the Supreme Court currently in force must be treated as an obvious evasion of the unambiguous guarantee of the office of the First President of the Supreme Court.

V. REFLECTIONS ON MAKING LAW

"The law should be made in such a way that it does not offend the nature of things.[10] When someone (the legislature) gives reason to law, this reason must be worthy enough."[11] In the case of the discussed Act on the Supreme Court of 8 December 2017, it is difficult to recognise as reasonable the lowering of the "retirement age" of the Supreme Court judges by 10 years (women) and five years (men). Judges of the Supreme Court belong, next to academics, to the category of people whose knowledge and professional skills grow with experience. It is in the best understood public interest that they remain active in the public service as long as possible, judges for justice and professors for science. Meanwhile, it is impossible to resist an impression that the acts adopted as part of the "good change" program are aimed at removing both judges and professors from active professional activity. Not only them.[12] "Retirement age" as a method of removal from profession has been used by the legislature relatively recently. Previously the legislature "cleaned up" the foreground using the concept of expiration of employment relations.[13] The use of any of these methods must be considered a wrong way of legislating.

[10] MONTESQUIEU, CH. L. *The spirit of laws*. Translated by T. Boy-Żeleński. Warsaw: PWN, 1957, p. 381.
[11] MONTESQUIEU, CH. L. *The spirit of laws*. p. 379.
[12] The Act – Law on Higher Education and Science passed by the Polish Sejm on 3 July 2018. Constitution for Science.
[13] ŚWIĄTKOWSKI, A. M. Wygaśnięcie stosunku pracy [Expiration of employment relationship]. In: B. Godlewska-Bujok – K. Walczak (eds.). *Różnorodność w jedności* [Diversity in Unity]. *Księga pamiątkowa dedykowana prof. Wojciechowi Muszalskiemu* [Liber Amicorum in Honour of Professor Muszalski]. Warsaw: C.H. Beck, 2019, p. 151 ff.

Further objections to the Act of 8 December 2017 relate to the legal consequences of its application to Supreme Court judges employed on the basis of the previously existing laws on the Supreme Court. In the case of judges and the First President of the Supreme Court, what needs to be considered is the argument raised against the Act of 8 December 2017, namely infringement by the legislature of the principle of retroactivity of provisions lowering the "retirement age" of judges and the legal consequences resulting in the retirement. In the situation regarding the First President of the Supreme Court, it is reasonable to consider a case related to the arguments presented by the representatives of the ruling political party and the state executive authorities regarding the missed opportunity to initiate the review of presumption of constitutionality of provisions determining the lowered "retirement age" of judges and their automatic effect on the change – from active to retired – of the status of the First President of the Supreme Court.

VI. LOWERING THE "RETIREMENT AGE" OF JUDGES OF THE SUPREME COURT AND THE LEX RETRO NON AGIT PRINCIPLE

Article 2 of the Constitution of the Republic of Poland considers the principle of non-retroactivity as one of the most important principles of a democratic state of law that implements the principles of social justice. *Lex retro non agit* is expressed in the provisions of article 42 (1) of the Constitution of the Republic of Poland, Article 1 § 1 of the Criminal Code and also Article 3 of the Civil Code. In matters relating to employment and the achievement of the "retirement age" by the Supreme Court judges, a significant provision is Article 3 of the Civil Code, the legal norm prohibiting in principle the enactment of laws that may cause retroactive effect in social and economic relations regulated by civil law in the broadest sense. Such matters include, among others, matters relating to labour law and social security.[14] The principle of non-retroactivity expressed in Article 3 of the Civil Code means that the new law does not apply to the assessment of legal events and their consequences, if they occurred and ended before the entry into force of the new provisions.[15] In the case of incidents of a continuous nature, which include the service relations of judges of the Supreme Court, both under previously applicable and new legal provisions, the application of the principle of non-retroactivity changes its character. It can take the form of a postulate. Article 3 of the Civil Code provides that "an act has no retroactive force, unless this (retroactivity) results from its wording and purpose". According to the Supreme Court, it is necessary to refer to the general principles of "transitional private law".[16] Legal relationships, including service relationships, established under the "old" regulations, modified, and – most importantly – expiring during the effective force of the "new" provisions are usually governed by the provisions under which they were established. This is because one rule is observed: a legal event that took place under the repealed act, such as the appointment of a judge to an active status, applies to the legal

[14] See article 1 of the Polish Code of Civil Procedure of 17.11.1964, Journal of Laws [Dz.U.] of 2018, item 155.
[15] A judgment of the Supreme Court of Poland of 18 September 2014, V CSK 557/13, LEX no. 1523369.
[16] A judgment of the Supreme Court of Poland of 4 September 2008, IV CSK 196/98, LEX no. 466004.

