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## EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: IMPACT ON POLISH LAW DEVELOPMENT

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# EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: IMPACT ON POLISH LAW DEVELOPMENT

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**A**bstract *The European Convention of Human Rights along with the case law elaborated by the European Court of Human Rights set an international procedural standard of a fair trial. It exerts a predominant influence not only on the creation and interpretation of European regulations connected with access to court and basic principles of the European justice system, but also on the interpretation of national constitutional laws in the realm of civil procedure.*

*Any evaluation of the impact of protecting human rights and fundamental freedoms on the form, shape and daily practice of the Polish justice system in terms of the remedies mechanism demands that a number of issues be taken into account, not only with regard to the imperative of securing the right to an effective remedy, but also the form and functioning of the same in Poland. They should be adequate in terms of protecting the interests of individual parties as well as public interest.*

The impact of Art. 10 of the Convention on the evolution of Polish law on protection of freedom of expression is invaluable. According to the analysis, ECtHR case law under Art. 10 of the ECHR has had a major influence on the decisions of Polish courts; in fact, in certain instances it led to significant changes in Polish legislation.

**Keywords:** *European Convention on Human Rights; civil procedure; right to a fair trial; Poland.*

## 1 INTRODUCTION

The European Convention of Human Rights (hereinafter – the ECHR),<sup>1</sup> along with the case law elaborated by the European Court of Human Rights (hereinafter – the ECtHR),<sup>2</sup> set an international procedural standard of a fair trial. It exerts a predominant influence not only on the creation and interpretation of European regulations connected with access to

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1 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] ETS 5.

2 Strasbourg Court, ECtHR.

court and basic principles of the European justice system,<sup>3</sup> but also on the interpretation of national constitutional laws in the realm of civil procedure. Although Poland has been a party to the ECHR since 19 January 1993,<sup>4</sup> its impact on the Polish law has been significant even prior to this date.<sup>5</sup> The ECHR procedural standard comprises the guarantees of a *right to a court*, access to the court, fair trial, obtaining a judgement within a reasonable period of time and various sub-rights determining effectiveness of the proceedings. The components of a fair trial within the meaning of Art. 6 para. 1 ECHR, such as a right to a public hearing, equality of arms, adversarial principle, stability and finality of rulings (*res iudicata*), are congruent with the rules incorporated in Art. 45 (1) of the Polish Constitution, which only enhances their role by providing them with a double legal basis stemming from both the ECHR and the Constitution of the Republic of Poland.<sup>6</sup> The requirement of a fair trial applies to proceedings in their entirety. Thus, in order to take the reality of the domestic legal order into account, the Strasbourg Court has always attached a certain importance to judicial practice in examining the compatibility of domestic law with Art. 6 para. 1 ECHR.

## 2 INSTITUTIONAL COMPONENTS OF THE RIGHT TO A FAIR TRIAL

Right to a court along with a right to a fair trial are based on both institutional and procedural requirements. As regards the latter, the right to a fair hearing under Art.6 para. 1 ECHR demands that a case be heard by an independent and impartial tribunal. The concepts of 'independence' and 'impartiality' are closely linked and, depending on the circumstances, may require joint examination. The ECHR has consistently stressed that the scope of the State's obligation to ensure a trial by an 'independent and impartial tribunal' under Art. 6 para. 1 of the ECHR is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, to respect judgments and decisions of the courts, even when they do not agree with them. Thus, respecting the authority of the courts by the State is a prerequisite for public confidence in the courts and the rule of law. Therefore, the constitutional safeguards of independence and impartiality of the judiciary, i.e. theoretical guarantees, are not sufficient. They must be effectively incorporated into attitudes and practices at all levels of Government and legislature.<sup>7</sup> Compliance with this requirement is assessed on the basis of statutory criteria such as: the manner of appointment of the members of the court or tribunal and the duration of their term of office, the existence of sufficient safeguards against the risk of outside pressures and an appearance of independence.<sup>8</sup> However, the mere fact that judges are appointed by the executive does

3 Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935; Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc And CIBC Mellon Trust Company* [2009] ECR I-02563.

4 Polish Journal of Laws (Dziennik Ustaw) 1993, no 61, item 285.

5 P Grzegorzczuk, K Weitz in L Bosek, K Safjan (eds), *Constitution of the Republic of Poland: Commentary* to article 45, note 3-4 (CH Beck 2016).

6 P Grzegorzczuk, 'O konstytucjonalizacji prawa procesowego cywilnego' [On constitutionalisation of civil procedural law] (2012) 2 *Kwartalnik Prawa Prywatnego* 293; M Kutwin, 'Prawo do sądu w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka' [Right to a court in the case law of the Constitutional Tribunal and the the European Tribunal of Human Rights] (2018) 76 *Studia Iuridica* 266; A Łazarska, *Rzetelny proces cywilny (Fair civil trial)* (Lex 2012); Z Czeszejko-Sochacki, 'Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)' [Right to a court in the light of the Constitution of the Republic of Poland] (1977) 11-12 *Państwo i Prawo* 86; J Wróblewski, 'Z zagadnień pojęcia ideologii demokratycznego państwa prawnego (analiza teoretyczna)' [From the realm of the meaning of ideology of a democratic legal state (a theoretical analysis)] (1999) 6 *Państwo i Prawo* 9.

7 *Agrokompleks v Ukraine* App no 23465/03 (ECtHR 6 October 2011); *Beaumartin v France* App no 36813/97 (ECtHR 24 November 1994); *Sramek v Austria* App no 8790/79 (ECtHR 22 October 1984).

8 *Ramos Nunes de Carvalho e Sá v Portugal* App nos 55391/13, 57728/13 and 74041/13 (ECtHR 6 November 2018).

not *per se* amount to a violation of Art. 6 para. 1 ECHR. The appointment of judges by the executive is permissible provided that the appointees are free from influence or pressure when carrying out their adjudicatory role. Cases involving intervention of the Minister of Justice in the appointment and removal from office of members of a decision-making body have also been addressed in the proceedings before the Strasbourg court.<sup>9</sup> It examined the specific case of judges' independence in relation to a decision by the judges' disciplinary body where judges appealing against a decision by that body come under the authority of the same body as regards their careers and disciplinary proceedings against them.<sup>10</sup> The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, in relation to their judicial superiors, may lead the Court to conclude that an applicant's doubts with regard to the independence and impartiality of a court have been objectively justified.<sup>11</sup>

As regards the situation in Poland,<sup>12</sup> amendments of systemic regulations governing the organization and functioning of judiciary bodies (in particular, judicial appointments, implemented since the effective date of the Act of December 8<sup>th</sup> 2017, amending the Act on the National Council for the Judiciary and certain other Acts<sup>13</sup> as well as the practical application of solutions implemented by the legislature) have given rise to doubts that they may depart too far from the standards for courts set in international and national law. The criteria to be met by judges who adjudicate cases are essential to compliance with those standards, specifically, independence and impartiality of judges and independence of the court as a public body which administers justice. Such doubts have been referred nationally<sup>14</sup> and – under Art. 267 of the Treaty on the Functioning of the European Union – to the Court of Justice of the European Union.<sup>15</sup> Similar questions will also be reviewed by the Strasbourg Court, which has recently accepted to examine the application of a Polish judge who was adversely affected by the abovementioned legislative amendments.<sup>16</sup>

Polish questions and applications referred both to the European Court of Human Rights and the Court of Justice of the European Union essentially focused on the compliance of regulations governing the appointment of judges of common courts and the Supreme Court which define the systemic position of the Disciplinary Chamber of the Supreme Court with international law, as well as the effect of the departure from the previously applicable procedures of judicial appointment and the status of persons who took office after appointment in proceedings carried out since the effective date of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. The applicants raised doubts as to whether the changes to the system of judicial appointments and the new method

9 *Brudnicka and others v Poland* App no 54723/00 (ECtHR 3 March 2005).

10 *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018); *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR judgement, 9 January 2013).

11 *Agrokompleks v Ukraine* (n 7); *Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR 22 December 2009).

12 J Sobczak, 'Niezawisłość sędziowska i niezależność sądów. Problem ważny i ciągle aktualny' [Independence of judges and independence of courts. A valid and incessantly present problem] (2015) 4 Gdańskie Studia Prawnicze – Przegląd Orzecznictwa 79; Łazarska (n 6); A Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach: wymiar sprawiedliwości w pułapce sprawności* (Wolters Kluwer Polska 2018).

13 Polish Journal of Laws (Dziennik Ustaw) 2018, item 3.

14 Case III KO 154/18 [2019] Polish Supreme Court.

15 Case III CZP 25/19 [2019] Decision of a formation of seven judges of the Polish Supreme Court OSNC 10:99; Case II PO 3/19 [2019] Polish Supreme Court; Case III PO 7/18 [2018] Polish Supreme Court; Case III PO 8/18 [2018] Polish Supreme Court; Case III 9/18 [2018] Polish Supreme Court; Case II GOK 2/18 [2019] Polish Supreme Administrative Court; Case I Aca 649/19 [2019] Appeal Court of Kraków.

16 M Jałoszewski, M Pankowska, 'Trybunał w Strasburgu zbada nielegalne rozwiązanie przez PiS starej KRS' (*Oko.press*, 19 May 2020) <<https://oko.press/trybunał-strasburgu-zbada-nielegalne-rozwiazanie-przez-pis-starej-krs/>> accessed 22 January 2021.

of appointing judges to the office affect the status of persons who were appointed as judges in that period of time.

In the meantime, the abovementioned issues were also examined by the Polish Supreme Court in a resolution of the combined Civil Chamber, Criminal Chamber and Labour and Social Security Chamber of 23 January 2020.<sup>17</sup> The combined chambers ruled that a court is unduly appointed within the meaning of Art. 439(1)(2) of the Polish Code of Criminal Procedure or a court formation is unlawful within the meaning of Art. 379(4) of the Polish Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017<sup>18</sup> if the defective appointment causes, under given circumstances, a breach of standards of independence within the meaning of Art. 45(1) of the Constitution of the Republic of Poland, Art. 47 of the Charter of Fundamental Rights of the European Union and Art. 6 para. 1 of the ECHR.

As regards the possible outcome of the pending Polish cases, it is worth mentioning that the Strasbourg Court stated a violation of Art. 6 para. 1 ECHR in a judgement of 12 March 2019, *Guðmundur Andri Ástráðsson v. Iceland*.<sup>19</sup> It concluded that the process by which A.E. was appointed a judge of the Court of Appeal – taking account of the procedural violations of domestic law as confirmed by the Supreme Court of Iceland – was a flagrant breach of the applicable rules at the time. The executive exercised undue discretion in the choice of four judges, including A.E., which was coupled with the Parliament failing to adhere to the legislative scheme enacted to secure an adequate balance between the executive and legislative branches in the appointment process. According to the Strasbourg Court, this situation was to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law. Possibly, the Court might adopt a similar approach while examining the Polish application.

The impartiality of courts and tribunals is determined on the basis of the objective test connected with the court itself (its composition, appearance of impartiality etc.) as well as a subjective test, dealing with the personal conviction and behavior of a particular judge.<sup>20</sup> Thus, in some cases where it may be difficult to prove judge's subjective impartiality, the requirement of objective impartiality provides an additional guarantee. As the Strasbourg Court put it, 'justice must not only be done, it must also be seen to be done.'<sup>21</sup> This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, it is decisive whether this fear can be objectively justified.

On several occasions the Strasbourg Court examined Polish applications concerning grounds for exclusion of a judge and its impact on civil proceedings.<sup>22</sup> The assessment of whether the participation of the same judge at different stages of a civil case complies with the requirement of impartiality laid down by Art. 6 para. 1 ECHR is to be made on a case-by-case basis, taking into account circumstances of the individual case.<sup>23</sup> As the Court stated in

17 Case no BSA I-4110-1/20 [2020] Resolution of the joined Chambers of the Supreme Court.

18 Polish Journal of Laws (Dziennik Ustaw) 2018, item 3.

19 *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR 12 March 2019).

20 *Micallef v Malta* App no 17056/06 (ECtHR 15 October 2009); *Morel v France* App no 34130/96 (ECtHR 6 June 2000); *Wettstein v Switzerland* App no 33958/96 (ECtHR 21 December 2000).

21 *Olujić v Croatia* App no 22330/05 (ECtHR 5 February 2009) note 63.

22 J Barcik, 'Wyłączenie sędziego w orzecznictwie ETPCz w świetle spraw polskich, Iustitia' [Exclusion of a judge in the ECHR case law in the light of Polish applications] (2014) 4 Iustitia 173.

23 *Pasquini v San Marino* App no 50956/16 (ECtHR 2 May 2019).

*Toziczka v. Poland*,<sup>24</sup> it is necessary to consider whether the link between substantive issues determined at various stages of the proceedings by same judge is so close as to cast doubt on the impartiality of the judge participating in the decision-making process at all these stages.<sup>25</sup> The Court found a violation of the principle of impartiality as a judge who had already ruled on the case was required to decide whether or not he had erred in his earlier decision.<sup>26</sup> As regards the case *Warsicka v. Poland*,<sup>27</sup> the ECtHR stated that the requirements of a fair hearing, such as guaranteed by Art. 6 para. 1 of the ECHR, do not automatically prevent the same judge from successively performing different functions within the framework of the same civil case. In particular, it is not *prima facie* incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined. The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Art. 6 para. 1 ECHR is to be made with regard to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge. It is worth mentioning in this context that the Polish Constitutional Tribunal ruled in a judgement of 20 July 2004, SK 19/02, that Art. 48 para. 1 (5) of the Polish Code of Civil Procedure – which states that ‘a judge shall be excluded by operation of this Act in cases where he/she co-issued in the court of a lower instance the ruling that is subject to appeal, as well as in cases relating to the validity of a legal act co-issued by the judge or heard by the judge, or in cases where the judge acted as the prosecutor’ – shall be subject to an extensive interpretation. Namely, the exclusion shall concern not only judges *directly* subordinate to the court of appeal, but to all judges of lower instance who had connection with the case.

### 3 PROCEDURAL COMPONENTS OF THE RIGHT TO A FAIR TRIAL

The right to a court is not absolute. It may be subject to limitations,<sup>28</sup> but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.<sup>29</sup> A limitation will not be compatible with Art. 6 para. 1 ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In this context, a number of cases involving Polish nationals concerned the effectiveness of legal aid, representation and costs. Among the judgements which concerned these issues, the case *Siałkowska v Poland*<sup>30</sup> should be

24 *Toziczka v Poland* App no 29995/08 (ECtHR 24 July 2012).

