ASPECTS OF COURT DELAY AND THE ROLE OF COURTS PRESIDENTS IN DELAY REDUCTION

Prof Dr Hab. Lech K. Paprzycki
President of The Supreme Court
Poland

Ladies and Gentlemen, Distinguished Participants of the Conference,

It is a great pleasure for me to take part in the Conference of Presidents of Supreme Courts of Central and Eastern Europe. I found very useful and interesting all topics for discussion chosen by organisers. However, the problem of delayed court proceedings and the role of courts' presidents in delay reductions are extremely important for judges. Therefore let me allow providing you with some information about the role of court's presidents in reduction of delays in court proceedings in Poland.

Poland was one of the first countries of the Council of Europe which introduced the law on combating delayed court proceedings. The *Law on complains about a breach of the right to a trial within a reasonable time* was adopted in 2004. It is a general measure introduced in order to implement the judgment of the European Court of Human Rights in the case of *Kudła v. Poland*, delivered in 2000.

Since September 2004 every party to the court proceedings may lodge a complaint on excessive length of such proceedings to the higher court. Under the Law of 2004 the applicant may obtain a finding of an infringement of the "reasonable-time" principle and, where appropriate, may be awarded just satisfaction in an amount not less than 2 000 Polish zloty (about 500 euro) and not exceeding 20,000 Polish zloty (about 5 000 euro). Secondly, he can request the court to instruct the court examining the merits of the case to take certain measures within a fixed time-limit and thus to accelerate the impugned proceedings.

In 2005 the European Court of Human Rights accepted that the Law of 2004 offered an effective remedy which shall be exhausted before lodging a complaint to Strasbourg Court. However, with the passing of time the application of the Law of 2004 appeared to be defective. Instead of examining the length of the whole proceedings, Polish courts looked only at their fragment, for example at the proceedings in one instance. Such limited – fragmentary assessment of the length of proceedings was not in compliance with the case-law of the European Court of Human Rights. Furthermore, no "sufficient redress" was afforded to applicants by domestic courts for a breach of the right to a hearing within a reasonable time.

On 28 March 2013 the Supreme Court (case no. III SPZP 1/13) decided that in the light of the Convention standards the principle of fragmentation of proceedings no longer had any basis. It was recognised by the Supreme Court, among other things, that the complaint under the 2004 Act, if interpreted as a measure preventing the excessive length of proceedings only at the current stage of the proceedings, was not an effective remedy within the meaning of Article 13 of the ECHR, because it created an obstacle to fully compensating a party in respect of non-pecuniary damage arising from the excessive length of proceedings. It was concluded that, if applied in the manner described above, the Act of 2004 did not fulfil its role as a legal mechanism serving to exercise the constitutional right of access to a court. Nor did it stop applications concerning the excessive length of proceedings being lodged with the Strasbourg Court but merely delayed them.

Unfortunately the ruling of the Supreme Court has not been followed by all ordinary courts. As a result of this many new complaints were lodged to the ECHR by applicants who had used the domestic remedy offered by the Act of 2004 but had not obtained adequate just satisfaction at the domestic level.

Both dysfunctions of the remedy offered by the Act of 2004 were criticised by the European Court of Human Rights in the recent pilot-judgment in the case of *Rutkowski and others v. Poland* (judgment of 7 July 2015). The European Court of Human Rights underlined that the practice of the "fragmentation of proceedings" applied by the national courts is incompatible with Article 6 § 1 of the ECHR since the reasonableness of the length of the proceedings must be assessed in the light of the

particular circumstances of the case taken as a whole. Moreover, the whole period of excessive length of proceedings shall be compensated by domestic court.

The above pilot judgment of the European Court of Human Rights concerns 594 applicants. The ECHR underlined that 650 similar cases are pending before it. The main problem in all these cases is just satisfaction for a violation of the right to a hearing within a reasonable time. All these applicants were unable to obtain it before the national courts. The direct cause for this situation is the insufficiency of compensation awarded for non-pecuniary damage for unreasonable delays at domestic level. The ECHR stressed that in consequence, despite the introduction of a domestic remedy by Poland – a complaint designed to provide "appropriate just satisfaction" for unreasonable length of judicial proceedings, the Court is continually forced to act as a substitute for the national courts and handle hundreds of repetitive cases where its only task is to award compensation which should have been obtained by using a domestic remedy.

