

# EXTRAORDINARY COMPLAINT IN CIVIL PROCEEDINGS UNDER THE POLISH LAW

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*The system of appeal measures in civil proceedings under the Polish law has been subject to profound evolution over the years. The Supreme Court Law of 8 December 2017 has introduced a new legal measure called the extraordinary complaint, which allows rebuttal of final judgments terminating respective proceedings. Extraordinary complaint examination has been entrusted to the newly established Extraordinary Control and Public Affairs Chamber of the Supreme Court.*

*Literature has referred to this extraordinary measure of appeal as a total instrument with considerable material and temporal scope, allowing contestation of final judgments regardless of whether any legal measures had been applied in the course of respective proceedings and the type of measures used. Although parties to civil proceedings have gained another extraordinary measure of appeal, they have no real influence over its application.*

*The expansion of the extraordinary appeal measures catalogue in Polish civil law proceedings has triggered multiple reservations as to the connection between parallel complaints. One should not assume a priori that the new extraordinary measure of appeal shall destabilise the legal system in Poland – albeit certain operational distortions seem realistic.*

*Key words: measures of appeal, extraordinary measures of appeal, extraordinary complaint, setting aside of the judgment under appeal, filling gaps in the appeal measures system, stability of court judgments.*

## 1. INTRODUCTION

Certainty of law requires respect for the principle of formal validity of judgments, and consequences of the *res iudicata* in civil proceedings. Concern for adjudicat-

ing a dispute correctly in civil proceedings is of particular importance until the moment of securing a valid judgment – once a judgment is pronounced valid, any cases of further examination should be an exception and unique in nature.<sup>1</sup> While efforts ought to be made to improve the quality and general level of adjudication, this purpose does not necessarily have to be achieved only by increasing the number of potential control measures.<sup>2</sup> A tendency to restrict the catalogue and scope of appellate measures has been recently observed in the European legal culture.<sup>3</sup> It has been unanimously accepted – in the Polish case law and in the civil procedure jurisprudence alike – that the right to fair trial requires that access to the judiciary as well as reliable court proceedings and a judgment be secured. Nonetheless, such a right does not comprise the authority to question judicial determinations,<sup>4</sup> in particular, the possibility of challenging valid court judgments.<sup>5</sup>

Notwithstanding the above, the occurrence of judicial missteps and misconduct in the process of passing a judgement is unavoidable. Main reasons for faulty judgments include errors in reasoning – on legal as well as factual grounds – and in proceeding. Due to a wide diversity of legal interpretations and the frailty of human nature, the need for or even the necessity of existence of an extensive system of appellate measures in civil proceedings are unquestionable.

In civil proceedings under the Polish law, legal measures serving the purpose of eliminating a faulty judicial judgment are by no means a uniform group.<sup>6</sup> Their nature may be complete or restricted in terms of the catalogue and types of deficiencies potentially justifying the questioning of a judicial determination. Any appeal against a judgment is fundamentally intended to annul or amend it, unless the legislator specifies some other particular procedural consequences. Regular (ordinary) measures of appeal are intended to challenge non-final judgments, whereas extraordinary measures of appeal allow for the questioning of legally binding rulings. The role and importance of mechanisms recognised as part of the latter category ought to be considered from the viewpoint of ascertaining correctness in adjudication, as well as in the context of uniformity in the interpretation and application of law by the justice system.<sup>7</sup> Their number and nature have been undergoing major change over the years.

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1 T Ereciński (ed), 'Środki zaskarżenia' in J Gudowski (ed), *System Prawa Procesowego Cywilnego*, vol. III part 1 (Wolters Kluwer Polska 2013) 31 ff.

2 W Siedlecki, 'Z prac Komisji Kodyfikacyjnej nad nowym kodeksem postępowania cywilnego PRL' (1961) vol I *Studia Cywilistyczne* 287 ff; T Ereciński, 'Ograniczenia w dostępności do kasacji w sprawach cywilnych' in Z Banaszczyk (ed), *Prace z prawa prywatnego. Księga pamiątkowa ku czci sędziego Janusza Pietrzykowskiego* (CH Beck 2000) 73 ff.

3 M Michalska-Marciniak, 'Formy ograniczenia dostępu do sądu wyższego w sprawach cywilnych (analiza modelu teoretycznego)' in K Flaga-Gieruszyńska, G Jędrejek (eds), *Aequitas sequitur legem. Księga jubileuszowa z okazji 75. urodzin Profesora Andrzeja Zielińskiego* (CH Beck 2014) 379 ff.

4 A Zieliński, 'Konstytucyjny standard instancyjności postępowania sądowego' (2005) No 11 *Państwo i Prawo* 4 ff.

5 T Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym* (Wolters Kluwer 2011) 76 ff, and reference sources quoted therein.

6 S Hanausek, 'System zaskarżania orzeczeń sądowych w nowym polskim postępowaniu cywilnym' (1967) No 9 *Studia Cywilistyczne* 141 ff.

