Warsaw, 10 January 2023

OIA./2023/PSP

The European Court of Human Rights
Mr. Marko Bošnjak
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Wałęsa v. Poland*
Application no. 50849/21

Pursuant to the letter of Ms Renata Degener, the Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 16 December 2022 granting us leave to make written submission to the Court by 11 January 2023, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Lech Wałęsa v. Poland (application no. 50849/21).

On behalf of the Helsinki Foundation for Human Rights,

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Warsaw, 11 January 2023

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

Wałęsa v. Poland

Application no. 50849/21

EXECUTIVE SUMMARY:

- The case of *Wałęsa v. Poland* concerns, among others, the mechanism of extraordinary appeal which was introduced to the Polish legal system in 2017. The extraordinary appeal allows to challenge courts' judgments which became final even many years ago what may be perceived as threatening the principle of legal certainty.
- The principle of legal certainty requires that final judgments of courts are respected. Nevertheless, there may be exceptional situations where revision of final rulings would be justified.
- All extraordinary remedies must serve primarily the protection of individuals against grave injustice and not to undermine final rulings by public authorities for political reasons. For this reason, extraordinary remedies must be properly construed. In particular, such factors as grounds and time-limits for their submission, catalogue of subjects authorised for submission and character of judicial body which has a competence to consider them are of particular importance.
- The grounds for submission of extraordinary appeal to the Supreme Court are relatively vague and broad. Likewise, the time-limits are unusually long.
- Extraordinary appeal may only be brought by certain state authorities, and not parties to proceedings. In practice, majority of extraordinary appeals are submitted by the Prosecutor General, whose office is merged with the Minister of Justice.
- The Prosecutor General submitted a number of extraordinary appeals in controversial cases what may suggest that his true motivations were of political nature.
- All extraordinary appeals are considered by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court which is composed solely of judges appointed with violation of law, what was confirmed also in the final judgment of the Court.
- In the light of all these circumstances, the compliance of the mechanism of extraordinary appeal with the principle of legal certainty is doubtful.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights ("HFHR"), pursuant to the leave granted by the President of the Section on 16 December 2022.

2. The present written comments are divided into two sections (excluding introduction and conclusions). In the first part we address the problem of the relations between the concept of extraordinary remedies and the principle of legal certainty. In the second part we discuss controversies around the mechanism of extraordinary appeal in Poland.

II. EXTRAORDINARY REMEDIES AND THE PRINCIPLE OF LEGAL CERTAINTY

3. While Article 4 of Protocol no. 7 encompasses the principle of legal certainty (*non bis in idem*) only in criminal cases, it is clear that such guarantee must also be secured in civil cases. As the Court aptly noted, "One of the fundamental aspects of the rule of law is the

principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question" (*Brumarescu v. Romania* [GC], 28 October 1999, no. 28342/95, § 61). In *Ástráðsson v. Iceland* the Court explained that this "aspect of legal certainty presupposes, in general, respect for the principle of *res judicata*, which, by safeguarding the finality of judgments and the rights of the parties to the domestic proceedings – including any persons involved as victims – serves to ensure the stability of the judicial system and contributes to public confidence in the courts" (*Guðmundur Andri Ástráðsson v. Iceland* [GC], 1 December 2020, no. 26374/18, § 238). At the same time, the Court underlines that the protection of finality of judgments is not absolute and some exceptions to this principle may be permitted provided that they are justified "by circumstances of a substantial and compelling character, such as correction of fundamental defects or miscarriage of justice" (*OOO Link Oil SPB v. Russia* [dec.], 25 June 2009, no. 42600/05).

4. The HFHR fully agrees with the approach of the Court. As a rule, final judgments of courts should be respected and enforced and their binding force should not be challenged. Otherwise, individuals would be put in a situation of legal uncertainty and the effectiveness of their right to court would be completely illusory. However, the principle of legal certainty is not absolute and in some circumstances it may be limited in favour of other legal values of equal importance for the rule of law. Among such values are the principle of legality, which obliges all state authorities to act in accordance with law, or the necessity to protect human rights. Therefore, introduction of extraordinary remedies aimed at challenging final judgments of courts is not *per se* inconsistent with the principle of rule of law. However, very design of such measures, as well as their practical operation, must ensure an appropriate balance of conflicting interests and values. In particular, extraordinary remedies must serve primarily the protection of individuals against grave injustice and not to undermine final rulings by public authorities for political reasons.

