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**COMMENTARY TO THE JUDGEMENT OF THE  
EUROPEAN COURT OF HUMAN RIGHTS OF  
23 NOVEMBER 2023 IN THE CASE OF *WAŁĘSA V POLAND*  
(APPLICATION NO 50849/21)**

**Abstract**

In the commented judgment of 23 November 2023, issued in the case of *Wałęsa v Poland* (application no. 50849/21), the European Court of Human Rights stated that the extraordinary complaint, which has been functioning in the Polish legal system since 2018, is incompatible with the standards of a fair trial and the principle of legal certainty under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The author, sharing reservations about the extraordinary complaint brought by the European Court of Human Rights, discusses the fundamental defects of this institution with regard to the broader domestic context and formulates *de lege ferenda* conclusions. The commentary also indicates that the defectiveness of the extraordinary complaint also manifests itself in other aspects that were overlooked in the commented judgement. For this reason, it is necessary to undertake a deeper, systemic reflection on this legal institution before its possible reform.

## KEYWORDS

extraordinary complaint, extraordinary appeal, legal certainty, Chamber of Extraordinary Review and Public Affairs, European Court of Human Rights, pilot-judgment, independent and impartial court established by law

## SŁOWA KLUCZOWE

skarga nadzwyczajna, pewność prawa, Izba Kontroli Nadzwyczajnej i Spraw Publicznych, Europejski Trybunał Praw Człowieka, wyrok pilotażowy, niezawisły i bezstronny sąd ustanowiony ustawą

## I. INTRODUCTORY REMARKS

On 23 November 2023, the European Court of Human Rights (hereinafter ‘ECHR’) issued a judgment in the case of *Wałęsa v Poland*,<sup>1</sup> which has important implications for the functioning of the Polish judicial system. Generally, the case concerns two important legal issues – the status of judges of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court and the role of the extraordinary complaint in the Polish legal system. While the first of these has already been analyzed by the ECHR, for example in the case of *Dolińska-Ficek and Ozimek v Poland*,<sup>2</sup> the ECHR has not yet considered in detail the issue of extraordinary complaint, which has been introduced into the Polish legal system in 2018.

Therefore, the purpose of this commentary is to analyze the commented judgment on the latter legal issue indicated above, i.e. considerations regarding the functioning of the extraordinary complaint in the Polish legal system. Consequently, the status of the judges of the Chamber of Extraordinary Review and Public Affairs Chamber of the Supreme Court and the defective procedure for their appointment will be beyond the scope of the analysis.

As can be concluded from the commented judgement, the functioning of the extraordinary complaint in the Polish legal system is incompatible with the standards of a fair trial and the principle of legal certainty under Article 6(1) of

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<sup>1</sup> Judgment of the European Court of Human Rights of 23 November 2023, application no 50849/21, *Wałęsa v Poland*, HUDOC (hereinafter referred to as the ‘commented judgment’).

<sup>2</sup> Judgement of the European Court of Human Rights of 8 November 2021, application no 49868/19 and no 57511/19, *Dolińska-Ficek and Ozimek v Poland*, HUDOC.

the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup> Analysis of the ECHR's considerations leads to a conclusion about the general defectiveness of an extraordinary complaint, which is manifested in the following aspects:

- a. general and vague conditions for the admissibility of an extraordinary complaint,
- b. possibility of re-examination of the facts of the case by the Supreme Court as a result of lodging an extraordinary complaint, what thus creates a third instance in the course of Polish judicial proceedings,
- c. possibility of challenging, through an extraordinary complaint, judgments issued before the introduction of this remedy into the Polish legal system, which undermines the principle of legal certainty,
- d. possibility of political instrumentalization of extraordinary complaint as a result of entrusting the right to lodge this remedy to the Prosecutor General, holding the office of Minister of Justice, and entrusting exclusive jurisdiction to examine extraordinary complaint to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court.

This commentary is of an approving nature – the conclusions of ECHR on defects of the extraordinary complaint should be fully shared. Their detailed analysis has been presented in the further part of the paper with regard to the broader, domestic context of the functioning of this institution in the Polish legal system.

## II. FACTS OF THE CASE

Lech Wałęsa<sup>4</sup> filed a complaint to the ECHR in connection with the lawsuit for the protection of personal rights brought against Krzysztof Wyszowski.<sup>5</sup> On 16 November 2005, a television station broadcasted a programme in which Krzysztof Wyszowski stated that Lech Wałęsa was a secret collaborator of the communist Security Service, operating under a nickname 'Bolek'.<sup>6</sup>

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<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No 61, item 284, as amended and supplemented; hereinafter referred to as the 'Convention').

<sup>4</sup> Lech Wałęsa is a former President of the Republic of Poland from 1990 to 1995, laureate of the Nobel Peace Prize in 1983, leader of the Solidarity Independent Self-Governing Trade Union (pol. *Niezależny Samorządny Związek Zawodowy Solidarność*), as well as a political opposition activist during the Polish People's Republic.

<sup>5</sup> Krzysztof Wyszowski is a Polish politician and publicist, associated with the right-wing political party – Law and Justice (pol. *Prawo i Sprawiedliwość*).