7 See J Gudowski, 'Pogląd na kasację' in P Grzegorzczak, K Knoppek, M Walasik (eds) *Proces cywilny. Nauka – Kodyfikacja – Praktyka. Księga jubileuszowa dedykowana profesorowi Feliksowi Zedlerowi* (Wolters Kluwer Polska 2012) 155 ff.

## 2. EVOLUTION OF APPEAL MEASURES IN CIVIL PROCEEDINGS UNDER THE POLISH LAW

The system of appeal measures in civil proceedings under the Polish law has been subject to profound evolution over the years, all change and transformation arising from discussions and debates in legal communities in the wake of system, social, and political changes introduced in Poland in 1989. Optimal solutions were sought<sup>8</sup> with intent to warrant the right to a fair trial and the option of implementing the postulate of error-free adjudication to any party concerned by introducing and specifying the nature and boundaries of appeal measures. Efforts were made to recognise the role and importance of the validity and stability of court judgments.<sup>9</sup>

The most significant changes include the 1996<sup>10</sup> abandonment of the review system, which provided for a ruling review by a second-instance court and an extraordinary review supplement as a non-instance measure of appealing against final judgments. In imitation of pre-war procedural solutions, the Polish legislator restored<sup>11</sup> the appeal and cassation system.<sup>12</sup> The appeal was restored to replace reviews,<sup>13</sup> whereas extraordinary reviews – as a measure unfit for the rule of law – were duly replaced with cassation.<sup>14</sup> Transforming cassation into the cassation complaint in 2004<sup>15</sup> and conferring upon it the nature of an extraordinary appeal measure constituted another major step in restructuring the appeal measure system.<sup>16</sup>

The phased revolution served to restore procedural instruments typical for West European state systems, ultimately resulting in the abandonment of the three-instance for the two-instance system based on a quadruple-tiered judicial structure. The two-instance system of judicial proceedings and the right to appeal against the

- 8 T Ereciński, 'Kilka uwag o modelu kasacji w sprawach cywilnych' in Ewa Łętowska Tomasz Dybowski et al, *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci prof. Tomasza Dybowskiego*, vol XXI (Wydawnictwa Uniwersytetu Warszawskiego 1994) 97 ff.
- 9 P Grzegorzcyk, 'Stabilność prawomocnych orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych' in T Ereciński, K Weitz (eds) *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego* (Lexis Nexis 2010) 151 ff.
- 10 Law of 1 March 1996 on amendments to the Civil Proceedings Code, to ordinances of the President of the Republic of Poland (Bankruptcy Law and Arrangement Law), to the Administrative Proceedings Code, to the Law on Legal Costs in Civil Cases, and to selected other laws (*Journal of Law* 1996, No 43 item 189).
- 11 The appeal and cassation system was operational in Poland until 1950, when numerous procedural solutions were duly adapted to reflect the Soviet system. Z Resich, *Nauka o ustroju organów ochrony prawnej* (Wydawnictwa Uniwersytetu Warszawskiego 1970) 128 ff.
- 12 S Rudnicki, 'Nowy środek odwoławczy: apelacja' (1993) No 6 Przegląd Sądowy 42 ff.
- 13 The review model had been operational in Poland for over 40 years. For details concerning advantages and disadvantages of the institution, see J Gudowski, 'Pogląd na apelację' in J Gudowski, K Weitz (eds), *Aurea Praxis. Aurea Theoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego*, vol 1 (Lexis Nexis 2011) 246 ff.
- 14 T Ereciński, 'O nowelizacji kodeksu postępowania cywilnego w ogólności' (1996) 10 Przegląd Sądowy 8 ff.
- 15 Law of 22 December 2004 on amendments to the Civil Proceedings Code and the Common Court System Law (*Journal of Law* 2005, No 13 item 98).
- 16 T Zembrzuski, 'Ewolucja charakteru skargi kasacyjnej w polskim postępowaniu cywilnym' in H Dolecki, K Flaga-Gieruszynska (eds), *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych* (CH Beck 2009) 329 ff.

judgment of a first-instance court have been duly reflected in the Constitution of the Republic of Poland – Articles 78<sup>17</sup> and 176 clause 1.<sup>18</sup> The system has been recognised as entirely sufficient in terms of delivering targets to be met by the practice of appealing against judicial judgments – from the perspective of constitutional requirements and international standards alike<sup>19</sup>.

