The right to a fair trial and the (dys–)functionality of justice system

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Abstract
In the public discourse in Poland and in Europe, quite often, there is complaining about the dysfunctionality of justice system. The need of its correction is increasingly common element of the public discourse. An inadequate implementation of the right to fair trial due to the too high fees or excessive length of proceedings is shown. The response to this kind of evaluation of justice system should be based on the analysis of statistical data on the number of cases on the docket (case-list) in Poland and Polish law in the European Court of Human Rights and on the analysis of the existing procedural or organizational solutions.

Keywords: *human rights, justice system, the European Court of Human Rights, the right to a fair trial, irregularities in the functioning of the court.*

Introductory issues

One of the basic human rights in a democratic state is the right to court. This right is normatively reflected in instruments of international and national law. Its base in the Polish legal system are the articles 45, 77 and 78 of the Constitution of the Republic of Poland.

The number of Polish, EU and international regulations, and thus the studies concerning the right to a court is so significant that it is impossible to analyse and to discuss them all in one study. Hence, it is necessary to limit them to the selected cases related to common media and political statements indicating the dysfunction of the judiciary, such as lengthiness proceedings or too high legal fees (Dammacco 2011, pp. 102–129).

The subject of study is to analyse the law and jurisprudence through the prism of statistical data in the confrontation with the existing stereotypes regarding the functioning of justice system in Poland. The aim is to confirm or deny these often populist opinions.

The content of the right to court in the light of the provisions of law and stereotypes

The right to a court guaranteed to every person access to the courts, and fair and open examination of a case without undue delay by a competent, independent and impartial court (Kluz, Lech, *Nowoczesne…* 2015, pp. 289–296). In the light of article 6, paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms of 1950 as well as the article 10 of the Universal Declaration of Human Rights of 1948 and the article 14, paragraph 1 of the International Covenant on Civil and Political Rights of 1966, the following rights of every person connected with the right to a court may be pointed out:

- equal access to the courts and tribunals;
- fair and public examination of a case;
- obtaining legal aid;
- the possibility of compensation for the excessive length of proceedings or for the legislative tort or issuing the wrong decision.

The Polish legislator, in article 45 of the Constitution guaranteed to everyone the same level of protection of the right to a court, which is guaranteed in acts of international law. According to the Polish Constitution, everyone has the right to a fair and public trial without undue delay. The Court should be competent, impartial and independent. An important constitutional guarantee of the right to a court is a provision of the article 77, paragraph 2 of the Constitution, which states that even the Act cannot close the access to courts in an investigation alleging infringement of freedoms or rights. The legislator did not foresee any exceptions provided here – for example: the fact of martial law or the state of war.

However, these extremely precious statutory provisions intended to ensure enforceability of the right of everyone to the court may be subject to functional justice. In the scientific discussions (Dybowski, 2009, p. 89–105),

the media discussions (Deska, 2014) or in the current political discourse (Wojciechowski, 2014), and often at meetings with friends or family, we talk about the dysfunction of law, implicitly the Polish law and consequently, about the dysfunction the Polish justice system. A statement the Secretary of State in the Ministry of Justice Patryk Jaki may be an example of such public discourse. He believes that the quality of justice in Poland is very low. A negative feature of the Polish justice system, according to Deputy Minister, is the excessive length of proceedings, rare met in Europe. In his view, this phenomenon inhibits economic development. Therefore, Deputy Minister announces decisive fight against this and other dysfunctions of justice system (Patryk Jaki, 2016).

Also other statements of other participants of public and private disputes may be quoted here. Those disputes, a priori, accept the thesis about the dysfunction of the judiciary in Poland and reflect on how to improve the legal and the judiciary system in Poland? They also deliberate on the issue what these systems should be, to be fair. Is it enough to change the organizational structure of the courts, or whether it is necessary far-reaching reform of the Code of Civil Procedure? Such formulated questions, concerns or proposals contain a defined research hypothesis. They, a priori, accept the assertion of the dysfunctionality of laws (procedures) and organizational system of justice, and most often it is about inadequate protection of human rights.