In the pilot-judgment the Court did not indicate any specific actions to be taken by Poland or any time-limit for that purpose. The Court leaved those matters to the Committee of Ministers, a body better equipped to monitor the progress achieved in that process, to ensure that Poland adopts the necessary measures consistent with the conclusions in the judgment. However, the court suspended the examination of 594 cases annexed to the judgment only for two years from the date on which this judgment became final. Consequently, in practice, during two years Poland shall reach friendly settlements with these applicants or offer them an effective remedy at domestic level.

Coming back to the main subject of this session - what is the role of courts presidents in delay reduction - I will limit my further remarks to the role of courts' presidents regulated by the above described Act of 2004 *on complaints about a breach of the right to a trial within a reasonable time.*

Pursuant to Article 10 para 1 of the Act, the court competent to examine the complaint is obliged to inform about it the president of the court whose actions or omissions caused undue delay in proceedings, in the opinion of a complaining party. The president of the court indicated in the complaint represents the interests of the State Treasury in the proceedings conducted under the Act of 2004. This is due to

the fact that - in case of allowing the complaint - the amount of just satisfaction is paid to the applicant from the budget of the court which was found responsible for delay.

If the complaint is allowed, the court shall recommend to the court responsible for delay to take an appropriate action within the prescribed time limit. Such recommendation shall not concern the assessment of fact and of legal grounds of the case examined in delayed proceedings. Pursuant to Article 13 para 1 of the Act of 2004, the copy of a decision allowing the complaint shall be served on the president of the court responsible for delay. Once informed about allowing the complaint, the president of the court is obliged to initiate supervisory measures provided for in the Law on Common Courts Organisation. As transpires from Article 37 para. 4 of this Law, if irregularity in efficiency of court proceedings is identified, presidents of courts may make a written comment on the irregularity and request the removal of such irregularity. The judge to whom the comment refers may submit a written reservation within seven days. However, this shall not exempt the judge from the obligation to remove the results of the irregularity. The president of the court may accept the reservation or pass the case to a disciplinary court for hearing.

Pursuant to Article 37b of the Law on Common Court Organisation the president of the court is also obliged to examine the expediency of court proceedings on the permanent basis. Thus, the president of the court has two sources of information about delays in court proceedings. The first one are copies of decisions allowing complaints on delays examined in the course of proceedings conducted under the Act of 2004. The second source of information is the president's own supervision of expediency of court proceedings, conducted under Article 37b para. 1 of the Law on Common Court Organisation. Information stemming from both sources may cause initiation of disciplinary proceedings against the judge responsible for delays.

In practice unjustified delays in proceedings are quite often the reason for initiating disciplinary proceedings against a judge. In several cases the Supreme Court of Poland ruled that delay in performing duties of the judge in the course of proceedings (for example a delay in preparation of written reasons of the judgment) constitutes a disciplinary offence which should be punished by an admonition or reprimand.

Thank you very much for your attention.

ENHANCING COURT EFFICIENCY (LENGTH OF TRIALS, USE OF EXPERTS, REDUCING MULTIPLE APPEALS IN THE SAME COURT)

Prof Dr Hab. Lech K. Paprzycki
President of The Supreme Court
Poland

The problem of excessive length of judicial proceedings is also the background of this afternoon session. For this reason I would like to continue the discussion of this issue, however from another point of view. I would like to focus on specific solutions enacted recently in criminal proceedings in order to speed up examination of the case.

Let me start from some statistical information. In Poland the average duration of court proceedings at the first instance differs depending of the country region. It starts from about 3 months (in some small district courts) and finishes at the average duration of 7 months in Warsaw courts. Since 2010 the average duration of court's proceedings has decreased.

