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Extraordinary Appeals of the European Commissioner of Human Rights in the Light of Judgement of the ECtHR Wałęsa v. Poland

Abstract

The institution of extraordinary appeal, provided by Polish law, was the subject of a multi-faceted assessment by The European Court of Human Rights in the case of *Wałęsa v. Poland*. In its judgment, the Court found its procedure inconsistent with the standards of a fair trial and the principle of legal certainty due to several defects identified in the judgment. The article compares the relevant statements in the mentioned judgment with the practice of filing extraordinary appeals by the Polish Commissioner for Human Rights (Ombudsman). To fulfill this task, the authors conducted a qualitative and quantitative analysis of all extraordinary appeals filed by the Ombudsman from the inception of the institution until the end of 2023. The research findings indicate that the body in question does not utilize the extraordinary appeal mechanism in a instrumental manner. Its actions are guided by the objective underlying its introduction by the legislator, to eliminate valid judgments that are grossly unjust and unlawful from circulation.

KEYWORDS: human rights, polish ombudsman, extraordinary appeal, pilot procedure, European Court of Human Rights

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1 Introduction

The European Court of Human Rights (ECtHR) has recently conducted a comprehensive review of the extraordinary appeal process outlined in Polish law. This assessment was undertaken as part of the justification for the November 23, 2023, judgment in the case of Wałęsa v. Poland[1]. After considering the complaint to the ECtHR, it was determined that due to several defects, the current extraordinary appeal procedure in Poland is not aligned with the standards of a fair trial and the principle of legal certainty set forth in Section 6, Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[2]. This article is aimed at comparing the relevant statements contained in the judgment with the practice of filing such appeals by the Polish Commissioner for Human Rights (hereinafter: Ombudsman).

Based on the analysis conducted, we will argue that this practice, unlike the negative manifestation of the use of the remedy in question, which was the basis for issuing the discussed judgment by ECtHR, does not violate the standards arising from the Convention.

2 Extraordinary appeals in a Polish legal system

The legal aspects of the case Wałęsa v. Poland are connected with the so-called "reform of the judiciary" in Poland, which began in 2017 and has been enacted through a series of amending laws.

The extraordinary appeal was designed to be a useful institution with the objective of eliminating from circulation final judgments that are grossly unjust and unlawful. These judgments fundamentally violate human freedom and rights and, under the current legal status, cannot be appealed in

1 Complaint No. 50849/21. On the sidelines, it should be mentioned that there are voices in the public space regarding the procedural flaws of the ruling issued in the case, consisting of the absence of a Polish judge in the adjudicating panel, see Ireneusz C. Kamiński, „Wałęsa przeciwko Polsce albo znikający polski sędzia" *Dziennik Gazeta Prawna*, 2 January 2024; Michał Balcerzak, „Jeszcze o sędziach ad hoc w Strasburgu. Sprawa Wałęsy" *Dziennik Gazeta Prawna*, January 9, 2024.

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

another manner[3]. However, from the outset, this institution has prompted concerns due to the form in which it was introduced. The extraordinary appeal process allows for the challenging of court judgments that have become final many years ago, which could be perceived as threatening the principle of legal certainty. The system of extraordinary appeals against final judgments was previously in place in many former communist countries. The ECtHR found that such a system violated the principles *res judicata* and legal certainty. The proposed Polish system is not entirely identical to the old Soviet system but has a lot of similarities to it[4].

This remedy was introduced to the Polish legal system in the Act of December 8, 2017 on the Supreme Court[5] (hereinafter: ASC). One of the main motives of carrying out a reform of judiciary, according to its authors, is very low confidence of citizens in the justice system and in creating a legal institution, which will restore elementary legal order compliant with the principle of social justice. A variety of factors have contributed to this situation, but in particular, a series of rulings have raised significant legal concerns and violated fundamental principles of justice[6].