<sup>6</sup> Krzysztof Wyszowski made this statement following granting Lech Wałęsa the victim status under Article 6 of the Act of 18 December 1998 in the Institute of National Remembrance

It should be noted that due to historical reasons, cooperation with state security during the People's Republic of Poland was, and invariably still is, associated with social disapproval and judged negatively. Therefore, during the trial, it was generally considered that the allegation made against Lech Wałęsa undermined his reputation and personal dignity. The contentious issue, however, was whether Krzysztof Wyszowski – as a defendant – had proved the truthfulness of his statement concerning alleged collaboration with the communist security service, which could consequently exclude the unlawfulness of his conduct,<sup>7</sup> and whether he had made this statement on television as a journalist or as an ordinary citizen. The defendant argued that his action was not unlawful as he had made the statement as a journalist, exercising his freedom of expression and the right to seek historical truth. Although he did not have sufficient evidence to support his claims, he maintained that he had displayed the requisite diligence in researching and checking information on which he had relied when formulating the allegation against Lech Wałęsa. Consequently, he stated that his conduct was not unlawful, and he was not required to prove the truth of the allegation.

The trial ended with the judgement of the Court of Appeal in Gdańsk of 24 March 2011, issued in the case ref. no.: I ACa 1520/10<sup>8</sup>, based on which Krzysztof Wyszowski was ordered to publicly apologize to Lech Wałęsa by publishing an appropriate statement in television stations. The Court of Appeal in Gdańsk held that permissible public criticism of politicians cannot violate the dignity and reputation of others unless it is based on true allegations and undertaken to protect a legitimate public interest. In the court's opinion, the defendant failed to prove the accuracy of his claim that Lech Wałęsa had collaborated in the past with the communist Security Service, as well as that he had acted as an active journalist at that time. In the court's view, when formulating the allegation about Lech Wałęsa, Krzysztof Wyszowski had acted as 'an ordinary citizen asked to comment on the applicant's having been granted victim status by the IPN'.<sup>9</sup> Therefore, contrary

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– Commission for the Prosecution of Crimes against the Polish Nation (consolidated text, Journal of Laws 2023, item 102). According to Article 6(1), a victim within the meaning of this act was 'a person in respect of whom organs of the secret service collected information on the basis of purposefully gathered data, including in a secret manner'. According to Article 6(3) of the act, 'a person who subsequently became an officer, employee or collaborator of the secret service' was not a 'victim' for the purposes of the act. By issuing this certificate, the IPN, therefore, confirmed that Lech Wałęsa had not been a collaborator of the communist state security organs.

<sup>7</sup> Article 24 of the Act of 23 June 1964 - Civil Code (consolidated text: Journal of Laws of 2023, item 1610, as amended) provides for the statutory presumption of illegality of the actions of a person violating personal rights. This presumption may be rebutted by circumstances excluding the unlawfulness of the violation of another person's personal rights, which include, among others acting within the legal order, i.e. acting as permitted by law, exercising a subjective right, or acting within the framework of a justified social or private interest.

<sup>8</sup> Judgement of the Court of Appeal in Gdańsk of 24 March 2011, I ACa 1520/10, LEX no 3147749.

<sup>9</sup> See the commented judgement, § 21.

to the defendant's belief, the scope of his freedom of expression was not broader considering the circumstances of the case. The verdict of the Court of Appeal in Gdańsk – as a verdict of the court of second instance – was binding and in force as soon as it was issued, but in the following years it was not enforced by the defendant, i.e. the defendant did not apologize to Lech Wałęsa by publishing an appropriate statement.<sup>10</sup>

After almost nine years, on 31 January 2020, the Prosecutor General lodged an extraordinary complaint to the Supreme Court, challenging the judgement of the Court of Appeal in Gdańsk in the part concerning the defendant's obligation to publish an apology, requesting to revoke it in this regard and to rule on the merits of the case by dismissing the lawsuit. The Supreme Court based on the judgment of 21 April 2021, issued in the case conducted under ref. no.: I NSNc 89/20,<sup>11</sup> accepted the motions of the Prosecutor General, i.e. revoked the appealed judgment in part and dismissed the appeal insofar as the Court of Appeal allowed the claim, stating that the judgement of the Court of Appeal in Gdańsk violated Article 54 of the Constitution of the Republic of Poland<sup>12</sup> (freedom of speech) and flagrantly violated Article 10(1) of the Convention (freedom of expression). In the opinion of the Supreme Court, the severity of these violations prejudged the need to revoke the contested judgement to ensure its compliance with the principle of a democratic state ruled by law and implementing the principles of social justice (Article 2 of the Polish Constitution).

In view of the circumstances of the case described above, Lech Wałęsa, on 5 October 2021, filed a complaint to the European Court of Human Rights, in which he alleged that Poland had violated the provisions of the Convention, in particular:

- a. Article 6(1) by examination of his case by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which does not constitute an 'independent and impartial court established by law' within the meaning of this provision, as it is composed entirely of judges appointed with the participation of the National Judicial Council, formed according to the rules introduced in 2017, which does not ensure the independence of this body from the legislative and executive powers, as well as by lodging an extraordinary complaint, a construction of which violates the principle of legal certainty,

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<sup>10</sup> It should be noted that Krzysztof Wyszowski made an unsuccessful attempt to lodge a cassation appeal, as well as a request to reopen the proceedings in this case. See the commented judgment, § 22-25.

