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**Gloss on the Judgment of the European Court of Human Rights
in the case *Grobelny v. Poland*, Application No. 60477/12**

The judgment of the European Court of Human Rights (ECHR, hereinafter: the Court) in the case *Grobelny v. Poland*² concerns ensuring by public authorities that decisions and actions on judging individuals' rights were taken consistently, in an appropriate timeframe, and respected the idea of good governance. The case's background was the Farmers' Social Security Fund's³ (FSSF) establishing the right to pension due to a complete inability to work in a homestead⁴.

The judgment was made under the following circumstances. As a person not able to work in a homestead, the complainant received an agricultural pension until March 31, 2008. In May 2008, based on a medical commission's opinion, the FSSF decided to withheld paying the pension from April 1, 2008. The complainant made an appeal, and courts of two instances agreed with the

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² *Gobelny v. Poland*, application No. 60477/12, ECHR judgment of March 5, 2020. All ECHR's judgments referred in the paper are derived from the official Council of Europe's database HUDOC, <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#> (10.07.2021).

³ In Poland known as *Kasa Rolniczego Ubezpieczenia Społecznego* (KRUS).

⁴ The Act on Farmers' Insurance of December 20, 1990 (Dz.U. 2008, No. 50, item 291), the Act of 1990" in short.

FSSF. After having a surgery, the complainant submitted another application for the agricultural pension due to the complete inability to work on January 19, 2010. The court of first instance granted the complainant the right to the agricultural pension but from the day of submitting the new application instead of April 1, 2008, like he demanded. Simultaneously, based on an expert witnesses' opinion, the court included a statement to the judgment that the complainant was completely unable to work from the end of March 2008. The experts claimed that the difference in their opinion resulted from receiving incomplete medical documentation in the first proceeding. The court of appeal dismissed the complainant's appeal. It confirmed that due to the *res iudicata* it was impossible to establish the complainant's health condition before the submission because in that time, it was bound with the establishment of the first proceeding.

The complainant's prosecution against the FSSF based on Art. 417 of the Civil Code for paying the compensation due to the faulty statement of medical commission and non-granting the benefit during the 21 months in question was inefficient. The courts that analyzed the case decided that premises for liability due to unlawful action are not met and cannot consider the experts' opinion issued during the second proceeding in the extent in which it contradicts the rightful judgment of the first proceeding.

In the application to the Court, the complainant argued that the rejection to grant him the agricultural pension for the period in question was an unjustified deprivation of property.

Based on the expert witnesses' opinions made for the second proceeding, the Court decided that the complainant was unable to work from April 1, 2008 to January 19, 2010 and met all legal criteria for receiving the agricultural pension due to the inability to work. That is why his claim was property protected by Art 1. of the Protocol 1 to the European Convention on Human Rights (hereinafter: Art 1 ECHR)⁵. The Court assessed that the provision was violated because the interference with the complainant's property was not disproportionate. It indicated that the complainant bore the whole burden of the FSSF experts' mistake. Moreover, the Court decided that the

⁵ European Convention on Human Rights (Dz.U. 1993, No. 61, item 284 with amendments), CETS No. 005, Protocol to the European Convention on Human Rights (Dz.U. 1995, No. 36, item 175 with amendments), CETS No. 009.

good governance principle should be applied as the quality control standard. In this context, it is assessed that the principle of legal certainty is not unconditional and in the case in question it should be abandoned to ensure respect for social justice and fairness. However, the Court stipulated that assessing the compensation of the complainant's 21 months loss is the competence of the domestic public authority.

The Court's judgment fulfills the need for protecting individuals under particular circumstances, and as such, deserves an approval. However, it needs to be noted that it raises questions in the research context. First of all, from the Polish law perspective, the correctness of referring to *res iudicata* principle by domestic courts should be investigated, considering that recognizing the medical documentation as incomplete could bring another result which would reopen a possibility for considering the right to the pension in the resume mode, even though changing the assessment of already assessed evidence would be unacceptable in the context of the Supreme Court's functioning. Secondly, making far-reaching factual findings by the Court requires an analysis as it seems to interfere with the principle that it should not act as the court of "fourth instance" (e.g., by assigning assessment faultiness to the FSSF while the assessment was made ultimately and rightfully by the courts running evidence procedures based on the expert witnesses' opinions⁶. Thirdly, the Court's assessment should be perceived under recognizing that the complainant exhausted the domestic appeal measures through submitting an appeal instead of a cassation appeal⁷. Fourthly, based on the judgment it seems justified to ask what actions are required by the judgment execution and should they be legislative or practical. The issues will not be the subject of analysis as the commentary concerns the Court's assessment of the state's decision proportionality in the context of – unknown for the ECHR – the idea of good governance⁸.