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3 About this measure from the perspective of representatives of the legal dogma, see e.g. Jarosław Stasiak, *Skarga nadzwyczajna w postępowaniu cywilnym* (Warszawa: C.H. Beck, 2020); Mateusz Radajewski, „Skarga nadzwyczajna (wybrane zagadnienia)" *Państwo i Prawo*, No. 3 (2020); Aldona Domańska, „Czy skarga nadzwyczajna do Sądu Najwyższego spełnia swoje cele?" *Acta Universitatis Lodziensis Folia Iuridica*, No. 93 (2020); Dagmara Gruszecka, „Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście «wypełniania luk w systemie środków zaskarżenia»" *Palestra*, No. 9 (2018); Kamil Dziga, „Czy merytoryczne rozpoznanie skargi nadzwyczajnej w sprawach karnych jest możliwe?" *Czasopismo Prawa Karnego i Nauk Penalnych*, No. 5 (2019); Tomasz Zembrzuski, „Skarga nadzwyczajna w polskim postępowaniu cywilnym" *Państwo i Prawo*, No. 6 (2019); Oktawian Nawrot, Krzysztof Olszak, „Rażące naruszenie prawa jako przesłanka skargi nadzwyczajnej" *Prawo i Więź*, No. 2 (2023); Aleksandra Syryt, „Skarga konstytucyjna a skarga nadzwyczajna: analiza porównawcza instytucji usuwania naruszeń wolności i praw człowieka i obywatela określonych w Konstytucji RP" *Prawo i Więź*, No. 4 (2021).

4 The Opinion on the Draft [2017 Amending Act], on the Draft [2017 Act on the Supreme Court] proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts adopted by the Venice Commission at its 113th Plenary Session on December 11, 2017 (Opinion No. CDL-AD(2017)031).

5 Journal of Laws of 2023, item 1093, as amended.

6 Justification of the Bill of September 26, 2017, VIII Term of Office of Sejm, No. 2003, p. 8, https://orka.sej m.gov.pl/Druki8ka.nsf/0/5AB89A44A6408C3CC12581D800339FED/%241-'ile/2003.pdf.

According to Article 89 of the ASC, an extraordinary appeal may be submitted „if it is necessary in order to ensure compliance with the principle of a democratic state governed by the rule of law and implementing the principles of social justice", provided that „(1) the decision violates the principles or freedoms and rights of a human being and a citizen laid down in the Constitution, and/or (2) the decision grossly violates the law through its misinterpretation or misapplication, and/or (3) there is an obvious contradiction between significant findings of the court and the content of evidence collected in the case – and the decision may not be reversed or amended under other extraordinary complaints"[7]. The general time-limit for the submission of extraordinary appeal is five years from the date on which the ruling appealed against became final.

Several elements of the new system were particularly problematic, according to the Venice Commission[8]. Firstly, the ASC stipulates that final judgments may be overturned for the sake of „social justice" (Article 89 § 1). The term is open to a wide range of interpretations in the context of legal proceedings. Secondly, a final judgment may be revised on points of fact (Article 89 § 1 p. 3). The ASC allows the reopening of old cases not only in the event of newly discovered circumstances (such as perjury by a key witness), but on other grounds as well. The ASC provides for very few restrictions to the use of this instrument. Thus, extraordinary appeals should not be based on the same arguments as those examined in cassation (Article 90 § 2). The ASC introduces time limits for extraordinary appeals and it also appears that the request for the reopening may be introduced without the knowledge and even without consent of the parties. Finally, the ASC has introduced a system of extraordinary review for the future judgments, which is problematic itself. In addition, the Draft Act provides for the reversal of old judgments, which, at the moment of their adoption, were final and were not subject to any further review. This is not quite a retroactive application of criminal law, but, in practical terms, it may have a similar effect.

Aside from these doubts, which are fundamental from the human rights perspective, there are also significant practical ones concerning the formal possibilities of filing the measure in question. Some of them regard the relation of this measure to other extraordinary remedies in the Polish

7 Translation of provisions regulating extraordinary appeal were provided in the communication of the case Wałęsa v. Poland.

8 The Opinion No. CDL-AD(2017)031).

legal system, such as cassation in criminal proceedings or a complaint for a declaration of incompatibility with the law of a final decision in civil proceedings[9].

3 Case Wałęsa v. Poland

The concerns raised in relation to the extraordinary appeal have now been realised. The civil court judgment in the defamation case, which became final over ten years ago, was appealed by the Attorney General and subsequently reversed by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. It raised issues under Articles 6 § 1, 8, and 18 of the Convention for the Protection of Human Rights and Fundamental Freedoms and became the subject of ECtHR proceedings. In the first place, it required ECtHR to conduct proper fact-finding. We won't provide a detailed description of the facts established in the case in question, particularly those related to its political background. Considering the purposes of this article, we will limit it to those strictly relevant to the legal institution discussed.