<sup>11</sup> Judgement of the Supreme Court of 21 April 2021, I NSNc 89/20, OSNKN 2021, No 3, item 23.

<sup>12</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No 78, item 483, as amended and corrected; hereinafter referred to as the 'Polish Constitution').

- b. Article 8 by unlawful interference with his private life and violation of his right to reputation due to revocation of the final judgement of the Court of Appeal in Gdańsk following the extraordinary complaint.

As a result of examining the application of Lech Wałęsa, on 23 November 2023, the ECHR issued a judgment holding that Poland had violated Article 6(1) and Article 8 of the Convention, and awarded Lech Wałęsa the sum of € 30,000.00 in respect of the non-pecuniary damage he had suffered. What is particularly important, in this case the ECHR applied the pilot-judgment procedure, indicating that the identified violations are of a systemic nature, extend the sole interests of the applicant and are related to general dysfunction of the judicial system in Poland, including defective procedure for judicial appointments by the National Council of the Judiciary, the status of the Chamber of Extraordinary Review and Public Affairs, as well as defective construction of the extraordinary complaint, which undermines the principle of legal certainty.

After the judgment was issued, the Ministry of Justice published a press announcement indicating that the judgement of the ECHR is unlawful and has no binding force, as it was issued in violation of the Convention, and groundlessly negates the legitimacy of the National Council of the Judiciary and the Supreme Court, thus also violating the principles of international law.<sup>13</sup> On the one hand, the basis for adopting such a position was changes in the panel of judges that heard the case of *Wałęsa v Poland*. According to Article 26(4) of the Convention, the adjudicating panel should include a judge from the state against which the complaint is directed. In the case under comment, a Polish judge withdrew from adjudication. Due to the fact that in his place a judge from Greece was appointed to the panel, the Ministry of Justice considered a violation of the Convention. It should be noted, however, that according to Rule 29(2)(b) of the Rules of the Court of ECHR, the President of the Chamber may appoint another judge to adjudicate if he considers that fewer than 3 persons indicated on the *ad hoc* list of judges of the state, against which the complaint is directed, meet the required criteria. Therefore, contrary to the position of the Ministry of Justice, there was no violation of the Convention in this regard. On the other hand, the announcement stated that the ECHR, by questioning the legitimacy of national bodies, went beyond the scope of powers granted to it under international law, and the judgment itself is a manifestation of discrimination against the Republic of Poland, since in many European countries the procedure for appointing judges is far more politicized. However, it is only the Republic of Poland that has been criticizing in this regard.

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<sup>13</sup> The press announcement of the Ministry of Justice of the Republic of Poland is available in Polish at: <<https://www.gov.pl/web/sprawiedliwosc/bezprawny-wyroek-etpc-w-sprawie-lecha-walesa>> accessed 26 January 2024, whereas it should be noted that it is archival. It was prepared by the Ministry of Justice under the previous leadership and does not present the position of the current Minister of Justice. Mention in this regard is also made in the body of the announcement.

Shortly thereafter, the position of the Ministry of Justice changed, as the issuance of the judgment under comment coincided with the change of government in Poland. On 13 December 2023, i.e., on the day of its inauguration, the newly appointed Minister of Foreign Affairs sent a letter to the President of ECHR, as well as to the members of the Committee of Ministers, in which he declared that the Republic of Poland would not appeal the judgement issued in the case of *Wałęsa v Poland*, and that its implementation constitutes a priority task for the state.<sup>14</sup>

### III. DEFECTS OF THE EXTRAORDINARY COMPLAINT

Analysis of the judgment under comment leads to the conclusion that the institution of the extraordinary complaint is defective in general. It is worth noting that concerns about this institution are raised not only internationally, but primarily in Polish legal science. The fundamental problem of the extraordinary complaint is the conflict of constitutional values – on the one hand, justice, identified with the correctness of court decisions, and, on the other hand, legal certainty, associated with the stability of court decisions.<sup>15</sup> More specifically, the criticism of the extraordinary complaint concerns specific legal solutions regarding the way it is structured in the Polish legal system, in particular: the generally formulated conditions for the admissibility of the extraordinary complaint, the limited catalog of entities entitled to file the extraordinary complaint, including the right to file the extraordinary complaint granted to politically involved entities, as well as the broad substantive and temporal scope of the extraordinary complaint.

In view of the subject of this commentary, special attention should be paid to considerations undertaken by Michał Balcerzak on the compliance of the institution of the extraordinary complaint with the standards of the right to a fair trial, as referred to in Article 6(1) of the Convention.<sup>16</sup> The author points out that although the construction of the extraordinary complaint is not subject to the control of the

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<sup>14</sup> The press announcement of the Minister of Foreign Affairs of the Republic of Poland is available in Polish online <<https://www.gov.pl/web/dyplomacja/listy-ministra-radoslawasikorskiego-do-przewodniczacej-europejskiego-trybunalu-praw-czlowieka-oraz-do-komitetu-ministrow-rady-europy>> accessed 26 January 2024.