25 M Jankowska-Gilberg, A Rutkowska, ‘Udział tego samego sędziego w rozpoznawaniu danej sprawy w różnych fazach postępowania a gwarancja bezstronności sądu’ [Participation of the same judge in examining a case at different stages of proceedings versus the guarantees of impartiality of the court] (2013) 18 *Monitor Prawniczy* 1000.

26 See also *Driza v Albania* App no 33771/02 (ECtHR 13 November 2007).

27 *Warsicka v Poland* App no 2065/06 (ECtHR 16 January 2007).

28 N Półtorak in A Wróbel (ed), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* [The Charter of Fundamental Rights of the European Union. Commentary]: Commentary to article 6 (CH Beck 2013) 1225.

29 *De Geouffre de la Pradelle v France* App no 12964/87 (ECtHR 16 December 1992); *Nait-Liman v Switzerland* App no 51357/07 (ECtHR 18 March 2018).

30 *Siałkowska v Poland* App no 8932/05 (ECtHR 22 March 2007); *Staroszczyk v Poland* App no 59519/00 (ECtHR 22 March 2007); *Smyk v Poland* App no 8958/04 (ECtHR 28 July 2009); *Żebrowski v Poland* App no 34736/06 (ECtHR 3 November 2011). See also MA Nowicki, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń* (Wolters Kluwer 2008) 97; M Górski, ‘Głosa do wyroku Europejskiego Trybunału Praw Człowieka z 3.11.2011 r. w sprawie Kazimierz Żebrowski v. Polska, skarga nr 34736/06’ 2011 *LEX/el*.



mentioned. The Polish law of civil procedure requires that a party to civil proceedings be assisted by an advocate or legal counsel in the preparation of his or her cassation against a judgment issued by a second-instance court and that a cassation drawn up by the party herself, without legal representation, will be rejected by the court. The ECtHR accepts that this requirement cannot *per se* be regarded as contrary to the requirements of Art. 6 of the ECHR. In the *Siałkowska* case the Court of Appeal allowed the applicant's request for legal aid for the purpose of cassation proceedings. Subsequently, the local bar assigned advocate Z.W. to represent the applicant. The copy of the second-instance judgment was served on him on 9 November 2004. Under the applicable provisions of the Polish law the thirty-day time-limit for lodging the cassation appeal started to run from that date. It was to expire on 9 December 2004. The lawyer advised the applicant, by a written opinion dated 3 December 2004 that, in his view, a cassation against the judgment of the appellate court did not offer reasonable prospects of success. Subsequently, he met with the applicant in his office on 6 December 2004. During this meeting he reiterated that he believed that there were no grounds on which to prepare the appeal.

As regards the *Siałkowska* case, the Strasbourg Court considered that it is not the role of the State to oblige a lawyer, whether appointed *ex officio* or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion concerning the prospects of success of such an action or remedy. However, it remarked that it is necessary to set requirements for a decision to fully forgo an appeal by a lawyer in order to protect the appellant's right to access higher courts. One such requirement is a reasonable time-frame to communicate the decision to the appellant. The European Court of Human Rights emphasized that it is the responsibility of the State to ensure a requisite balance between effective enjoyment of access to justice on one hand and the independence of the legal profession on the other. Consequently, the Court observed that the applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation. When the applicant and the lawyer met, the time-limit for lodging of a cassation appeal was to expire in three days. The ECtHR remarked that in the circumstances of the *Siałkowska* case, it would have been impossible for the applicant to find a new lawyer under the legal-aid scheme. Consequently, the shortness of time left to the applicant to undertake any steps to have the cassation appeal in her case prepared did not give her a realistic opportunity of having her case brought to and argued before the cassation court. In the light of the circumstances of the case seen as a whole, the Strasbourg Court was of the view that the applicant was put in a position in which her efforts to have access to a court secured in a 'concrete and effective manner' by way of legal representation appointed under the legal aid system, failed.

Under the circumstances of subsequent cases, *Staroszczyk v. Poland*<sup>31</sup> and *Tabor v. Poland*,<sup>32</sup> the ECtHR reiterated that the refusal of a legal aid by a lawyer should meet certain quality requirements, which at the time were lacking in Polish law. In particular, the refusal of an *ex officio* attorney to grant legal aid must not be formulated in such a way as to leave the client in a state of uncertainty as to its legal grounds. The Court observed that under the applicable Polish regulations the lawyer was not obliged to prepare a written legal opinion on the prospects of the appeal, nor did the law set any standards as to the legal advice he was supposed to give in order to justify his refusal to lodge a cassation. As a result, the lawyer in the *Staroszczyk* case did not prepare such an opinion and only informed the applicants orally about his refusal to lodge a cassation on their behalf. The ECtHR remarked that if the requirements concerning the written form of refusal to draw up a cassation had existed in Polish law, they would have rendered possible an objective *post hoc* assessment of whether the refusal to prepare the cassation appeal in a given individual case had been arbitrary. This is particularly important in view of the difficulties involved in such an assessment.

31 *Staroszczyk v Poland* (n 30).

32 *Tabor v Poland* App No 12825/02 (ECtHR 27 June 2006).

Consequently, the lack of the written form of refusal left the applicants without necessary information as to their legal situation and, in particular, the chances of their cassation to be accepted by the Supreme Court. The mere fact that the timing of the refusal seemed unobjectionable could not cure this deficiency.

In order to overcome these problems, Art. 118 of the Polish Code of Civil Procedure (hereinafter – PCCP) was subject to an amendment by Act of 17 December 2009, in which the requirements stipulated by ECHR were addressed. Art. 118 para. 5-6 PCCP presently states that:

Where an attorney or legal advisor appointed *ex officio* in connection with cassation proceedings or action at a plea of illegality of a non-appealable ruling does not find any grounds to file a claim, he/she shall promptly notify the party and the court, however no later than two weeks from the date of being notified of the appointment. A notice by an attorney or legal advisor shall be accompanied by their opinion on the lack of grounds to file a claim. Such an opinion is not attached to the case files and is not served on the opposite party. If an opinion referred to in para. 5 is not drawn up with due diligence, the court shall report this fact to the relevant legal self-governing body. In this case, the competent Regional Bar Council or Council of the Regional Chamber of Legal Advisors shall appoint another attorney or legal advisor. If a party does not agree with a negative opinion of an attorney appointed *ex officio*, she still has sufficient time to find an attorney of her choice, who will submit the cassation on her behalf and at her cost.<sup>33</sup>

Hence, a legal aid system may exist which selects cases which qualify for it. However, the system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness.<sup>34</sup> It is therefore important to have due regard to the quality of a legal aid scheme within a State and to verify whether the method chosen by the authorities is compatible with the ECHR. It is essential for the court to give reasons for refusing legal aid and to handle requests for legal aid with diligence.

The strict requirement to be represented by a professional lawyer before the cassation court is not in itself contrary to Art. 6 ECHR, as stated in *Tabor v. Poland*.<sup>35</sup> In addition to that, it is worth mentioning that Art. 6 ECHR does not provide, as such, a right to appeal to a higher court from a decision of a lower court. Only where the domestic procedure foresees such a right, Art. 6 ECHR will apply to the superior stages of court jurisdiction – the ability to apply for two or more stages of court review is therefore a non-autonomous requirement of Art. 6 ECHR.<sup>36</sup> By contrast to the stance adopted by the Strasbourg Court, the Polish Constitutional Tribunal and the Polish legislator offer to a party a much wider possibility of appealing judgements and other procedural decisions, which does not contribute the stability and finality of court rulings in Poland.

The right to a fair trial, as guaranteed by Art. 6 para. 1 ECHR, requires that litigants should have an *effective* judicial remedy enabling them to assert their civil rights. Art. 6 para. 1 may therefore be relied on by anyone who considers that an interference with the exercise of one of his or her civil rights is unlawful. As already mentioned, the 'right to a court' may be subject to limitations only as long as these limitations do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. In this context a significant number of cases filed by Polish nationals before the

33 M Sienko in M Manowska (ed), *Kodeks postępowania cywilnego [Code of civil procedure]: commentary to article 118* (Lex 2020).

34 *Del Sol v France* App no 46800/99 (ECtHR 26 February 2002); *Aerts v Belgium* App no 61/1997/845/1051 (ECtHR 30 July 1998).

35 *Tabor v Poland* (n 32).

36 *Delcourt v Belgium* App no 2689/65 (ECtHR 17 January 1970).



ECHR concerned the problem of excessive cost of the proceedings<sup>37</sup> or the court's failure to correctly assess the grounds for a party's exemption from incurring court fees.<sup>38</sup> In cases such as *Kreuz v. Poland*<sup>39</sup> and *Podbielski and PPU Polpure v. Poland*,<sup>40</sup> the practical and effective nature of the right of access to a court was at risk, in particular, due to the prohibitive cost of the proceedings in view of the individual's financial capacity. In these cases, the ECtHR considered the question of court fees which had the effect of hindering access to the first-instance court or at a subsequent stage of the proceedings for applicants who were unable to pay. The Court has held that the requirement to pay fees to civil courts in connection with claims, or appeals, generally cannot be regarded as a restriction on the right of access to a court that is incompatible *per se* with Art. 6 para. 1 of the ECHR. However, the amount of the fees assessed in the light of the circumstances of a particular case, including the applicant's ability to pay, and the phase of the proceedings at which that restriction has been imposed constitute the factors which are crucial in determining whether a person was unjustly deprived of access to court.

In the circumstances of these cases and having regard to the prominent place held by the right to a court in a democratic society, the ECtHR considered that the judicial authorities failed to secure a proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts. The Strasbourg Court therefore concluded that the imposition of court fees on the applicant constituted a disproportionate restriction on his right of access to a court. Unfortunately, the recent developments in Polish Civil Procedure can be negatively evaluated in this respect, as either new court fees are introduced or the existing ones are raised.<sup>41</sup>

Nevertheless, the judgement in the case *Podbielski and PPU Polpure* has been frequently cited in the Polish case law, including in a decision of the Polish Constitutional Tribunal of 17 November 2008, SK 33/07. It is worth mentioning that the problem of excessive costs and legal aid is among the most common issues examined by this court.<sup>42</sup> In its rulings it tends to enlarge the scope of admissibility of legal aid. It has also examined on many occasions technical procedural issues in order to eliminate excessive procedural formalism. These issues included sanctions connected with the incorrect usage of procedural forms, service of judicial documents, preclusion.<sup>43</sup> In this way the Polish Constitutional Tribunal prompted amendments in civil procedure with a view to render the right to court in a more practical and effective way.

The parties to civil proceedings are required to show diligence in complying with the procedural steps relating to their case. In assessing whether the 'requisite diligence' was displayed in pursuing relevant procedural actions, it should be established whether or not the applicant was duly represented during the proceedings. This also applies to prisoners,

37 A Rutkowska, 'Koszty polskiego procesu cywilnego a prawo do sądu – analiza orzecznictwa krajowego oraz ETPCz' (2015) 18 *Monitor Prawniczy* 997.

38 *Sepczyński v Poland* App no 78352/14 (ECtHR 26 April 2018); *Mogielnicki v Poland* App no 4268/09 (ECtHR 15 September 2015); *Teltronic – CATV v Poland* App no 48140/99 (ECtHR 10 January 2006); *Kreuz v Poland* App no 28249/95 (ECtHR 19 June 2001); *Jedamski and Jedamska v Poland* App no 73547/01 (ECtHR 26 July 2005).

39 *Kreuz v Poland* App no 28249/95 (ECtHR 19 June 2001).

40 *Podbielski and PPU Polpure v Poland* App no 39199/98 (ECtHR 26 July 2005).

41 A Mendrek, 'Nowe unormowania kosztów sądowych w sprawach cywilnych wynikające z nowelizacji z 4.07.2019' [*New court fees regulations in civil matters as amended by the Act of 4.07.2019*] (2019) 11-12 *Palestra* 215.

42 Grzegorzcyk (n 6) 327-328.

43 Case P 37/07 [2008] Judgement of the Polish Constitutional Tribunal; Case SK 89/06 [2008] Judgement of the Polish Constitutional Tribunal; Case SK 9/02 [2003] Judgement of the Polish Constitutional.

because the concept of 'diligence normally required from a party to civil proceedings' is a matter to be assessed in the context of imprisonment, as examined in *Parol v. Poland*,<sup>44</sup> and *Kunert v. Poland*,<sup>45</sup> with regard to prisoners who were not assisted by a lawyer. The principle of 'equality of arms' in the sense of a 'fair balance' between the parties is inherent in the broader concept of a fair trial and is closely linked to the adversarial principle. As regards cases opposing the prosecuting authorities and a private individual, the prosecuting authorities may enjoy a privileged position justified for the protection of the legal order. However, this should not result in a party to civil proceedings being put at an undue disadvantage vis-à-vis the prosecuting authorities, as stated in *Stankiewicz v. Poland*.<sup>46</sup>

Art. 6 para. 1 ECHR lays down, among others, the right to a public hearing. The Strasbourg Court often states that litigants have a right to a public hearing because this protects them against the administration of justice in secret and with no public scrutiny. By rendering the administration of justice visible, a public hearing contributes to the achievement of the aim of Art. 6 para. 1, namely a fair trial. While a public hearing constitutes a fundamental principle enshrined in Art. 6 para. 1, the obligation to hold such a hearing is not absolute.<sup>47</sup> The right to an oral hearing is not only linked to the question whether the proceedings involve the examination of witnesses who will give their evidence orally. To establish whether a trial complies with the requirement of publicity, it is necessary to consider the proceedings as a whole.<sup>48</sup>

As regards the right to a public hearing, the Polish Code of Civil Procedure has recently been subject to one of the vastest amendments since its enactment in 1964.<sup>49</sup> The legislative action was aimed at simplifying and accelerating court proceedings.<sup>50</sup> In order to fulfil this goal, the lawmaker resolved to reform selected aspects of civil procedure which, in his/her view, hindered the effective course of the proceedings and a relatively quick adjudication of the case. Some of these changes adversely affect the right to a public hearing, which is significant considering the prominent role of this fundamental procedural right. The Act of 4 July 2019 widened the spectrum of situations in which the Polish Code of Civil Procedure allows the court to pass a judgement on the merits *in camera*, i.e. without conducting a public hearing.<sup>51</sup> The Act of 4 July 2019 introduced amendments also when it comes to examining an appeal at the court session held *in camera*. Situations in which the court passes the verdict without holding a public hearing should happen under exceptional circumstances because they diverge from the 'right to public hearing' guaranteed under art. 6 para. 1 ECHR, art. 45 (1) of the Constitution of the Republic of Poland, Art. 9 para. 1 sentence 1 *in principio* PCCP and Art. 148 para. 1 *in fine* PCCP. Therefore, some amendments introduced to the Polish civil procedure by the Act of 4 July 2019 are worth praising as they help to speed up the civil process in a good way. Others are more controversial as they overlook important aspects of the right to a fair and public hearing. The legislator should always keep in mind that parties to the proceedings are interested in a transparent judicial process. Therefore, adjudicating the case *in camera* should be regarded as an exception to the rule. The right to a fair trial as well as public control over it, constitute an indispensable element of the proper functioning

44 *Parol v Poland* App no 65379/13 (ECtHR 11 October 2018).