5. The question is, therefore, how to distinguish permissible and impermissible models of extraordinary remedies. In the HFHR opinion, following factors may be useful in making such assessments.

6. One of such relevant factors is the grounds on which given remedy may be submitted. First of all, such grounds must be framed sufficiently precisely to avoid arbitrariness in revision of final court judgments. Second, they must be limited to particularly serious violations of substantive or procedural laws. The Court underlines that extraordinary review "should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination" (*Morreira Ferreira v. Portugal [no. 2]* [GC], 11 July 2017, no. 19867/12, § 62). Likewise, the mere disagreement of State authorities with a final judgment should not be a ground for reopening of the proceedings (*Agrokompleks v. Ukraine*, 6 October 2011, no. 23465/03, § 151). In the HFHR opinion, the required level of seriousness and precision of grounds for revision of final judgment may depend on the type of case. In the civil proceedings the grounds for revision of final judgment must be limited in order to ensure legal certainty and proper balance between rights of both parties. In the criminal proceedings – as it is reflected by Article 4(2) of Protocol no. 7 – the strictest requirements should concern revision of final judgments to the detriment of defendants. However, the revision of final judgments to the benefit of convict does not have to be limited to the same extent as the public interest cannot justify upholding final judgment issued with grave violation of the right of defence or convicting a person who, in the light of newly discovered evidence, may be innocent.

7. Yet another crucial factor is the time-limits for submission of extraordinary remedy. As a rule, the more time that has passed since a ruling was made, the more important it will

be to respect the legal certainty and therefore the more difficult it should be to challenge it. In the Court's case law concerning the so-called "supervisory revision" in Russia, the question of lack of adequate time-limits was one the most important reasons for violation of Article 6. At first, the law did not provide any time-limit for submitting an application for supervisory revision (*Ryabakh v. Russia*, 24 July 2003, no. 52854/99, § 54). Subsequently, the law was changed and the one year deadline was introduced. However, the rules concerning time-limits were so laxed, that their practical effectiveness was illusory (see e.g. *Sobelin and others v. Russia*, 3 May 2007, nos. 30672/03 et al., §§ 56-58; *Prisyazhnikova and Dolgopolov v. Russia*, 28 September 2006, no. 30672/03, § 25; *Kulkov and others v. Russia*, 8 January 2009, nos. 25114/03 et al., §§ 30-31). Once again, the length of time-limit for submitting an extraordinary remedy may depend on the type of case.

8. The catalogue of subjects authorised to bring an extraordinary remedy is also important. In this regard, in the HFHR opinion the principle of legal certainty could be violated if a court could revise its own judgment *ex officio* or even upon the request of president of court. In *Ryabakh v. Russia*, in which the final judgment was set aside upon the motion of the court's president, the Court held that: "the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official" (§ 56). The most logical solution would be therefore to give a right to submit such remedy to parties of the proceedings. However, in the HFHR opinion it is not completely excluded to grant such right to certain public bodies in addition to parties to proceedings or even, for the sake of protection of legal certainty, instead of them. Nevertheless, states may not have an absolute discretion in this regard. The principle of the rule of law would be violated if final judgments of courts could be challenged by political authorities, especially if grounds and deadlines for submission of extraordinary remedies would not be sufficiently precise to prevent arbitrariness in this area. For in this situation an extraordinary remedy could be transformed from an exceptional measure aimed at protection of individuals against grave injustice into a tool of political supervision of the executive over judgments of courts. However, competence of independent state organs, especially such as Ombudsman, whose main tasks include protection of fundamental rights of individuals, to bring extraordinary remedies in benefit of individuals and public interest would raise less controversies.