<sup>15</sup> This is noticed, among others, by Anna Michalak, *Skarga nadzwyczajna – dopełniający czy konkurencyjny wobec skargi konstytucyjnej instrument ochrony konstytucyjnych wolności i praw jednostki*, Przegląd Sejmowy 2019, No 2(151), 93. See also Paweł Bury, *Skarga nadzwyczajna a trwałość orzeczeń w postępowaniu cywilnym* in *Zagadnienia współczesnego prawa publicznego*, Maciej Pisz, Marcin Przychodzki, Mateusz Radajewski (eds) (Poznań 2018) 117.

<sup>16</sup> Michał Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka* (Palestra 2018) No 1-2, 17-19.

Convention *in abstracto*, nothing prevents it from being assessed by the ECHR against the background of an individual case.<sup>17</sup>

For the first time, such an assessment has been made in the case of *Wałęsa v Poland*. The judgement confirms the previously expressed view of Michał Balcerzak as to the applicability of Article 6(1) of the Convention in proceedings initiated by an extraordinary complaint.<sup>18</sup> The objections of the ECHR to this institution, expressed in the justification of the judgement, can be divided into three groups, i.e. objections that concern:

- a. conditions for the admissibility (grounds) of an extraordinary complaint,
- b. time limits for lodging an extraordinary complaint, and
- c. possibility of political instrumentalization of an extraordinary complaint.

## 1. CONDITIONS FOR THE ADMISSIBILITY OF AN EXTRAORDINARY COMPLAINT

In the commented judgment, the ECHR indicated that one of the major defects of the extraordinary complaint is general and vague conditions for the admissibility of this remedy, which give wide discretion in their interpretation. It should be noted that objections to the conditions for admissibility of the extraordinary complaint had already been raised earlier by, among others, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR),<sup>19</sup> the Venice Commission<sup>20</sup> or the European Commission.<sup>21</sup> The ECHR shared the opinions of these institutions in the commented judgment.<sup>22</sup>

The conditions for the admissibility of the extraordinary complaint can be divided into substantive and formal conditions. The substantive conditions, also

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<sup>17</sup> *ibid* 17.

<sup>18</sup> *ibid* 19.

<sup>19</sup> See the opinion no JUD-PL/315/2017 of the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, dated 13 November 2017, on certain provisions of the draft act on the Supreme Court of Poland. The opinion is available in English online <[https://legislationline.org/sites/default/files/documents/35/FINAL%20ODIHR%20Opinion%20on%20the%20Draft%20Act%20on%20the%20Supreme%20Court%20of%20Poland\\_13Nov2017\\_ENGLISH.pdf](https://legislationline.org/sites/default/files/documents/35/FINAL%20ODIHR%20Opinion%20on%20the%20Draft%20Act%20on%20the%20Supreme%20Court%20of%20Poland_13Nov2017_ENGLISH.pdf)> accessed 26 January 2024.

<sup>20</sup> See the opinion no 904/2017 of the Venice Commission on the draft act amending the act on the National Council of the Judiciary and on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organization of common courts. The opinion is available in English online <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e)> accessed 26 January 2024.

<sup>21</sup> See Commission Recommendation (EU) 2018.103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 (OJ EU L of 23 January 2018.).

<sup>22</sup> See commented judgement, § 235.

referred to as its grounds, are further distinguished. Pursuant to Article 89 § 1 of the Act of 8 December 2017 on the Supreme Court,<sup>23</sup> the substantive conditions for the admissibility of an extraordinary complaint, comprise the general (functional) condition of the need to ensure compliance of the contested decision with the principle of a democratic state ruled by law and implementing the principles of social justice, and three special conditions:

- 1) infringement by the contested decision of the principles or rights and freedoms of human and citizen, enshrined in the Constitution of the Republic of Poland,
- 2) gross infringement of law by the contested decision through its misinterpretation or misapplication, and
- 3) obvious contradiction between the court findings and the evidence collected in the case.

For the extraordinary complaint to be admissible, the general condition and one of the special conditions must be cumulatively met.

The analysis of the commented judgment leads to the conclusion that the ECHR recognized, although only partially, the nature of Article 2 of the Polish Constitution, to which the functional condition of the extraordinary complaint refers, indicating that the concept of ‘social justice’ is general and unclear, and thus creates the possibility of its broad interpretation in legal proceedings.<sup>24</sup> Beyond the scope of the ECHR’s considerations, however, remained the concept of a ‘democratic state of law’, which is also an ill-defined phrase, as well as the analysis of the special conditions of Article 89 § 1 points 1-2 of the Act on the Supreme Court.

In order to determine the nature of the functional condition of the extraordinary complaint, it is necessary to reconstruct the content scope of the standard of review, the carrier of which is the principle of a democratic state ruled by law and implementing the principles of social justice, formulated in Article 2 of the Polish Constitution. Jurisprudence and doctrine have not yet developed an unambiguous definition or any comprehensive approach to the principle of the democratic state ruled by law due to its wide flexibility and open interpretation formula. Some authors even indicate that it is a principle of a dynamic nature, which at no time obtains a metrified, final shape.<sup>25</sup> This is because both the phrase ‘democratic state ruled by law’ and the phrase ‘social justice’ are undefined, while Article 2

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<sup>23</sup> Act of 8 December 2017 on the Supreme Court (consolidated text, Journal of Laws of 2023, item 1093, as amended; hereinafter referred to as the: ‘Act on the Supreme Court’).