Delays in criminal cases usually occur at the following stages of proceedings: 1) at the stage of preparation to the main hearing; 2) during the trial, due to delayed preparation of experts opinions or absence of the accused; 3) after delivery of the judgment, during preparation of written reasons thereof; and 4) due to multiple appeals proceedings.

On 1 July 2015 comprehensive amendments to the Code of Criminal Procedure entered into force. Their aim was to change the model of Polish criminal trial into more adversarial. In the new model the role of a presiding judge is limited. A presiding judge is no longer responsible for searching for evidence. It is up to the parties to file evidentiary motions and to curry evidence proceedings at the trial. The court, acting *ex officio*, may introduce evidence at the trial only in exceptional circumstances.

The second purpose of these amendments was acceleration of criminal proceedings. For this reasons crucial changes were introduced to the Code of Criminal Procedure with the aim to eliminate all the above mentioned dysfunctions of criminal proceedings.

Ad 1) Let me first address the question of delays occurring at the first stage of court proceedings – before starting the main hearing.

At the first stage of court proceedings – preparation to the hearing - the most important amendment is reconsideration of the role of the so called "organisational session" of the court. Pursuant to the new Article 349 of the Code of Criminal Procedure, the president of the court is obliged to commit the case to the session before the hearing if he finds that, because of the complexity of the case, it will have to be examined at least at five dates of the hearing. At this "organisational session" of the court the parties to the proceedings are asked for their opinion as to the proposed schedule of the hearing; they are also requested to submit evidence motions or any other motions which shall be decided before the main hearing. At the session the presiding judge shall also inform the parties about scheduled dates of the hearing. Parties present at this session are not served with written summons to the hearing any more. This should shorten the time dedicated for the preparation of the main hearing.

Another important amendment concerns the participation of the accused in the hearing. The accused is no longer obliged to be present at the hearing. As a rule, it is his or her right to take part in the hearing, so the accused may decide to waive this right. The court is no longer obliged to adjourn the hearing due to absence of the accused, of course if he was properly summoned to the hearing. The new rules governing participation of the accused in the hearing are in conformity with the standing case-law of the European Court of Human Rights. The Strasbourg Court underlines that the accused may waive his right to attend the hearing, either expressly or tacitly. However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest. Furthermore, it must be shown that the accused could reasonably have foreseen what the consequences of his conduct would be (case of Hołowiński v. Poland, decision of 28 November 2006).

Ad 2) As was mentioned above, the second obstacle to efficient justice is long preparation of experts' opinions.

Unfortunately this obstacle to the efficient conduct of court proceedings has not been removed by the recent amendments to the Code of Criminal Proceedings. It is well known that waiting for an expert's opinion causes considerable delays in court proceedings. However, no effective remedies were proposed to enhance efficiency of court experts. Courts have limited competences to speed up preparation of experts' opinions. Remedies available to them are very weak. As transpires from Article 194 of the Code of Criminal Procedure, courts shall indicate the time-limit for preparation of the opinion by an expert. Furthermore, in theory, experts can be punished by a fine of up to 10 000 Polish zloty (about 2 500 euro) for delayed preparation of an opinion. However this measure is not used in practice. Courts prefer to wait for a well elaborated opinion than to obtain the incomplete or weak opinion but within the reasonable time. Polish Ministry of Justice has been working on the new law on experts in court proceedings since many years. The main problems are quality of experts' opinions and availability of experts to prepare opinion within the reasonable time. Different options are considered, but so far no final version of the draft law on experts has been elaborated.

Ad 3) Efficiency of court proceedings may also be increased by shortening the time spent on preparing written reasons of judgments. However, every measure taken in order to accelerate this stage of criminal proceedings shall be balanced with the right of the accused to information. Under Article 6 of the European Convention on Human Rights the accused has the right to obtain explanations (reasons) for the judgment. In Poland written reasons of the first instance judgment are not prepared *ex officio* but upon the motion of the parties to the proceedings. The recent amendments to the Code of Criminal Procedure provide that the parties shall indicate the scope of requested written reasons of the judgment. For example, the parties to the proceedings may request explanations concerning only the penalty imposed by the judgment or may request reasoning of the judgment only in part related to one, out of several accused persons. Then the written reasons of the judgment are limited in accordance with the request of the parties. Furthermore, the new Article 424 para. 1 of the Code of Criminal Procedure provides

that written reasons of the judgment shall be concise. As transpires from the new Article 455a of the Code of Criminal Procedure, the judgment cannot be quashed by the appeal court solely due to the fact that its written reasoning does not meet the statutory requirements. These changes shall shorten the time spent by first instance judges on elaborating written reasoning of judgments.

