***Case Title:*** The case of the judge who sent the controversial Twitter post

**Case Analysis**

***Meta-Data*:**

* **Case Number**: II DSS 14/18
* **Date of decision**: May 16, 2019 [05.16.2019]
* **Featured case**: N/A
* **Region**: Europe and Central Asia
* **Country**: Poland
* **Type of expression**: Electronic / Internet-based Communication, Public Speech, Written Speech
* **Judicial Body**: Supreme (court of final appeal)
* **Type of law**: Constitutional law
* **Main Themes**: Political Expression, Digital Rights
* **Outcome**: Affirmed Lower Court
* **Status**: Closed
* **Tags**: Members of the Judicial Branch, Social Media, Political Speech

***Analysis:***

* **Summary and Outcome**:

The Polish Supreme Court - Disciplinary Chamber found that the defendant judge did not anticipate, although he should have, that his explicit statement on Twitter would reverberate in the public discourse. The defendant compared a well-known politician to Adolf Hitler, using one of the Twitter accounts of the judges' association "Iustitia". The Court emphasized that the post in question affected not only the original audience (i.e. the profile’s followers), but had a wider impact because of "the Internet's capacity for self-reproduction", which means that social network users can copy, forward or share a particular message. The Supreme Court - Disciplinary Chamber also held that in the case of a judge, freedom of expression is subject to additional, specific restrictions, which also apply to activities outside a courtroom. According to the Court, the post in question caused general damage to the image of the judges and compromised their impartiality. Therefore, the defendant judge undermined the dignity of his office and committed a disciplinary offense, the Court ruled. As a result, the disciplinary penalty of caution was imposed on him.

* **Facts**:

On Mar. 22, 2017, the Deputy Disciplinary Ombudsman of the Court of Appeal filed an application for disciplinary proceedings against the defendant judge, who was a regional court judge and vice-president of the Warsaw branch of the judges' association "Iustitia." He allegedly committed a disciplinary offense by publishing a post on the Twitter (today: X) account of the Warsaw branch of "Iustitia" on Sept. 23, 2016. The post in question stated: "Like the Fűhrer.... He also sacrificed everything for the nation. Ein Volk, ein Reich, ein Fuhrer. It's not even funny anymore”. It was a comment on a politician's remark about why another politician (Jarosław Kaczyński, leader of the political bloc that has been in power in Poland since 2015) did not start a family. The defendant allegedly undermined the dignity of his office and thus committed a disciplinary offense, as provided by Pol., Law on the Common Court System, 2001, art. 107 § 1 (pursuant to this provision in the relevant time “For professional offences, including clear and flagrant violation of the law and undermining the dignity of judicial office (disciplinary offences), a judge is subject to disciplinary liability”).

The court of the first instance (Court of Appeal - Disciplinary Court, *nomen non est omen*) stated that the act in question was unintentional. The Court of Appeal referred to Pol. Code of Criminal Procedure, 1997, art. 17 § 1 point 3, which is applied as appropriate in disciplinary cases of judges by the virtue of Pol., Law on the Common Court System, 2001, art. 128, and discontinued the proceedings, claiming that the social noxiousness of the act was insignificant. The case went to the Supreme Court - Disciplinary Court as a result of appeals by the Deputy Disciplinary Ombudsman of the Court of Appeal and the Minister of Justice. The Supreme Court - Disciplinary Court, acting as a court of cassation in this case, overturned the verdict and remanded the case to the court of the first instance. The evaluation of the defendant's act as insignificant in terms of the social noxiousness was found to be erroneous. Furthermore, the Supreme Court - Disciplinary Court was of the opinion that the claim that the act in question had been unintentional was not convincing.

The Court of Appeal - Disciplinary Court reopened the case and this time found the defendant judge guilty of the alleged disciplinary offense under art. 107 § 1, imposing on him the disciplinary penalty of caution (Pol., Law on the Common Court System, 2001, art. 109 § 1 point 1). A dissenting opinion was submitted to the judgment, according to which the act should be classified as a minor offense and the penalty should be waived (Pol., Law on the Common Court System, 2001, art. 109 § 5). Two motions for appeal were filed against the repeated verdict of the Court of Appeal - Disciplinary Court, one by the defendant and the other by the Minister of Justice. As a result of the appeals, the case went to the Supreme Court - Disciplinary Chamber (which succeeded the Supreme Court - Disciplinary Court in connection with the Polish constitutional crisis controversy).

* **Decision Overview**:

In the case at hand, the Court had to determine whether the defendant judge undermined the dignity of his office and committed a disciplinary offense and, if so, what the appropriate disciplinary penalty should be. The case involved the problem of disciplinary offenses and penalties under Pol., Law on the Common Court System, 2001 (art. 107 § 1 and art. 109 § 1, respectively), but at its core it was about confronting – in the specific context of social media posting – the general right of freedom of expression with specific restrictions on judges. As for the motion for appeal filed by the defendant, it repeated the point of the *votum separatum* appended to the verdict of the Court of Appeal - Disciplinary Court, as it proposed to waive the penalty on the basis of Article 109 § 5. The second motion, submitted by the Minister of Justice, requested the disciplinary penalty of reprimand (which is one level above the penalty of caution). According to the Minister of Justice, the penalty was disproportionately lenient because the Court of Appeal - Disciplinary Court failed to take into account the seriousness of the misconduct, its harmfulness to the administration of justice, the preventive purpose of the disciplinary penalty and the degree of the judge’s fault. According to the Supreme Court - Disciplinary Chamber, the positions of both appellants should be rejected because the verdict of the first instance court, imposing the disciplinary penalty of caution, proved to be sufficiently pertinent to not lead to a reversal or modification of the judgment.