The concept was a quality control standard known in the previous judgments of the Court even though none ECHR provision includes a reference to it or related terms like good administration or the right to good administration, i.e., instruments deduced in European legal culture from the legal sys-

⁶ Par. 68 and 70.

⁷ Par. 49–51.

⁸ Par. 68.

tem of the European Union and partially incorporated within the Council of Europe's system⁹. The Court has defined good governance as public authority's duty to act consistently, appropriately, and in an adequate timeframe¹⁰. The idea has been used by the Court for assessments when authorities have made mistakes during the proceedings concerning the significant rights of individuals acting in good faith and the consequences have been wholly transferred to the interested party (mostly in respecting the right to private property, including the realization of social security benefits). The failure to meet requirements of appropriateness and consistency¹¹ in the discussed judgment was not compensating the complainant's losses while simultaneously admitting that his health condition was wrongly assessed. The Court considered consistency through the prism of a possibility to undermine decisions made rightfully but to the complainant's disadvantage, which should function in a legal system.

The commented judgment inclines to reflection in several areas. First of all, attention should be paid to how the Court refers to good governance. The term had been used for the first time in the beginning of the 1990s in the World Bank's documents. Later, it has been a reference to administration (in management meaning) and governance used in the context of public authority assessment or functioning in public space¹². With time, new

⁹ For more about good administration and the right to good administration in EU law, see: K. Kowalik-Bańczyk, *Komentarz do artykułu 41 Karty Praw Podstawowych*, [in:] *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. A. Wróbel, Warsaw 2013, p. 1097.

¹⁰ For the first time, the Court *exlicite* referred to good governance in the judgment in the case *Moskal v. Poland*, Application No. 10373/05, judgment of September 15, 2009, par. 51 and 72, although it is assumed that the first evident reference to elements constituting good governance was included in the judgment in the case *Beyler v. Italy* (ECHR, *Beyler v. Italy*, Application No. 33202/96, judgment of January 5, 2000, par. 120). More about good governance in the Court's judgments: A. Andrijauskaite, *Good governance in the case law of the ECtHR: A (Patch)Work in Progress*, [in:] *Presented Paper in ICON-S Conference: Identity, Security, Democracy: Challenges for Public Law*, Hong Kong 2018, p. 6 et seq.

¹¹ These requirements entail the necessity for the state to act in law-making (ECHR, *Păduraru v. Romania*, Application No. 63252/00, judgment of December 1, 2005, par. 99) and law execution (*Plechanow v. Poland*, Application No. 22279/04, judgment of October 7, 2009 and *Sierpiński v. Poland*, Application No. 38016/07, judgment of November 3, 2009).

¹² M. Pinc, *Standardy dobrej administracji w prawie administracyjnym*, Poznań 2017, pp. 76–78, http://repozytorium.amu.edu.pl:8080/bitstream/10593/21984/1/Princ_Standardy%20dobrej%20administracji__7_7_2017_internet.pdf (2.05.2021).

international organizations, such as the United Nations¹³, the European Union¹⁴, and the Council of Europe¹⁵, joined promoting the ideals of good governance, also in assessing to what extent states meet the standards for protecting human rights. That is how good governance entered legal discourses, although it has not taken a well-defined normative context¹⁶. The Council of Europe understands it as an appropriate functioning of public authority and managing of public resources put into twelve principles¹⁷. Among them, there are timeliness, legalism, and transparency, i.e., three elements used by the Court referring to good governance. However, it is a much broader idea, used by the Court in a limited manner by selecting only some of its elements.

Moreover, the Court's judgment in the case *Grobelny v. Poland* has fixed using the theory of management quality as a quality control standard for fulfilling by states their obligations guaranteed by the ECHR. Based on the principles of good governance, the Court has constructed precise duties for the states. Such an argumentation has allowed the Court to deduct many obligations from Art. 1 ECHR, which sources consist rather in other provisions, particularly Art. 6 guaranteeing the right to court (with respect for the timeliness principle) and Art. 13 guaranteeing the right to efficient legal remedy. Referring to the good governance principle, the Court has achieved at least two goals. First, it has contributed to defining the normative meaning of that idea. Second, using it as a quality con-

¹³ <https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/About-GoodGovernance.aspx> (2.05.2021).