The appeal remains the fundamental ordinary measure of challenging substantive rulings in Poland. It is an instrument of appellation available with regard to any substantive judgment of a first-instance court, whereas – in cases duly specified in the law – a complaint may be filed against non-substantive judgments. Extraordinary measures of appeal against formally valid judgments include cassation complaints, applications for revision (reopening), and complaint for declaring a final judgment contrary to law.<sup>20</sup> The first two measures are cassatorial in nature, ie they allow annulment of a final and valid judgment; the third one serves the purpose of assessing the legality of juridical activities of common courts, allowing a prejudicial guideline to be secured in conjunction with state responsibility for any damage caused by action taken by one of its authorities.<sup>21</sup>

The use of extraordinary appeal measures in civil law proceedings has been enjoying favourable reception. It is commonly held that the system has been expanded above and beyond any measures required by the European Union, international treaties, or even the needs of addressees of procedural norms.<sup>22</sup> Yet the Polish legislator has yielded to the temptation of multiplying instruments of control. The Supreme Court Law of 8 December 2017<sup>23</sup> has introduced a new legal measure allowing rebuttal of final judgments terminating respective proceedings.<sup>24</sup> The said measure has been called the ‘extraordinary complaint’ (*skarga nadzwyczajna*). The aforementioned law entered into force on 3 April 2018.

According to the authors of the referenced legislation, the system of extraordinary

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17 Pursuant to Article 78 of the Constitution of the Republic of Poland, parties to any proceedings shall have the right to challenge judgments and decisions passed by a court of first instance. The law shall determine any exceptions to the aforementioned principle as well as the course of appealing.

18 Pursuant to Article 176 clause 1 of the Constitution, all judicial proceedings shall comprise at least two instances.

19 W Siedlecki, ‘System środków zaskarżenia według nowego kodeksu postępowania cywilnego’ (1965) Nos 5-6 Państwo i Prawo 696 ff.

20 Proceedings before the Supreme Court initiated by the motion of the Prosecutor General to annul a judgment passed in a case not subject as of the date of ruling to the adjudication of Polish courts (for reasons associated with the person in question) or precluding the allowability of judicial action altogether (Article 96 of the Supreme Court Law) are of particular importance.

21 J Gudowski, ‘Węzłowe problemy skargi o stwierdzenie niezgodności z prawem prawomocnego orzeczenia’ (2006) No 1 Przegląd Sądowy 4 ff.

22 A Góra-Błaszczkowska, ‘Skarga nadzwyczajna i wnioski o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017’ in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 58.

23 *Journal of Law* 2018 item 5, with subsequent amendments. Hereinafter referred to as ‘the Law’.

24 The Law applies in civil and criminal proceedings. It is not applicable in judicial administrative proceedings. All further comments reference issues of civil procedural law.

appeal measures had featured a gap requiring immediate supplementation. It was claimed that the previously applied appellate instruments had been 'insufficient in terms of safeguarding constitutional civic freedoms and rights in case of their breach pursuant to court judgments', given the fact that 'the legal system features final judgments which diverge from duly expected standards'.<sup>25</sup> The authors of the draft saw the introduction of the complaint as a response to very poor public trust in the justice system.

### 3. THE ORIGIN AND NATURE OF THE EXTRAORDINARY COMPLAINT

The Polish legislator has described the extraordinary complaint as a 'radically different measure of control applicable to the issued court judgments', intended to amend valid court judgments.<sup>26</sup> Yet the reasoning of the draft extraordinary complaint law comprises a direct reference to the extraordinary review institution (*rewizja nadzwyczajna*) – the non-instance measure of final judgements' overhaul, imitating procedural solutions applicable in the USSR (Soviet law), reminiscent of the previous era of socialist law.<sup>27</sup> The extraordinary review had been the product of a totalitarian state lacking standards of division of powers, independence of courts of law or autonomy of judges.<sup>28</sup> The contemporaneous socialist process assumed coherence of individual and state interests, the sense of the availability principle meaning that any rights due to an individual would be enforceable in conformity with socialist interests.<sup>29</sup> Apart from the possibility of reopening the proceedings, all socialist systems provided for an extraordinary review, designed to warrant a judgment's conformity with the so-called objective truth.<sup>30</sup>

The extraordinary review measure which had been in use in times of the Polish People's Republic allowed state authorities to appeal against any final judgment<sup>31</sup> 'in the name of public interest',<sup>32</sup> in case of 'blatant breach of law or interest of the Pol-

25 Justification of the draft Supreme Court Law of 8 December 2017. <[www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=38360B23CA93D0BCC12581D80035FD77](http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=38360B23CA93D0BCC12581D80035FD77)> accessed 4 February 2019. Hereinafter referred to as 'justification of the draft'.

26 Justification of the draft.

27 J Krajewski, *Nadzór judykacyjny nad prawomocnymi orzeczeniami w polskim procesie cywilnym* (Toruń 1963) 36 ff; Z Resich, 'Rewizja nadzwyczajna w procesie cywilnym' (1975) vol XXV-XXVI *Studia Cywilistyczne* 245 ff.

28 T Ereciński, K Weitz, 'Skarga nadzwyczajna w sprawach cywilnych' (2019) *Przegląd Sądowy* (forthcoming).

29 Krajewski, *Nadzór judykacyjny nad prawomocnymi orzeczeniami w polskim procesie cywilnym* (Toruń 1963) 101.

30 Krajewski (n 29) 106 ff; K Piasecki, *Wpływ postępowania i wyroku karnego na postępowanie i wyrok cywilny*, (Warsaw 1970) 53.