45 *Kunert v Poland* App no 8981/14 (ECtHR 4 April 2019).

46 *Stankiewicz v Poland* App no 46917/99 (ECtHR 6 April 2006).

47 *De Tommaso v Italy* App no 43395/09 (ECtHR 23 February 2017).

48 *Axen v Germany* App no 8273/78 (ECtHR 8 December 1983).

49 The Act of 4 July 2019 on the amendment of the Polish Code of Civil Procedure and other laws, Polish Journal of Laws 2019, item 1469.

50 Cf. the written explanation accompanying the Government's bill on the amendment of the Polish Code of Civil Procedure and other laws, Sejm's legislative materials no 3137.

51 See in detail A Gołab, 'Recent developments in Polish civil procedure in the field of public hearing' 2020(1) Access to Justice in Eastern Europe.

of judicial system. Hopefully, Polish courts will exercise restraint in taking advantage of the new possibilities of adjudicating civil cases in camera.

The guarantees enshrined in Art. 6 para. 1 include the obligation for courts to give sufficient reasons for their decisions. A reasoned decision shows the parties that their case has truly been heard. The reasons given must be such as to enable the parties to make effective use of any existing right of appeal. The Court has accepted summary reasoning where the appeal on the merits itself had no prospect of success, such that a reference for a preliminary ruling would have had no impact on the outcome of the case,<sup>52</sup> for example where the appeal did not satisfy the domestic admissibility criteria.<sup>53</sup> However, higher courts with responsibility for filtering out unfounded appeals and cassations are required to give reasons for their refusal to accept an appeal for adjudication.<sup>54</sup> In order to comply with these requirements, set by the ECHR and also in connection with the judgement of the Polish Constitutional Tribunal of 30 May 2007, SK 68/06, Art. 398<sup>9</sup> para. 2 of the Polish Code of Civil Procedure is interpreted in such a way that the Polish Supreme Court is obliged to provide written grounds when it refuses to accept a cassation for further examination on the merits.

The ECHR does not lay down rules on evidence as such. The admissibility of evidence, as well as the probative value of evidence, the burden of proof and the way it should be assessed, are primarily matters for regulation by national law and for assessment by the national courts. However, the proceedings in their entirety, including the way in which the evidence is permitted, must be 'fair' within the meaning of Art. 6 para. 1 ECHR. Where courts refuse requests to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the litigant's ability to present arguments in support of his/her case, as confirmed in *Wierzbicki v. Poland*. Although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions. As the evidence proceedings should respect the guarantees of fair trial, the Polish Supreme Court, as well as the Polish legal doctrine present a rather reserved stance towards accepting illicit means of evidence such as tapes of secretly recorded conversations.<sup>55</sup> In the deliberations on the admissibility of such evidence they often refer to the ECtHR case law on Art. 6 para. 1.

The case law of ECtHR had an impact on Polish procedural law also in respect of partially incapacitated individuals, which is evidenced by the judgement of 16 October 2012, *Kędzior v. Poland*.<sup>56</sup> ECtHR stated that the right of access to court by its very nature calls for regulation

52 *Stichting Mothers of Srebrenica and Others v the Netherlands* App no 65542/12 (ECtHR 11 June 2013).

53 *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v Greece* App nos 29382/16 and 489/17 (ECtHR 9 May 2017).

54 A Torbus, 'W sprawie braku obowiązku uzasadnienia postanowienia Sądu Najwyższego o odmowie przyjęcia skargi kasacyjnej w kontekście prawa do sądu' [On the lack of duty to provide a statement of reasons in the Supreme Court's decisions refusing to accept a case for further examination] (2007) 1 *Przegląd Sądowy* 46.

55 D Korszeń, 'Zakres zakazu przeprowadzania w postępowaniu cywilnym dowodów legalnych (bezprawnych)' [The scope of the prohibition to collect illicit (unlawful) evidence in civil proceedings] (2013) 1 *Monitor Prawniczy* 5; E Wengerek, 'Korzystanie w postępowaniu cywilnym ze środków dowodowych uzyskanych sprzecznie z prawem' [Using unlawful means of evidence in civil proceedings] (1997) 2 *Państwo i Prawo* 40; F Zedler, 'Dopuszczalność dowodu z taśmy magnetofonowej w postępowaniu cywilnym' [Admissibility of a tape recording evidence in civil proceedings] in E Łętowska (ed), *Proces i Prawo. Księga pamiątkowa ku czci Profesora Jerzego Jodłowskiego* [Process and Law. A collection of essays dedicated to Professor Jerzy Jodłowski] (Wrocław 1989) 539; A Laskowska, 'Dowody w postępowaniu cywilnym uzyskane sprzecznie z prawem' [Unlawful evidence in civil proceedings] (2003) 12 *Państwo i Prawo* 96; M Krakowiak, 'Potajemne nagranie na taśmę w postępowaniu cywilnym' [A secret tape recording in civil proceedings] (2005) 24 *Monitor Prawniczy* 1250.

56 *Kędzior v Poland* App no 45026/07 (ECtHR 16 October 2012).

by the State and may be subject to limitations. Nevertheless, the limitations applied must not restrict the individual rights in such a way or to such an extent that the very essence of that right is impaired. A limitation will violate the ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. As regards the partially incapacitated individuals, the ECtHR has stated that given the trends emerging in national legislation and the relevant international instruments, Art. 6 para. 1 of the ECHR must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity.<sup>57</sup> In other words, there is a trend at European level towards granting legally incapacitated individuals direct access to the courts to seek restoration of their capacity.

In *Kędzior* case, the applicant, who has been totally deprived of legal capacity, complained that between March and October 2007 he was prevented from directly applying to a court to have his capacity restored in spite of the Polish Constitutional Court's judgment of 7 March 2007. The ECtHR has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of 'civil rights and obligations.' In this case the question concerned admissibility of legally incapacitated persons to *directly* institute proceedings to have a legal incapacitation order varied on their own motion. The Strasbourg Court reiterated that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty.<sup>58</sup> The Court concluded that the applicant was deprived of a clear, practical and effective opportunity to have access to court in respect of his request to restore his legal capacity. All in all, the system was therefore not sufficiently coherent and clear.<sup>59</sup> The infringement of Art. 6 para. 1 was eliminated by the amendment of the Polish Code of Civil Procedure of 9 May 2007, which entered into effect on 7 October 2007. The amendment concerned Art. 559 of the Polish Code of Civil Procedure, to which a new para. 3 was added ('An application to set aside or change the state of legal incapacity may also be filed by the incapacitated person herself').

Another important issue has to do with the length of civil proceedings, as justice delayed is, in fact, justice denied. Therefore, the Member States to the ECHR are required to organise their judicial systems in such a way that their courts are able to guarantee everyone's right to a final decision on disputes concerning civil rights and obligations within a reasonable time.<sup>60</sup> The reasonableness of the length of proceedings coming within the scope of Art. 6 para. 1 ECHR must be assessed in each case according to the particular circumstances, which may call for a global assessment of the proceedings as a whole, such as performed for instance in the case *Majewski v. Poland*.<sup>61</sup> In order to combat the excessively long civil proceedings the Polish legislator introduced changes aimed at simplifying and accelerating the proceedings. Some of these changes concerned the possibility of filing procedural documents via Internet,

57 *Stanev v Bulgaria* App no 36760/06 (ECtHR 17 January 2012).

58 *Shtukaturov* App no 44009/05 (ECtHR 27 March 2008).

59 Cf P Ryłski, 'Legitymacja osoby, której dotyczy wnioski do żądania ubezwłasnowolnienia samej siebie' [Legitimation of a person to apply for her own legal incapacitation] in A Laskowska-Hulisz, J May, M Mrówczyński (eds), *Honeste Procedere. Księga jubileuszowa dedykowana Profesorowi Kazimierzowi Lubińskiemu* [*Honeste procedure. A jubilee book dedicated to Professor Kazimierz Lubiński*] (Wolters Kluwer 2017) 451 ff; M Walasik, 'Skuteczność pełnomocnictwa procesowego udzielonego przez osobę z zaburzeniami psychicznymi' [Effectiveness of a power of attorney granted by a mentally unstable person] (2015) 23 *Monitor Prawniczy* 1259.

60 R Arnold, 'Prawo do rozpatrzenia sprawy w rozsądnym terminie (art. 6 Europejskiej Konwencji Praw Człowieka)' [Right to having a case examined within reasonable time (art. 6 of the European convention of Human Rights)] (1999) 2 *Monitor Prawniczy* 41; K Mazurek, 'Przewlekłość postępowania w sprawach cywilnych' [Excessive length of proceedings in civil cases] (2018) 3 *Edukacja Prawnicza* 24.

61 *Majewski v Poland* App no 52690/99 (ECtHR 11 October 2005).

transmitting procedural documents in an electronic form via electronic transmission bureau.<sup>62</sup> They also included the possibility of holding a court session by means of technical devices which allow to hear a witness at distance; adjudicating certain cases in camera and combating abusive practices of parties to the civil proceedings.<sup>63</sup>

Art. 6 para. 1 ECHR also protects the implementation of final, binding judicial decisions. The right to execution of such decisions, given by any court, is an integral part of the 'right to a court.' Otherwise, the provisions of Art. 6 para. 1 ECHR would be deprived of all useful effect. The refusal of an authority to take account of a ruling given by a higher court – leading potentially to a series of judgments in the context of the same set of proceedings, repeatedly setting aside the decisions given – is also contrary to Art. 6 para. 1 ECHR, as stated in *Turczanik v. Poland*.<sup>64</sup>

In contrast to the ECtHR, as of today the Polish Constitutional Tribunal did not examine the issue of the potential clash between the right to access to court and the procedural immunities of public international law.<sup>65</sup> As regards the Supreme Court of Poland,<sup>66</sup> it stated that given basic congruency between the scope of Art. 6 (1) ECHR and Art. 45 (1) of the Polish Constitution, the right to court is not infringed when a foreign state is given immunity in a case concerning a claim *ex delicto* with regard to a deed performed by German armed forces in Poland during WWII.<sup>67</sup> This case law is in compliance with the stance presented by the Strasbourg Court, which asserted that the doctrine of foreign State immunity is generally accepted by the community of nations.<sup>68</sup> Measures taken by a member State which reflect generally recognized rules of public international law on State immunity do not automatically constitute a disproportionate restriction on the right of access to court.<sup>69</sup>

## 4 RIGHT TO AN EFFECTIVE REMEDY

Art. 13 of the ECHR references an effective remedy.<sup>70</sup> The ECtHR case law points out that it ought to be interpreted as a provision guaranteeing 'effective remedy' to the benefit of anyone claiming alleged violation of his or her rights and/or freedoms guaranteed under the ECHR.<sup>71</sup>

62 A Kościółek, 'Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym' [*Electronic procedural activities in court civil proceedings*] (Lex 2012).

63 P Grzegorzczak, M. Walasik, F. Zedler (eds.), *Nadużycie prawa procesowego cywilnego (Abuse of civil procedural law)*, Warsaw 2019, *passim*.

64 ECtHR judgement of July 5<sup>th</sup> 2005 in the case of *Turczanik v. Poland*, Application No. 38064/97.

65 ECtHR judgement of 14 January 2014 in the case of *Jones and Others v. the United Kingdom*, Application Nos. 34356/06 and 40528/06.

66 Decision of the Polish Supreme Court of October 29<sup>th</sup> 2010, OSNC 2011, No. 2, item 22.

67 P Lewandowski, *Cywilnoprawny immunitet jurysdykcyjny państwa pozwanego przed sądem innego państwa w zakresie czynów popełnionych w czasie konfliktu zbrojnego na terenie tego państwa (The civil jurisdiction immunity of a state sued before the court of a different state with regard to deeds performed at the time of an armed conflict on the territory of that state)*, *Państwo i Prawo* 2011, No. 10, p. 129 *et seq.*; P Grzegorzczak, *Immunitet państwa w postępowaniu cywilnym (State immunity in civil proceedings)*, Warsaw 2010, *passim*.

68 ECtHR judgement of June 11<sup>th</sup> 2013 in the case of *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Application No. 65542/12.

69 ECtHR judgement of November 21<sup>st</sup> 2001 in the case of *Fogarty v. the United Kingdom*, Application No. 37112/97.

70 "Everyone whose rights and freedoms are violated shall have an effective remedy before a national remedy notwithstanding that the violation has been committed by persons acting in an official capacity".

71 ECtHR judgment of September 6<sup>th</sup> 1978 in the case of *Klass and others v. Germany*, Application No. 5029/71; ECtHR judgment of June 16<sup>th</sup> 2011 in the case of *Ciechońska v. Poland*, Application No. 19776/04.