9. It is obvious that the character of judicial authority competent to consider an extraordinary remedy is also important from the perspective of legal certainty. If a court competent to consider a motion for revision of final judgment is composed of judges whose independence, impartiality or legality of appointment is doubtful, the abovementioned risk of undermining the finality of judgments for political reasons becomes even more likely. There are therefore clear links between the right to an independent and impartial tribunal established by law and the right not to have a final judicial decision called into question.

10. Finally, while assessing the character of given extraordinary remedy, not only a mere wording of domestic provisions is important, but also their practical application. The Court has always underlined "the need to look beyond appearances and the language used and to concentrate on the realities of the situation" (*Blokhin v. Russia* [GC], 23 March 2016, no. 47152/06, § 180). It is therefore important to take into account whether, for example, the legal grounds for revision of final judgments are interpreted in a foreseeable way. Likewise, the practice of the use of extraordinary remedies by public authorities to question judgments which are, for some reasons, "politically inconvenient", may also raise concerns.

III. LEGAL CERTAINTY AND THE EXTRAORDINARY APPEAL TO THE SUPREME COURT

11. Before we move to the analysis of the legal framework regulating the extraordinary appeal and its practical functioning, it is worth to remind that this remedy was introduced to the Polish legal system in the Act of 8 December 2017 on the Supreme Court (hereinafter: ASC). The need for introduction of such measure was justified by authors of the bill as following: "One of the main motives of carrying out a reform of judiciary, the Supreme Court included, is very low confidence of citizens in the justice system. Various circumstances have contributed to this state of affairs, but in particular a series of rulings that not only raise serious legal doubts, but also grossly violate the principles stemming from the principle of justice. [...] The aim of the author of the bill is to create a legal institution, which will restore elementary legal order compliant with the principle of social justice"[1]. The ASC provided also many other controversial regulations including establishment of the Disciplinary Chamber and lowering the mandatory retirement age of judges of the Supreme Court. Moreover, on the same day the Sejm adopted the Act amending the Act on the National Council of Judiciary and certain other acts, which changed the model of election of judicial members of the National Council of Judiciary (hereinafter: NCJ) and prematurely terminated term of office of serving members of the NCJ. All these changes led to multiple violations of the ECHR, as declared in final judgments Court (in cases of *Reczkowicz v. Poland*, 22 June 2021, no. 43447/19; *Dolińska-Ficek and Ozimek v. Poland*, 8 November 2021, nos. 49868/18 et al.; *Advance Pharma sp. z o.o. v. Poland*, 3 February 2022, no. 1469/20; *Grzęda v. Poland [GC]*, 15 March 2022, no. 43572/18).

12. As already mentioned, one of the factors relevant for the assessment of whether an extraordinary measure complies with the principle of legal certainty is the grounds on which given remedy may be submitted. According to Article 89 of the ASC, the 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 appeals"[2]. When compared to other extraordinary remedies in the Polish legal system, grounds for submission of extraordinary appeal differ in several respects.

13. Firstly, in addition to detailed grounds (in the subparagraphs 1-3), the general ground for submission of extraordinary appeal is the necessity to "ensure compliance with the principle of a democratic State governed by the rule of law and implementing the principles of social justice". The notion of "democratic State governed by the rule of law and implementing the principles of social justice" is provided in Article 2 of the Constitution of Poland and was the subject of an extensive case law of the Constitutional Tribunal. Nevertheless, as the Venice Commission aptly pointed out "this term is open to a large discretion in the interpretation in the legal proceedings. When it comes to the conditions for overturning final and binding judgments, such unspecific criteria should

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[1] Justification of a bill of 26 September 2017, VIII Term of Office of Sejm, No. 2003, p. 8, https://orka.sejm.gov.pl/Druki8ka.nsf/0/5AB89A44A6408C3CC12581D800339FED/%24File/2003.pdf.