31 It was also possible to apply the extraordinary review to appeal against judgment justification only. See B Dobrzański, J Krajewski, *Środki odwoławcze. Wznowienie postępowania. Rewizja nadzwyczajna* (Katowice 1965/66) 76 ff.

32 A Miączyński, 'Z dyskusyjnej problematyki rewizji nadzwyczajnej w postępowaniu cywilnym' (1967) vol X *Studia Cywilistyczne* 146 ff; F Rusek, 'Review Założenia i podstawy rewizji nadzwyczajnej' (1973) No 9 *Nowe Prawo* 1225 ff.

ish People's Republic'.<sup>33</sup> The measure was intended to 'remedy any damage caused by judicial system-related infringement'.<sup>34</sup> An extraordinary review could be based on a breach of law as well as on any inconsistency of findings with the actual status quo, thus warranting the truth being established even once judgments had become legally binding.<sup>35</sup>

Parties to proceedings were not authorised to file for a review. Such power could only be exercised by the Minister of Justice, First President of the Supreme Court, Prosecutor General, Ombudsman, or Minister of Labour, Remuneration, and Social Affairs in the field of labour law or social insurance.

The extraordinary review frequently became an instrument of manipulation by state authorities.<sup>36</sup> In practice, although the complaint had mostly been used 'in the interest of the people's state' and the measure itself was appraised very critically from a historical perspective,<sup>37</sup> it became a role model for the contemporary legislator, who proceeded to reconstruct numerous mechanisms while adapting the new instrument to conditions of the current system.<sup>38</sup> Introducing the new instrument as a direct repetition of solutions applied in earlier times was not an option – yet assorted structure-related similarities may be observed when comparing the current extraordinary complaint and the extraordinary review in its previous form.

The extraordinary complaint has been designed, formed and introduced as a measure of extraordinary appeal; it may be applied against final judgments of the courts of general jurisdiction, thus excluding the challenging ability of Supreme Court judgments. While the unfortunate phrasing of some provisions of the Law<sup>39</sup> may point to the use of the complaint as an instrument of appeal against judgments passed by the Supreme Court and concluding all proceedings in a case, such an option has to be unquestionably rejected for systemic reasons. The complaint makes it possible to appeal against all final judgements of the courts of general jurisdiction,<sup>40</sup>

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33 Article 417 para 1 of the Civil Proceedings Code, 1964 version.

34 Krajewski (n 29) 105.

35 S Kalinowski, *Rewizja nadzwyczajna w polskim procesie karnym* (Wydawnictwo Prawnicze 1954) 35.

36 Ereciński (n 8) 95.

37 J Gudowski, 'Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego (z uwzględnieniem aspektów historycznych i prawnooporównawczych)' (1999) No 4 *Przegląd Legislacyjny* 21.

38 Justification of the draft.

39 Pursuant to 89 para 3 of the Law, the extraordinary complaint shall be filed within a term of five years as of the appealed judgment becoming valid, or within one year as of the date of examining the cassation or cassation complaint if duly filed. Conversely, pursuant to Article 94 para 2 of the Supreme Court Law, should an extraordinary complaint apply to a judgment passed in the course of proceedings involving a Supreme Court ruling, the case shall be examined by the Supreme Court, the panel comprising five Supreme Court justices adjudicating in the Extraordinary Control and Public Affairs Chamber, and two Supreme Court jurors.

40 The extraordinary complaint shall not be admissible against a judgment establishing the non-existence of a marriage, annulling a marriage, and/or in divorce cases, if one or both parties remarries after such judgment having become valid, or against an adoption judgment (Article 90 para 3 of the Law). An analogous solution had been adopted for purposes of the extraordinary review.

the rule applying to substantive decisions as well as rulings formally concluding proceedings in a given case.

The introduction of the complaint instrument has been conjoined with the necessity of securing conformity with the principle of a democratic state of law implementing rules of social justice (Article 89 para 1 of the Law). Literature has referred to this extraordinary measure of appeal as a '*total instrument*'<sup>41</sup> with considerable material and temporal scope, allowing contestation of final judgements regardless of whether any legal measures had been applied in the course of respective proceedings, and the type of the measures used. The complaint shall be admissible if it is impossible to annul or amend the questioned ruling by applying other extraordinary measures of appeal. Consequently, the respective party shall be obliged to file an appeal, a cassation complaint, or a complaint to reopen proceedings. The objective inability to revoke a ruling shall otherwise give rise to the right to submit a motion to file an extraordinary complaint. The above shall apply accordingly if a respective party has exhausted all other measures of appeal, and to rulings becoming final as a result of a measure of appeal not having been filed.<sup>42</sup> The option of filing a complaint might become dubitable once it has been established that a party did not take expected action as a result of negligence or disregard. Adopting such a solution is a repetition of models followed in the socialist process, and undermines the assumption of a party's obligation to handle the proceedings with a sense of accountability for his/her own actions<sup>43</sup>. Such a solution may further encourage parties to consciously abandon other legal measures in the hope that an extraordinary complaint shall be duly drafted and filed in their case.