Guarantees expressed under said provision ought to be interpreted as a consequence of the fundamental principle of a democratic society, that is the rule of law. This provision – similarly to Art. 35 clause 1 of the ECHR – lays out the obligation of the state (derived from the subsidiarity principle) to protect every individual's human rights under the domestic legal system.<sup>72</sup> Consequently, any measures offering an option of remedying the effects of violations to freedoms and/or rights guaranteed under the ECHR should be exhausted before a case is filed in Strasbourg.<sup>73</sup> It shall be concluded that all respective remedies have been exhausted if the appellant had formerly advanced pleas before national courts of law, which pleas may subsequently be renewed in an application filed with the ECtHR.<sup>74</sup>

Furthermore, the regulation stipulated in Art. 13 references Art. 6 of the ECHR, which combines the right to one's case being resolved with no undue delay with the right to a fair trial, thus establishing an essential procedural standard, the delivery of or failure to adhere to which shall be subject to examination by the Court in Strasbourg, whereas the outcome of proceedings shall directly determine the existence, boundaries, and/or manner of exercising the right sought.<sup>75</sup> The subsidiarity principle does not imply a waiver of the ECtHR's control of Polish legal remedies. The effectiveness and efficiency of legal measures applied in Poland should be assessed from the viewpoint of key standards resulting from the ECHR and created by ECtHR case law. The Court's power to assess whether the formulation, interpretation and/or application of national law produce effects consistent with the principles of the ECHR is not called into question. In Poland, the consensus prevails that the subsidiarity principle in Strasbourg case law should provide for constant supervision of the outcomes of applying domestic measures.

Over the years, the largest number of violations identified by the ECtHR in Poland<sup>76</sup> concerned the violation of the right to have a case heard by a court within a reasonable time, and the right to a fair trial.<sup>77</sup> The question whether the rights guaranteed by the ECHR in the field are implemented in the practice of civil judicial proceedings should give rise to reflection. From such vantage point, it would be worthwhile to approach the issue of counteracting the protracted nature of proceedings, as well as the proper forming and functioning of the system of appeals in terms of the right to a fair trial.

72 MA Nowicki, *Komentarz do art. 13 Konwencji o ochronie praw człowieka i podstawowych wolności (Commentary to Article 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms)*, [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka (Concerning the European Convention. Commentary to the European Convention on Human Rights)*, Lex 2017.

73 M Krzyżanowska-Mierzejewska, *Krajowe środki odwoławcze przewidziane przez prawo polskie jako warunek dopuszczalności skargi indywidualnej do Europejskiego Trybunału Praw Człowieka. Wybór orzecznictwa organów kontrolnych Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności (Domestic Remedies under Polish Law as the Condition of Individual Application Admissibility before the European Court of Human Rights. Selected Case Law of Supervision Authorities of the European Convention on the Protection of Human Rights and Fundamental Freedoms)*, [in:] H. Machińska (ed.), *Polska w Radzie Europy. 10 lat członkostwa. Wybrane zagadnienia (Poland in the Council of Europe. Ten Years of Membership. Selected Issues)*, Warsaw 2002, p. 267 *et seq.*

74 ECtHR judgment of December 9<sup>th</sup> 2008 in the case of Dzieciak v. Poland, Application No. 77766/01.

75 M Romańska, *Skarga na naruszenie prawa strony do rozpoznania sprawy bez nieuzasadnionej zwłoki (Action concerning the Infringement of a Party's Right to Fair Trial without Undue Delay)* [in:] T. Erciński (ed.), *System Prawa Procesowego Cywilnego (System of Procedural Civil Law)*, vol. 3, *Środki zaskarżenia (Appeals)*, J. Gudowski (ed.), Warszawa 2013, p. 1756.

76 M Górski, *Najnowsze wyroki ETPCz stwierdzające naruszenie Konwencji przez Polskę (Recent ECtHR Judgments to the Effect of Poland Violating the Convention)*, *Europejski Przegląd Sądowy* 2012, No. 5, p. 31 *et seq.*

77 Other major cases concerned the conditions of serving prison terms, application of pre-trial detention (remand custody), and patient rights violation.



## 5 EFFECTIVE REMEDY VS. PROTRACTED PROCEEDINGS

One of the important issues is the approach of the Polish legislator and judicial practice to the issue of the speed and efficiency of civil proceedings from the means of redress perspective. The speed of resolving cases usually ties in with the effectiveness of a fair settlement.<sup>78</sup> Yet swifter proceedings should not be the main objective in any court proceedings, especially since ECtHR case law stipulates that the speed of proceedings should be 'reasonable,' and that swifter proceedings should not be pursued at the expense of the court's findings.<sup>79</sup> It has been emphasised that any speed in handling individual stages of proceedings should be moderate, and subject to proper case examination.<sup>80</sup>

The length of proceedings remains one of the most serious 'diseases' afflicting judicial proceedings in numerous countries, giving rise to a debate on an international level with regard to values and rights guaranteed under the ECHR.<sup>81</sup> Notably, proceedings against Poland – ECtHR judgment of 26 October 2000 in the case of *Kudła v. Poland*<sup>82</sup> became an incentive for all Member States setting up a system of remedies against protracted proceedings. This was the result of the ECtHR pointing to the need for an effective remedy before national authorities in the event of a breach of the right to a fair trial within a reasonable time, although the ECHR does not require the authority hearing the case to be judicial in nature.<sup>83</sup> While the Court's ruling referred to the lengthiness of criminal procedures, its implementation required solutions to be introduced for criminal, civil and administrative court case purposes.<sup>84</sup> It was argued that the right to fair trial, comprising the requirement of a reasonable proceeding time, shall be less effective if the internal legal order does not provide for the pre-emptive option of bringing an action against national authorities on such grounds.<sup>85</sup>

78 P Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym (Exercise of the Right to Trial in Civil Proceedings)*, Warsaw 2005, p. 11 *et seq.*

79 ECtHR judgment of 21 February 2006 in the case of *Sefer v. Turkey*, Application No. 52390/99.

80 ECtHR judgment of 24 March 2009 in the case of *Mosiejew v. Poland*, Application No. 11818/02.

81 Cz.P. Klak, *Skarga na przewlekłość postępowania a rozwiązanie przyjęte w wybranych krajach europejskich jako „środki odwoławcze” na nadmierną długość postępowania – podobieństwa i różnice (cz.1) (Action Regarding Protracted Proceedings vs. Solutions Adopted in Selected European Countries as “Remedies” against Protracted Proceedings – Similarities and Differences, Part One)*, *Palestra* 2012, Nos. 3-4, p. 49 *et seq.*

82 ECtHR judgment of October 26<sup>th</sup> 2000 in the case of *Kudła v. Poland*, Application No. 30210/96. More on the subject: M. Sykulska, *Prawo do skutecznego środka odwoławczego na przewlekłość postępowania – skutki wyroku przeciwko Polsce dla polskiego prawa i praktyki (Right to an Effective Remedy against Protracted Proceedings – Outcomes of the Ruling against Poland for Polish Law and Practice)*, [in:] J. Zajadło (ed.), *Prawa człowieka: wczoraj, dziś, jutro (Human Rights: Yesterday, Today, Tomorrow)*, *Gdańskie Studia Prawnicze* 2005, No. 13, p. 390 *et seq.*

83 M. Balcerzak, *Konstrukcja prawa do skutecznego środka odwoławczego (Right to an effective remedy) w uniwersalnym i regionalnych systemach ochrony praw człowieka (Right to an Effective Remedy in the Universal and Regional Systems of Human Rights Protection)*, [in:] J. Białocerkiewicz (ed.), M. Balcerzak (ed.), A. Czeczko-Durlak (ed.), *Księga Jubileuszowa Profesora Tadeusza Jasudowicza (Anniversary Commemorative Book of Professor Tadeusz Jasudowicz)*, Toruń 2004, p. 52 *et seq.*; M. Gąsiorowska, *Skuteczność skargi na przewlekłość postępowania w świetle Europejskiej Konwencji Praw Człowieka (Effectiveness of Action against Protracted Proceedings under the European Convention on Human Rights)*, *Palestra* 2005, Nos. 5-6, p. 196 *et seq.*

84 L. Garlicki, *Implementacja orzecznictwa Europejskiego Trybunału Praw Człowieka w ustawodawstwie krajowym (problemy przewlekłości postępowania) (Implementing European Court of Human Rights Case Law in Domestic Legislation (Protracted Proceedings Issues))*, Council of Europe Information Office. *Bulletin* 2002, No. 1, p. 7 *et seq.*

85 T. Zembrzusi, *Skuteczny środek odwoławczy przed organami krajowymi a prawo do rozpoznania sprawy sądowej w rozsądnym terminie – rozważania na tle wyroku Europejskiego Trybunału Praw Człowieka z 24.06.2014 r. w sprawie Grzona przeciwko Polsce (skarga nr 3206/09) (Effective Remedy before National Authorities vs. the Right to Fair Trial in a Reasonable Time – Deliberations on Basis of the European Court of Human Rights Judgment of June 24<sup>th</sup> 2014 in the case of Grzona v. Poland (Application No. 3206/09))*, *Europejski Przegląd Sądowy* 2015, No. 3, p. 14 *et seq.*

It follows from ECtHR case law that any appeal serving the purpose of making proceedings more expedient should prevent their excessive duration, as well as preventing the perpetuation and/or recurrence of the infringement of a party's rights.<sup>86</sup> Legal remedies should serve the purpose of challenging protracted proceedings; furthermore, they should serve both a preventive and compensatory function by securing so-called adequate relief.<sup>87</sup> Spurred on by that body's case law, an appropriate remedy was introduced in many European countries, best-known solutions including the so-called Pinto Law in Italy.<sup>88</sup> In Poland, a decision was made to address complaints concerning the length of proceedings as incidental procedures forming part of proceedings regarding the substance of the given case.<sup>89</sup>

Poland introduced the complaint concerning protracted proceedings under a Law of 17 September 2004,<sup>90</sup> amended but a few times over the years. Importantly, its contents include a statement to the effect that '*provisions of the Law shall be applied in conformity to standards arising from the Convention for the Protection of Human Rights and Fundamental Freedoms*.' The notion of '*protracted proceedings*' is defined as a set of circumstances wherein proceedings serving the purpose of passing a closing decision in any given case last longer than would be necessary to clarify relevant factual circumstances, or longer than would be necessary to settle an enforcement case (Art. 2 of the Law). The Polish legislator has directly referenced values established under ECtHR case law; according to said values, whenever determining whether proceedings were protracted in a given case, it shall be necessary to account for i.a. the timeliness and correctness of actions taken by the court, the entire duration of proceedings, the nature of the case, the degree of its factual and legal complexity, the importance of the case to the party concerned, and the conduct of the party alleging protracted proceedings. The Polish legislator has thus directly referenced ECtHR case law, wherein the concept of '*reasonable time*' is interpreted on basis of assorted criteria.<sup>91</sup>

In Poland, complaints regarding protracted proceedings are heard by the court of law superior to the court the action pertains to. The ruling does not affect the substantive decision passed in the principal case. The court does not address issues arising from material law, nor shall it adjudicate with regard to the claims or statements of parties to proceedings. Any analysis is limited to the issue of swiftness, i.e. the efficacy of any procedural action taken.<sup>92</sup>

Under Polish law, the court of law examining the complaint or action shall not in its duties be limited to establishing protraction of proceedings. The first outcome of such legal solution – frequently underestimated in practice – is that the court hearing the case with regard to its substance shall be recommended to take appropriate action within a specified time

86 ECtHR judgment of March 29<sup>th</sup> 2006 in the case of Scordino v. Italy, Application No. 36813/97.

87 M Kłopočka *Skarga na przewlekłość w postępowaniu sądowym (ze szczególnym uwzględnieniem przepisów postępowania karnego)* (Action against Protracted Judicial Proceedings (with Particular Focus on Provisions of Criminal Proceedings)), [in:] L. Bogunia (ed.) *Nowa kodyfikacja prawa karnego (New Codification of Criminal Law)*, vol. 19, Wrocław 2006, p. 150 et seq.

88 CP Kłak, *Skarga na przewlekłość postępowania karnego a Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności* (Action against Protracted Criminal Proceedings vs. the European Convention on the Protection of Human Rights and Fundamental Freedoms), Rzeszów 2011, p. 106 et seq.

89 M Sykulska, *Prawo do skutecznego środka odwoławczego...*, p. 403; T Zembrzusi, *Niezaskarżalność orzeczeń w przedmiocie skargi na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki (Non-contestability of Judgments Concerning Actions Regarding the Infringement of a Party's Right to Fair Trial without Undue Delay)*, *Palestra* 2006, Nos. 9-10, p. 36 et seq.; M Krakowiak, *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego (Action to Establish Protracted Enforcement Proceedings)*, *Przegląd Prawa Egzekucyjnego* 2005, Nos.1-6, p. 26 et seq.

90 Law of June 17<sup>th</sup> 2004 of action regarding the infringement of a party's right to have a case examined in preparatory proceedings conducted or supervised by a Prosecutor and in judicial proceedings without undue delay (uniform text: *Journal of Law* 2018, item 75 as amended).