At the request of the ECtHR, the Government submitted a document describing the functioning of extraordinary appeals between April 3, 2018 (the date the Act on the Supreme Court of 2017 came into force) and November 30, 2022[10]. The document shows that the total number of extraordinary appeals submitted to the Supreme Court during this period amounted to 1,489. Of these, 801 cases were referred to lower courts in order to correct formal deficiencies in the case files, and therefore were not considered on their merits. The government clarified that due to the Supreme Court's statistical recording methodology, the same extraordinary appeal may be registered multiple times under different reference numbers.

9 See: Dziga, „Czy merytoryczne"; Tomasz Zembrzuski, „Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia" *Przegląd Sądowy*, No. 2 (2019). See also comprehensive analysis of extraordinary complaints in civil proceedings: Marcin Asłanowicz, *Nadzwyczajne środki zaskarżenia w postępowaniu cywilnym* (Warszawa: C.H. Beck, 2023).

10 Statistical data on extraordinary appeals in 2018–2022 provided by the government, cited in the judgment of November 23, 2023 in the case of Wałęsa v. Poland (complaint No. 50849/21), § 48.

From April 3, 2018 to November 30, 2022, the Supreme Court heard 429 extraordinary appeals. Of these, 237 (approximately 55%) were accepted in whole or in part.

Of the 429 extraordinary appeals filed, 348 were submitted by the Attorney General (81.1%), of which 158 were accepted. The Chamber of Extraordinary Control and Public Affairs also examined 58 extraordinary appeals filed by the Ombudsman (37 of which were accepted) and 23 appeals filed by other authorized bodies (7 of which were accepted).

The government presented two tables listing all extraordinary appeals submitted to the Supreme Court. The table lists 1.460 cases (49 criminal and 1.411 civil ones), including the cases that were returned without being examined on their merits.

The majority of extraordinary appeals included in the list pertained to civil matters, with the majority of these being disputes regarding contracts, compensation for torts, inheritance matters, entries in land and mortgage registers, evictions, and international child abduction. Additionally, there were several extraordinary appeals related to labor law, pensions, and social benefits. The criminal cases pertained to various crimes (most often murder, theft, fraud, sexual abuse) and several claims for compensation for unlawful deprivation of liberty.

As previously stated, 234 cases (approximately 55% of all examined appeals) were overturned by the Supreme Court. In these instances, the Court either transferred the case to a lower court or ruled on the case's merits. 191 extraordinary appeals (approximately 45%) were dismissed, rejected, deleted at the outset or they resulted in the discontinuation of the proceedings. In three instances, the Supreme Court merely noted that the final judgment was issued in violation of the law.

When assessing the personal scope of the mechanism of extraordinary appeal, one must consider the position and role of the Attorney General – the state authority who has, so far, brought the largest number of extraordinary appeals.

The situation in which the Minister of Justice holds the position of Attorney General is not unprecedented in Poland. According to the Venice Commission, this structure creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed

by the rule of law[11]. The Helsinki Foundation for Human Rights[12] has indicated that, in evaluating the nature of a specific extraordinary remedy, its practical implementation may also be a relevant consideration. Although at the first glance these may seem politically neutral cases, the practice shows that the risk of abusing the mechanism of extraordinary appeal by the Attorney General for political purposes is not merely hypothetical[13].

The character of the judicial authority competent to consider an extraordinary remedy may also be important from the perspective of legal certainty. The Chamber of Extraordinary Review and Public Affairs, composed solely of judges appointed upon the motion of the reorganized National Council of Judiciary, considers extraordinary appeals. In the case of Dolińska-Ficek and Ozimek v. Poland, the Court ruled that the panels of three judges of the Chamber of Extraordinary Review and Public Affairs did not constitute a „tribunal established by law" due to violation of law in the process of appointing the judges. The Court of Justice of the EU also identified irregularities in the appointment procedure and their impact on the independence and impartiality of judges of the Chamber of Extraordinary Review and Public Affairs[14].