#### 4. GROUNDS FOR APPEAL WITH THE USE OF AN EXTRAORDINARY COMPLAINT

Pursuant to the intent of the Polish legislator, the introduction of the extraordinary complaint was designed to 'restore the fundamental legal order by eliminating from legal relations all rulings breaching the Constitution, blatantly violating the letter of law, and indisputably contradicting the content of evidence gathered in the case'. It was claimed that "the extraordinary complaint secures corrective justice, restoring adequate order to the distribution of assets, and remedying public shortages in market economy mechanisms"<sup>44</sup>.

These assumptions have been reflected in the extremely broadly defined grounds for the extraordinary complaint as such, general foundations specified alongside

41 D Gruszecka, 'Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście „wypełniania luk w systemie środków zaskarżenia”' (2018) No 9 *Palestra* 27.

42 In case of the former extraordinary review mechanism, over 60% of motions filed concerned cases not examined by courts of second instance. Ereciński (n 8) 98.

43 J Gudowski, 'O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro' in A Nowicka (ed.), *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysinowskiemu* (Wydawnictwo Naukowe UAM 2005) 1029.

44 K Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz* (Wolters Kluwer 2018) 56.

detailed basics<sup>45</sup>. The complaint has been developed upon the general premise of ensuring conformity to the democratic state of law implementing rules of social justice, whereas Article 89 para 1 of the Law specifies three specific premises referencing the following circumstances: a) a ruling breaching the principles or freedoms and rights of persons and citizens as stipulated in the Constitution (item 1); b) a ruling blatantly violating the letter of law through its faulty interpretation or application (item 2); c) an indisputable contradiction between significant findings of the court and evidence gathered in the case (item 3).

The admissibility of drafting complaint charges concerning contradiction between significant findings of the court and evidence gathered in the case renders the complaint similar to a regular measure of appeal. Furthermore, the Law applies a variety of unspecific concepts, their scopes frequently intersecting. Conversely, the option of interpreting the '*principle of social justice*' diversely as stipulated under Article 89 para 1 of the Law gives rise to a possibility of judgments falling under the threat of extensive discretion of the court<sup>46</sup>.

The assumption – formerly adopted and consistently unquestioned – of the Supreme Court's cognition and activities primarily serving the purpose of safeguarding public interest, has been modified. The rule of safeguarding public interest in judicial activities of the Supreme Court has been reflected in efforts to secure uniformity of case-law<sup>47</sup>. Proceedings before the Supreme Court should fundamentally be limited to supervision of the application of law<sup>48</sup>, otherwise its function and purpose are modified so as to resemble the role of courts of general jurisdiction. Drafting complaint premises according to the form and manner specified in Article 89 of the Law makes the Supreme Court an authority directly appointed to administrate justice through the control of final court judgments passed by common courts of all levels.

The possibility of verifying factual findings by the Supreme Court examining extraordinary complaints also raises concerns<sup>49</sup>. In such a case, the Court ceases operating in the natural role and function duly assigned to it – that of a court of law<sup>50</sup>. Furthermore, European procedural law systems follow the standard of a dual examination of the factual grounds of a dispute; in some cases, they may be examined only in the course of one-instance proceedings<sup>51</sup>. The Polish legislator espoused the possibility of examining the factual grounds in civil proceedings on three separate

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45 Szczucki (n 44) 460ff.

46 Ereciński, Weitz (n 28) (forthcoming).

47 Gudowski (n 7) 156 ff.

48 FK Fierich, 'Postępowanie przed Sądem Najwyższym (Skarga w przedmiocie kasacji)' in *Polska Procedura Cywilna. Projekty referentów z uzasadnieniem*, vol II (Kraków 1923) 20 ff.

49 The option had raised doubt with regard to the extraordinary review. See M Waligórski, 'Gwarancja wykrycia prawdy obiektywnej w procesie cywilnym' (1953) Nos 8-9 Państwo i Prawo 276 ff.

50 W Sanetra, 'O roli Sądu Najwyższego w zapewnianiu zgodności z prawem oraz jednolitości orzecznictwa sądowego' (2006) No 9 Przegląd Sądowy 14 ff.

51 P Grzegorzczak, 'Dopuszczalność i kształt apelacji w postępowaniu cywilnym – perspektywy przyszłej regulacji z uwzględnieniem standardów konstytucyjnych i międzynarodowych' in K Markiewicz, A Torbus (eds), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego* (CH Beck 2014) 282 ff.



occasions. The multiplication of stages of proceedings to examine and verify facts of the case, while not warranting any improvement in the clarification of factual circumstances, is most definitely conducive to an extension in proceedings and contributes to their lengthiness.