The imposed, by public discourse, research hypothesis includes the assumption that the system of law and justice in Poland is inefficient and dysfunctional. It creates a negative stereotype of the judiciary in Poland, often as the needs of current policies or to justify negative emotions of entities who lost the case.

The key to this discussion is the word dysfunction. According to the dictionary of the Polish language, the term means maladjustment of something to perform specific goals, objectives, expectations and disorder or maladjustment (Słownik Języka Polskiego). Dysfunction is therefore, an evaluative term, the entirely negative, even provoking the notion of decisive action to change the designate to which it refers, in this case – the justice system.

In this perspective, it is logical to ask the question on *how to improve the justice system and the system of legal means in Poland*. Indirectly, also, to define the Polish justice system as dysfunctional, suggests the need for a discussion on the assessment of the legal situation in Poland in the field

of human rights protection and, consequently, taking the legislative actions in order to provide better and more effective protection. The discourse about the dysfunction of the law and the judiciary is of particular importance in the case of human rights to court and thus to pursue their case before an independent state office. P. Kluz states that: an effective judiciary means easy access to the courts, where the really effective legal protection can be obtained in the most convenient way, in a reasonable period of time (Kluz, Lech, Ocena pracy sędziów…2015, p. 324).

The new proposals as a remedy for dysfunction of the judiciary in Poland

As part of the repair of the judicial system in Poland, the various solutions to improve the effectiveness of enforcement of the right to court are proposed. One of them is the proposal to expand the properties of cassation, through the possibility of writing it by everyone if the lawyer does not want to write it. Another proposed new solution is to introduce a general remedy of the legal protection (general effective remedy). There is also a proposal to implement amendments to the Criminal Code, understood in this case as an instrument to identify and combat dysfunction of the legal system and judicial practice.

However, it is necessary to ask the question of whether a change in law or the introduction of new remedies is a necessary remedy for any violation of human rights? The legitimacy of this question stems from the observable in Poland fact where there is the legislator's excessive tendency to introduce new regulations in each occurrence of new social, economic or political problems. Through such practice, the legal system becomes unreadable and increasingly confusing. In addition, in Poland, the lack of professional legislative base can be seen and therefore, the regulations are of quite low quality (Zielona Księga 2013, p. 105). Over-regulation does not actually solve these problems. Rather, we should strive to create a good law also by applying the principles of interpretation of existing regulations, eliminating all the dysfunctions, especially in the functioning of the judiciary.

Without denying the need for the academic, social and political discussion about the dysfunctions of law and justice in the protection of human rights, including the right to a court, however, it is necessary to try to analyse and

evaluate the Polish system of law and justice in optics of realization of the right to court. This need stems, of course, not only from a priori grounds, but also from the static data on the number of complaints to the Polish justice, as they are brought before the European Court of Human Rights.

The effectiveness of the right to a court in the light of the ECHR's data

According to the statistical data of the European Court of Human Rights of 2015, there were 64 850 court cases in progress. In the same year, there were 40 650 new cases and among them 27 050 cases were recognize as the inadmissible complaints (Analysis of Statistics, 2015). The biggest number of complaints was brought against Russia, Ukraine and Turkey. Among all this cases, there were 22,15% of the admissible complains on the right to court based on the article 6 of the Human Right Convention of 1950. This is the biggest group pf cases. The cases concerning the use of tortures and the restrictions of the right to freedom and security were on the second place (*The ECHR*, 2015).

The number of Polish cases brought to the ECHR systematically decreases in the period of last years. In 2013, there were 3968 such cases brought to the ECHR and in 2015, there were only 2182 such cases (Analysis of statistics 2015). The significant portion of if this cases was recognized as the inadmissible complaints. Also, in this situation, the biggest number of complains was about the functioning of the justice system. In 2013, Poland was only on 12 place in Europe in terms of the number of new complaints.

The number of pending cases and the new cases brought annually before the ECHR, including cases from Poland, reflects rather high availability to justice system. Many of these issues are settled, so the state governments, including Poland, facing the threat of proceedings before the ECHR, agree to end case in a different way – it means way beneficial to the citizen. In 2013, 123 cases were completed with the settlement concluded between Poland and the complainant entities. The number of cases and the apparent downward trend indicate a fairly universal access of citizens to the courts of law in Poland, and to the ECHR.