91 T Zembrzusi, *Skuteczny środek odwoławczy...*, p. 15.

92 T Zembrzusi, *Niezaskarżalność orzeczeń...*, p. 8 et seq.

limit. Secondly, on demand of the appellant, the court may award him/her a sum of no less than PLN 2,000 and no more than PLN 20,000, payable by the State Treasury.<sup>93 94</sup> In an effort to ensure that appellants receive sums adequate to those adjudged by the ECtHR, the Polish legislator clarified that the sum awarded shall not be less than PLN 500 per year of proceedings; concurrently, courts are expected to award higher amounts whenever a case is of particular importance to the appellant, and had he/she through his/her conduct not culpably contributed to further protraction of the proceedings in question. While the sum awarded due to protraction of proceedings is compensatory in nature, it is not intended to remedy any damage to property; consequently, Polish case law has classified such sum as remittance not recognised as compensation or indemnification,<sup>95</sup> but rather a special-purpose benefit not classifiable as any typical notion under civil law.<sup>96</sup>

The legal system in place respects the subsidiary nature of applying the ECHR system on the understanding that actions against protracted proceedings are originally heard by domestic courts, and only then filed before the ECtHR.<sup>97</sup> The Court has repeatedly pointed out that any party intending to bring a case before that European body shall be required to adhere to the necessary earlier recourse to a domestic legal measure.<sup>98</sup> Notably, the ECtHR has in the past recognised that extraordinary circumstances may occasionally arise, exempting the applicant from exhausting remedies available under domestic law;<sup>99</sup> yet doubts concerning the effectiveness of domestic remedies alone shall not be recognised as such circumstances.<sup>100</sup>

The practice of employing the Polish complaint against procedural protraction raises no fundamental objections. Yet while it does constitute a key component of the legal remedies system under Polish procedural law, the practical interest of parties in using it is insignificant. Such condition is partly due to the lack of awareness that such instrument – born of ECtHR case law and ECHR standards – is actually available, and partly to the occasionally tabled belief that the use of a protraction-preventing measure may sometimes – paradoxically – contribute to the underlying protraction. Importantly, the effectiveness of this remedy has been positively verified by the ECtHR, if only following an analysis of the Polish law.<sup>101</sup>

It should also be borne in mind that – in addition to the complaint against protracted legal proceedings – Polish law provides for action for damages under Art. 417 of the Civil Code, pursuant to which the State Treasury, local government unit, or another legal entity exercising public authority shall be held liable for damage caused by an unlawful act or omission in the

93 Or by a court bailiff, in case of protracted enforcement proceedings.

94 EUR 1.00: ca. PLN 4.44.

95 K. Gonera, *Przewlekłość postępowania w sprawach cywilnych (Protracted Proceedings under Civil Law)*, *Przegląd Sądowy* 2005, Nos. 11-12, p. 13 *et seq.*; A. Łaskowska, *Przyznanie odpowiedniej sumy pieniężnej wskutek uwzględnienia skargi na przewlekłość postępowania egzekucyjnego (Awarding Adequate Sums Following the Recognition of Action against Enforcement Proceedings as Justified)*, *Przegląd Prawa Egzekucyjnego* 2007, No. 9, p. 30; J. Kuźmicka-Sulikowska, *Suma pieniężna przyznawana z tytułu przewlekłości postępowania (Sums Awarded for Protracted Legal Proceedings)*, [in:] E. Marszałkowska-Krześ, *Aktualne zagadnienia prawa prywatnego (Current Issues in Private Law)*, Warsaw 2012, p. 92 *et seq.*

96 A Góra-Błaszczkowska, *Skarga na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki (Action against the Infringement of a Party's Right to Have a Case Heard in Judicial Trial without Undue Delay)*, *Monitor Prawniczy* 2005, Nos. 11, p. 537; T. Zembrzusi, *Skuteczny środek odwoławczy...*, p. 16.

97 M Romańska, *Skarga na naruszenie prawa strony...*, p. 1765 *et seq.*; T. Zembrzusi, *Skuteczny środek odwoławczy...*, p. 14 *et seq.*

98 ECtHR decision of March 1<sup>st</sup> 2005 in the case of Charzyński v. Poland, Application No. 15212/03; ECtHR decision of May 31<sup>st</sup> 2005 in the case of Ratajczyk v. Poland, Application No. 15212/03.

99 ECtHR judgment of September 24<sup>th</sup> 2007 in the case of Kukówka and Wende v. Poland, Application No. 56026/00.

100 ECtHR decision of March 1<sup>st</sup> 2005 in the case of Michalak v. Poland, Application No. 24549/03.

101 M Romańska, *Skarga na naruszenie prawa strony...*, p. 1773.

exercise of public authority. Action<sup>102</sup> may be brought after the close of proceedings in the case;<sup>103</sup> concurrently, the sum awarded by the court in proceedings concerning a protraction-related complaint shall not be credited towards any compensation sought in the course of a separate trial. The citizen may choose from legal remedies as he/she considers appropriate; in case of remaining dissatisfied with decisions before Polish courts, he/she shall be entitled to pursuing his/her case before the ECtHR. The above conforms with an assumption arising from ECtHR case law, pursuant to which the use of a single legal remedy shall be recognised as tantamount to the non-imperative of reaching for another measure serving an identical or similar objective.<sup>104</sup>

An aggregate of both Polish instruments: the complaint against protracted proceedings (as a remedy and compensatory measure) and the action for damages (as a compensatory measure) offers grounds to claim that all requirements set out in Art. 6 and 13 of the ECHR regarding the issue of the right to fair trial being breached through protracted proceedings have been met.<sup>105</sup> One should account for the belief encapsulated in ECtHR case law, pursuant to which a 'set' or package of remedies may jointly meet the requirement of effectiveness, even should individual remedies not meet such requirement when assessed separately.<sup>106</sup> From day one, Poland has followed a belief that the state has duly fulfilled its obligation to adapt its legislation to the requirements of the ECHR.<sup>107</sup>

## 6 THE REMEDIES SYSTEM IN THE CONTEXT OF THE RIGHT TO A FAIR TRIAL

Guarantees and principles arising from the ECHR justify perceiving the issue of legal remedies in Poland from a perspective broader than that of Art. 13 of the ECHR. Remedies available to parties in individual countries should always have the attribute of 'effectiveness', i.e. they have to be adequate and accessible. In terms of ECHR standards, there is no doubt that the use of remedies should not be unjustifiably hindered. Appealing against judgments ties in also with the right to a fair trial as stipulated in Art. 6 of the ECHR.

The issue of the right to a fair trial is often combined with the right of appeal, which involves interference with the citizens' rights by independent and impartial judicial authorities only.<sup>108</sup> The general outline of the remedies system is one of the key issues affecting the reliability, effectiveness and comprehensiveness of legal protection in civil law cases.<sup>109</sup> It has been deliberated on numerous occasions whether the establishing of appeal mechanisms combined with restricted access to legal solutions does not tie in with denying citizens their

102 Attempts to identify in such action a construct of an efficient and effective remedy as defined by Article 13 of the ECHR were something of a misunderstanding. For more detailed information, see T. Zembrzusi, *Skuteczny środek odwoławczy...*, p. 16 *et seq.*

103 Z Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej (Liability for Damage Caused in the Course of Exercising Public Authority)*, Warsaw 2012, p. 102 *et seq.*

104 ECtHR decision of July 7<sup>th</sup> 1997 in the case of Wójcik v. Poland, Application No. 26757/95.

105 T Zembrzusi, *Skuteczny środek odwoławczy...*, p. 17 *et seq.*

106 ECtHR judgment of October 6<sup>th</sup> 2005 in the case of Lukenda v. Slovenia, Application No. 23032/02.

107 P Grzegorzcyk, *Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym (Consequences of European Court of Human Rights Judgments to the Domestic Legal Order)*, *Przegląd Sądowy* 2006, No. 5, p. 25 *et seq.*

108 J Gołaczyński, A Krzywonos, *Prawo do sądu (Right to fair Trial)* [in:] *Prawa i wolności obywatelskie w Konstytucji RP (Civic Rights and Freedoms in the Constitution of the Republic of Poland)*, Warsaw 2002, p. 725 *et seq.*

109 T Zembrzusi, *Dokąd zmierza apelacja w postępowaniu cywilnym (The Future of Appeals in Proceedings under Civil Law)*, *Przegląd Sądowy* 2019, Nos. 7-8, p. 48 *et seq.*

right to fair trial.<sup>110</sup> Another indispensable question is whether contemporary standards of operating the remedies system in Poland today are fully guaranteed and respected.

Regardless of the system transformations over the years, the remedies system in Polish judicial has always been extensive – yet problems associated with appealing judgments have been many,<sup>111</sup> in particular with regard to affirming the final stage of judicial activity.<sup>112</sup> It is generally agreed that the number of instances and remedies available should be a trade-off between the tendency to secure a fair and orderly judicial decision, and that leaning towards reaching a swift and definitive settlement of the dispute.<sup>113</sup> Systemic, social and economic changes in post-1989 Poland had major impact on the process of establishing remedies, the said process reflective of attempts to account for the right to fair trial and intent to implement the postulate of flawlessness in all judicial judgments,<sup>114</sup> as well as recognise respect for the role and importance of their validity and stability.<sup>115</sup>

The principle of the right to appeal is recognised among the key rules of the judiciary.<sup>116</sup> The two-tier principle of judicial proceedings in Poland is considered a measure reinforcing the right to fair trial.<sup>117</sup> It has been ruled under ECtHR case law that the ECHR shall not secure the right for a case to be heard by courts of several instances.<sup>118</sup> Notwithstanding the above, the two-tier principle of judicial proceedings and the right to appeal against the ruling of a court of the first instance have both been reflected in the Constitution of the Republic of Poland. Pursuant to Art. 78 of the Constitution, each party shall have the right to appeal against decisions and judgments issued by a court of first instance, exceptions to the rule and potential course of appealing to be stipulated by an act of law.<sup>119</sup> The term 'appeal' extends to assorted legal remedies in Poland, united in the common feature of the first-instance rulings being subject to verification. Pursuant to Art. 176 clause 1 of the Constitution, judicial proceedings shall comprise no less than two instances. This provision protects a party to legal proceedings from being deprived of the option of its case being heard by a court of second instance, either through a direct mechanism, i.e. by excluding the possibility to lodge a complaint (appeal), or indirectly – through the introduction of formal appeal requirements sufficient to make such action excessively

110 ECtHR judgment of October 16<sup>th</sup> 2001 in the case of *Zmaliński v. Poland*, Application No. 52039/00.

111 W Siedlecki, *System środków zaskarżenia według nowego kodeksu postępowania cywilnego (The Remedies System under the new Civil Proceedings Code)*, Państwo i Prawo 1965, Nos. 5-6, p. 693 *et seq.*

112 S Hanausek, *Orzeczenie sądu rewizyjnego w procesie cywilnym (Review Court Rulings in Proceedings under Civil Law)*, Warsaw 1967, p. 49 *et seq.*

113 A Oklejak, *Z problematyki zaskarżalności orzeczeń sądowych w postępowaniu cywilnym (From the Issues of Contestability of Judicial Rulings in Proceedings Under Civil Law)*, *Studia Cywilistyczne* 1975, vol. XXV-XXVI, p. 222 *et seq.*

114 H. Pietrzkowski, *Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej (Right to fair Trial in Light of Amended Civil Law Proceedings)*, *Przegląd Sądowy* 2005, No. 10, p. 53 *et seq.*

115 P. Grzegorzczak, *Stabilność prawomocnych orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych (Stability of Valid Judicial Rulings in Civil Law Cases in Light of Constitutional and International Standards)* [in:] T Ereciński, K Weitz (ed.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego (Constitutional Tribunal Case Law vs. Civil Proceedings Code)*, Warsaw 2010, p. 151 *et seq.*

116 A Zieliński, *Konstytucyjny standard instancyjności postępowania sądowego (The Constitutional Standard of Multi-Tier Judicial Proceedings)*, *Państwo i Prawo* 2005, No. 11, p. 3 *et seq.*

117 Z Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (Ogólna charakterystyka) (Right to Fair Trial in Light of the Constitution of the Republic of Poland (General Description))*, *Państwo i Prawo* 1997, Nos. 11-12, s. 89 *et seq.*

118 ECHR judgment of October 26<sup>th</sup> 2004, case of *Międzszakładowa Spółdzielnia Mieszkaniowa Warszawscy Budowlani v. Polska*, Application No. 13990/04.

119 While the Polish legislator has a modicum of freedom in terms of establishing procedural regulations, the option is not tantamount to acting at complete discretion.



difficult.<sup>120</sup> Constitutionally speaking, the Polish legal system gives full-blown guarantees of introducing legal regulation to secure fair, equitable and possibly swift trial of any case.<sup>121</sup> From such vantage point, Polish solutions seem to suffice in terms of achieving the goal that any system of appeals against judicial decisions should reach, whether from the perspective of constitutional requirements or standards guaranteed by the ECHR. However, circumstances merit a brief presentation of the evolution of Polish solutions in the field.

One of the most important changes to Polish procedural law involved the 1996 abandonment of the revision system, originally based on a second-instance court review and supplemented with extraordinary reviews as a non-instance mechanism of challenging final rulings. This was when the Polish legislator brought back the appeal and cassation system, in emulation of pre-war solutions.<sup>122</sup> The appeal replaced the revision system, extraordinary reviews – a measure not conforming to standards of the rule of law – substituted for cassation.<sup>123</sup> In 2004, the cassation was transformed into an extraordinary measure of appeal against final rulings of courts of the second instance.<sup>124</sup>

The appeal is the fundamental and ordinary measure of contesting decisions regarding substantive matters in Poland; decisions regarding matters other than substantive can be appealed against under circumstances stipulated by law. Extraordinary measures of appeal against formally binding decisions include a cassation complaint, action to reopen proceedings, and action to establish the unlawfulness of a final judicial ruling. The workings of the remedies system in civil proceedings under Polish law have been assessed favourably over the years. Not only the right to fair trial as stipulated under Art. 6 of the ECHR – but also the related right to appeal against judicial judgments<sup>125</sup> seem to be fully secured in the Polish legal order. It even seems that the constitutional standard (model) of the right to appeal against and contestability of judgments<sup>126</sup> exceeds the expectations and requirements stipulated under the ECHR. This system has evolved beyond international obligations, beyond European Union requirements, and even beyond the needs of procedural standard addressees.<sup>127</sup>

120 T Zembrzusi, *Zaskarżanie orzeczeń incydentalnych wydanych po raz pierwszy w toku instancji (Appealing against Incidental Rulings Passed for the First Time in a Given Instance)*, *Przegląd Sądowy* 2007, No. 9, p. 18 et seq.

121 H Izdebski, *Perspektywy dostępu obywateli do europejskiego wymiaru sprawiedliwości (Perspectives of Civic Access to the European Justice System)* [in:] *Dostęp obywateli do europejskiego wymiaru sprawiedliwości (Civic Access to the European Justice System)*, Warsaw 2005, p. 154 et seq.

122 S. Rudnicki, *Nowy środek odwoławczy: apelacja (New Remedy: the Appeal)*, *Przegląd Sądowy* 1993, No 6, p. 42 et seq.; J. Gudowski, *Pogląd na apelację (Opinion Concerning the Appeal)*, [in:] J. Gudowski, K. Weitz (ed.), *Aurea raxis. Aurea Theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego (Aurea raxis. Aurea Theoria. Book Commemorating Professor Tadeusz Ereciński)*, vol. 1, Warsaw 2011, p. 246.

123 T Ereciński, *O nowelizacji kodeksu postępowania cywilnego w ogólności (General Comments on Amendments to the Civil Proceedings Code)*, *Przegląd Sądowy* 1996, No. 10, p. 8 et seq., T. Zembrzusi, *Skarga nadzwyczajna w polskim postępowaniu cywilnym (Extraordinary Complaint in Civil Proceedings under Polish Law)*, *Państwo i Prawo* 2019, No. 6, p. 124 et seq.