consequences resulting from the establishment of the official employment relationship of the judge. Therefore, the previously applicable provisions should apply to them. The right to employment up to the age of 70 is treated as an "acquired right".[17] However, this is not a safe guarantee, because until the date of reaching the lowered "retirement age" under the amended provisions of the Act on the Supreme Court, it constitutes an expectation, which will transform into subjective entitlement to remuneration on the day of confirmation by the President of the Republic of Poland of the retirement status. That is why the Constitutional Tribunal of the Republic of Poland recognised the *lex retro non agit* principle as "an important element of the legal culture of contemporary civilised countries, as well as an essential component of the constitutional order of contemporary constitutional regimes."[18] The "soft" prohibition of attaching legal consequences to legal events from the past should be expressed in the maxim *lex prospicit, non respicit.*[19]

VII. PRESUMPTION OF CONSTITUTIONALITY OF THE LEGAL CONCEPT OF AUTOMATIC RETIREMENT AFTER REACHING THE "RETIREMENT AGE"

One of the main arguments of the state executive authority was the allegation that the Supreme Court managed by the First President of the Supreme Court did not use the measure to challenge the presumption of constitutionality of the provision governing the lowering of the "retirement age" of the Supreme Court judges. It is, therefore, necessary to consider, only in legal terms, whether the initiation of such proceedings by the Constitutional Tribunal would make sense due to the very precisely defined term of office of the First President of the Supreme Court stipulated in article 183 § 3 of the Constitution. The presumption of constitutionality is not a legal concept, as it has not been regulated in the provisions of legal acts. However, it is widely discussed in the Polish literature on constitutional law[20] and the theory of law.[21] The presumption of constitutionality has been

[17] ZUBIK, M. (ed.). *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów* [Constitution of the Third Republic of Poland in the judicial decisions of the Constitutional Tribunal and selected courts]. Warsaw: C. H. Beck, 2008.

[18] A judgment of the Constitutional Tribunal of 3 October 2001, K 27/01, W. Dajczak, T. Giaro, F. Longchamps de Bérier, Krakow 2012, p. 24.

[19] ZAJADŁO, J. Mit zakazu retroaktywności prawa [The myth of prohibition the retroactivity of law]. In: *Konstytucyjny.pl* [online]. 25. 1. 2017 [2019-07-01]. Available at: <http://konstytucyjny.pl/mit-zakazu-retroaktywnosci-prawa-jerzy-zajadlo/>.

[20] RADZIEWICZ, P. Wzruszenie "domniemania konstytucyjności" akty normatywnego przez Trybunał Konstytucyjny [Challenging the "presumption of constitutionality" of normative acts by the Constitutional Tribunal]. *Przegląd Sejmowy.* 2008, Vol. XVI, No. 5, p. 55 ff.; GUTOWSKI, M., KARDAS, P. Domniemanie konstytucyjnosci a kompetencje sądów [Presumption of constitutionality and competence of courts]. In: *Konstytucyjny.pl* [online]. 20. 2. 2017 [2019-07-01]. Available at: < http://konstytucyjny.pl/domniemanie-konstytucyjnosci-a-kompetencje-sadow-maciej-gutowski-piotr-kardas/>; DĘBOWSKA, A., FLORCZAK-WATOR, M. Domniemanie konstytucyjnosci ustawy w swietle orzecznictwa Trybunału Konstytucyjnego [Presumption of constitutionality of the act in the light of the jurisprudence of the Constitutional Tribunal]. *Przegląd Konstytucyjny.* 2017, No. 2, p. 5 ff.

[21] WRÓBLEWSKI, J. Domniemania w prawie – problematyka teoretyczna [Presumptions in law - theoretical problems]. *Studia Prawno-Ekonomiczne.* 1973, Vol. X, p. 7 ff.; GIZBERT-STUDNICKI, T. Znaczenie terminu „domniemanie prawne" w języku prawnym i prawniczym [The meaning of the term "legal presumption" in legal language and lawyers' language]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny.* 1977, No. 1, p.101 ff.; GIZBERT-STUDNICKI, T. Spór o domniemania prawne [Dispute over legal presumptions]. *Państwo i Prawo.* 1977, No. 11, p. 68 ff.

developed in the jurisprudence of the Constitutional Tribunal on the occasion of the constitutional review of both the wording and the procedures for the enactment of legal acts by the legislative authority. Article 188 (1) and (3) of the Constitution authorises the Constitutional Tribunal to adjudicate "on matters" regarding constitutionality of legal acts, national and international, listed in paragraphs 1 and 3. Therefore, there is no obligation in the Polish law system to initiate proceedings aimed at control of the adopted legal act. However, the Constitution of the Republic of Poland provides for an authorisation addressed to "everyone whose constitutional freedoms or rights have been violated" to submit to the Constitutional Tribunal a complaint regarding the constitutionality of law or other act on the basis of which the court or public administration body ultimately ruled on his freedoms, rights or obligations (Article 79, paragraph 1). Further provisions of the Constitution, namely article 191 (1) and article 193 name the institutions and entities and legal measures that can be used by the entitled persons to request a review of constitutionality of a legal act. This, however, does not mean the obligation to initiate judicial review by the Constitutional Tribunal. Until a ruling on non-compliance with the Constitution is issued, the "challenged" legal act benefits from the presumption of constitutionality. The presumption of constitutionality of legal acts is a guarantee of the exercise of rights and freedoms confidently, safely and in the trust of public authorities and the law they enact.