¹⁴ R. Grzeszczak, *The Concept and Practice of Good Governance in the European Union*, "World Academy of Science, Engineering and Technology International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering" 2015, vol. 9, No. 2, http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/2015_The-Concept-and-Practice-of-Good-Governance-in-the-European-Union.pdf (4.05.2021).

¹⁵ 12 Principles of Good Governance, <https://www.coe.int/en/web/good-governance/12-principles> (5.05.2021).

¹⁶ More about problems with defining the normative context of good governance: C. Ifitimoaei, *Good Governance: Normative v. Descriptive Dimensions*, "SEA-Practical Application of Science" 2015, vol. III, No. 1 (7), p. 310.

¹⁷ 12 Principles of Good Governance, <https://www.coe.int/en/web/good-governance/12-principles> (5.05.2021).

trol standard has tested it in the context of standards for protecting human rights¹⁸.

Based on the analyzed judgment one can observe that the Court's interpretation of good governance principle is broader than the Polish Constitutional Tribunal's (the CT) interpretation of good administration that undoubtedly is an element of the discussed idea¹⁹. The CT refers to it marginally, highlighting that it is not a constitutional right and so a procedural entitlement encompassing individual's guarantees²⁰. In this context, it needs to be highlighted that the principles of timeliness and consistency are interpreted by the Court not only through the prism of the democratic rule of law that includes a citizen's trust in the state and its execution of law (the Polish CT perceives them as a basis and a standard for good administration²¹) but also as a possibility to eliminate faulty decisions and judgments from the legal circulation, even if one of them would be revealed in further proceedings and not be a result of unlawful action. The Court's argumentation on the latter proves that in the discussed case, it used good governance as a normative model based on which recognized Art. 47 of the Civil Code as unsatisfying due to conditioning its effect on unlawfulness. Thus, requirements for good governance were not met.

Despite the individual character of the infringement of the right to private property stated by the Court in the commented judgment, the latter may be a cause for reviving a debate on introducing general domestic remedy to the Polish legal order²². Judging on the need for restricting the absolute character of *res iudicata* principle, the Court has opened a possibility for reflecting on different methods for compensating a complainant's harm. However, it has

¹⁸ The literature indicates the need for verifying the effectiveness of the intensively developing concept, M. Pinc, *op.cit.*, p. 79.

¹⁹ A. Bodnar, B. Grabowska, *Glosa do wyroku Europejskiego Trybunału Praw Człowieka w sprawie Moskal przeciwko Polsce*, "Praca i Zabezpieczenie Społeczne" 2010, No. 6, p. 31.

²⁰ The Constitutional Tribunal judgment of 18 December 2007 (SK 54/05).

²¹ The Constitutional Tribunal judgment of May 12, 2015 (P 46/3).

²² More on discussions about a possibility to implement the institution of "general domestic remedy" to the system of Polish law: K. Gónera, *Effective remedies from the perspective of common national courts*, [in:] *Publikacja pokonferencyjna: 5th Warsaw Seminar on Human Rights*, Warsaw, 29 September – 1 October 2011, Warsaw 2012, pp. 233–235; P. Wiliński, *General Domestic Remedy and the role of the Constitutional Court – opening remarks*, [in:] *Publikacja pokonferencyjna: 5th Warsaw...*

left the final decision on specific legal measures to the state. Since the supervision on the judgment execution has not ended, it is difficult to foresee what legal measures will be indicated the state within defining the so-called general remedies as ones that could potentially ensure compensation in similar cases. In this context, we can recall a discussion that took place several years ago on the legitimacy of creating in Poland the so-called general domestic remedy. It ought to be an independent from hitherto legal possibilities way of appeal, allowing to compensate all potential violations of the ECHR within the domestic legal order. The circumstances of the commented case seem perfect for returning to that discussion, also in the context of using good governance as a legal standard. Such a discussion is needed, especially since the initial observations on judging cases concerning the right to social security benefits are up-to-date even without considering the broader – constitutional (human rights, international soft law) – context²³.

Therefore, the judgment in the case *Grobelny v. Poland* may be an incipience for other discussions on effective legal remedies and a significant scientific problem, which is defining the good governance principle in the Polish legal order.

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²³ E. Łętowska, *Czekając na Godotą, czyli jak wykonywać wyroki ETPC (uwagi na tle sprawy Moskal v. Polska)*, “Europejski Przegląd Sądowy” 2011, No. 2, p. 9.

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