The scope of an extraordinary complaint application is partially convergent with other extraordinary measures of appeal. There is a similarity between the premises of an extraordinary complaint and certain premises of a cassation complaint, a complaint for declaring a final judgment contrary to law, and applications for reopening of proceedings. For example: in case of a cassation complaint, premises may only involve a breach of material law through its misinterpretation or faulty application, or procedural error, if such an infringement has a significant impact on the ultimate result of the case (Article 398<sup>3</sup> para 1 of the Code of Civil Proceedings)<sup>52</sup>. The scope of the extraordinary complaint most definitely extends beyond the circumstances described above.

Aforementioned comments give rise to serious doubts with regard to the transparency and coherence of the adopted solutions<sup>53</sup>. Overly general premises of the extraordinary complaint deserve particular criticism. With regard to the previously used extraordinary review, the Law had also been employing the unspecific concept of the ‘interest of the Polish People’s Republic’. In hindsight, it may well be concluded that ‘the interest of the Polish People’s Republic had become an unlimited value, attacks on any inconvenient ruling encountering no major difficulty; consequently, the certainty of legal relations deteriorated, the value of finality of judgments diminishing’<sup>54</sup>. Although those legal premises cannot be equated with the contemporary reference to the ‘principle of a democratic state of law implementing rules of social justice’, greater precision and unambiguousness ought to be expected from a statutory regulation in terms of specifying the scope of a measure of appeal.

## 5. AUTHORITY TO FILE AND TERMS OF FILING AN EXTRAORDINARY COMPLAINT

Pursuant to Article 89 para 2 of the Law, an extraordinary complaint may be filed by the Prosecutor General, an Ombudsman, and – within the scope of his/her competence – the President of the General Counsel’s Office to the Republic of Poland,<sup>55</sup> the Ombudsman for Children’s Rights, the Ombudsman for Patients’ Rights, the

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52 Zembrzuski (n 5) 316 ff.

53 M Balcerzak, ‘Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka’ (2018) Nos 1-2 *Palestra* 19; Gruszecka (n 41) 28 ff.

54 Gudowski (n 13) 247 ff.

55 Doubt is cast with regard to authority to file an extraordinary complaint being vested with the President General Counsel’s Office to the Republic of Poland, as the entity remains at the helm of the institution handling legal representation for the State Treasury and other duly specified entities – and may thus have an interest in revoking rulings passed in cases involving the Prosecutor General’s Office. See A Góra-Błaszczkowska, ‘Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017’ in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 59 ff; Ereciński, Weitz (n 28) (forthcoming).

Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium-Sized Enterprises, and the President of the Office of Competition and Consumer Protection<sup>56</sup>. The legitimacy for filing the appeal measure has been fully stipulated in the Law.

The decision to draft the extraordinary measure of appeal does not rest with the parties. As in case of the extraordinary review, parties have been deprived of the right to file it, in favour of specific entities and institutions that are public in nature. The interested party may only apply to a duly authorised body – or even to a number of them. Yet the Law does not specify the manner, or the form of filing a request with the duly authorised entity, which may ultimately approve or reject the party's application, or even leave it unexamined in some cases. Legitimate entities are obliged to verify whether 'principles arising from the rule of justice had been blatantly breached' in the given case.<sup>57</sup>

Such shape of legitimacy to file an extraordinary complaint ultimately means that the party questioning a ruling concerning his/her rights and responsibilities shall be assigned the mere role of an applicant to state agencies. It had been duly pointed out – in case of the extraordinary review – that entrusting appeal measure availability to an official body gives rise to a tool of manipulation, and is conducive to clientelist attitudes being formed and fostered in the society.<sup>58</sup> This is clearly an anti-civic solution, whereas from the perspective of parties to a legal relationship, the complaint can hardly be considered as rational or effective legal measure. Moreover, the drafting and filing of an extraordinary complaint may be triggered by actions other than a simple application by an interested party – it may also proceed ex officio, should relevant justifying information be revealed and found out. Depriving parties to proceedings under civil law of any influence over the initiation or course of extraordinary complaint-related proceedings constitutes an infringement of the right to fair trial.

Pursuant to Article 90 para 1 of the Law, an extraordinary complaint shall only be filed once against a specific ruling concerning the interest of a given party<sup>59</sup> – yet the restriction does not apply to the proceedings in case, but rather to the specific judgment. A complaint in the interest of the other party is admissible – consequently, complaint proceedings may be repeated; conversely, in non-procedural proceedings involving a larger number of parties, the complaint may be filed multiple times. If the extraordinary complaint is admitted and the appealed judgment annulled, a new judgment shall be passed; as of the date of such a new judgment becoming final, it may be subject to appeal under a (subsequent) extraordinary complaint. Thus, a real risk of extraordinary complaint multiplication arises for proceedings regarding a specific civil law case.

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56 In the original draft version, the authority to file a complaint was to be vested in a group of no less than 30 deputies or 20 senators.