After a thorough examination of the case facts, the ECtHR identified several systemic problems at the root of the violations of Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[15]. These issues are summarized as follows:

1. The defective procedure for judicial appointments involving the National Council of Judiciary as established under the 2017 Amending Act, which inherently and continually affects the independence of judges so appointed;
2. The Chamber of Extraordinary Review and Public Affairs, a body which is not an independent and "lawful" court under the Convention,

11 Venice Commission, Opinion on the Act on the Public Prosecutor's Office as amended, CDL-AD(2017)028, §111, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e.

12 Written submission to the European Court of Human Rights by 11 January 2023, the Helsinki Foundation for Human Rights, OM/2023/PSP

13 See also: Barbara Grabowska-Moroz, *Skarga (nad)zwyczajna. Środek przywrócenia sprawiedliwości czy zagrożenie dla praworządności?* (Warsaw: HFHR 2021). https://hfhr.pl/upload/2022/01/skarga-nad-zwyczajna_-s-rodek-przywro-cenia--sprawiedliwos-ci-czy-zagroz-enie-dla-praworza-dnos-ci-.pdf.

14 Court of Justice of the EU (Grand Chamber), October 6, 2021, Case C-487/19.

15 The case of Wałęsa v. Poland (complaint No. 50849/21), § 324.

has exclusive competence to deal with any motion for the exclusion of judges involving a plea of lack independence of a judge or a court, including the situation where the motion is directed against them personally;

3. The extraordinary appeal procedure as currently operating in Poland is incompatible with the fair trial standards and the principle of legal certainty under Article 6 § 1 of the Convention on account of several defects:
   a. the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure,
   b. the possibility of using in practice this exceptional remedy as an „ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including redetermination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction,
   c. the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Attorney General and the Ombudsman to contest judgments that became final before the entry into force of the 2017 ASC,
   d. the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure;
4. The extraordinary appeals are examined by the Chamber of Extraordinary Review and Public Affairs, which has exclusive competence in this respect.

The discussed judgment of the ECtHR makes it urgently necessary to undertake legislative work on changing the current shape of the institution of extraordinary appeal and adapting this measure to the directives arising from the cited judgment (§ 328-332). Furthermore, it will be necessary to address the systemic problems related to the functioning of the Polish judiciary, as identified in a series of previous ECtHR judgments from the so-called Reczkowicz group[16]. Formulating *de lege ferenda* comments,

16 Judgments of July 22, 2021, Reczkowicz v. Poland, §§ 4 and 53; November 8, 2021, Dolińska-Ficek and Ozimek v. Poland; February 3, 2022; Advance Pharma sp. z o.o. v. Poland, §§ 4-78 and 95-225 and of March 15, 2022, Grzęda v. Poland, §§ 14-28.

however, remains beyond the scope of this work, as considerations in this area are planned to be undertaken in a separate and more detailed study.

An important starting point for further considerations is the observation that the European Court of Human Rights sees the source of the defectiveness of the extraordinary appeal not only in the act, but also in the practice of its application. As the ECtHR highlights, each of these factors, either individually or collectively, has the potential to violate the right to a fair trial. It can be concluded that some elements of the extraordinary appeal do not in themselves violate the Convention. However, only in connection with arbitrary practice (as in the case of the Wałęsa v. Poland judgment) may they lead to its violation. The remaining sections of this article will demonstrate how this practice is applied in the context of extraordinary appeals filed by the Ombudsman.

4 Extraordinary appeals in the practice of the Ombudsman

To demonstrate how the Ombudsman exercises their authority in extraordinary appeals, it was necessary to carry out appropriate analyses using a particular method. However, our focus was not on case law, but rather on extraordinary appeals filed by the Ombudsman from the inception of the institution until the end of 2023. The ability to access the subject of this analysis was greatly facilitated by the fact that the authors of this text, in addition to their scientific activities, are employees of the Office of the Commissioner for Human Rights. Thus, all extraordinary appeals (155, excluding the few that were rejected for formal reasons and then resubmitted after addressing the deficiencies) submitted during the aforementioned period were analyzed in both qualitative and quantitative terms, including those that were still in progress at the time of the research[17]. This allowed for obtaining a comprehensive understanding of the Ombudsman's appeal filing practices, while mitigating the risk of basing our conclusions on

17 In this regard, the statistics are as follows: 49.7% of the cases remain pending, 33.5% of appeals are upheld or partially upheld, 16.8% dismissed, rejected or concluded in another way.

incomplete data (no risk of incomplete induction). Obviously, not every filed appeal will be discussed in this text. There is neither room for this nor a need for it. When making the choice in this respect, our aim was, on the one hand, to present in a general way the appeals filed in regard to judgments burdened with errors repeated by various courts, and, on the other hand, to make our discussion of these appeals understandable and not making the reader delve into the details of factual and legal states that occurred in the complained cases. In those where a decision has already been made (not necessarily ruling on the merits of the appeal), exemplary judgments will be referred to.