[2] Translation of provisions regulating extraordinary appeal were provided in the communication of case *Wałęsa v. Poland*.

not serve as a basis for decisions. The use of such criteria is against the principle of foreseeability, which is a cornerstone principle of the broader concept of the Rule of Law"[3]. The use of criterion based on the vague notion of "social justice" was criticised also by OSCE Office for Democratic Institutions and Human Rights (ODIHR): "every judgment carries with it a winning and losing party and coupled with the vague definition of the basis for instigating an extraordinary appeal, any person who feels wronged by a court judgment could potentially invoke some form of social injustice, which could then serve as the basis for relevant officials (...) to lodge an extraordinary appeal."[4]

14. Secondly, one of the detailed grounds for submission of extraordinary appeal is "an obvious contradiction between significant findings of the court and the content of evidence collected in the case". According to legal scholars, such provision "appears to be the clearest break in the hitherto existing system of extraordinary appeals. The Supreme Court ceases to be a court of law only and becomes also a court of fact".[5] And indeed, grounds for submission of other extraordinary remedies in the Polish legal system do not include the allegation of erroneous assessment of facts. As the Venice Commission pointed out, "Normally, the main function of the highest judicial instance in a country is to review cases on points of law; extraordinary review should not be an «appeal in disguise», and «the mere possibility of there being two views on the subject is not a ground for re-examination»[6]. Interpretation of evidence and establishment of facts should normally be the tasks of the first-instance courts and of the courts of appeal"[7].

15. Thirdly, yet another ground for submission of extraordinary appeal, that is violation of "the principles or freedoms and rights of a human being and a citizen laid down in the Constitution" also seems to be wide. It resembles the ground for submission of constitutional complaint to the Constitutional Tribunal, however the complaint may be lodged only against the normative act. Moreover, as a rule constitutional complaint may be based only on allegation of violation of constitutional freedoms and rights. Constitutional principles may be invoked only in conjunction with concrete freedoms and rights or, exceptionally, when they constitute source of rights and freedoms which were not directly expressed in the Constitution.[8]

16. Yet another relevant factor for the assessment of permissibility of extraordinary measures is the time-limits. The general time-limit for the submission of extraordinary appeal is 5 years from the date on which the ruling appealed against had become final. According to the Venice Commission the 5-years' time-limit is "very long by itself"[9]. And indeed, time-limits for the submission of other extraordinary remedies in Poland are usually shorter. For example, in civil proceedings parties may lodge cassation appeal within 2 months from delivery of final judgment. Time-limit for submission of cassation appeal by Prosecutor General, Commissioner for Human Rights and Commissioner for

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[3] Venice Commission, Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, CDL-AD(2017)031, § 55, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e.

[4] OSCE/ODIHR, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), § 33, https://citizensobservatory.pl/wp-content/uploads/2017/11/FINAL-ODIHR-Opinion-on-the-Draft-Act-on-the-Supreme-Court-of-Poland_13Nov2017_ENGLISH.pdf.

[5] D. Gruszecka, *Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście „wypełniania luk w systemie środków zaskarżenia"*, „Palestra" 2018, no. 9, p. 30 (translation – HFHR).

[6] *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 62, ECHR 2017 (extracts).

[7] Venice Commission, Opinion on the Draft Act..., § 56.

[8] M. Florczak-Wątor, *Komentarz do art. 79 Konstytucji RP* [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el. 2021.

[9] Venice Commission, Opinion on the Draft Act..., § 58.

Children's Rights is longer – 6 months from the day the judgment became final (or from the day of delivery of final judgment to a party). In the criminal proceedings time-limits for submission of cassation appeal are regulated differently. Parties may lodge cassation appeal within 30 days from delivery of final ruling. The law does not provide any time-limit for submission of cassation appeal by Prosecutor General, Commissioner for Human Rights and Commissioner for Children's Rights. However, it is "inadmissible to allow an extraordinary appeal to the detriment of the defendant lodged after one year from the date on which the ruling has become final". The complaint for reopening of civil proceedings may be lodged within 3 months from the day on which party became aware of existence of ground for reopening, however no later than 10 years from the moment the ruling became final (with except to situations where a party was prevented from acting or was not duly represented). The Code of Criminal Proceedings provides a one-year deadline only for submission of complaint for reopening of proceedings by the defendant on the ground that his case was heard without his presence. Moreover, it is impermissible to reopen the proceedings *ex officio* to the detriment of defendant after one year from the date on which the ruling became final. Yet another extraordinary remedy, complaint for a declaration of unlawfulness of a final ruling, may be lodged within 2 years from the day the judgment became final. Although such time-limit may seem relatively long, one should keep in mind that as a rule successful complaint does not lead to quashing of final judgment, but merely authorise complainant to sue the State for compensation of damage suffered as a result of unlawful final judgment.