<sup>24</sup> See the commented judgement, § 235.

<sup>25</sup> Tatiana Chauvin, Jan Winczorek, Piotr Winczorek, *Wprowadzenie klauzuli państwa prawnego do porządku konstytucyjnego Rzeczypospolitej Polskiej in Zasada demokratycznego państwa prawnego w Konstytucji RP*, Sławomira Wronkowska (ed) (Warsaw 2006), 16. Piotr Tuleja, *Zastane pojęcie państwa prawnego in Zasada demokratycznego państwa prawnego w Konstytucji RP*, Sławomira Wronkowska (ed) (Warsaw 2006) 63.

of the Polish Constitution has the character of a provision referring to the concept (model) of the state, which the legislator has recognized as a certain type of political standard.<sup>26</sup> At the same time, it is an indefinite reference, as the concept of the state ruled by law is constantly changing due to the political, economic, and social transformations ongoing in the state, which is emphasized in the discussion conducted between representatives of legal studies, politicians, and the judiciary.<sup>27</sup>

Thus, the principle of the democratic state ruled by law is a legal construct of a complex, yet open-ended nature, which has certain consequences for the reconstruction of its content scope. First, this principle remains open to interpretation by the entities applying the Polish Constitution, including the Supreme Court examining extraordinary complaints. Therefore, due to the dynamic nature of this principle, it is not possible to precisely define its content scope, as it is subject to a continuous process of formation. Hence, the content of the principle of the democratic state ruled by law is not unambiguously defined, although it is possible to indicate within its framework certain elements that are constant and form the so-called hard core of this principle. However, still, there remains a large scope of vagueness, which results from the use of undefined phrases in Article 2 of the Polish Constitution. As rightly noted by the ECHR, this opens the way for arbitrary use of extraordinary complaint in the Polish legal system.<sup>28</sup> Therefore, a legal provision formulating a functional condition of extraordinary complaint does not satisfy the requirements of the Convention for the quality of law, since the conditions for the admissibility of extraordinary remedies should be precisely formulated.

It seems that also the special conditions of the extraordinary complaint have not been adequately concretized, which is argued in the Polish legal science<sup>29</sup> but has not been raised by the ECHR in the judgment under comment. Indeed, the ambiguity of the expression ‘a principle laid down in the Polish Constitution’ as well as the use of an evaluative phrase of an estimative nature, such as ‘gross violation of the law’ leaves a wide discretion for the interpretation of the special conditions of the extraordinary complaint set forth in Article 89 § 1(1) and (2) of the Act on the Supreme Court.

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<sup>26</sup> Sławomira Wronkowska, *Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej) in Zasada demokratycznego państwa prawnego w Konstytucji RP*, Sławomira Wronkowska (ed) (Warsaw 2006) 103-104. The Constitutional Tribunal in its judgment of 20 November 2022, case no K 41/02, OTK-A 2002, No 6, item 83, pointed out that Article 2 of the Polish Constitution resolves the model of the state, defining it as a ‘democratic legal state implementing the principles of social justice’.

<sup>27</sup> Sławomira Wronkowska, *Charakter prawny klauzuli...*, 105.

<sup>28</sup> See the commented judgement, § 235.

<sup>29</sup> See among others, Bartosz Wyżykowski, *Skarga nadzwyczajna w postępowaniu cywilnym – wybrane zagadnienia* (Studia Prawa Publicznego 2018) No 4(24), 114-115; Oktawian Nawrot, Krzysztof Olszak, *Rażące naruszenie prawa jako przesłanka skargi nadzwyczajnej* (Prawo i Więź 2023) No 2, 334; Aldona Domańska, *Czy skarga nadzwyczajna do Sądu Najwyższego spełnia swoje cele?* (Acta Universitatis Lodziensis. Folia Iuridica 2020) No 93, 111-113.

In turn, the ECHR analyzed in detail the special condition of Article 89 § 1(3) of the Act on the Supreme Court, highlighting that it allows to use the extraordinary complaint as an ‘ordinary appeal in disguise’, as it creates the possibility for the Supreme Court to reconsider the facts of the case. This conclusion should be shared, as *de facto* the extraordinary complaint creates a third instance in the course of proceedings and allows triple determination of the facts, which leads to the prolongation of the proceedings and promotes its protraction, while not guaranteeing a better clarification of the facts.<sup>30</sup> Most of all, it also violates the principle of legal certainty and *res judicata*. According to ECHR case law, the principle of legal certainty is manifested, inter alia, in the requirement that final judicial decisions should not be questioned, which serves to ensure the stability of the judiciary and build the confidence of citizens in the state.<sup>31</sup> Consequently, the extraordinary review of final judicial decisions should be exceptional, it cannot serve solely to reconsider the case but should be justified by serious defects of the judgment.<sup>32</sup> The ECHR did not find such defects in the discussed case and indicated that there were no circumstances justifying a departure from the principle of *res judicata*.<sup>33</sup>