In terms of the presumption of constitutionality of the provisions of the Act of 8 December 2017 on the automatic retirement of the First President of the Supreme Court as a result of lowering the "retirement age" of the Supreme Court judges, the most important criterion is the criterion of the wording of the Act which benefits from the presumption of constitutionality.[22] The Act of 8 December 2017 regulates constitutional issues as well as employee matters and social rights. It can therefore be assumed that a significant lowering of the "retirement age" of the Supreme Court judges falls into the category of matters classified by the state authorities and the governing party in the category of labour law and social security regulations that implement the social policy program. According to the case-law of the Constitutional Tribunal, such categories of matters are perceived as "enjoying a greater presumption of constitutionality",[23] although there are serious doubts as to whether the above-mentioned statement would be accepted by the person concerned - the First President of the Supreme Court.[24] In employment and social matters, the Constitutional Tribunal provides the state authorities with a greater margin of discretion in regulating such matters as, for example, retirement age as one of the two statutory prerequisites for acquiring a pension entitlement. The Constitutional Tribunal "should not replace the legislature in formulating assessments as to the relation between goals and measures. These are strictly political assessments and – except when it is required to

[22] DĘBOWSKA, A., FLORCZAK-WĄTOR, M. *Domniemanie konstytucyjnosci ustawy w swietle orzecznictwa Trybunału Konstytucyjnego.* p. 22 ff.

[23] DĘBOWSKA, A., FLORCZAK-WĄTOR, M. *Domniemanie konstytucyjnosci ustawy w swietle orzecznictwa Trybunału Konstytucyjnego.* p. 22.

[24] University titular professors continue to retire on 30 September of the year in which they reached the age of 70 before 1 October.

protect an individual, and especially his personal and political rights – they should be left to the legislature."[25] According to A. Dębowska and M. Florczak-Wątor, the constitutional presumption "is inextricably linked to the need to respect the legislative freedom of the parliament, which, however, is not absolute in nature".[26] It is therefore not surprising that people representing state institutions, the Supreme Court, the Spokesman for Public Interest, decide not to file complaints with the Constitutional Tribunal, not only for legal reasons.

The concept of presumption of constitutionality corresponds with four different purposes,[27] such as among others determining the distribution of the burden of proof,[28] and interpretation, review proceedings, legal norms assessed by the Constitutional Tribunal in terms of their constitutionality. If the institutions mentioned in the mass media by representatives of public authorities decided to lodge a constitutional complaint for a ruling on the non-conformity of article 37 (1) of the Act of 8 December 2017 with Article 138 (3) of the Constitution of the Republic of Poland, it would be sufficient if the Attorney of the Supreme Court, the Ombudsman, informed the President of the Republic of Poland that until the expiration of the term of office of the First President of the Supreme Court, no person holding this function can be transferred to retirement status by law or the will of any state authority on the pretext of lowering the retirement age.

VIII. FINAL REMARKS

It is impossible to refrain from a general reflection, which is best depicted by a quotation of the author of the democratic concept of separation of powers. "Laws always come across the passions and superstition of the lawmakers. Sometimes they go through them and they stain from them: sometimes they are stuck in them and they will grow in them".[29] The executive authority first argued that after reaching the "retirement age" each judge of the Supreme Court was automatically retired. *Ergo*, the person holding the position of the First President must resign. After a meeting with the President of the Republic of Poland, the First President of the Supreme Court and the most senior judge, the President of the Chamber of Labour and Social Security of the Supreme Court of Poland, who was appointed by no one else but the First President of the Supreme Court as a temporary deputy in the event of her absence, the representatives of the executive power of the Polish State when speaking in the public media, started leaning towards the concept that the Constitution guarantees to the person holding this office that he/she will remain in the office until the end of the constitutional six-year term. *Quid ergo est*, under the Act on the Supreme Court effective from 4 July 2018, a judge acting as the First President of the

[25] Dissenting opinion of judge L. Garlicki to the judgment of the Constitutional Tribunal of 12.4.2000, K 8/98, OTK 200, no. 3, item 87.
[26] GUTOWSKI, M., KARDAS, P. *Domniemanie konstytucyjnosci a kompetencje sądów*. pp. 23–24.
[27] GUTOWSKI, M., KARDAS, P. *Domniemanie konstytucyjnosci a kompetencje sądów*. p. 6 ff.
[28] WOJTYCZEK, K. Ciężar dowodu i argumentacji w procedurze kontroli norm przez Trybunał Konstytucyjny [The burden of proof and argumentation in the procedure of review of norms by the Constitutional Tribunal]. *Przegląd Sejmowy*. 2004, No. 1, p. 22.
[29] MONTESQUIEU, CH. L. *The spirit of laws*. p. 384.

Supreme Court retains the current status of the active judge. And what about the other judges who did not make the appropriate statement, presented on state television as a request to the President of the Republic of Poland to extend the service? Unfortunately, they were defeated in the battle not only for the independence of the institution, for which they had a legitimate expectation of performing state service until the age of 70, but above all for the self-image of an independent judge.