The analysis of statistical data shows that in Europe, including in Poland, there is a fairly wide access to justice. Virtually, every citizen can join the complaint to the ECHR.

However, one should be aware that the number of cases is not always the primary criterion showing the size of the human rights violations in the country or occurring dysfunction of the legal system or the administration of justice. B. Gronowska of the Nicolaus Copernicus University in Torun, lists the following reasons or factors affecting the size of the number of cases considered by the ECHR, with which it is difficult not to agree:

- gradual increase in the number of states parties to the EC,
- greater awareness and „faith" of the community of these countries about the real possibility of obtaining redress in the ECHR
- the so-called avalanche of cases means serial, and so successive cases involving the same problem in terms of the practices or national law, the existence of which was confirmed in the first sentence of the series (Gronowska 2010, s. 12–13).

Yet, it is worth pointing to the fact that the courts in the oral motives of judgment quite often refer to the European Convention on Human Rights, even if ultimately, it is not recalled *expresis verbis* in a written justification to judgment. This practice may be evidence of the impact of the Strasbourg case, not only on the position of the Court of Justice of the European Union, but also on the national judicial authorities and it is in all possible instances (Gronowska 2010, p. 11). In this way, the model standards and human rights, developed under authority of the Council of Europe is implemented (Gronowska 2010, p. 11).

The importance of the case law of the ECHR also leads to questions about the role of this Court in the system of European and national justice. B. Gronowska of Nicolaus Copernicus University in Torun, writes that *the ECHR is the first international court for the protection of the rights and freedoms of individuals, equipped with the right to rule on individual cases, as well as on a consequence of the liability of States Parties* (Gronowska 2010, p. 10). It cannot be forgotten, however, that the ECHR acts as a subsidiary body and it does not replace the Polish justice system. Also, it does not eliminate a Polish systems of compensation, and the judgment of the ECHR cannot be the basis for the resumption of proceedings in the Polish justice system.

Equal access to the courts and tribunals

The basic criterion for assessing the functionality of the judiciary is to guarantee universal and equal access of every person to court. This law is based on the constitutional principle of equality of all citizens before the law expressed in the article 32, paragraph 1 of the Constitution. In turn, the article 31, paragraph 1 of the Constitution has guaranteed the legal protection of the freedoms and rights of every human being. In the article 42 of the Constitution there is a guarantee of the rights of defence and the presumption of innocence. The combination of these rules is a constitutional guarantee of equal access of citizens to the court. Appropriate safeguards are also present in the numerous acts and in the legal regulations based on these acts.

The amount of the fees and court costs

In practice, however, a citizen can meet with tangible barriers, which can be considered a form of limiting equal access to the courts and tribunals. The legal fees and the amount of the costs of legal representation may be one of them. In the media, it can be heard or read that the financial status of many citizens does not always allow to carry out these costs (Jaraszek 2009). But, is it real case? The answer to this question can be obtained by reference to their height and to relation to average earnings in Poland. According to the Act of 28 July 2005 on the court costs in civil cases (Journal of Laws of 2010, no. 90, item. 594), the fees for providing information, issuing copies, extracts and certificates from the National Court Register are between 5 and 60 Polish zlotys, and in the case of registration proceedings, range from 40 to 500 Polish zlotys. Higher fees are for the activities of lawyers and legal advisers done before the organs of justice in civil matters. Their amount depends on the amount of the value of the dispute. The value of the dispute above 200,000 PLN generates a rate of 7200 PLN (Regulation of the Minister of Justice of 2015).

Even, if the amount of attorneys' and solicitors' fees may be for some people too high, what happens in the poorer regions of Poland, for example in Masuria or in southern Poland, however, the Polish legislator foresaw the possibility of incurring the costs of unpaid legal assistance by the State Treasury.

