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Report - Poland

Right to an effective remedy before an independent and impartial judge.

Ladies & Gentlemen,
I'm very grateful to the organizers for giving me the opportunity to participate in the workshop today and to say few words referring to the current topic of our session. I believe that Polish experiences with regard to the issue of effective remedies and judicial independence and impartiality form an important contribution to our discussion today.

The ongoing constitutional crisis in Poland since 2015 is not a novelty, surely not to anyone sitting in this room. I'd like nevertheless to briefly sketch how the proposed topic of our session corresponds with the present situation of judges in Poland, their independence and impartiality as well as with the right to an effective remedy before judge.

There are 3 aspects to be taken into consideration:

(1) the extraordinary claim – a new remedy for civil and criminal matters,
(2) the new disciplinary system that threatens the judicial independence and impartiality,
(3) Extra-legal means of pressure on Polish judges performed by the executive power.

(1) The extraordinary claim in the Supreme Court

First, I'd like to briefly describe the new legal remedy provided by the new Law on the Supreme Court.

According to the wording of the new law, the Prosecutor General and the Ombudsman can rise an extraordinary claim regarding judgements issued in Civil or Criminal Procedure which became final since 17th October 1997. The requirements of this claim are broad and imprecise. The claim is being applied when the final judgement is in violation of the principles or human and civil rights and freedoms laid down in the Constitution, is in gross violation of the law due to wrong interpretation or misapplication of the law (both of substantive law or procedure) or its findings are in obvious non-compliance with the evidence presented in the case. According to the wording of statute, the aim of the extraordinary claim is to ensure compliance with the principle of a democratic state ruled by law implementing the principles of social justice. The claim is designated to set the *res iudicata* decision aside. How does the new remedy comply with the right to an effective remedy?

Firstly, the extraordinary claim can be risen even if the parties wouldn't intend to, because they are not the direct disposers of the remedy.

Secondly, the statute gives opportunity to retroactively lever past judgments, issued even 23 years ago.

Thirdly, the new remedy rises doubts to whether the evidence might be effectively analysed again after 23 years from issuing the final judgement.

Further on, it challenges the rights of people who won their cases years ago and act in confidence with the final judgements, not to mention third parties whose interests are also affected.

Finally, according to art. 13 sec. 1 of the EChHR everyone has a right to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. However, a final judgement issued as a consequence of an extraordinary claim risen by the Prosecutor General against the will of the parties cannot be challenged by any remedy.

According to the new law, final judgements can be levered by the extraordinary claim 5 years long after having been issued, for the judgements issued after 3rd April 2018. [Older judgements from the years 1997-2018 can be levered up to 3rd April 2021.] Cases are to be set aside by mixed panels in collaboration with lay judges.

[Moreover, in Polish procedure there already means to appeal from final judgements: the cassation, the plea for revival of proceedings and claim for illegality of a final rulings.]

There is, of course, one argument in favour of this remedy: people can pursue their interests asking the Prosecutor General or Ombudsman for intervention (not having formally any influence on the contents of the claim: they are parties without the right to claim, the Prosecutor General has a right to claim, but is not a party to the process). But should we sacrifice other values for the sake of introducing this new remedy? Is there any limit for the number of extraordinary remedies that should be accessible for the parties? Is there any reasonable number of instances in our procedures we stop stay with?

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Let me now demonstrate how pressure is being brought to bear on judges by means of a new disciplinary proceeding's system.

(2) New disciplinary system threatening the judicial independence and impartiality

The current shaping of disciplinary proceedings has been introduced by the same Act of 8th December 2017 amending the Law on Supreme Court and the Law on the NCJ (Journal of Laws 2018, pos. 3 and 5; in force since April 2018). It has created new disciplinary procedure for judges, but also other legal professions. Its characteristic feature is the subordination to the Minister of Justice. The new disciplinary procedure is an object of our concern for the following reason: the reform challenges heavily the right to a fair trial by an independent and impartial tribunal (art. 45).

Let me show you some examples: the Minister of Justice, being the Prosecutor General at the same time, has vast competences with regard to launching or relaunching disciplinary proceedings and with regard to the composition of disciplinary panels. He has broad competences with respect to appointing disciplinary prosecutors and judges of disciplinary courts (incl. setting their number) and influencing any disciplinary proceedings. Astonishingly rights of judges to defence are on lower level than those of normal citizens in court proceedings.