Ad. 4) Let me now allow moving to the question of multiple appeals in the Polish criminal proceedings.

Before the latest changes in our model of criminal procedure, very often criminal cases had been re-examined two or even three times by first instance courts, since appeal courts frequently used their competence to quash the first instance judgment and remit the case for re-consideration. Before 1 July 2015 we had rather the model of revision than the appeal in criminal proceedings. As a rule appellate courts could not conduct evidentiary proceedings at the appeal hearing. Quite often the first instance judgment was set aside for the need to conduct a few additional evidence by the first-instance court. Recent amendments changed the model of the appeal hearing. Now the appeal court may quash the first instance judgement and remit the case for reconsideration only exceptionally, if there is the need to conduct the whole evidentiary proceedings once again.

The above mentioned changes in criminal procedure leave more space for activities of the parties. However, at the same time, parties bear more responsibility for the outcome of the case. For this reason the accused is entitled to request that defence counsel be appointed to him at any stage of the proceedings. Costs of legal representation are borne by the accused only in case of conviction, but still the accused may be exempted from bearing the costs of the proceedings.

It is too early to judge the new model of criminal procedure. One can expect that the new adversarial hearing will take more time than the old one. However, the average duration of criminal proceedings should be shortened. In my opinion it will not happen because of the change to the adversarial model but thanks to increased use of plea bargaining procedure. Recent amendments to the Code of Criminal Procedure increased the opportunities to settle a criminal case by plea bargaining. In particular, it is worth stressing the new opportunity to discontinue criminal proceedings at the request of the victim, if the material and moral damages caused

by an offence has been compensated by the accused. In such a case the criminal proceedings can be discontinued even at the investigative stage by the public prosecutor.

Since 1 July 2015 measures of restorative justice can be used also with reference to the most serious crimes, including murder. The accused who pleaded guilty may benefit from extraordinary mitigation of punishment. However, acceptance of plea bargaining is possible only if the public prosecutor and the victim do not object to it.

Summarizing, the Polish legal system follows the path indicated by other European countries and extends the use of plea bargaining agreements. Currently this seems to be the most important tool of enhancing efficiency and shortening courts proceedings. One may not overlook the fact that the European Court of Human Rights accepted this tendency in criminal justice. In the recent judgment in the case of *Natsvlishvili and Togonidze v. Georgia* (judgment of 29 April 2014) the Strasbourg Court stated that “it can be considered a common feature of European criminal justice systems for an accused to obtain the lessening of charges or receive a reduction of his or her sentence in exchange for a guilty or *nolo contendere* plea in advance of trial or for providing substantial cooperation with the investigative authority”.

Thank you very much for your attention.

ALTERNATIVE DISPUTE RESOLUTIONS (ADR)

Prof Dr Hab. Lech K. Paprzycki
President of The Supreme Court
Poland

Yesterday we discussed the methods of enhancing courts efficiency. Alternative Dispute Resolution may be an important tool to achieve this aim. ADR lowers the number of cases adjudicated by courts, mainly in commercial and civil matters. However, alternative methods of dispute resolution may also be applied in criminal matters. As a president of the Criminal Chamber of the Supreme Court I would like to give you some information on functioning of out–of- court settlements in the Polish criminal procedure.

In Poland investigative organs are obliged to initiate and conduct criminal proceedings if there is a suspicion of commission of an offence prosecuted *ex officio.* Our criminal procedure is based on legality principle and procedural organs are not free to drop out the investigation. For this reason plenty of cases concerning minor offences must be adjudicated by criminal courts instead of being resolved out of courts.