The most common extraordinary appeals filed by the Ombudsman (24.5%) concern situations in which banks (or other similar entities) made credit (loan) agreements with consumers. These agreements often included confusing conversion, indexation, or denomination clauses that made it impossible for consumers to predict the economic consequences of entering into such a contract[18]. In the cases that were complained about, the courts only applied general procedural rules without considering the consumer nature of the basic legal relationship and the relevant consumer protection provisions. Moreover, incorrectly, they did not apply the national provisions of the Civil Code[19] – Art. 385^1 § 1 in connection with Art. 385^1 § 3, and provisions of the EU law – Art. 6 section 1 and Art. 7 section 1 of the Directive No. 93/13[20], as they did not *ex officio* control the abusiveness of contractual provisions. In the event that it is not possible to ascertain the value of the benefit, contracts containing such provisions should be deemed null and void. It is clear that consumers, who are the weaker parties in the legal relationship, have been harmed not only by professionals granting credits (loans), but also by the system of justice in cases of this type. By failing to take the specific *ex officio* actions, to which they were obliged by law, the courts created an imbalance in the legal protection of consumers, effectively supporting the actions of entrepreneurs who sought to exploit

18 E.g. Judgment of the Supreme Court of January 18, 2023, file ref. II NSNc 54/23, Lex No. 3508864; Judgment of the Supreme Court of July 6, 2022, file ref. I NSNc 378/21, Lex No. 3385789; Judgment of the Supreme Court of March 2, 2023, file ref. II NSNc 182/23, Lex No. 3555371; Judgment of the Supreme Court of June 28, 2022, file ref. I NSNc 450/21, Lex No. 3358709.

19 Act of 23 April 1964 on the Civil Code, (Journal of Laws of 2023, item 1610, as amended, hereinafter: CC).

20 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal of the European Communities No. L 95/29.

the weaker position of consumers who were unable to effectively defend themselves. Such proceedings were contrary to the principle of state loyalty to citizens in the application of the law.

The next most numerous extraordinary appeals filed by the Ombudsman (14.8%) concern situations in which there are two final judgments confirming the inheritance of the same person[21]. This state of affairs violates the *res judicata*. It is undesirable even when the issued judgments are not contradictory to each other (they state in the same way who inherits which share), their coexistence itself causes significant problems in court proceedings (for example, land and mortgage register proceedings or those concerning abolition of co-ownership) and administrative proceedings (because determining the circle of heirs is not the responsibility of public administration organs, but of common courts[22]). Thus, due to reasons attributable to the state, citizens experience restrictions on their rights and freedoms, such as property ownership or the right to inheritance. It does not matter that the second court proceedings are initiated by the interested applicants, as those who turn to the court do not necessarily know the law or remember that inheritance for the same deceased person has already been confirmed. These would be far-reaching effects—potentially irreversible without statutory intervention—of the principle *ignorantia iuris nocet*. This issue is systemic in nature, and in most cases, an extraordinary appeal is the only means of amending a situation that restricts the rights and freedoms of heirs and their legal successors[23].

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21 E.g. Judgment of the Supreme Court of 6 April 2022, file ref. I NSNc 475/21, Lex No. 3345112; Judgment of the Supreme Court of 16 February 2023, file ref. II NSNc 104/23, Lex No. 3538086; Judgment of the Supreme Court of 24 February 2021, file ref. I NSNc 132/20, Lex No. 3123152; Judgment of the Supreme Court of 19 January 2022, file ref. I NSNc 156/21, Lex No. 3303864.

22 See e.g. Judgment of the Supreme Administrative Court in Warsaw of 16 January 2002, file ref. I SA 1421/00, Lex No. 78481.