In the Court's view, it was important whether the judge's act was intentional (for the sake of clarity, it should be added that in Poland the disciplinary proceedings against judges closely resemble criminal proceedings). According to the Court, on the one hand, the act of the judge in writing the message in question was intentional. At this point, it was pointed out that acquaintance of the nature and rules of social media stems from the need to accept the rules and regulations of a particular service, which is a *conditio sine qua non* for creating an account. On the other hand, the Court found that the defendant judge's act was unintentional as regards the social impact of the message in the public sphere, as demonstrated, among other things, by his behavior after the act. Accordingly, in the Court's opinion, the defendant's act was of a hybrid intentional/unintentional nature. However, in such cases, the act should ultimately be treated as intentional, the Court stated.

According to the Supreme Court - Disciplinary Chamber “It should be emphasized that the message made by the defendant, did not have an effect only on the original audience, the so-called ‘profile’s followers’, but had a wider scope of influence. This is reflected primarily in the aspect of the so-called ‘Internet's capacity for self-reproduction’, since users of the social network can copy a given message, forward or share it” (p. 7). The Court noted a number of circumstances justifying the assumption that the defendant judge was aware that he should avoid behavior that could undermine confidence in his impartiality or otherwise bring the dignity of the judiciary into disrepute. He is an experienced lawyer, active in the judges' association and experienced in media relations. The defendant judge compared the living politician, a person in the public eye, to one of the greatest criminals in world history. He did not anticipate, although he should have, that his explicit statement would reverberate in the public discourse. The act in question and its further exposure have damaged the prestige of the judiciary and created the image of judges as being on the one side of a political dispute. It also undermined confidence in the judge's impartiality, the court said. According to the Supreme Court - Disciplinary Chamber, the fact that the judge did not post from his private account but from an institutional one is also relevant. Writing about politicians, publicly expressing political sympathies or antipathies, and doing so in such an expressive manner is considered a threat to the judge's impartiality and undermines the dignity of judicial office. At this point, the Court also found that the defendant's second post showed that he did not understand the meaning and consequences of the first post, although he should have.

Subsequently, the Court referred to Pol., Const., 1997, art. 54, which provides general regulation for freedom of expression in the Polish jurisdiction (“The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone”). The Court noted that judges are covered by this provision. In the next step, Pol., Const., 1997, art. 178(1), which relates to the independence of judges in individual dimension, was referred (“Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes”). The Court stated that judicial independence requires creating a situation that protects judges from pressure. Nevertheless, the Supreme Court - Disciplinary Chamber pointed out that “In the case of a judge, freedom of speech is limited by additional requirements arising from his special status. In and out of office, a judge should be apolitical, independent of the influence of political factors, in particular of political parties, which does not mean that he or she may not have opinions on political, economic, social and religious issues. The essence of the requirements for judges in this regard comes down to the manner, form and place of presenting these views” (pp. 9-10). In the present case, the statement in question did not meet these requirements and exceeded the limits of the constitutionally guaranteed freedom of speech. The judge was deprived of the attribute of political neutrality, which consequently undermined the dignity of judicial office and led to a disciplinary offense under art. 107 § 1.

Having considered the above, however, the Court opposed the view that the disciplinary punishment determined by the Court of Appeal - Disciplinary Court should be increased. On the one hand, the defendant has violated values of great importance, damaging the prestige of the Polish judiciary and the interests of justice. On the other hand, the Court pointed that, after committing the act, the defendant deleted the post, apologized and clarified that the comment was not a position of the judges association “Iustitia”, but his private opinion. He also resigned from membership in the association. In addition, the act in question was incidental and the defendant is a judge with a good reputation at work, the Court noted.

To conclude, the Supreme Court - Disciplinary Chamber ruled that the defendant undermined the dignity of his office and committed a disciplinary offense, also causing harm to the administration of justice in general. He did not anticipate, although he should have, that his explicit statement on Twitter would reverberate in the public discourse. Crucially, in the case of a judge, freedom of expression is subject to additional, specific restrictions, which also apply to activities outside a courtroom. The Court also noted the special nature of the Internet - the content posted can have an impact far beyond the intended audience. Finally, the Supreme Court - Disciplinary Chamber stated that the disciplinary penalty of caution is adequate, proportionate and sufficiently punitive taking into account all its purposes.

***Direction:***

* **Outcome**:

Mixed Outcome

* **Explanation for why and how it contracts or expands expression or has a mixed outcome.**

The need for judges to use social media prudently is not in question. However, how far these restrictions should go is still a matter of debate. In Poland, the relevant discussion takes place against the background of constitutional crisis.

The impact of the judgment is weakened by the controversy over the unconstitutionality of the Disciplinary Chamber of the Supreme Court.

The facts of the case were widely reported in the Polish media and sparked the discussion within the judicial community. While the case was pending, the Code of Judicial Ethics was amended. According to the newly added § 23, "a judge should use social media with restraint".

***Perspective***:

* **National law or jurisprudence**:

Pol., Const., 1997, Article 54, Article 178(1)

Pol., Law on the Common Court System, 2001, Article 107 § 1

***Significance***:

The significance of this case is undetermined at this point in time.

***Docs***:

* **Official Case Documents**:

[**Judgment**](http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20dss%2014-18-3.pdf) (available only in Polish)