124 T Zembrzusi, *Ewolucja charakteru skargi kasacyjnej w polskim postępowaniu cywilnym (Evolution of the Nature of the Cassation Complaint in Civil Proceedings under Polish Law)* [in:] H Dolecki, K. Flaga-Gieruszyńska (ed.), *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych (Evolution of Civil Proceedings under Polish Law in the Context of Political, Social and Economic Transformation)*, Warsaw 2009, p. 329 et seq.

125 F Zedler, *Zagadnienia instancyjności postępowania sądowego (Issues of Multi-Tier Judicial Proceedings)* [in:] *Prace z prawa prywatnego. Księga pamiątkowa ku czci sędziego Janusza Pietrzykowskiego (Private Law Writings. Book Commemorating Justice Janusz Pietrzykowski)*, Warsaw 2000, p. 378 et seq.

126 A Jakubecki, *Kilka uwag o instancyjności postępowania cywilnego na tle orzecznictwa Trybunału Konstytucyjnego (Several Comments on Multi-tier Civil Law Proceedings in Light of Constitutional Tribunal Case Law)* [in:] T Ereciński, K Weitz (ed.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego (Constitutional Tribunal Case Law vs. Civil Proceedings Code)*, Warsaw 2010, p. 81 et seq.

127 A Góra-Błaszczkowska, *Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017 r. (Extraordinary Complaint and Action to Establish*



An additional extraordinary measure introduced in Poland in the year 2017 – the extraordinary complaint, allowing for any final judgment to be contested – merits reflection from the perspective of standards and guarantees arising from the ECHR.<sup>128</sup> The complaint has triggered grave doubts<sup>129</sup> for reasons of i.a. the form of establishing eligibility for its filing, and its broad-spectrum subject matter and temporal range.<sup>130</sup> It allows for final judicial decisions to be contested, regardless of whether and what kind of legal measures had been applied in the course of earlier proceedings. The general foundation for the complaint is that of ensuring compliance with the rule of a democratic state of law embodying the principles of social justice, whereas Art. 89 para.1 of the Law lists three specific grounds tying in with the following circumstances: a) a ruling violating the principles or freedoms and human and civil rights set out in the Constitution (item 1); b) a ruling found to be in gross violation of the law through its misinterpretation or misapplication (item 2); c) manifest contradiction occurring between the essential findings of the court and the content of evidence collected in the case (item 3).

The scope of an extraordinary complaint is partly consistent with that of other extraordinary remedies. A similarity may be identified between grounds for an extraordinary appeal and selected grounds for a cassation complaint, action to establish the unlawfulness of a final judicial ruling, and action to reopen proceedings. Instruments available to citizens seeking compensation from the State for unlawful activity include action to establish the unlawfulness of a final judicial ruling, said action tried before the Supreme Court. The role and importance of this action in Poland were marginalised in the wake of introducing the extraordinary complaint in 2017.<sup>131</sup> This is a grave flaw since the Polish legislator has to date taken no action to properly organise relations between extraordinary remedies.

In terms of principles and guarantees arising from the ECHR, greatest doubt is raised by the fact that the decision to file an extraordinary complaint is not at the discretion of the parties. A party to proceedings is not authorised to file an extraordinary complaint; the power to challenge any final ruling has been vested in public bodies and institutions only. An extraordinary complaint may be filed by the Prosecutor General, the Ombudsman and – within their respective remits – the President of the General Attorney's Office of the Republic of Poland, Ombudsman for Children, Ombudsman for Patient Rights, Chairman of the Polish Financial Supervision Authority, Financial Ombudsman, Ombudsman for Small and Medium Enterprises, and President of the Office of Competition and Consumer Protection. A citizen may only apply to a duly authorised body, or a number of such bodies; all may approve or reject the party's application, in certain cases going as far as to leave it

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*the Unlawfulness of a Final Ruling Pursuant to the Supreme Court Law of December 8<sup>th</sup> 2017* [in:] A. Barańska, S. Cieślak (ed.), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (*Ars in vita. Ars in iure. Anniversary Commemorative Book Dedicated to Professor Janusz Jankowski*), Warsaw 2018, p. 58.

128 T Zembrzusi, *Extraordinary Complaint in Civil Proceedings under the Polish Law* in *Access to Justice in Eastern Europe*, 2019, No. 1 (2), p. 31 *et seq.*

129 M Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka* (*Extraordinary Complaint Brought before the Supreme Court in the Context of an Application Filed with the European Court of Human Rights*), *Palestra* 2018, Nos. 1-2, p. 11 *et seq.*; D. Gruszecka, *Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście „wypełniania luk w systemie środków zaskarżania”* (*Grounds for Extraordinary Complaint in Criminal Law Proceedings – Comments in the Context of “Filling Gaps in the Remedies System”*), *Palestra* 2018, No. 9, p. 27 *et seq.*; T. Ereciński, K. Weitz, T. Ereciński, K. Weitz, *Skarga nadzwyczajna w sprawach cywilnych* (*Extraordinary Complaint in Proceedings under Civil Law*), *Przegląd Sądowy* 2019, No. 2, p. 18.

130 The complaint shall be filed no later than within a term of 5 years as of the date of the contested ruling becoming final; should a cassation complaint have been filed against such ruling – no later than within a term of one year as of the date of the hearing.

131 T Zembrzusi, *Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* (*Influence of Introducing the Extraordinary Complaint on the Action to Establish the Unlawfulness of a Final Judicial Ruling*), *Przegląd Sądowy* 2019, No. 2, p. 28 *et seq.*

unexamined. This means that a party challenging a decision ruling on his/her rights and responsibilities may only act as petitioner to state authorities. Denying influence over the initiation or course of proceedings against an extraordinary complaint to parties to a civil trial resembles solutions adopted in the socialist process of the People's Republic of Poland; it also constitutes a breach of the right to fair trial.<sup>132</sup> Doubts have arisen in contemporary Poland with regard to whether the mechanism of controlling final judicial rulings should primarily serve the public interest, or rather the interest of persons seeking legal protection in proceedings before courts of law.

Notwithstanding the above, numerous changes were made to Polish judicial proceedings in 2019, with intent to improve their expedience and swiftness.<sup>133</sup> All individual solutions have been bound with the goal of reducing the length of appeal proceedings. As far as remedies are concerned, the intent has been particularly clear in case of the appeal – the fundamental measure of contesting judgments of courts of first instance – and of the complaint to control the correctness of resolving in formal issues. The *prima facie* realisation of the postulate to improve the swiftness of appeal proceedings reflects the guarantees and standards arising from the ECHR. It goes without saying that delayed justice stands in opposition thereto.<sup>134</sup> The effectiveness of contesting judicial decisions should comprise the initiation of fair appeal proceedings.<sup>135</sup> Yet no improvement of court proceedings should come at the expense of the right to fair trial or procedural fairness, both of which are linked to predictability, legalism and trust in the law.<sup>136</sup> Under the changes recently introduced, these values are occasionally pushed into the background,<sup>137</sup> as proven i.a. in restrictions to the openness of appeal proceedings, or the right to justify selected rulings. Claims that the vision of appeal proceedings in Poland occasionally lacks the attribute of reliability are a cause for concern.<sup>138</sup> Although at present it would be difficult to identify any inconsistencies between individual solutions and the ECHR, the Polish legislator should always take care for any transformation to remain in line with the '*spirit*' of the ECHR.

## 7 RIGHT TO AN EFFECTIVE REMEDY: SUMMARY

Any evaluation of the impact of protecting human rights and fundamental freedoms on the form, shape and daily practice of the Polish justice system in terms of the remedies mechanism demands that a number of issues be taken into account, not only with regard to

132 T Zembrzusi, *Skarga nadzwyczajna...*, p. 131 *et seq.*

133 M Klonowski, *Kierunki zmian postępowania cywilnego w projekcie Ministra Sprawiedliwości ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw z 27.11.2017 r. – podstawowe założenia, przegląd proponowanych rozwiązań oraz ich ocena (Directions of Amendments to Civil Law Proceedings in the Justice Minister's Draft Law to Amend the Civil Proceedings Code and Selected Other Laws of November 27<sup>th</sup> 2017 – Basic Assumptions, Review of Proposed Solutions, and their Assessment) Polski Proces Cywilny 2018, No. 2, p. 180 *et seq.**

134 M Borucka-Arctowa, *Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawa (Procedural Justice in the Context of Constitutional Tribunal Case Law and its Role in Times of Changes to the Legal System)* [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzęskiej (The Constitution and Related Compliance Guarantees. Book Commemorating Professor Janina Zakrzęska)*, Warsaw 1996 p. 28 *et seq.*

135 A Zieliński, *Konstytucyjny standard...*, p. 8 *et seq.*

136 T Zembrzusi, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym (Cassation Complaint. Accessibility in Proceedings under Civil Law)*, Warsaw 2011, p. 82 *et seq.*

137 T Zembrzusi, *Dokąd zmierza apelacja...*, p. 64 *et seq.*

138 T Wiśniewski, *Czy potrzebne są zmiany w systemie środków zaskarżenia w postępowaniu cywilnym (Are Changes to the Remedies System in Proceedings under Civil Law Necessary)*, *Polski Proces Cywilny* 2011, No. 2, p. 9.

the imperative of securing the right to an effective remedy, but also the form and functioning of the same in Poland. They should be adequate in terms of protecting the interests of individual parties as well as public interest.

The existence of solutions to counteract protracted judicial proceedings in Poland – in direct reference to Art. 13 of the ECHR – raises no fundamental objections. Some controversy does, however, arise from the abundance of recent changes to procedural law, all stemming from intent to accelerate and streamline judicial proceedings (somewhat mechanically); while desirable in itself, such activity should not take place at the expense of standards of the right to fair trial. Amendments to the state of Polish legislation with regard to access to measures of legal redress, especially through the development of an extraordinary remedies system, occasionally seem to be overlooking or underestimating the importance of the key assumption pursuant to which legal certainty requires respect for the principle of formal legality of rulings, and the outcomes and gravity of the *res iudicata*. In terms of ECHR standard implementation, doubt may arise as to the introduction of an additional extraordinary remedy: the extraordinary complaint, unavailable to parties to judicial proceedings, accessible to the State only.

It goes without saying that the impact of the ECHR on the development of Polish procedural law and the organisation of the judiciary is significant and must be appreciated. ECtHR case law has contributed significantly to the development and strengthening of standards and guarantees of rights protection. Such backdrop, however, serves to highlight contemporaneous disputes and doubts raised by various entities – the European Commission, among others – with regard to Poland's compliance with the rule of law and state of law standards, including guarantees of judicial independence.<sup>139</sup>

## 8 EVOLUTION OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER POLISH LAW

The regulation enshrined in Art. 10 of the ECHR which provides for the right to freedom of expression is one of the most lively and most frequently used provisions of the ECHR. It is of particular importance for countries such as Poland that acceded to the ECHR during the political transformation. The changes that began in 1989 included, among other things, ensuring freedom of expression. Before that date, when the government had no political mandate, the political system was imposed by force, freedom of expression was not really guaranteed; in fact, the state authorities intentionally tried to deprive the citizens of their right to freedom of expression in order to keep the political system. Any attempts to take advantage of that right which is quite an obvious one in free countries were repressed by the authorities.

It is therefore not surprising that guaranteeing freedom of expression was one of the main objectives and assumptions of the political transformation. The first changes that were introduced were of formal nature. The office of censorship, which had been set up back in 1946 and which had been renamed in 1981 as the Central Office for the Control of Publications and Public Performances<sup>140</sup> was liquidated first. Under the political system of that time, persons who took advantage of freedom of speech and freedom of press in publications and

139 P Bogdanowicz, M. Taborowski, *Brak niezależności sądów krajowych jako uchybienie zobowiązaniu w rozumieniu art. 258 TFUE (cz.1) (Deficiencies in the Independence of Domestic Courts of Law as a Breach to Obligations under Article 258 of the TFEU (Part One))*, *Europejski Przegląd Sądowy* 2018, No. 1, p. 4 et seq.

140 Pursuant to the decree of 5 July 1946 of the Central Office for the Control of Press, Publications and Public Performances (*Journal of Laws* No. 34, item 210).

public performances<sup>141</sup> were not allowed (*inter alia*) to 'call for the overthrow of, vituperate, deride or degrade the constitutional order of the Polish People's Republic,' in accordance with Art. 2(1) of the Control of Publications and Public Performances Act of 31 July 1981. The provision was by definition used for suppressing freedom of expression, particularly as censorship at that time was preventive.

The Central Office for the Control of Publications and Public Performances was liquidated as of 7 June 1990 pursuant to the Act of 11 April 1990 on Repealing the Publications and Public Performances Control Act, Lifting the Control Authorities and Amending the Press Law Act.<sup>142</sup> Consequently, preventive censorship was lifted in Poland.

However, lack of censorship by itself does not automatically mean that freedom of expression is guaranteed. Mere legal provisions, even at the constitutional level, do not suffice to ensure such freedom. Art. 71(1) of the Constitution of the Polish People's Republic of 1952<sup>143</sup> provided for a declaration that the Polish People's Republic guaranteed its citizens freedom of speech, the press, meetings and assemblies, processions and demonstrations. However, it was far from reality. As a result of the provisions of ordinary statutes, not only those concerning preventative censorship but also the criminal law regulations, freedom of expression was not provided for in Poland. Even though subsequent regulations (particularly during the later period of the Polish People's Republic) declared broader freedom of expression, the lack of independent judiciary, including the lack of constitutional court,<sup>144</sup> did not provide for any actual guarantees that those verbal guarantees would be kept.

The existing Constitution of the Republic of Poland of 1997,<sup>145</sup> notably Art. 54(1), reads as follows: 'The freedom to express opinions, acquire and disseminate information shall be ensured to everyone.' Under Art. 54(2) of the Polish Constitution preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station. It is evident that the scope of that provision largely overlaps with Art. 10 of the ECHR.

## 9 POLISH CONSTITUTIONAL TRIBUNAL'S POINT OF VIEW

The Polish constitutional court has evaluated the compliance of the provisions of ordinary statutes with Art. 54(1) of the Polish Constitution on several occasions. In the majority of those cases, the Constitutional Tribunal did not find any incompatibility of the provisions being reviewed with the constitutional regulations. It needs to be pointed out that in some cases the review covered both Art. 54(1) of the Polish Constitution and Art. 10(1) of the ECHR which were used as benchmarks, and the Polish constitutional court did not find any incompatibility in either case.