57 Justification of the draft.

58 Gudowski (n 13) 247.

59 In case of the extraordinary review, Article 417 para 3 of the Civil Proceedings Code introduced a ban on extraordinary reviews against a Supreme Court judgment passed in consequence of an extraordinary review having been filed.

The time limits for an extraordinary complaint admissibility are considerably broad. An extraordinary complaint shall be filed within five years since the appealed judgment became final, or within one year as of the date of examining the respective cassation complaint, if filed (Article 89 para 3 of the Law). Such an extensive period of time undermines the stability of court judgments, casting doubt upon their durability. Legal protection becomes uncertain, thus failing to fully ascertain the function of adjudication with a view to determine the outcome of the dispute in a legally binding and lasting way.<sup>60</sup>

Furthermore, within a term of three years as of the Law coming into force, putting into question all rulings which became final after 17 October 1997, ie after the enactment of the current Constitution, becomes an actual possibility. Practice will duly prove the extent to which the said capacity shall be taken advantage of by entities authorised to file an extraordinary complaint.

## 6. JUDICIAL RESOLUTION FOLLOWING EXTRAORDINARY COMPLAINT EXAMINATION

Extraordinary complaint examination has been entrusted to the newly established Extraordinary Control and Public Affairs Chamber of the Supreme Court. The Court shall adjudicate in a panel comprising two Supreme Court justices and a Supreme Court juror.<sup>61</sup> It has been assumed that the so-called social factor involvement in the Supreme Court adjudication shall serve the purpose of due public supervision. Such a solution is rare in European legal systems, it has never been employed in proceedings under the Polish civil law, and it has been critically received upon its introduction.<sup>62</sup>

Once it has been found that there are no grounds for annulling the appealed judgment, the extraordinary complaint shall be dismissed. Extraordinary complaint recognition shall be tantamount to the annulment of the appealed judgment in part or in whole. Pursuant to Article 91 of the Law, the Supreme Court – results of proceedings pending – shall rule as to the essence of the case, refer the case for re-examination, or discontinue all proceedings. Ruling on the subject matter of an extraordinary complaint blends in both potential consequences of examining an appeal measure – a reforming effect (*iudicium rescissorium*) and a cassatorial effect (*iudicium rescindens*). While the ultimate ruling is dependent on the type of identified infringement(s), stipulations of the Law suggest that the alteration of an appealed judgment is a preferred consequence of examining an extraordinary com-

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60 Ereciński, Weitz (n 28) (forthcoming).

61 Supreme Court jurors shall be elected by the Senate (Article 61 para 2 of the Law), ie by a body of the legislative power.

62 It has been raised that adjudication in the Supreme Court requires legal education and many years of experience. See A Góra-Błaszczkowska, 'Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017' in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 64 ff.

plaint.<sup>63</sup> The legislator has pointed out that a cassatorial ruling shall only be issued once it has been ascertained that the Supreme Court cannot rule on the merits of the case.

If the appealed judgment had caused irreversible legal consequences,<sup>64</sup> the Supreme Court shall only rule that the appealed judgment was passed with breach of the law. In such a case, the court shall be obliged to duly indicate reasons justifying the original judgment.

The Civil Proceedings Code's provisions concerning the cassation complaint shall apply to all and any circumstances of proceeding with an extraordinary complaint, unregulated by the provisions of the Supreme Court Law.

## 7. CONCLUDING REMARKS

The introduction of the extraordinary complaint into the Polish system of appellate measures was accompanied by a belief that its intent would be to meet public expectations of 'judicial rulings being just, passed on the basis of properly interpreted legal provisions, and reflective of a duly gathered and correctly appraised body of evidence'. While such argumentation was favourably received by the general public, it has been based on a dubitable assumption that the introduction of yet another legal measure shall definitely eliminate the criticised phenomenon of grossly unjust final judicial rulings. A judgment issued following the examination of an extraordinary complaint may also be objectively assessed as grossly unjust and harmful to a given party. Consequently, the following question arises: once such a line of reasoning is applied, should not another legal measure be secured to somehow restrain the volume of faulty court judgments identified and remaining in the legal system?

Ostensibly, the number of instances and appellate measures available ought to become a compromise between the tendency of safeguarding proper and well-controlled court judgments and that of securing a swift and definitive conclusion to a dispute.<sup>65</sup> Solutions introduced by the Law of 8 December 2017 distort the established compromise between the absolute stability of valid judgments and the need to rectify each erroneous judgment. The contemporary Polish legislator concluded that while the stability of final court judgments remains a Constitution-ingrained value, it does not necessarily deserve to be defended at all cost. The scope and form of defending the said value has been considerably restricted. In a sense, the stability of judgments has been juxtaposed against the principle of justice.<sup>66</sup>

The expansion of the extraordinary appeal measures catalogue in the Polish civil

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63 In case of the cassation complaint, the usual solution involves an annulment of the appealed judgment – reforming rulings are rare.