## 2. TIME LIMITS FOR LODGING THE EXTRAORDINARY COMPLAINT

The institution of the extraordinary complaint was also found by the ECHR to be incompatible with the above-mentioned principles of legal certainty and *res judicata* because of the time limits for lodging this remedy. According to Article 89 § 3 of the Act on the Supreme Court, the general time limit for lodging the extraordinary complaint is five years from the date on which the decision appealed against has become final and, if a cassation appeal has been lodged against that decision, within one year from the date of its examination.<sup>34</sup> At the same time, it should be noted that Article 115 of the Act on the Supreme Court, which is a transitional rule, indicates that within 6 years from the date of entry into force of this Act, the extraordinary complaint may be lodged by the Prose-

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<sup>30</sup> Tadeusz Zembrzuski, *Skarga nadzwyczajna w polskim postepowaniu cywilnym* (Państwo i Prawo 2019) No 6, 130.

<sup>31</sup> See the judgement of European Court of Human Rights of 23 January 2001, *Brumărescu v Romania*, application no 28342/95, HUDOC, § 61; and the judgement of European Court of Human Rights of 12 March 2019, *Guðmundur Andri Ástráðsson v Iceland*, application no 26374/18, HUDOC, § 238.

<sup>32</sup> See the judgement of European Court of Human Rights of 6 July 2021, *Tığrak v Turkey*, application no 70306/10, HUDOC, § 48.

<sup>33</sup> See the commented judgement, § 255.

<sup>34</sup> In criminal proceedings the extraordinary complaint shall be inadmissible to allow an extraordinary complaint to the detriment of the defendant if it is lodged after one year from the date on which the decision has become final and, if a cassation appeal or a cassation has been lodged against that decision, after six months from the date of its examination.

cutor General and the Polish Commissioner for Human Rights against final decisions terminating proceedings in cases that became final after 17 October 1997 – i.e. after the date of entry into force of the Polish Constitution, but before the entry into force of this Act, i.e. before 3 April 2018. This means that through the extraordinary complaint, until 3 April 2024, on the initiative of the Prosecutor General and the Polish Commissioner for Human Rights, any final decision of a common and military court issued within the last 25 years could be challenged, provided that it became final before the entry into force of the Act introducing the extraordinary complaint and after the entry into force of the Polish Constitution.

In the commented judgment, the ECHR held the view that the exception provided for in the transitional provision is incompatible with the requirements of the rule of law, in particular, with the principles of legal certainty, *res judicata*, and foreseeability of the law.<sup>35</sup> In fact, the power provided by this provision was established retrospectively, which created a significant risk of destabilizing legal affairs. Indeed, it should be noted that lodging the extraordinary complaint can lead to far-reaching, adverse, and often irreversible legal consequences for the parties to the proceedings.

Therefore, such a solution should be assessed in an unequivocally critical manner.<sup>36</sup> The institution of the extraordinary complaint implies the need to weigh certain general values of the legal system – on the one hand, the fairness of judicial decisions, and on the other hand, their stability, and the related value of legal security. It should be recognized that by introducing the extraordinary complaint, the legislator assumed the primacy of the principle of justice, understood in this context as the issuance of a judgment free of defects, consistent with the law, as well as based on correctly collected and verified evidence. Thus, the Polish legislator took the position that the stability of final judicial judgments cannot be defended at all costs. However, this position has led to the introduction of a kind of insecurity about the stability of final judicial decisions since the legal protection granted under them is, in fact, temporary.<sup>37</sup>

### 3. POSSIBILITY OF POLITICAL INSTRUMENTALIZATION OF THE EXTRAORDINARY COMPLAINT

In its considerations, the ECHR also noticed the possibility of political instrumentalization of the extraordinary complaint<sup>38</sup> for two main reasons – firstly, by

<sup>35</sup> See the commented judgement, § 237.

<sup>36</sup> This solution is also criticized in Polish literature. See Tadeusz Zembrzuski, *Skarga nadzwyczajna...*, 132; Tadeusz Eryciński, Karol Weitz, *Skarga nadzwyczajna w sprawach cywilnych* (Przegląd Sądowy 2019) No 2, 12-13; Mateusz Radajewski, *Skarga nadzwyczajna (wybrane zagadnienia)* (Państwo i Prawo 2020) no 3, 76.

<sup>37</sup> Tadeusz Zembrzuski, *Skarga nadzwyczajna...*, 132.

<sup>38</sup> See the commented judgement, § 231.

entrusting the right to lodge this remedy to the Prosecutor General, who holds the office of Minister of Justice in the Polish legal system, and secondly, by entrusting exclusive jurisdiction to examine extraordinary complaints to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which does not constitute an ‘independent and impartial court established by law’ in the light of ECHR’s judicature.