17. The ASC provides several exceptions to the general 5 years rule. First of all, if a final judgment has been challenged via cassation appeal, an extraordinary appeal may be lodged within one year from the date of its examination. Second, in the context of criminal proceedings, it is "inadmissible to allow an extraordinary appeal to the detriment of the defendant lodged after one year from the date on which the ruling has become final and, if a cassation appeal has been lodged, after six months from the date of its examination". Therefore, this regulation resembles the abovementioned rules concerning submission of cassation appeals in criminal cases. Third, Article 115 of the ASC provided a temporary rule, according to which within 6 years[10] from the date of entry into force of the ASC, it is permissible to lodge extraordinary appeal against final judgments terminating proceedings that have become final after 17 October 1997. The length of such time-limit is extraordinary and, in itself, poses a serious threat to the legal certainty.

18. It is worth to note that the effects of lengthiness of time-limits are, to some extent, mitigated by the rule which provides that if "the contested ruling has had irreversible legal consequences, in particular if five years have elapsed since the date the contested decision has become final, and also if the reversal of the decision would violate the international obligations of the Republic of Poland", the Supreme Court shall not quash the challenged ruling or rule on the merits of the case, but merely declare that it was issued with violation of law. However, this rule is not absolute and the Supreme Court still may rule on the merits or refer the case for re-examination to the competent court, if "the principles or freedoms and rights of a human being and a citizen specified in the Constitution speak in favour of issuing" such decision.

19. As already mentioned, the catalogue of subjects authorised to lodge extraordinary remedy may also be relevant for the assessment of its consistency with the principle of legal certainty. The extraordinary appeal may be lodged only by competent public

[10] Originally, the provision was to be applicable for 3 years from the day of entrance into force of the ASC but in 2021 this period was extended to 6 years (see: Act of 30 March 2021 amending the Supreme Court Act, Journal of Laws 2021, item 611). The period of 6 years will expire on 3 April 2024.

authorities, that is: Prosecutor General, Commissioner for Human Rights and, only within the scope of their jurisdiction, the President of the General Counsel's Office to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the Chairman of the Financial Supervision Commission, the Financial Ombudsman, the Commissioner for Small and Medium-sized Entrepreneurs and the President of the Office of Competition and Consumer Protection. Extraordinary appeals based on the abovementioned transitional rule may be lodged only by the Prosecutor General and Commissioner for Human Rights. Therefore, extraordinary appeal may not be submitted directly by parties to the proceedings. According to the Venice Commission, "the practice of «appeals in the general interest» launched without reference to or participation by the parties, is not acceptable, because there is a risk that such appeals may focus on wrong issues, and be contrary to the best interests of the party on whose behalf the appeal was introduced"[11]. In this aspect the extraordinary appeal differs from most of other extraordinary remedies. Cassation appeal in civil proceedings, as well as in criminal proceedings may be submitted both by parties and certain competent authorities (Prosecutor General, Commissioner for Human Rights, Commissioner for Children's Rights), even though the law provides less restrictive rules for the latter. For example, in civil proceedings competent authorities may submit cassation appeal within 6 months from the day the judgment became final (parties have 2 months), while in criminal proceedings Prosecutor General and Commissioner for Human Rights may challenge via cassation appeal any final ruling, unlike parties who may challenge only final rulings punishing defendant with a deprivation of liberty without suspension (in case of cassation appeal to the benefit of defendant) or rulings acquitting defendant or discontinuing the proceedings (in case of cassation appeal to the detriment of defendant). A rare example of extraordinary remedy which may be submitted only by competent authorities (Prosecutor General and Commissioner for Human Rights – in all cases, Deputy Prosecutor General for Military Affairs – in cases falling within the jurisdiction of military courts and Commissioner for Children's Rights – in cases concerning violations of the children's rights), and not by parties to proceedings, is cassation appeal in misdemeanor proceedings. Another example in this regard is the complaint for annulation of final judgment which may be lodged only by the Prosecutor General. However, the grounds for submission of this extraordinary remedy are very narrow – it may be brought only if given ruling was issued by court with transgression of its jurisdiction because the case did not fall within the jurisdiction of Polish courts at all or the adjudication was inadmissible. Moreover, this complaint may be submitted only if the ruling cannot be set aside with the use of other remedies.