When it comes to the legal fees in civil cases, they are in height from 30 to 600 Polish zlotys. In matters of the labour law and the social security, the court fee is 30 Polish zloty. These charges, in relation to the charges applied in other European Union countries are relatively low. Additionally, the legislator, on the basis of article 100, paragraph 2 of the Act of 2005 may the party, in whole or in part, exempt from court fees.

In the judicial practice, the courts often exempt from court fees (Górski, Walentynowicz 2007, p. 117 and the following). This is particularly true in penitentiary cases, where some prisoners run simultaneously 600 or more cases against the State Treasury. In most of these cases, the courts are inclined to the requests for full and not only partial exemption from court fees and for the granting of legal aid. In this perspective, it is difficult not to agree with the assertion that the practice of Polish courts is therefore extremely flexible and citizen friendly. This attitude of the courts is also apparent through practice of recovery terms and extending deadlines for filing a pleading.

From the preclusion of evidence to the judge's discretionary power in the hearing of evidence

One of the mechanisms which cause disturbances to equal access to justice may be inappropriate use of the evidence preclusion, which determine the final deadline for reporting the evidence and citing facts. This situation occurred in the case of separate proceedings in commercial cases, governed by the article 479^{1}–479^{27} of the Code of Civil Procedure (Journal of Laws of 1964, no. 43, item. 296; Górski, Mądrzak 1999, p. 250–254).

Until the amendment of the Code of Civil Procedure by the Act of 16th September 2011 on amending the Act – Code of Civil Procedure and some other acts (Journal of Laws of 2011, no. 233, item. 1381), which entered into force on 3rd May 2012 r., all the evidence in the economic proceedings had to be brought in the lawsuit or at the latest at the first meeting. Thus, the legislature limited the possibility of establishing new allegations and evidence during the proceedings in economic cases, accepting the argument according to which the entrepreneur is not only a professional in his or her action, but also in the activities before the court. This line of reasoning, of course, was wrong and introduced de facto inequality of the parties in

proceedings before the court. The other side often had an advantage through the application of professional legal assistance.

The amendment of 2011 of the Code of Civil Procedure abolished the separate proceedings in economic matters, and at the same time the article 217 of the Code of Civil Procedure was amended. Currently, in the hearing of evidence, there is the principle of concentration of evidence, which requires greater activity of the parties and at the same time the caring for their case in accordance with the principle of *vigilantibus iura sunt scriptis (*Panfil 2013, p. 108–109).

Based on the article 217, paragraph 1 of the Code of Civil Procedure, the party may bring up facts and evidence on the reasons for its conclusions or to refute the conclusions and assertions of the opposing party up to the closure of the hearing. At the same time, the discretionary power of judge was expanded. It means that the judge may reject the statements and evidence belated (article 217, paragraph 2 of the CCP), or invoked only for the unjustified prolongation of the proceedings, or if they are related to circumstances that were already sufficiently clarified during the procedure (article 217, paragraph 3 of the CCP). A Party may, therefore, request evidence before closing the case but it cannot, however, be an opportunity to bring new claims as to the facts of the case (Panfil 2013, p. 108–109).

This implies that the Polish courts does not come up too formally to the issue of evidence preclusion probative, but rather the tendency of liberal approach to this issue can be observed, which is an expression that the courts value more the investigation of material truth than the procedural formalism In addition, the courts in civil proceedings may spontaneously allow evidence from the office, acting as a party, which is also an expression of superiority of the material truth over the procedural formalism (Gruszecka 2015, p. 24–25).

Informatisation of the courts as the way to easier access to the courts

An important element of the right to court is to increase funding for the computerization of the judiciary. This process began in the 90s of the twentieth century introducing the possibility of electronic – it means the very rapid communication of the applicant with courts. Different kinds of software facilitating the communication between courts or between the court

and the parties or their representatives are implemented or they are in the implementation phase. This allows that the applicant, as well as his or her representative may learn about the progress of the case at any time, especially, they may seek the information about the dates of meetings. The plans for changes go even further, that we can even talk about the electronic evolution in the courts. It is created the opportunity to submitted the writings in the electronic form and in the near future, in the administrative courts (in the future also in the civil court) records of the proceedings will be conducted exclusively in electronic form.

