



Dr Andrzej Duda

President of the Republic of Poland

W a r s a w

Meister President,

Further to the letter of 4 July 2018, which I received on 6 July 2018, where you, Mr President, notify me of the date of my retirement with reference to Article 39 in connection with Article 111 § 1 of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5, as amended, hereinafter "Supreme Court Act"), I hereby announce as follows.

Article 39 of the Supreme Court Act applies in cases governed by Article 111 § 1 of the Supreme Court Act. According to Article 39 of the Supreme Court Act, "the date of the voluntary or mandatory retirement of a judge of the Supreme Court is determined by the President of the Republic of Poland." While the provisions of Article 111 § 1 of the Supreme Court Act imply retirement of certain judges by force of law, those provisions are abstract and generic in nature. Consequently, to have a legal effect for a specific individual, the resulting norm must be substantiated in a determination made by the authorised body.

In the case in question, the determination must comply with Article 39 of the Supreme Court Act. In practice, the foregoing implies that, irrespective of the assessment of the constitutionality of Article 111 § 1 of the Supreme Court Act as established in the resolution of the General Assembly of the Judges of the Supreme Court of 28 June 2018, the President of the Republic of Poland is required to declare such retirement and determine its date.

Furthermore, it should be noted that according to Article 142 (1) of the Constitution of the Republic of Poland, the President of the Republic shall issue regulations and executive orders in accordance with the principles specified in Articles 92 and 93 of the Constitution of the Republic of Poland; according to Article 142 (2) of the Constitution of the Republic of Poland, the President of the Republic shall issue decisions within the scope of discharge of his other authorities. Neither Article 92 nor Article 93 of the Constitution of the Republic of Poland applies to the determination of the date of the retirement of judges of the Supreme Court because such determination involves neither the issuance of a generally applicable act nor an internal act binding on organisational entities managed by the President of the Republic of Poland. Therefore, to determine the date of retirement, the President shall issue a decision.

Moreover, in the light of Article 144 (2) of the Constitution of the Republic of Poland, a decision of the President of the Republic determining the date of the retirement of a judge of the Supreme Court, as an official act which is not included among the prerogatives enumerated in Article 144 (3) of the Constitution of the Republic of Poland, shall be null and void unless signed by the Prime Minister. The prerogatives of the President of the Republic of Poland are expressly listed in the Constitution of the Republic of Poland and are not to be implicitly deduced. Assuming, for the sake of the argument, the notion of "competences derived from prerogatives," invoked by representatives of the President's Chancellery, it should however be noted that the scope of such notion, considered in the light of the existing doctrine of constitutional law, includes only such acts whose issuance is a precondition for a prerogative to be properly exercised (such as, for instance, the appointment of the Doyen Speaker as part of the procedure of convening the first session of the Sejm and the Senate after the parliamentary election). However, the determination of the date of the retirement of a judge of the Supreme Court is not required for any prerogative enumerated in Article 144 (3) to be properly exercised; in particular, it has no functional connection with the "appointing of judges" referred to in Article 144 (3) (17) of the Constitution of the Republic of Poland.

Furthermore, please note that you, Mr President, have previously accepted the foregoing line of argumentation in the context of three judges of the Constitutional Tribunal properly appointed by the Sejm of the 7th term. According to the resolutions of the Sejm of the 8th term of 25 November 2015 (*Monitor Polski* 2015, items 1131 – 1135), conventional actions are those actions whose "effect is defined by the relevant rules of meaning. In the case of a conventional action which has a legal effect, the rules of meaning are contained in legal acts (cf. L. Nowak, S. Wronkowska, M. Zieliński, Z. Ziemiński, "Czynności konwencjonalne w prawie," *Studia Prawnicze* 1972, Vol. 33, pp. 73 et seq.; S. Czepita, *Reguły konstytucyjne a zagadnienia prawoznawstwa*, Szczecin 1996; Z. Ziemiński, *Teoria prawa*, Warsaw 1978; S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 2001; Z. Ziemiński, *Analiza pojęcia czynu*, Warsaw 1972; Resolution of the Constitutional Tribunal of 10 May 1994, W 7/94, OTK 1994/1/23)... A convention established by the legislator as having the legal effects set out in a normative act is not realised in the absence of any element of the process of passing a resolution as required under the normative act. The non-fulfilment of even a single element among those which define the convention implies that the convention has no legal effect." While the notion of conventional action was improperly used in the justification of the Resolutions of the Sejm, it is legitimate as such, as you, Mr President, seemed not to doubt when taking decisions at the time. Therefore, with regard to the letter now presented by you, Mr President, it follows that the said letter fails to contain such elements which would make it eligible as a conventional action which has the intended effect of determining the date of my retirement or determining my retirement.

It should be emphasised that the status of the First President of the Supreme Court and the term of office of the First President are governed directly by the Constitution. According to Article 183 (3) of the Constitution, the First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court. The term of office of the First President of

the Supreme Court begins upon the appointment to such office and cannot be terminated by statute. Neither may the constitutional term of office of other constitutional bodies be terminated by statute. In view of the clear constitutional norm (*clara non sunt interpretanda*), there can be no doubt that once I have been properly appointed by the President of the Republic of Poland to such office, no decision of yours, Mr President, may annul that effect. Neither may such effect be annulled by an ordinary statute if the conventional action appointing [me] to the office of the First President of the Supreme Court was taken directly in accordance with Article 183 (3) of the Constitution of the Republic of Poland.

Considering the foregoing arguments concerning my appointment to the office of the First President of the Supreme Court, I conclude that my term of office continues until 30 April 2020 and I am obligated to remain in office by force of the supreme law of the Republic of Poland: the Constitution of the Republic of Poland.

With regards
Lisowski