20. While assessing the personal scope of the mechanism of extraordinary appeal, one has to take into account the actual position and role of the Prosecutor General – state authority who has so far brought the largest number of extraordinary appeals[12]. The reform which entered into force in March 2016 abolished the independent office of Prosecutor General and merged this position with the Minister of Justice. The situation in which the Minister of Justice holds the position of Prosecutor General is not unprecedented in Poland – such model was in force also before 2010. However, the 2016

[11] Venice Commission, Opinion on the Draft Act..., § 59.

[12] According to article published in April 2021, the Prosecutor General submitted 265 extraordinary appeals, Commissioner for Human Rights – 44, Financial Ombudsman – 4, Commissioner for Small and Medium-sized Entrepreneurs – 1 (K. Żaczkiewicz-Zborska, *Skarga nadzwyczajna - zasada sprawiedliwości społecznej trudna do udowodnienia*, "Prawo.pl", 13 April 2021, https://www.prawo.pl/prawo/zasada-sprawiedliwosci-spolecznej-trudna-do-udowodnienia,507500.html).

reform gave the Prosecutor General more extensive powers to influence the course of concrete criminal proceedings. For this reason, the Venice Commission assessed that the model adopted in the 2016 reform "creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law"[13]. Moreover, the Minister of Justice has significant powers with regards to the organisation of judiciary. For instance, he may order an immediate break in the exercise of judicial functions by a concrete judge, delegate and revoke delegation of judges to other courts, appoint and dismiss courts' presidents and vice-presidents. Moreover, as noted by the Court itself,[14] the Minister of Justice had a strong influence on the composition of the National Council of Judiciary after the reform adopted in 2017. Of course, the Prosecutor General is authorized to submit many other extraordinary remedies as well, nevertheless his power to lodge extraordinary appeal must be analysed also in the light of other controversial aspects of this remedy discussed here.

21. As already mentioned, the character of judicial authority competent to consider an extraordinary remedy may also be important from the perspective of legal certainty. Extraordinary appeals are considered by the Chamber of Extraordinary Review and Public Affairs which is composed solely of judges appointed upon the motion of the reorganised National Council of Judiciary. In *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 appointment of judges. Irregularities in the appointment procedure and their impact on independence and impartiality of judges of the Chamber of Extraordinary Review and Public Affairs were noted also by the Court of Justice of the EU[15].

22. Finally, while assessing the character of given extraordinary remedy, its practical functioning may also be significant. Many submissions for extraordinary review concern cases of two contradictory decisions of courts on inheritance[16], lack of examination of abusive clauses in loans in CHF[17], excessive interest in consumer contracts,[18] as well as land law disputes.[19] Although at first glance these may seem like politically neutral cases, the practice[20] shows that the risk of abusing the mechanism of extraordinary appeal by the Prosecutor General for political purposes is not merely hypothetical.

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[13] 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.

[14] „According to the information now in the public domain, the NCJ members had been elected with the support of a narrow group of judges with strong ties to the executive (judges seconded to the Ministry of Justice and the presidents and vice-presidents of courts recently promoted to those offices by the Minister of Justice" – *Dolińska-Ficek and Ozimek v. Poland*, 8 November 2021, nos. 49868/19 and 57511/19, § 347).