Currently the Code of Criminal Procedure provides for two important institutions of restorative justice. The first one is mediation and the second one – discontinuation of criminal proceedings at the pre-trial stage upon the request of a victim who has been compensated by a suspect. My further remarks do not concern plea bargaining agreements frequently used in our criminal proceedings, since they have to be reached before the court and accepted by the court. Plea bargaining agreements speed up the proceedings, as does the summary proceedings. According to available statistics, in 2013 about 50 % of all convictions were secured

due to plea bargaining. However, I would limit my presentation to the above mentioned two institutions of restorative justice.

Let me start from mediation. The case may be directed to mediation only upon the request or consent of both parties: a victim and the accused. There are no legal restrictions as to the application of mediation to any type of crime. Mediation is aimed at amicable resolution of conflicts stemming from an offence, by means of communication between the victim and the suspect or the accused with the help of a mediator. The case may be directed to mediation already at the pre-trial stage of the proceedings (by the police or public prosecutor). Having received a decision on submitting the case to mediation, the mediator contacts the suspect and the victim and explains the aims of mediation proceedings, as well as informs them about their rights. Mediation may have a form of face-to-face mediation, or mediation without direct contact of the parties, during which the mediator holds sessions with each party separately, informing them about the other party's standpoint and expectations as to the conditions of the settlement. Mediation proceedings are neutral and confidential. A mediator cannot testify before the court on information obtained from the parties during mediation.

Mediation may be concluded with a settlement accepted by both parties or the lack of thereof. The mediator forwards the report from mediation process to the police, the prosecutor or the court, enclosing the settlement agreement, if it was reached. It must be underlined that a settlement reached in mediation does not terminate the criminal procedure. However, deciding on bringing a case before the court, the prosecutor should take the content of a settlement agreement into consideration. Moreover, the court should take into account the results of the mediation while delivering the judgment. Pursuant to Article 53 § 3 of the Criminal Code while imposing a penalty, the court shall take into consideration the positive results of the mediation between the harmed party and the perpetrator or the settlement they have reached during the proceedings held before a court or a public prosecutor.

Another important measure of restorative justice is the opportunity to discontinue the criminal proceedings upon the motion of the victim. This measure

was introduced by the latest amendments of the Criminal Code, in force since 1 July 2015. Pursuant to Article 59a of the Criminal Code, if a suspect (the accused) reconciled with the victim, in particular as a result of mediation, and repaired the material or moral damages, criminal proceedings shall be discontinued at the request of the victim. The above provision applies only to minor offences subject to the penalty of deprivation of liberty not exceeding 3 years and also to offences against property subject to the penalty of deprivation of liberty not exceeding 5 years. Furthermore, this institution of restorative justice cannot be applied to suspect previously convicted for intentional, violent crime.

It is worth stressing that the discontinuation of criminal proceedings on the basis of Article 59a of the Criminal Code may be initiated only by the victim. As a rule, the motion of the victim shall be accepted. It may be refused only exceptionally, when discontinuation of the proceedings would be contrary to the aims of imposition of penalties, as defined in Article 53 of the Criminal Code.

A decision to discontinue the proceedings may be taken by a public prosecutor already at the pre-trial stage of the proceedings. Judicial supervision of this decision may be initiated only by the victim or the suspect. Once refused at the pre-trial stage of the proceedings, the victim's motion for discontinuation of criminal proceedings may be submitted to the court at the judicial stage of the proceedings.

In Poland the new institution of restorative justice is strongly criticized. Some authors say that it is "a justice for the rich". They argue that this way of avoiding conviction and its consequences will be available only for rich people. Others point to the risk that suspects will exert pressure on victims in order to get discontinuation of criminal proceedings. In my opinion it is too early to draw conclusions as to the usefulness of the institution. Much depends on proper exercise of control on agreement reached by the parties. Procedural organs should always examine whether the reconciliation and settlement reached between the suspect and the perpetrator is actually the expression of their free will.

Thank you very much for your attention.