Regarding the first of the stated reasons, it should be emphasized that from 2015 to 2023, the office of the Prosecutor General was continuously held by Zbigniew Ziobro – the president of the party ‘Solidary Poland’ (pol. *Solidarna Polska*), which formed the ruling government coalition during that period. As a Minister of Justice, he was responsible for the widely criticized reform of the judiciary in Poland, including the reform of the Supreme Court in 2017 and the introduction of the institution of extraordinary complaint into the Polish legal system. According to statistics, which are also presented in the commented judgement of the ECHR,<sup>39</sup> between 2018 and 2023, the Prosecutor General showed the highest activity in challenging judicial decisions with the extraordinary complaint among all entities entitled to lodge it.<sup>40</sup> However, cases in which the Prosecutor General brought the extraordinary complaint during this period often had a political context. Among them, one can generally distinguish cases of an ideological nature (e.g. cases involving the LGBT community, cases concerning marches of nationalist groups), cases of political supporters of the ruling parties, brought in their favor (e.g. the case of journalists of Public Television in Poland – Magdalena Ogórek and Rafał Ziemkiewicz),<sup>41</sup> and cases of political opponents of Zbigniew Ziobro, brought against them (e.g. commented case of Lech Wałęsa or the case of Waldemar Żurek).<sup>42</sup>

Consequently, the possibility of political instrumentalization of the extraordinary complaint is confirmed not only by the case of Lech Wałęsa but in general by the past practice of Zbigniew Ziobro, who served as Prosecutor General until 2023, in the selection of cases in which he lodged the extraordinary complaint. Its analysis leads to the conclusion that the extraordinary complaint can be used as a legal tool of political supervision over judicial decisions, used for the implemen-

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<sup>39</sup> See the commented judgement, § 48 and 228.

<sup>40</sup> I have presented statistics in this regard with Magdalena Wrzałik based on information obtained through access to public information. See Aleksandra Szydzik, Magdalena Wrzałik, *Legitymacja Prokuratora Generalnego do wniesienia skargi nadzwyczajnej – rozważania na tle spraw wybranych* (Gubernaculum et Administratio 2024) No 1(29), vol 2, 204 <<https://czasopisma.ujd.edu.pl/index.php/GeT/issue/view/185/457>> accessed 25 September 2024.

<sup>41</sup> See the decision of the Supreme Court of 18 August 2023, II NSNk 23/23, LEX no 3594066.

<sup>42</sup> Most of the mentioned cases have been discussed in the literature. See Aleksandra Szydzik, Magdalena Wrzałik, *Legitymacja Prokuratora Generalnego do wniesienia skargi nadzwyczajnej – rozważania na tle spraw wybranych* (Gubernaculum et Administratio 2024) No 1(29), vol 2, 207-213 <<https://czasopisma.ujd.edu.pl/index.php/GeT/issue/view/185/457>> accessed 25 September 2024.

tation of the views of the Minister of Justice. This was accurately stated by the ECHR, which indicated that ‘it is one thing to hold strong and hostile opinions on one’s political opponents yet another to pursue those opinions through the state judicial mechanism, using one’s exceptional statutory powers to challenge the finality of an unfavorable judgment in the case of a person who is closely related politically’.<sup>43</sup>

Consequently, it should be concluded that the Prosecutor General, while holding the office of Minister of Justice, is a politically involved entity, as he represents certain views and pursues an agreed political agenda. Therefore, *de lege ferenda* postulate to deprive the Prosecutor General of the right to lodge the extraordinary complaint – at least as long as the office of the Prosecutor General is combined with the office of the Minister of Justice<sup>44</sup> – should be considered as desired. However, it is worth noting that in January 2024, the current Minister of Justice – Adam Bodnar, presented a draft of the act providing the separation of these offices.<sup>45</sup> This may help to partially resolve this problematic aspect of the functioning of the extraordinary complaint provided that the President of the Republic of Poland, who is politically connected to the previous ruling government, will be willing to sign this act.

Referring to the second of the reasons identified by the ECHR that generates the risk of political instrumentalization of the extraordinary complaint, it should be noted that the status of the Chamber for Extraordinary Review and Public Affairs is questioned by both domestic<sup>46</sup> and international<sup>47</sup> justice. This is because the Chamber is composed entirely of judges appointed with the participation of the National Judicial Council, which does not provide sufficient guarantee

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<sup>43</sup> See the commented judgement, § 253.

<sup>44</sup> A similar postulate is also made by Jarosław Stasiak, who indicates that the right of the Prosecutor General to lodge an extraordinary complaint should be left only with the separation of the offices of the Prosecutor General and the Minister of Justice due to the possibility of instrumental use of the extraordinary complaint for political purposes. Jarosław Stasiak, *Skarga nadzwyczajna w postępowaniu cywilnym* (Warsaw 2020) 89.

<sup>45</sup> This commentary considers legal situation as of 31 January 2024.

<sup>46</sup> See the resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labor and Social Insurance Chamber of the Supreme Court of 23 January 2020, case no BSA I-4110-1/20, OSNKW 2020, No 2, item 7. The resolution is available in English on the website of the Polish Supreme Court at <[https://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1\\_20\\_English.pdf](https://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf)> accessed 26 January 2024.