The inquisitorial character of disciplinary proceedings is strengthened by the fact that it can be conducted regardless of the presence of the accused or his defence attorney, giving thus no possibility to present one's arguments. This is obviously contrary to art. 6 of the ECHR (art. 6 sec. 1). The absence of defence attorney does not stop the examination of the motion to deprive a judge of his immunity. Appointing an *ex officio* defence attorney and before this lawyer begins the defence, does not halt the course of proceeding (art. 113a). The deprivation of immunity takes place in a 24-hours 'fast track' for recognition of a motion for authorisation to deprive the judge of his immunity and bring him to criminal justice or temporary detention (art. 80 § 2da of the Law on Common Courts). Further, the new procedure assigns a 14-day deadline for submission of evidence, thus introducing a preclusion of sorts and excludes the *ne peius*-principle.

According to article 82 of the Law on Common Court, the Minister of Justice has the right to appoint judges to serve in the disciplinary court. Refusal to sit the a disciplinary panel might be a premise for their disciplinary proceeding. However particularly high remunerations shall ensure that there always be will 'volunteers'. Further on, the Minister of Justice has been granted the full rights to choose a Disciplinary Prosecutor of the Judges of Common Courts, and of Military Courts, as well as two of his deputies based solely on his unlimited discretion. Additionally, the Disciplinary Prosecutor to the Ministry of Justice, appointed by the Minister, can intervene in any explanatory or disciplinary proceeding against any particular judge. The intervention of the Disciplinary Prosecutor to the Ministry of Justice excludes the participation of any other disciplinary prosecutor in the case. The Minister of Justice can enter into any proceeding already pending. If the Disciplinary Prosecutor refuses to initiate disciplinary proceeding or decides about its termination, the Minister of Justice might make an objection. Especially because objection made by the Minister serves as obligatory guideline for the Disciplinary Prosecutor and obligation to conduct investigation even though there might not be any reasonable grounds for it. This competence includes the right to make a motion for re-opening of legally ended proceedings. This right of the Minister of Justice is particularly harmful as the limitation periods for disciplinary offence is suspended by the opening of any new proceeding. In consequence a judge might be constantly under charges, if the Minister (the *de facto* highest disciplinary prosecutor) desires to do so. The influence on judge's career may be especially high in cases considered politically sensitive: currently there are ca. 100 ongoing politically motivated proceedings.

The system created 1,5 years ago threatens the judicial independence, impartiality with respect to the proceedings and serves for the intimidation of particular judges, especially those showing civil courage in defence of the Rule of Law. It is an instrument in the hands of politicians to

manually steer the Judiciary by skilfully rewarding and punishing judges as it pleases. The independence of the Judiciary is not guaranteed in a systemic manner any more.

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Finally, I'd like to demonstrate that the independence and impartiality of judges is endangered also by extra-legal means applied by the politicians.

(3) Extra-legal means of pressure against Polish judges: Hate speech

On 19th August this year journalists have discovered a broad, organised hate-speech-network, paid by the Ministry of Justice and aimed against Polish judges, especially those active in defending the rule of law. The attacks have been carried out since 2016 by a number of so called 'trolls'. One of them was even personally instructed by the vice-minister. In the following days journalists discovered a closed WhatsApp-group consisting i.a. in employees of the Ministry as well as in several judges delegated by the Minister of Justice to work in the Ministry. Regrettably, some of the group members involved in this hate-speech-network were the newly elected members of the National Council of Judiciary and the judges of the newly established Disciplinary Chamber of the Supreme Court, all of them promoted with the support of the ruling political party. Their presence has given the government an occasion to pin the blame on 'a war between judges' factions'.

A group of people, directed by the vice-minister, was collecting or fabricating compromising materials, spreading rumours & fake news regarding strictly personal circumstances, giving the trolls personal data, such as phone numbers, photographs, data of judge's partners or children, slandering, trolling in the Internet, sending vulgar messages. Journalists found out links between the trolls, the state media, public administration and the intelligence.

One of the main targets of these attacks was Prof. Krystian Markiewicz, the president of 'Iustitia', the biggest free association of judges, person particularly active in promoting and defending the rule of law in Poland. Another person was the First President of the Supreme Court.

As the journalists report, the National Council of Judiciary has been informed about the hate-speech attacks at judges, but didn't react. The public prosecutors have admittedly already launched an investigation and seized the computers in the Ministry of Justice. But what can we expect from the Minister of Justice being the Prosecutor General at the same time? Indeed, shortly after launching the investigation, the District Prosecutor's Office in Warsaw has realised how thankless this task is and asked for challenge for cause.

I've decided to describe this occurrence, because these are evident attempts to break down the impartiality of judges and their independence. Moreover, as we could see, the participation of some of the judges in the hate-speech-network demonstrates how easily can judge's impartiality be lost by both punishment and reward.

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The abovementioned examples from current Polish experiences demonstrate that the right to an effective remedy before an independent and impartial judge is strongly determined by the general condition of the entire system of Judiciary. I hope, Europe can learn a lesson form what currently happens in Poland. Thank you for your attention.