23 Although, pursuant to Article 403 § 2 *in principio* of Act of November 17, 1964 on the Code of Civil Procedure, (Journal of Laws of 2023, item 1550, as amended), it is possible to request the resumption of proceedings that ended with a final judgment in the event of subsequent discovery of a final judgment regarding the same legal relationship. However, due to a short period – usually of three months – counted from the day on which the party learned about the basis for the reopening (which is treated in practice as knowledge of the issued judgment), the lack of legal awareness of the participants in the proceedings often causes its expiry. In cases involving double provisions of inheritance, where it is possible, the Ombudsman often uses this means of appeal instead of an extraordinary appeal.

The Ombudsman's extraordinary appeals are often an effective solution when judgments are issued in gross violation of the law, in the cases, in which individuals who are not yet of legal age and who have incurred debts that are not their own may face adverse consequences. In inheritance cases, an example of errors made by the courts was not taking into account the declarations of legal representatives of minors regarding rejection of the inheritance. This issue constituted 1.9% of the extraordinary appeals submitted by the Ombudsman[24]. In some cases, the reason for this situation was that the declarations were submitted after the six-month deadline specified in the law. The reason for this was the necessity for legal representatives to obtain consent from the guardianship court to perform activities that exceeded the scope of ordinary management on behalf of the child. In such cases, the right to reject the inheritance on behalf of a minor was often rendered ineffective due to the speed of the court proceedings. If it was not issued on time, the minor inherited with the benefit of the inventory, being liable for the inheritance debts up to the value of the active state of the inheritance determined in the inventory list or the active inventory of the estate. Unlike the problem of double inheritance provisions, in this case the legislator systematically addressed the obstacles faced by minor heirs[25].

Frequent examples of extraordinary appeals in which the failure of certain individuals to reach the age of majority plays a key role, were those filed in cases involving liability for debts arising from the fact of occupancy of the premises (5.1%)[26]. People turning to the Ombudsman sometimes learned about their debts from the letters of the bailiff initiating enforcement many years after judgments had been issued against them, which, as minors, they had not been able even to read or appeal against. The most apparent violations in this respect are related to the provisions governing the lease agreement. Article 688^1 *in principio* CC states that adults permanently residing with the tenant are jointly liable for the payment of rent and other due fees. However, the courts ruled on the liability of individuals who had not yet reached the age of majority during the period

24 Each appeal regarding this issue remains pending, so it is not possible to refer to an example judgment of the Supreme Court in this respect.

25 Act of July 28, 2023 on amending the Act – Civil Code and certain other acts (Journal of Laws of 2023, item 1615).

26 E.g. Judgment of the Supreme Court of June 23, 2022, file ref. I NSNc 103/22, Lex No. 3357563; Judgment of the Supreme Court of 18 May 2022, file ref. I NSNc 621/21, Lex No. 3439126.

covered by the lawsuit, despite the inclusion of relevant documents such as a birth certificate in the case files. Similarly, an error was made in relation to judgments on liability for occupying premises without a legal title. In this case the relevant provision (Article 18 (1) of the Act on the Tenants' Rights, Municipal Housing Stock and the Civil Code Amendment[27]) did not explicitly stipulate that persons occupying premises without a legal title have to be adults. The Ombudsman has argued that the occupation of premises requires the attribution of the will to perform this activity to a person. However, the use of residential premises by minors is not a manifestation of their autonomous will, but only a derivative of the use of these premises by their statutory representatives. In accordance with Article 26 § 1 CC, the place of residence of a child under parental authority is the place of residence of their parents.

An analysis of extraordinary appeals filed by the Ombudsman indicates that they are often made against judgments that, due to their defects, also cause harm to other, weaker participants in legal transactions. These are, for example, disabled people, towards whom the court in a judgment ordering the vacancy of the premises is obliged to decide on the right to conclude a social tenancy agreement for the premises, unless these persons can live in a premises other than the one previously used or their financial situation allows them to meet their housing needs on their own (Art. 14 Sec. 4 (2) TRA). In the judgments appealed by the Ombudsman in this respect (1.2%), the defendants were not even subject to the evidentiary proceedings required by law to determine whether these persons did not belong to the categories of persons specified in Art. 14 section 4 TRA[28].