It also needs to be noted that in exceptional cases Art. 10 was used as a benchmark of review (by the Constitutional Tribunal) together with the provisions of the Polish Constitution

141 The original text as published in Journal of Laws No. 20, item 99.

142 Journal of Laws No. 29, item 173.

143 Constitution of the Polish People's Republic enacted by the Legislative Sejm on 22 July 1952 (the original text as published in the Journal of Laws No. 33 item 232).

144 The Constitutional Tribunal did not come into being until 1 January 1986, in accordance with the Constitutional Tribunal Act of 29 April 1985 (the original text as published in Journal of Laws No. 22 item 98).

145 Constitution of the Republic of Poland of 2 April 1997 (the original text as published in Journal of Laws No. 78. Item 493).

other than Art. 54(1). In its judgment of 28 January 2003, K 2/02,<sup>146</sup> the Constitutional Tribunal concluded that Art. 13<sup>1</sup> (3) and (4) of the Education in Sobriety and Alcoholism Prevention Act of 26 October 1982,<sup>147</sup> which is understood as not including a ban on advertising and promotion, provided they use an advertising image that is only incidentally convergent with an advertising image typical for alcohol products or alcohol manufacturers, is compatible with the provisions of the Polish Constitution and with Art. 10 of the ECHR. In the statement of reasons, the Polish constitutional court concluded that there was no doubt that commercial speech (which includes advertising) was subject to protection under Art. 10 of the ECHR. There was also no doubt that the law was not of absolute nature and could be effectively restricted under internal law. The Tribunal also observed that, under the Polish Constitution, Art. 54(1) was the equivalent of Art. 10 of the ECHR. While the provision was not cited as a benchmark in the case under review, the Polish constitutional court found it irrelevant because the subject matter and the scope of those two benchmarks were identical (at least in terms of the scope covered by the charge). The Constitutional Tribunal also noted that Polish bans on alcohol advertising and promotion were not the most restrictive ones in Europe.<sup>148</sup> However, no violation of the ECHR was raised in other countries, even in case of more stringent restrictions in that regard. Restrictions on commercial speech (in case of which there is more regulatory freedom among the European countries than in the case of restrictions on freedom of information referring to issues other than advertising and promotion)<sup>149</sup> must be mandated by a statute. In its judgment of 28 January 2003, K 2/02, the Constitutional Tribunal found that a restriction must be necessary in a democratic society, subject to the proportionality principle.

The provisions of the Press Law were also subject to judicial review.<sup>150</sup> In its judgment of 20 February 2007, P 1/06,<sup>151</sup> the Constitutional Tribunal concluded that Art. 45 of the Press Law insofar as it read that 'whoever publishes a daily newspaper or a magazine without registration is subject to a fine or restriction of liberty,' was compatible with Art. 31(3) of the Polish Constitution<sup>152</sup> and its Art. 54. The Polish constitutional court also found that the reviewed provision was compatible with Art. 10(2) of ECHR which reads that the exercise of freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.' In this context, the Polish constitutional court referenced the ECtHR judgment of 6 May 2003 in the case of *Appleby and Others v. the United Kingdom*.<sup>153</sup> However, in the subsequent judgment of 14 December 2011, P 42/09,<sup>154</sup> the Constitutional Tribunal

146 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 1 Item 4. (*Constitutional Tribunal Case Law. Official Bulletin*)

147 Journal of Laws No. 35, item 230 as amended.

148 The scope of restrictions has increased in certain ways over the years; however, Article 13<sup>1</sup> of the Education in Sobriety and Counteracting Alcoholism still permits beer advertising albeit with certain restrictions.

149 Constitutional Tribunal judgement of 8 April 1998, K 10/97 (Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. /*Constitutional Tribunal Case Law. Official Bulletin Series A 2015 No. 3 Item 29*) and C Mik, Reklama w prawie międzynarodowym praw człowieka (*Advertising in International Human Rights Law*), *Kwartalnik Prawa Prywatnego* 1995 No. 1, p. 116 et seq.

150 Press Law Act of 26 January 1984 (the original text as published in Journal of Laws No. 5, item 24).

151 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 2 Item 11. (*Constitutional Tribunal Case Law. Official Bulletin*)

152 The provision of Article 54(1) of the Polish Constitution which provides for the freedom of expressing opinions is typically used as a benchmark for judicial review in conjunction with Article 31(3) of the Polish Constitution which provides for the proportionality principle.

153 Application No. 44306/98, ECHR 2003/VI, § 43.

154 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 10 Item 118. (*Constitutional Tribunal Case Law. Official Bulletin*)

concluded that Art. 45 of the Press Law Act insofar as it imposed criminal liability for the publication of a printed magazine without registration was not compatible with Art. 31(3) read together with Art. 54(1) of the Polish Constitution. The Tribunal also emphasised that it was not the violation of freedom of expression that underlaid such a verdict but the disproportionality of the legal sanction. As a consequence of that verdict, the sanction for publishing a magazine without registration, as envisaged under Art. 45 of the Press Law, was reduced to a fine, as of 19 July 2013, and the legislator resigned from the restriction of liberty as a penalty in that regard.<sup>155</sup>

The Constitutional Tribunal's judgement of 5 May 2004, P 2/03 addressed other issues relating to the Press Law.<sup>156</sup> In the judgment, the Tribunal concluded that, insofar as it prohibited commenting upon a correction in the same issue or broadcast in which the correction was published, Art. 32(6) of the Press Law was compatible with Art. 31(3) read in conjunction with Art. 54(1) of the Polish Constitution, Art. 10 of the ECHR and Art. 19 of the International Covenant on Civil and Political Rights.<sup>157</sup> In that same judgment, the Polish constitutional court concluded, however, that, insofar as it did not define the term 'correction' and 'response,' and also prohibited commenting upon the correction in the same issue or broadcast in which the correction was published under the pain of penalty, Art. 46(1) in conjunction with Art. 32(6) of the Press Law was incompatible with Art. 2 and Art. 42(1) of the Polish Constitution because it was not precise when defining the criteria of an offence, as required.

In its judgment of 21 September 2015, K 28/13,<sup>158</sup> the Constitutional Tribunal determined that Art. 49 para. 1 of the Code of Petty Offences,<sup>159</sup> whereby anyone who conspicuously shows disregard to the constitutional authorities of the state shall be subject to detention or a fine, was compatible with Art. 54(1) read in conjunction with Art. 31(3) of the Polish Constitution and with Art. 10 of the ECHR. The Constitutional Tribunal did not share the view of the applicant (the Commissioner for Human Rights) and concluded that isolating that offence was intended to protect the authority of the constitutional authorities of the state. The Polish constitutional court argued that 'lowering their prestige which leads to decreasing identification of the citizens is detrimental to the Republic of Poland which is a common good of all citizens.' The Constitutional Tribunal cited similar reasons when it determined that Art. 135 para. 2 of the Criminal Code,<sup>160</sup> whereby 'anyone who insults the President of the Republic of Poland in public is liable to deprivation of liberty for up to three years,' was compatible with Art. 54(1) read in conjunction with Art. 31(3) of the Polish Constitution and Art. 10 of the ECHR (the Constitutional Tribunal judgment of 6 July 2011, P 12/09.)<sup>161</sup>

In few cases, the Polish constitutional court found that a provision subject to judicial review was incompatible with Art. 54(1) of the Polish Constitution. In this context, it is worth noting the judgment of 12 May 2008, SK 43/05,<sup>162</sup> whereby the Constitutional Tribunal determined that, insofar as it excluded punishability of an offence of raising or publicising true allegation

155 That change was introduced pursuant to Article 1(1) of the Act of 10 May 2013 Amending the Press Law Act (Journal of Laws item 771).

156 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 5 Item 39. (*Constitutional Tribunal Case Law. Official Bulletin*)

157 International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, and ratified by Poland on 3 March 1977. (Journal of Laws No. 38, item 167).

158 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 8 Item 120. (*Constitutional Tribunal Case Law. Official Bulletin*).

159 Petty Offences Code Act of 20 May 1971 (Journal of Laws of 2015, item 1094).

160 Criminal Code Act of 6 June 1997 (the original text as published in Journal of Laws No. 88, item 503).

161 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2011 No. 6 Item 51. (*Constitutional Tribunal Case Law. Official Bulletin*).

162 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2008 No. 4 Item 57. (*Constitutional Tribunal Case Law. Official Bulletin*).



concerning a public person only if it was made 'in defence of a justifiable public interest,' Art. 213 para. 2 of the Criminal Code (where it refers to Art. 212 para. 1 of the Criminal Code that penalises defamation) was incompatible with Art. 14 of the Polish Constitution<sup>163</sup> and its Art. 54(1) read in conjunction with Art. 31(3) of the Polish Constitution. The Constitutional Tribunal concluded that there was no sufficiently founded reason for such a restriction of justification in a democratic state that respected freedom of expression as a fundamental value from the perspective of civil liberties. People who hold public functions and who have the possibility of influencing broader social groups with their behaviours, decisions, attitudes and views, must accept the risk that they will be subjected to a more stringent evaluation by the public.

The Constitutional Tribunal judgment led to a change in regulations;<sup>164</sup> as a result, in keeping with Art. 213 para. 2(2) of the Criminal Code in the current wording, anyone who raises or publicises a true allegation concerning a publication is not deemed to have committed an offence and does not need to prove that they acted in defence of a justifiable public interest. It needs to be pointed out, however, that – despite a lively debate as to whether or not it was not excessively intruding on freedom of expression – Art. 212 paras. 1 and 2 of the Criminal Code continues to apply, and anyone who slanders another person (including a business entity) about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence commits an offence. It raises controversy that, where such defamatory statements are made via the mass media, the veracity of the allegation does not exclude punishability, in keeping with Art. 213 para. 2 of the Criminal Code (an exception is made for public persons, as mentioned before). It is argued that protection, if any, against public (i.e. using the mass media) presentation of true allegations, or actually excesses in that regard, should be afforded in civil proceedings rather than criminal ones. An analysis of that issue in view of Art. 10 of the ECHR will be presented hereinafter.

It needs to be stated at this point that the introduction of Art. 54(1) of the Polish Constitution (and also the evolution of the modern case law of Polish courts, including the Constitutional Tribunal, that accounts for the importance of freedom of expression) did not diminish the role of protection provided by ECtHR based on Art. 10 of the ECHR in terms of protection of freedom of expression. The ECtHR case law in that regard continues to be more stable, and the standards it adopts to protect freedom of speech continue to be higher, than in the case law of Polish courts.

## 10 ECtHR CASE LAW CONCERNING ARTICLE 10 OF ECHR IN CASES AGAINST POLAND – GENERAL COMMENTS

It should be noted, as a preliminary observation, that initially there were certain difficulties with interpreting the provision subject to review herein as a result of the Polish translation of the first sentence of Art. 10(1) of the ECHR (as published in the Polish Journal of Law), which is imprecise and narrows the sense of the original text.<sup>165</sup> While according to the English version of that regulation it is the 'freedom of expression' that is subject to protection, the Polish version only refers to the 'freedom of expressing opinions' (*wolność wyrażania opinii*).<sup>166</sup> Therefore, the Polish version does not refer to the form of expressing opinions as

163 In keeping with Article 14 of the Polish Constitution, the Republic of Poland shall ensure freedom of the press and other means of social communication.

164 Pursuant to Article 1(27) of the Act of 5 November 2009 Amending the Criminal Code Act, the Criminal Procedure Code Act, the Criminal Enforcement Code Act, the Fiscal Penal Code Act and Certain Other Acts (Journal of Laws No. 206, item 1589 as amended).

165 Journal of Laws of 1993, No. 61, item 284.

166 As regards the Polish regulations, the phrase used in Art. 54(1) of the Polish Constitution is that everyone

much as it refers to their content. It is considered a mistranslation.<sup>167</sup> However, ECtHR case law relies on the authentic texts (in English and in French) which is backed by Art. 59 of the ECHR. As already mentioned, the English version of Art. 10(1) uses the term 'freedom of expression,' while the French version uses the equivalent term 'la liberté d'expression.'

In cases concerning Poland in relation to Art. 10 of the ECHR, the ECtHR also refers to the category of 'freedom of expression' and its consistent stance in that area has had a material impact on the practice of Polish courts. There are two aspects that need to be distinguished in this regard. First of all, it is because of the ECtHR case law that Polish courts have more and more frequently made a distinction between statements of facts and opinions, recognising that opinions by themselves will not stand the test of truth. Second, following the ECtHR, Polish courts have more and more frequently acknowledged that persons who hold public functions (particularly politicians) must recognise that they will be subject to more intense criticism, both in terms of the content and in terms of the form.

For a long time, there has not been sufficient distinction between statements of facts and opinions in the decisions taken by Polish courts. As a consequence, evaluative statements, particularly those criticising political opponents, were subjected to the test of truth.<sup>168</sup> There is still a tendency in the Polish courtroom practice to evaluate such statements in terms of true vs false, which should not take place.<sup>169</sup> That is because those are statements that express the beliefs and assessments of their authors concerning their activity and the criticism of actions taken by the opposing political parties.<sup>170</sup> That issue is of major significance because the burden of proof in cases concerning infringement of personal rights is reversed in Art. 24 of the Civil Code.<sup>171</sup> It is therefore assumed that where it is impossible to determine whether the allegations made in a press publication were true or false (a situation described as *non liquet*), the person who makes those allegations will, as a rule, bear civil liability.<sup>172</sup>

That view is softened in the ECtHR case law because the ECtHR makes a distinction between statements of facts and assessments. The ECtHR also applies those established standards in cases against Poland. In the judgment of 17 January 2017 in the case of *Zybertowicz v. Poland*<sup>173</sup> the ECtHR evaluated whether or not a certain statement made [by the applicant] within the framework of a public debate was a statement of facts or a subjective assessment. The Polish courts considered that statement to be a statement concerning facts and because they concluded that the author failed to prove it was true, the courts ordered the applicant to pay PLN 10,000 (approx. EUR 2,380) in compensation for moral loss and obliged him to publish an apology at his own cost and expense.

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is ensured "the freedom to express their opinions (*poglądów*), to acquire and to disseminate information".

167 MA Nowicki, *Komentarz Konwencji o ochronie praw człowieka i podstawowych wolności (Commentary to the Convention on the Protection of Human Rights and Fundamental Freedoms)*, [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, (Concerning the European Convention. Commentary to the European Convention on Human Rights)*, 7th ed., Warsaw 2017, thesis 1 in regard to Article 10.