64 Examples of such circumstances catalogued by the Law include the expiry of a five-year term as of the date of the appealed judgment becoming valid, and the risk of violation to international obligations of the Republic of Poland.

65 A Oklejak, 'Z problematyki zaskarżalności orzeczeń sądowych w postępowaniu cywilnym' (1975) vol XXV-XXV *Studia Cywilistyczne* 222 ff..

66 Szczucki (n 44) 458.

law proceedings has triggered multiple reservations as to the connection between parallel complaints. This is due in part to these matters having remained unregulated by the legislator, or to the exercise having been fragmentary in nature.<sup>67</sup> Notably, the extraordinary complaint should be a subsidiary instrument – consequently, the respective party should exhaust all legal measures available prior to such a complaint being filed. It seems that from the viewpoint of the order of filing of appellate measures, the extraordinary complaint – while yielding to other measures of appeal (ordinary and extraordinary alike) – prevails over the complaint for declaring a final judgment contrary to law, which (as opposed to the cassation complaint and the application for revision) has not been designed to revoke valid judgments.<sup>68</sup> Early experiences have already demonstrated that the introduction of the extraordinary complaint has had considerable influence over the admissibility of complaint for declaring a final judgment contrary to law; the vast majority of the latter is currently being rejected as inadmissible.<sup>69 70</sup>

Literature is dominated by concerns that the operation of legal order and the entire justice system may be subject to disturbance.<sup>71</sup> Doubts have been cast with regard to the fact that filing extraordinary complaints in civil cases against judgments already involving other extraordinary appellate measures may produce an increase in the number of appellate measures employed and result in lengthiness of proceedings, which may pose a real threat to legal certainty and stability of judgments.<sup>72</sup> Although parties to civil proceedings have gained another extraordinary measure of appeal, they have no real influence over its application.

Given numerous similarities to the extraordinary review employed in the previous era, one might well ask whether the appellate measure provided for under the 2018 Law shall prove to be a valuable solution, bearing a resemblance to the so-called cassation in the interest of law functioning in some legal systems – or rather a source of chaos, doubt, and controversy. The negative record of the times of the

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67 The draft Law justification only references the association between the extraordinary complaint and the cassation complaint and the constitutional complaint.

68 T Zembrzuski, 'Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia' (2019) *Przegląd Sądowy* (forthcoming).

69 In a decision of 30 August 2018, Ref. No III CNP 9/18, unpublished, the Supreme Court ruled that in the wake of the new Supreme Court Law coming into force, the party filing the complaint for declaring a final judgment contrary to law shall be obliged to prove that it had submitted a motion for the filing of an extraordinary complaint with an authorised body, and that such motion had not been recognised. Conversely, in a decision of 24 October 2018, Ref. No CNP 48/17, unpublished, the Supreme Court pointed to the fact that a party who had filed the complaint for declaring a final judgment contrary to law prior to the Law introducing the extraordinary complaint having come into force shall be obliged to prove that an extraordinary complaint cannot be filed, or else said action for annulment shall be declared void and duly rejected.

70 Zembrzuski (n 68) (forthcoming).

71 M Balcerzak, 'Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka' (2018) Nos 1-2 *Palestra* 11 ff; Gruszecka (n 41) 27 ff; Erciński, Weitz (n 28) (forthcoming).

72 See A Góra-Błaszczkowska, 'Skarga nadzwyczajna i wnioski o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017' in A Barańska, S Cieślak (eds), *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* (CH Beck 2018) 61ff.

Polish People's Republic – especially the one referring to the anti-democratic and bureaucratic nature of the extraordinary review<sup>73</sup> – has proven that the option of discretionary attempts to undermine final judgments, designed to 'correct wrongful and unjust judgments on a state-wide scale',<sup>74</sup> may produce legal uncertainty.

Practice will verify both hopes and concerns connected with the new instrument of procedural law in Poland. One should not assume a priori that the new extraordinary measure of appeal shall destabilise the legal system in Poland – albeit certain operational distortions seem realistic. One may express hope that the scope of application of the extraordinary complaint shall prove limited in practice, and that it shall only apply to cases of particular and gross violations of the letter of law. Depriving parties of actual influence over the possibility to file the measure shall be a factor largely limiting the number of complaints filed. Another vital factor involves the expectation that the party filing the complaint should prove beyond doubt that the questioned judgment cannot be annulled or amended under other extraordinary measures of appeal, and that particular circumstances duly described under Article 89 para 1 of the Law have arisen. In all probability, the Supreme Court shall conclude in selected cases that the need to re-examine a case prevails over the need to safeguard a judgment's stability, thus justifying the abandonment of a ruling's formal finality and undermining the consequences of the *res judicata* in respective proceedings.

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73 Gudowski (n 13) 247 ff.

74 L Penner, 'Rewizja nadzwyczajna. Kilka uwag na tle praktyki' (1953) Nos 8-9 Nowe Prawo.