The described examples show that an extraordinary appeal in the practice of the Ombudsman is aimed at restoring a sense of justice to those affected by obvious and gross errors of the courts, often weaker participants in legal transactions. It should be emphasized, however, that even in situations where a particular person does not belong to groups that the state should protect in a special way (such as minors, consumers, disabled people), in fact each such shortcoming violates the principles or freedoms and human or citizen rights specified in the Constitution (which is one

27 Act of 21 June 2001 on the Tenants' Rights, Municipal Housing Stock and the Civil Code Amendment (Journal of Laws of 2023, item 725, as amended, hereinafter: TRA).

28 Judgment of the Supreme Court of April 13, 2023, file ref. II NSNc 82/23, Lex No. 3581460.

of the conditions for an extraordinary appeal, specified in Article 89 § 1 point 1 ASC). If a defective judgment causes financial consequences, it violates Art. 64 section 1 and 2 of the Constitution. If the court proceeds incorrectly, the principle of the right to a court referred to in Art. 45 of the Constitution is violated. Finally, the very existence of defects causes damage to the principle of protecting the citizen's trust in the state derived from Art. 2 of the Constitution of the Republic of Poland. This is visible in the extraordinary appeals submitted by the Ombudsman. In addition to the obligatory general premise (the need to ensure compliance with the principle of a democratic state of law that implements the principles of social justice), one of the allegations in the vast majority of appeals submitted by the Ombudsman (96.7%) was based on a special premise under Art. 89 § 1 point 1 ASC[29], in addition to the premise provided for in Art. 89 § 1 point 2 (this allegation was also formulated in 96.7% of the appeals) or – much less frequently – in Art. 89 § 1 point 3 ASC[30] (an allegation cited

29 In only five appeals (3.2%) this premise was invoked as the only one.

30 The evidentiary requirement was limited to cases such as, for example: an unfounded and erroneous determination that the defendant was an adult during the entire period covered by the lawsuit, and therefore jointly and severally liable for the full payment of the amount claimed in the lawsuit during that period, while the data contained in the lawsuit, as well as the evidence collected in the case files, show that the defendant became an adult later; the court's recognition that the defendant was a member of the management board of a limited liability company on the date when the company incurred the obligation that is the subject of the proceedings and later, in a situation where the full extract of the National Court Register attached by the plaintiff to the lawsuit shows that the resignation of the defendant from the company's management was disclosed in the National Court Register several months before the date of incurring the obligation by the company; unfounded and incorrect determination that the defendant lived in the premises during the period covered by the lawsuit, and was therefore jointly and severally liable for the full payment of the claimed amount during that period, while neither the lawsuit nor the evidence collected in the case files indicated this circumstance; lack of comprehensive consideration of the evidence and omission of the conclusions resulting from the opinion of a court expert in the field of sexology, who confirmed diagnosing the plaintiff with transsexuality (dysphoria) and stated that "therefore, gender change is medically justified", the omission of the plaintiff's testimony, which shows that he looks and behaves like a man, feels like a man and wants to be one very much, and the omission in the assessment of the evidence included in the documents attached to the claim (a sexological opinion and medical history from the Mental Health Clinic), and consequently, dismissal of the claim, in the situation when these documents are assessed according to general principles and confronted with all the evidence.

in 12.9% of appeals, never on its own, and in each case at least an allegation of gross violation of law was formulated, which is important in the light of the conclusion of the judgment in the case Wałęsa v. Poland). However, as noted above, the absence of an explicit reference to this allegation in the remaining appeals does not prove that the ruling did not violate the constitutional principles or the rights and freedoms of individuals as citizens.

It is impossible to ignore the completely unique situation of extraordinary appeals brought in criminal cases. Their specificity lies in the fact that only two were filed and, moreover, they were dismissed by the Supreme Court[31]. Their submission was necessary due to the need to ensure compliance with the principle of a democratic state of law, implementing the principles of social justice, and also due to the violation of the principle derived from Art. 45 section 1 of the Constitution. The Supreme Court in the Chamber of Extraordinary Control and Public Affairs dismissed the extraordinary appeals[32], pointing out that they were limited to raising only general doubts concerning the compliance of the regulations on