Also, the access to databases, such as the electronic land registers is an important element of computerization of courts. This makes possible to update the relevant data on a regular basis. In addition, the judges during the hearings have access to the criminal records or to the National Court Register. The informatisation, carried out in this way, allows for streamlining operations and increasing the efficiency of justice (Kluz 2013, p. 367–389).

In the context of the informatization of the courts, the Act of 10th July 2015 on the amending the Act – the Civil Code, the Act – Code of Civil Procedure and some other acts (Journal of Laws of 2015, item 1311) amended the Code of Civil Procedure. The article 130, paragraph 6 of the Code of Civil Procedure introduced the possibility of submitting letters to the courts in electronic form and the electronic delivery of those documents to parties and to their representatives. Next, according to the article 9, paragraph 1, the parties and participants of the case can receive protocols and the statements in electronic form using the data communications system supporting the judicial proceedings. In the amended article 125 paragraph 2^1 was added, which introduces the possibility of an electronic copy of the document done by acting as the representative of a party who is an advocate, legal adviser, Attorney advisor or patent attorney.

The changes introduced by the 2015 amendment definitely improved performance of the judiciary in Poland, and also they brought considerable savings for the state budget. Thus, Poland implements processes which has been ongoing in the European Union for a long time (Gołaczyński 2009, p. 13 and fallowing).

The equal access to the courts could still experience the obstacles by organizational or physical restrictions of access to the courts. In the first

case, it may be the information foreclosure. In Poland, they are still area sparsely covered with the Internet access. But each year their range is smaller. In the second case, they are not known, however, the situations of physical limitations of access to the ordinary courts in Poland or the Court of Human Rights in Strasbourg caused by the public authorities in Poland. The lack of understanding of the language might appear as an obstacle in communication but as it was said, in such cases the court office establishes an interpreter. The ignorance of the law is mitigated through the legal assistance, including a new system of free legal aid, which entered into force on 1st January 2016 (Act of 5th August 2015 on free legal aid and legal education – Journal of Laws of 2015 item 1255).

Righteous and public examination of the case

The right to court implies a fair and public examination of the case, and the legislator guarantees this right in the article 45, paragraph 1 of the Constitution. Hence, the right of the court is carried out not only by allowing the applicant to submit a complaint to the court but by the substantive and fair settlement of the case.

With the right to a fair hearing we have to do if the court proceedings is conducted in accordance with the statutory deadlines – without undue delay and the case is examined by the competent, independent, impartial court. The exclusion of openness to public can only take place in exceptional cases, in certain cases, such as considerations of morality, national security, public order, protection of private life or an important public interest. These constitutional values are reflected in the provisions of Acts, but also it is the implementation of the provisions of international law, including the Convention on Human Rights and Fundamental Freedoms (Pagiela 2003, p. 125–144).

Courts in Poland use the favourable interpretation for people pursuing their rights in terms of the court proceedings, even in situations at least questionable. The well–known example of Ms. Kinga Jasiewicz can be use here. She sued the State Treasury – Regional Examination Board in Cracow in connection with her opinion on understated assessment of matriculation. Further, she argued that she was deprived of the chance of full-time studies on pharmacology. The damage suffered by her are very tangible, because

of school fees correspond to what the plaintiff must bear to attend to extramural payed studies. The case was recognized by the District Court in Cracow I C 1835/14. In this case, it seemed pretty obvious that if there is no possibility of court proceedings in the case administrative examination therefore the lawsuit should be dismissed. Meanwhile, the Regional Court in Cracow decided otherwise and the case was carried on. Finally, the court ruled that the according to the current legal situation, the complaint cannot be resolved. In order to have better understanding of solutions, it can be compared to a situation where the student pays a claim for compensation for the damage suffered in connection with the situation where, in his or her opinion, the received on master's exam grade was understated. The final assessment on the diploma deprives him or her to have the chance for a well-paid job.

The above-mentioned example is the exemplification of abuse of right to court by citizens, which is quite assiduously raised by the media, politicians and citizens as evidence of the dysfunction of the justice system.