168 J Sadowski presented numerous examples arising from an analysis of specific court case files in *Rozstrzyganie sporów wyborczych – analiza praktyki sądowej (Resolving Electoral Disputes – An Analysis of Courtroom Practice)*, Prawo w działaniu. Sprawy cywilne 2011 No. 10, pp. 118-123.

169 D Bychawska-Siniarska, Rola Europejskiego Trybunału Praw Człowieka w kształtowaniu standardów ochrony wolności słowa w Polsce (*Role of the European Court of Human Rights in Shaping Protection of Freedom of Expression in Poland*), Europejski Przegląd Sądowy 2017 No. 2 p. 37.

170 J Sadowski, *Rozstrzyganie sporów wyborczych... (Resolving Electoral Disputes...)*, p. 123.

171 Civil Code Act of 23 April 1964 (Journal of Laws of 2019, item 1145 as amended).

172 P Sobolewski in: *Kodeks cywilny. Komentarz* (ed. K. Osajda) (*Civil Code. Commentary*), 25th edition, Legalis 2020, note 84 to Article 24.

173 Application No. 59138/10.

The ECtHR found the complaint about that decision to be valid. In the said judgment of 17 January 2017, 59138/10, the ECtHR made a reservation that the expression used by the applicant (the defendant in the case before the domestic courts) cannot be subject to a clear categorization as it was not a simple statement of fact or a subjective assessment. However, the ECtHR was of the view that the impugned phrase could be understood as the applicant's interpretation of statements made by the plaintiff (A.M.) and his stance in the public debate. Consequently, the critical issue for the proportionality of the interference was the question of a reasonable basis for the interpretation, since even a value judgment without any factual basis to support it may be considered as an infringement of personal rights subject to civil liability. However, the ECtHR concluded that the domestic courts failed to take into account the particular nature of the impugned utterance (which was within the framework of public debate) and consequently did not examine the question whether the evidence available to them could be considered as a reasonable basis for the interpretation proposed by the applicant. The ECtHR added that the reasons given by the domestic courts could not be regarded as a sufficient justification for the interference with the applicant's right to freedom of expression. The domestic courts therefore failed to strike a fair balance between the competing interests. That conclusion could not be affected by the fact that the incriminated proceedings were civil rather than criminal in nature. Accordingly, in the opinion of the ECtHR, the interference complained of was not 'necessary in a democratic society' within the meaning of Art. 10(2) of the ECHR. There had therefore been a violation of Art. 10 of the ECHR.

Similar view is becoming more and more popular in the decisions of Polish courts. In the judgment of 19 July 2019, V ACa 539/18,<sup>174</sup> the Court of Appeal in Warsaw concluded that the impugned statements rarely had an unambiguous 'clear-cut' form in practice. Most frequently, such statements combined factual elements and evaluative judgments (in different proportions) and the proportions in which those elements appear form the basis for determining the nature of the statement. In such cases, it was necessary to examine whether or not there were any elements in the statement that could be tested according to the true or false criterion. The Court of Appeal noted that such a confrontation line needed not be so clear-cut, it may also account for the criterion used in the ECtHR judgments.<sup>175</sup> The ECtHR permits the possibility of examining whether or not 'the facts on the basis on which the applicant formulated their judgment were substantially true' or, in other words, whether the judgments expressed took advantage of a 'sufficient factual ground.' That approach is also more and more frequently adopted by Polish courts.

It should also be taken into consideration that in its judgment of 4 November 2014 in the case of *Braun v. Poland*<sup>176</sup> the ECtHR reiterated that freedom of expression, as secured in paragraph 1 of Art. 10, constituted one of the essential foundations of a democratic society and one of the basic conditions of its progress and each individual's self-fulfilment. Subject to Art. 10 (2) of the ECHR, freedom of expression was applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such were the demands of that pluralism, tolerance and broadmindedness without which there was no 'democratic society.' There was little scope under Art. 10 (2) of the ECHR for restrictions on political speech or on debate on questions of public interest.

In the said judgment of 4 November 2014, 30162/10, ECtHR determined that the applicant had clearly been involved in a public debate on an important issue. Therefore,

174 LEX No. 2704192.

175 ECHR judgements: of 28 August 1992, Application No. 13704/88, *Schwabe v. Austria*; of 27 May 2001, Application No. 26958/95, *Jerusalem v. Austria*, and also 12 July 2001, Application No. 29032/95, *Feldek v. Slovakia*

176 Application No. 30162/10.

the domestic courts' approach that required the applicant to prove the veracity of his allegations could not be accepted. It was not justified, in the light of the ECtHR case-law and in the circumstances of the case, to require the applicant to fulfil a standard more demanding than that of due diligence only on the ground that the domestic law had not considered him a journalist. The ECtHR held that the domestic courts, by following such an approach, had effectively deprived the applicant of the protection afforded by Art. 10 of the ECHR. The Court added that although the national authorities' interference with the applicant's right to freedom of expression may have been justified by a concern to restore the balance between the various competing interests at stake, the reasons relied on by the domestic courts cannot be considered relevant and sufficient under the ECHR. That conclusion could not be altered by the relatively lenient nature of the sanction imposed on the applicant. There had therefore been a violation of Art. 10 of the ECHR in the opinion of the ECtHR.

ECtHR case law is also of major importance insofar as it acknowledges that one of the most important standards arising from Art. 10 of the ECHR is the duty of politicians and persons holding public functions to display a greater degree of tolerance for criticism against them than in case of ordinary citizens.<sup>177</sup> As far as decisions in cases involving Poland are concerned, one needs to note the ECtHR judgments: of 2 February 2010 in case of *Kubaszewski v. Poland*,<sup>178</sup> and of 22 June 2010 in case of *Kurlowicz v. Poland*.<sup>179</sup>

Due to the limited scope of this paper, it is impossible to present the full impact of Art. 10 of the ECHR and of the ECtHR case law on Polish law and the practice of Polish courts. It should, however, be signalled that Art. 10 of the ECHR was also applied in cases brought against Poland which concerned, among other things, a medical doctor's freedom of expression on medical errors made by his peers,<sup>180</sup> as well as the rights of public media employees to criticise the programming policy of their employer.<sup>181182</sup>

Presented below in more detail are ECtHR judgments that had the greatest impact on Polish law or on the practice of Polish courts.

## 11 ABROGATING THE DUTY TO SEEK AND OBTAIN AUTHORISATION (QUOTE APPROVAL)

ECtHR case law concerning Art. 10 of ECHR has had an impact on Polish law-making. Art. 14(2) of the Press Law Act was repealed as of 12 December 2017; under that provision, 'a journalist may not deny authorisation (quote approval) by a source of information unless it was published before.' As a consequence of that decision, the lack of

177 IC Kamiński, *Swoboda wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu (Freedom of Expression in Case Law of the European Court of Human Rights in Strasbourg)*, Warsaw 2006, p. 113.

178 Application No. 571/04.

179 Application No. 41029/06.

180 ECHR judgment of 16 December 2008 in case of *Frankowicz v. Poland*, Application No. 53025/99.

181 ECHR judgment of 16 July 2009 in *Wojtas-Kaleta v. Poland*, Application No. 20436/02.

182 In addition, it is also worth noting the new Article 107 §1(3) of the Common Court System Act of 14 February 2020, whereby a judge is liable to disciplinary action for "actions questioning the existence of a professional relationship of a judge, the effectiveness of a judge's appointment or the empowerment of a constitutional body of the Republic of Poland". The amendment was introduced by way of the Act of 20 December 2019 Amending the Common Court System Act, the Supreme Court Act and Certain Other Acts (Journal of Laws item 190). The preamble reads that "each judge appointed by the President of the Republic of Poland should be afforded conditions that will allow him or her to perform the judicial profession in a dignified manner; particularly, effective procedures should be ensured that will not allow for any unlawful undermining of a judge status by any executive, legislative or judicial body, or by any persons, institutions, including other judges".

seeking and obtaining such quote approval by a journalist is no longer an offence within the meaning of Art. 49 of the Press Law.<sup>183</sup> As indicated in the rationale behind the bill of 27 October 2017 on amending the Press Law Act,<sup>184</sup> the amendment was dictated by the need to implement the judgment of the European Court of Human Rights of 5 July 2011 in *Wizerkaniuk v. Poland*.<sup>185</sup>

In the aforesaid judgment of 5 July 2011, 18990/05, ECtHR concluded that sentencing a journalist for publishing statements made by a Member of Parliament (MP) without obtaining authorisation (quote approval) had been a violation of Art. 10 of the ECHR. The sentence was issued based on the mere lack of obtaining authorisation (quote approval). The criminal sanction was not imposed because the MP's words were distorted or quoted out of context or conveyed in the manner which could have misled readers or depicted the MP in a negative light. In the Court's Assessment, the ECtHR emphasised that the applicant's criminal conviction was based exclusively on a breach of a technical character, namely on the fact that he had published the interview despite the MP's refusal to give his authorisation. The Court observed that the Press Act was adopted in 1984, that is before the collapse of communist system in Poland which took place in 1989. Under that system, the media were subjected to preventive censorship. The provisions of the Press Act, on which the applicant's conviction was based, were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. The ECtHR pointed out that it was not for the Court to speculate about the reasons why the Polish legislature had chosen not to repeal those provisions. However, as applied in the said case, the provisions of the Press Act could not be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.

In the Court's assessment in regard to the judgment of 5 July 2011, ECtHR was critical of the Polish Constitutional Tribunal's judgment of 29 September 2008, SK 52/05,<sup>186</sup> where the Constitutional Tribunal concluded that Art.49 and Art. 14(1) and (2) of the Press Act were compatible with Art. 54(1) in conjunction with Art. 31(1) of the Polish Constitution. In the statement of reasons, the Polish constitutional court held that authorisation (quote approval) was one of the simplest means to ensure veracity of the message and that failure to approve sources' quotes gave rise to the 'risk of confusticating or, in extreme cases, distorting their statements. Such a state of affairs may lead to consequences that are undesirable for the society.' The court also added that the duty to seek and obtain approval only applied to exact quotes; it did not, however, apply to their treatment because this is how Art. 14(2) of the Press Law was interpreted in practice. The ECtHR noted that such an approach of the Polish constitutional court was paradoxical. The more faithfully journalists rendered the statements of interviewed persons, the more they were exposed to the risk of criminal proceedings being brought against them for failure to seek authorisation. The ECtHR found it to be equally paradoxical that Art. 14 of the Press Act obliged journalists to seek authorisation only in respect of interviews recorded in a phonic or visual form whereas no such obligation was imposed where a journalist only made notes of an interview.

183 In keeping with Article 49 of the Press Law Act, whoever violates the provisions of Article 14 (amongst others) thereof, shall be subject to a fine or restriction of liberty.

184 Journal of Laws Item 2173.

185 Application No. 189φ90/05.

186 Orzecznictwo Trybunału Konstytucyjnego. Zeszyty Urzędowe. Series A 2015 No. 7 Item 125. (*Constitutional Tribunal Case Law. Official Bulletin*)

## 12 DEFAMATION

As already mentioned, there are concerns about the compatibility of Art. 212 para. 2 read in conjunction with Art. 213 para. 2 of the Criminal Code, which regulate the punishability of defamation, with Art. 10 of the ECHR. Even after the changes introduced as a consequence of the Constitutional Tribunal judgment of 12 May 2008, SK 43/05, the regulations read that 'slandering' a specific person (including a business entity) 'about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence that is required for a specific position, profession or type of activity' (as long as made through the mass media) is subject to a fine, the penalty of restriction of liberty, deprivation of liberty up to one year, even if the allegation was true. An exception is made only for allegations concerning the conduct of a person who holds a public function, and allegation in defence of a justifiable public interest.

It is emphasised in the legal doctrine that even though Poland keeps losing defamation cases before the ECtHR, the number of criminal cases under Art. 212 of the Criminal Code in Poland keeps growing.<sup>187</sup> However, the ECtHR case law did have an impact in that the penalty of restriction or deprivation of liberty is imposed much less frequently in such cases; if there is a conviction, it usually amounts to a pecuniary penalty (a fine). It is emphasised in the ECtHR judgments that, in light of Art. 10 of the ECHR, the penalty of deprivation of liberty may be considered permissible only in extraordinary cases.<sup>188</sup> In the case of *Długolecki v. Poland*,<sup>189</sup> the proceedings for defamation against the local journalist were conditionally discontinued; however, while determining that there was a violation of Art. 10 of the ECHR, the ECtHR observed that it remained open to the court to resume the proceedings and impose a full penalty on the journalist.

Furthermore, the literature on the topic points out that the ECtHR seems to soften its approach to criminal sanctions in the more recent judgments concerning cases against Poland, and the Court seems to recognise that the application of a fine may be proportionate in certain cases, especially if the journalist acted in an unreliable manner.<sup>190</sup> Therefore, it is pointed out that such softening in the ECtHR approach has undoubtedly had an impact on the growing number of convictions to a fine in defamation cases.<sup>191</sup>

## 13 RIGHT OF FREEDOM: SUMMARY

The impact of Art. 10 of the ECHR and Fundamental Freedoms on the evolution of Polish law on protection of freedom of expression is invaluable. According to the analysis, ECtHR case law under Art. 10 of the ECHR has had a major influence on the decisions of Polish courts; in fact, in certain instances it led to significant changes in Polish legislation.

187 D Bychawska-Siniarska Rola Europejskiego Trybunału Praw Człowieka (*Role of the European Court of Human Rights*), pp. 35-37.

188 ECHR judgment of 17 December 2004 in *Cumpana and Mazare v. Romania*, Application No. 33348/96.

189 ECHR judgment of 24 February 2009 in *Długolecki v. Poland*, Application No. 23806/03.

190 Cf. ECHR judgments: of 19 July 2016 in *Dorota Kania v. Poland*, Application No. 49132/11 and of 13 January 2015 in *Łozowska v. Poland*, Application No. 62716/09.

191 D Bychawska-Siniarska Rola Europejskiego Trybunału Praw Człowieka (*Role of the European Court of Human Rights*), pp. 36-37.



The importance of ECtHR case law in cases against Poland may become even greater as Poland has been falling every year in the press freedom rankings compiled by Reporters Without Borders. In 2020, Poland was ranked 62<sup>nd</sup>.<sup>192</sup>

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