31 In identical cases, the courts conditionally released two convicts who committed new crimes during their probation period. The provisions requiring the automatic waiver of early release upon committing a new crime were questioned in 2013 by the Constitutional Tribunal. The Tribunal assessed that courts may, but do not have to, revoke conditional releases; however, they must first assess the individual's situation. After the judgment, the regulations were changed accordingly, but the amendment does not apply to old cases. In appeals, the Ombudsman emphasized that the 2015 amendment does not decide whether it applies only to new judgments or also to those issued before it. In the opinion of the Ombudsman, judgments issued from January 2012 to July 1, 2015 violate Art. 45 section 1 of the Constitution. As the Ombudsman emphasizes in both appeals, the unconstitutional limitation of the court's role occurs under Art. 160 § 1 of the Act of 6 August 1997 on the Penal Enforcement Code, (Journal of Laws of 2023, No 90, item 557, as amended, hereinafter: PEC) in the wording before the amendment, which significantly limited the independence of the court. It reduced it to the role of a court only for technical activities, eliminating the actual administration of justice. The rules of a fair procedure require the legislator to provide the court with its basic attributes when creating a specific procedure, enabling it to assess whether there are valid reasons to revoke the convict's conditional early release. The courts of first and second instance did not have such an opportunity in both cases. The sum of all these arguments indicates that Article 160 § 1 of the PEC, in its pre-amendment wording from 2015, interferes with the constitutionally protected judicial independence guaranteed in Article 45, Section 1 of the Constitution.

32 Judgment of the Supreme Court of 3 April 2019, file ref. I NSNk 1/19, Lex No. 2649731; Judgment of the Supreme Court of April 3, 2019, file red. I NSNk 2/19, Lex No. 2649782.

the basis of which the contested judgments were made (Article 160 § 1 PEC) with the Constitution of the Republic of Poland. The complaints failed to provide any reference to the specific cases in which the contested judgments were made, and thus did not adequately address the reasons for bringing them. The Supreme Court stated that, from a material perspective, the considered extraordinary appeals essentially resemble requests for abstract control of the compliance of specific regulations with the Constitution of the Republic of Poland.

The Ombudsman's restraint in using the institution of extraordinary appeals is also evident when considering general numerical data. In response to approximately 16,200 requests from citizens to file an extraordinary appeal regarding judgments issued against them in criminal and civil cases, the Ombudsman filed 155 such appeals (representing approximately 0.95% of all requests). This demonstrates that this office exercises restraint in appealing judgments that, in its opinion, are inconsistent with the values of a law-abiding state.

5 Conclusions

The mechanism of extraordinary appeal to the Supreme Court may raise serious concerns regarding its consistency with the principle of legal certainty. The grounds for submitting such an appeal are relatively broad and vague, especially when compared to other extraordinary remedies, such as a cassation appeal. As for the personal scope of this remedy, it can only be initiated by certain state authorities, not by the parties involved in the proceedings.

The European Court of Human Rights identifies the defectiveness of the extraordinary appeal mechanism not only in its legal framework but also in its application. In practice, the majority of extraordinary appeals are submitted by the Attorney General, who, since the 2016 reform, is no longer an independent body. Furthermore, the Attorney General has brought several extraordinary appeals under circumstances suggesting potential political motivations. Additionally, all extraordinary remedies are reviewed by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which is composed solely of judges appointed in

violation of the law. For the principle of the rule of law to be upheld, such extraordinary remedies must be properly structured.

However, an analysis of the Ombudsman's practices indicates that the extraordinary appeal is not used instrumentally by this body (e.g., for political purposes). Rather, the Ombudsman's actions are guided by the original legislative intent behind its introduction, aiming to overturn final judgments that are grossly unjust and unlawful – judgments that fundamentally undermine the rights and freedoms of individuals, who are always at a disadvantage relative to the state apparatus.

One of the authors notes that the state, symbolized by Hobbs's Leviathan, which

> was created to defend the individual against the danger posed by others, may itself become a source of an incomparably more powerful threat to them than the one from which it is supposed to protect them. The state apparatus itself can be a potential source of oppression, leaving individuals practically defenseless[33].

Therefore, unlike situations such as the one that formed the basis for the judgment Wałęsa v. Poland, where the extraordinary appeal appeared to be a manifestation of the oppressiveness of Leviathan, in the Ombudsman's practice, it is a weapon that introduces more balance in the fight against this oppressiveness. It can therefore be concluded that the Ombudsman is an exemplar of an authority that uses the institution of extraordinary appeal in accordance with its stated purposes.

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