[15] Court of Justice of the EU (Grand Chamber), 6 October 2021, Case C-487/19, *W. Ż.*

[16] E.g. decision of 26 March 2019, No. I NSNc 1/19; decision of 16 June 2020, No. I NSNc 40/19; decision of 2 December 2020, No. I NSNc 102/20; decision of 24 February 2021, No. I NSNc 132/20; decision of 16 June 2021, No. I NSNc 164/20; decision of 18 November 2021, No. I NSNc 639/21; decision of 4 August 2022, No. I NSNc 454/21.

[17] E.g. judgment of 14 May 2022, No. I NSNc 408/21; judgment of 14 May 2022, No. I NSNc 619/21; judgment of 28 June 2022, No. I NSNc 450/21; judgment of 28 June 2022, No. I NSNc 470/21; judgment of 6 July 2022, No. I NSNc 378/21. See also decisions concerning different abusive clauses: judgment of 28 October 2020, No. I NSNc 22/20; judgment of 29 June 2021, No. I NSNc 15/21; judgment of 30 June 2021, No. I NSNc 191/21.

[18] E.g. judgment of 8 May 2019, No. I NSNc 2/19; judgment of 13 May 2020, No. I NSNc 28/19; judgment of 17 July 2020, No. I NSNc 47/19.

[19] E.g. judgment of 17 June 2020, No. I NSNc 44/19; judgment of 21 April 2021, No. I NSNc 119/20.

[20] See also: B. Grabowska-Moroz, *Skarga (nad)zwyczajna. Środek przywrócenia sprawiedliwości czy zagrożenie dla praworządności?*, HFHR, Warsaw 2021, https://hfhr.pl/upload/2022/01/hfpc-skarga-nadzwyczajna-20-12.pdf.

23. One of examples of such controversial proceedings is the civil dispute of a judge, Mr. Waldemar Żurek, against his ex-wife (B.W.) concerning liability for payment of loan instalments. The courts of both instances (the District Court in B. in 2017 and the Regional Court in B. in 2018) allowed the claim for approximately 65.000 PLN. B.W. applied to the Prosecutor General to submit a petition for extraordinary review, which he did. The Supreme Court in its judgment in this case[21] held that there was obvious discrepancy between evidence and findings of facts. Therefore, the judgment of Regional Court was considered grossly unfair. The Supreme Court quashed the judgment of the Regional Court in B. and dismissed the claim of Mr. Żurek entirely. It is worth indicating that the judgment was convincingly criticised by Judge Jacek Widło in his dissenting opinion; he indicated *i.a.* that extraordinary review by the Supreme Court should not be the third instance, any potential violations of law by common courts were not gross (as in other cases submitted to the Chamber of Extraordinary Review and Public Affairs), the petition of the Prosecutor General was constructed in a defective manner. Moreover, the European Court of Human Rights in the case of *Żurek v. Poland*, App no. 39650/18, 16 June 2022, § 211 recognised the casual link between the exercise of the freedom of speech of Mr. Żurek as a spokesperson of National Council of Judiciary (up to 2018) and various measures taken by the executive power against him. The Court held that there had been a violation of Article 10 ECHR, as the interference had not been necessary in democratic society; the Court also raised doubts whether interference had been legal and had followed the legitimate aim. It can be suspected that lodging a petition for extraordinary review was also a part of the strategy aimed at intimidating Mr. Żurek (*Ibid*, § 227).

24. The similar case arose in the framework of criminal proceedings between a judge, Mr. Wojciech Łączewski (a well-known critic of the policy of the executive power in relation to judiciary), acting as a private prosecutor, and W.B., a journalist, publishing mainly in right-wing press. Both the District Court in Ł. (in 2018), and the Regional Court in Ł. (in 2019) found the defendant W.B. guilty of defamation (Article 212(2) of the Criminal Code). The sentence imposed on the defendant was 3000 PLN. As in the case of Mr. Żurek, the Supreme Court granted the petition of the Prosecutor General on the ground of obvious discrepancy between evidence and findings of facts, but remitted a case to the Regional Court in Ł. for retrial.[22]