Tort of the lawsuit or undue delay

The concept of court tort lies within the responsibility of the State Treasury for the damage caused by activities undertaken in the area of *imperium* by state or local government (article 417 of the Civil Code), or for damage caused by the issuance of a final judgment (article 417^1, paragraph 2). In this case, however, the compensation can be claimed when the victim obtains the statement about illegality of the decision in separate proceedings. Analogously, the compensation may be claimed if the judgment was given on the basis of a provision which was subsequently found to be unconstitutional. In both of these cases, the fault of functioning government official, in this case, the fault of the judge issuing the sentence, is not considered. The responsibility of the Treasury has been objectified and it is based on the premise of unlawfulness of the action and not on the fault of the official as it is defined in the article 415 of the Civil Code (Rąpała 2010, p. 46).

However, the most often mentioned dysfunction of the judiciary in Poland is the excessive length of the proceedings. Such an event occurs when there is undue delay in the proceedings. Based on statistical data prepared by the Ministry of Justice, it can be shown that in 2015, the Polish courts

received 15.15 million cases. This is a significant increase compared to 2011, when the courts received approx. 13.6 million cases. In 2015, there were 15.1 million completed cases and 2.3 million cases in progress, including those that remained from previous years. The number of cases that that, in 2015, lasted more than a year in the first instance is 13%, while the number of cases that lasted longer than three years is 1%. As it was noticed based on the analysis of statistical data, approx. 6% of the cases were a double decreed. This situation took place when the case was transferred to the courts of another property and there was registered under a different number. Despite this negative phenomenon, it is difficult to build a thesis about the excessive length of judicial proceedings in Poland.

Polish judicial practice, in regard to the protection of human rights, particularly with regard to respect for the right to court, in practice, goes further than it is provided in the European Convention on Human Rights. The proof of this is in the existence, in the Polish legal system, the emergency measure in the form of a claim for compensation for harm inflicted by the issuance of a final judgment (article 417^1, paragraph 3 of the Civil Code).

The undue delay in court proceedings may be grounds for compensation on the part of the victim. For this purpose, the Polish legislator has introduced appropriate solutions in the Act of 17th June 2004 on the complaints about the violation of the right to a trial within reasonable time. The legislature attaches to this issue a very high priority. Firstly, this is indicated by court of competent jurisdiction (the court superior to the court which carried the case) and secondly, it is indicated by the deadline for issuing a ruling (the court shall issue a decision within two months from the date of the complaint).

The complainant may request a new action in the same case after 12 months. The party whose complaint has been allowed may, in separate proceedings, claim compensation for damage resulting from the unreasonable length from the State Treasury, or jointly from the State Treasury and the bailiff. The statement granting the complaint binds the court in civil proceedings for damages or compensation, in relation to determine about the unreasonable length of proceedings. There is objectively low fee – 100 zlotys connected with submitting the claim. In addition, in order to obtain compensation for the excessive length there is no need of prejudication and this issue is examined the

court hearing the case. In addition, in accordance with the article 16 of above-mentioned Act, the party, which has not lodged a complaint on the length of proceedings in accordance with the article 5, paragraph 1, may claim – under the article 417 of the Act of 23th April 1964 – Civil Code (Journal of Laws of 1964, no. 16, item 93 with subsequent amendments) – to remedy the harm due to excessive length after the final conclusion of the proceedings as to its merit.

Conclusions

Quite often repeated in public discourse hypothesis about the various forms of dysfunction of the judiciary in Poland is not reflected in the statistics analysed above, nor in the analysis of the law and the existing normative solutions. The right to court is pretty well guaranteed by the Polish legislator.

Obviously, this does not mean that the legal protection of human rights in Poland, in the area of substantive and procedural law should not be improved. This discussion is very necessary and important if only because of the inherent and inalienable dignity of the person, which is mentioned in the article 30 of the Constitution of the Republic of Poland.

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Rozporządzenie ministra Sprawiedliwości z 22 października 2015 w sprawie ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej przez adwokata z urzędu (Dz.U 2015 poz. 1801)