<sup>47</sup> In this context, it is worth to mention the judgment of the European Court of Human Rights of 8 November 2021, applications no 49868/19 and no 57511/19, *Dolińska-Ficek and Ozimek v Poland*, HUDOC, in which it was indicated that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court is not an independent and impartial court established by law within the meaning of Article 6 § 1 of the Convention. For the same reason, the Court of Justice of the European Union refused to answer the preliminary ruling made by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. See judgment of the Court of Justice of the European Union of 21 December 2023, *LG v Krajowa Rada Sądownictwa*, C-718/21, ECLI:EU:C:2023:1015.

of independence from the legislative and executive powers. Consequently, all the judges sitting in this Chamber are considered to have been appointed in a defective procedure, which precludes them from being considered as an ‘independent and impartial court established by law’ within the meaning of Article 6(1) of the Convention.

At the same time, one should note that the Chamber of Extraordinary Review and Public Affairs has the exclusive jurisdiction to examine extraordinary complaints, which in fact leads to a state of affairs in which the consideration of an appeal that is incompatible with the standards of fair trial and the principle of legal certainty under Article 6(1) of the Convention has been entrusted with a body that is not considered as a court within the meaning of this provision.<sup>48</sup> This, among other reasons, determined the application of the pilot-judgment procedure by the ECHR, as the current situation involves a cumulative violation of Article 6(1) of the Convention. The ECHR stated that the described violations are systemic and the functioning of the extraordinary complaint in its current form should be considered a dysfunction that may result in systematic violations of Article 6(1) of the Convention, and consequently cause similar complaints to be lodged in the future.

#### IV. CONCLUSIONS

The conclusions of the ECHR arising from the judgement under comment should be generally shared. Extraordinary complaint is a flawed institution, and its legal construction as well as the manner in which it has been applied in practice so far should be criticized. Although the Polish legal system needs an instrument that would allow for the control of the constitutionality of judicial decisions, such an instrument should be constructed in accordance with the generally accepted standards of the rule of law and democracy. Therefore, the continued functioning of the extraordinary complaint in the Polish legal system requires comprehensive reform.

Analysis of the ECHR judgment leads to the conclusion that the defectiveness of the extraordinary complaint is multifaceted, and the violation of Article 6(1) of the Convention identified in the judgment under comment should be considered as a result of the sum of the defects of this institution. Indeed, the reservations raised against the extraordinary complaint concern both theoretical and practical aspects. Considering the application of the pilot-judgment procedure in the case of *Wałęsa v Poland*, as well as the indication by the ECHR of the general measures that should be taken with regard to the systemic problem, the analysis allows to formulate the following *de lege ferenda* postulates:

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<sup>48</sup> See the commented judgement, § 324.

- a. the substantive conditions of the extraordinary complaint, particularly the functional condition of the extraordinary complaint, should be precisely formulated in order to minimize the possibility of their arbitrary interpretation,
- b. the special condition of the extraordinary complaint, formulated in Article 89 § 1(3) of the Act on the Supreme Court, should be removed, as it allows for a re-examination of the facts of the case,
- c. the Prosecutor General should be deprived of the right to lodge an extraordinary complaint if in the future, the office will continue to be merged with the office of the Minister of Justice.

It should be reserved that the above *de lege ferenda* postulates do not exhaust the issue of the defectiveness of the extraordinary complaint, but only constitute a proposal to amend it in several key aspects. Therefore, before the possible reform of the extraordinary complaint, it is necessary to undertake a deeper, systemic reflection on this legal institution. In any case, however, the reform of the extraordinary complaint should be of a comprehensive nature, since its defectiveness cannot be repealed by introducing amendments to a limited extent. For example, although depriving the Prosecutor General of the right to file an extraordinary complaint would reduce the possibility of political instrumentalization of this institution, it would still be necessary to amend other aspects of the functioning of the extraordinary complaint, regarding, e.g. its substantive and temporal scope or the conditions for its admissibility, to remedy the violation of Article 6(1) of the Convention.

Despite the general defectiveness of the extraordinary complaint, it is worth making the effort to reform this institution to provide fuller protection of the Constitution of the Republic of Poland, in particular, constitutional rights and freedoms. Due to the narrow model of the constitutional complaint, only fragmentary constitutional protection is provided in the Polish legal system, as this institution allows for the control of the constitutionality of the law but not judicial decisions. As Piotr Tuleja points out, this results from the incompatibility of the substantive and procedural dimensions of the protection of rights in the Polish legal order, in which the means of protection have been strictly divided into those that are directed against acts of lawmaking and those that are directed against acts of law application.<sup>49</sup> As a result, effective protection of individual rights is sometimes only possible before the ECHR, and not at the domestic level.

The insufficient scope of constitutional protection, in particular, in the area of application and interpretation of law, is confirmed by the allegations raised in extraordinary complaints. For this reason, keeping the extraordinary complaint in the Polish legal system, subject to its prior reform, should be considered desir-

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<sup>49</sup> Piotr Tuleja, *Geneza, rozwój i upadek sądownictwa konstytucyjnego* (Państwo i Prawo 2022) No 10, 267.

able – at least until the political and legal conditions allow for the amendment of the Constitution of the Republic of Poland and the adoption of a broad model of constitutional complaint, based on the solutions existing in Germany, Spain or the Czech Republic.

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