25. The third interesting case concerned the return of a child to Belgium under 1980 Hague Convention on the Civil Aspects of International Child Abduction. A child was born in 2016 in Belgium, abducted to Poland by a Polish mother in 2017. Both Belgian (in 2017 and 2019) and Polish courts (in 2018) ordered the return of a child to a father residing in Belgium. The prosecutor's office[23] and the Commissioner for Children's Rights raised several petitions to various courts, with no effect. Because of the resistance of the factual guardians of a child, she was not returned to Belgium. The Commissioner for Citizens' Rights opined that all decisions of Polish courts are binding and extrajudicial resistance (even supported by other state organs) should be condemned[24]. In 2020, the Prosecutor General submitted a petition for extraordinary review in the return case before Polish courts, relying on the Article 72 of the Constitution of the Republic of Poland, prescribing the protection of child's interests. The Supreme Court granted a petition by means of

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[21] Judgment of 30 June 2021, No. I NSNc 79/20.

[22] Judgment of 2 September 2020, No. I NSNk 4/19.

[23] The Ministry of Justice was directly involved in a dispute, see https://www.gov.pl/web/sprawiedliwosc/interwencja-ministerstwa-sprawiedliwosci--polskie-sady-zdecyduja-o-losie-czteroletniej-dziewczynki.

[24] https://bip.brpo.gov.pl/pl/content/dziecko-nie-jest-wlasnoscia-panstwa-oswiadczenie-biura-rpo-w-sprawie-ines%C2%A0.

reformation of decision of lower instances and dismissal of a submission to return a child to Belgium.[25] The Court held that courts of lower instances had erroneously assessed the child's best interests.

27. The last example[26] is a case that has not yet been determined by the Chamber of Extraordinary Review and Public Affairs. Nevertheless, it reveals the similar pattern. In 2020, Mr. Norbert B. put 'a poster with a vulgar gesture' on the Monument to the Victims of Smolensk Tragedy 2010. He was acquitted of a charge of profaning a monument (Article 261 of the Polish Criminal Code). The ordinary courts of both instances held that actions of Mr. B. had been an exercise of freedom of expression, not aimed at victims of Smolensk Tragedy, but rather at actions of the ruling party. The Prosecutor General in his petition for the extraordinary review wrote that the monument was not a place for expressing political views[27].

IV. CONCLUSIONS

28. To conclude, the principle of legal certainty requires that final judgments of courts are respected and enforced. This does not mean that all extraordinary remedies are impermissible: there may be situations where certain important values and principles may justify departure from the principle of legal certainty and subjecting final judgment to revision. Nevertheless, to ensure the respect for the principle of the rule of law, such extraordinary remedies must be properly constructed.

29. The mechanism of extraordinary appeal to the Supreme Court may raise serious doubts as to its consistency with the principle of legal certainty. The grounds on which it may be submitted are rather broad and vague, especially when compared to other extraordinary remedies such as cassation appeal. Likewise, the time-limits are unusually long – extraordinary appeal may be used to challenge judgments which became final up to 5 years earlier (with some exceptions) and, during the transitional period, even judgments which became final as early as 1997. With regards to the personal scope of the analysed remedy, it may only be brought by certain state authorities, and not parties to proceedings. In practice, majority of extraordinary appeals are submitted by the Prosecutor General, who since the reform which entered into force in 2016, is no longer an independent body. What is more, the Prosecutor General brought a number of extraordinary appeals in circumstances which may indicate his political motivations. Finally, all extraordinary remedies are considered by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court which is composed solely of judges appointed with violation of law.

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[25] Judgment of 15 December 2021, No. I NSNc 277/21.

[26] Description is based on the basis of: https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8499075,zniewazenie-pomnik-smolenski-sad-prokuratura-umorzenie-ziobro-sn-skarga.html.

[27] *Nota bene* this view contradicts the approach of the Court in the case of *Handzhiyski v. Bulgaria*, App no. 10783/14, 6 April 2021.