THE EVOLUTION OF NULLITY IN CIVIL PROCEEDINGS: BETWEEN THE GERMANIC AND THE ROMANIC MODEL – A POLISH PERSPECTIVE

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Abstract

Nullity of proceedings is usually construed as a category serving to remove the most serious defects in the procedure and the court decision. It should raise no doubts nowadays that circumstances which are sometimes described as grounds for nullity of proceedings do not automatically annul a court decision but rather render it actionable. Nullity in civil procedure may be construed in various ways and exists only in selected legal systems. Nullity in the Germanic form refers to the proceedings as a whole and entails invalidating defective proceedings. Nullity in the Romanic form is construed in the context of individual steps taken in the proceedings and provides for the possibility to correct the errors.

Keywords: nullity of proceedings; evolution of nullity; nullity in the Germanic form; nullity in the Romanic form; challenging judgments; grounds for nullity

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I. INTRODUCTION

Court proceedings should be carried out in circumstances that involve no irregularities and that result in an accurate assessment of whether the demands of the parties to a civil procedure are founded. Yet it is not possible to rule out all errors. Therefore, it is sometimes justified to challenge a court decision and to review it along with the related proceedings. Minor or essential errors of procedure may occur at the initial stage of the proceedings, in the course of the hearing, or at the final stage, when the court is deciding the case. Nullity of proceedings is usually construed as a category serving to remove the most serious defects in the procedure and the court decision. Most often, it is used with regard to errors of procedure. If such errors occur, the case has to be decided based on procedural grounds or the proceedings have to be carried out again in circumstances free from irregularities. It should raise no doubts nowadays that circumstances which are sometimes described as grounds for nullity of proceedings do not automatically annul a court decision but rather render it actionable. When a court finds that an earlier proceeding was null, it means that the judgment and the related procedure are subsequently found void, unless a given legal system enables such errors to be corrected.

Nullity in civil procedure may be construed in various ways and exists only in selected legal systems. Understanding nullity as an instrument in contemporary civil procedure is not possible without acknowledging its evolution and the undeniable impact of Germanic thought on its development and crystallisation.[1] This is how we can ascertain the character of nullity in the Polish civil procedure.

II. ORIGINS OF NULLITY

The construction of nullity originates in Roman law, where private law was very closely connected with civil procedure. The concept of nullity (*nullitas*)[2] was not known at that time, but many other terms, which cannot be systematised any more, were used: *invalidum*, *infectum*, *inutile*, *imperfectum*, *irritum*, *nullum*, *nullius momenti*, *non esse* or *vitosum*.[3] Roman jurists distinguished between absolute nullity, which was a sanction under civil law (*ius civile*), and voidability, which meant that

1 T. Zembrzuski, *Nieważność postępowania w procesie cywilnym* [*The Nullity of Proceedings in Civil Procedure*], Warszawa 2017, p. 28 et seq.

2 M. Kaser, *Das römische Privatrecht* [*Roman Private Law*], vol. 1, München 1971, p. 247.

3 R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych* [*The Effects of Unlawfulness of Obligation Contracts. In Search of Effective and Proportionate Sanctions*], Warszawa 2013, pp. 241 et seq.

the interested party could avoid a juridical act.[4] A juridical act under Roman law could be either valid or invalid, following the concept of "all or nothing".[5] The maxim *quod ab initio vitiosum est, non potest tractu temporis convalescere* expressed the belief that correcting an invalid juridical act was incompatible with the concept of nullity as such.

The concept of nullity was present in ancient proceedings. The institution of nullity of judgment was applied irrespective of the issue of actionability. A judgment became null *ex lege*, without the need or necessity to challenge it. A characteristic feature of the Roman procedure was that the parties were not obliged to indicate the grounds for appeal. Moreover, the grounds for nullity were never rendered in a systematic fashion in Roman law. Yet it was acknowledged that the major errors, i.e. the most significant ones, should result in the nullity of the judgment.[6]

Means of challenge were available exclusively against valid decisions that the appellant believed to be defective. At that time, no action of nullity had been developed yet.[7] In Roman law, the nullity of a judgment entailed its non-existence. A void judgment did not exist in the legal sphere and could have no legal effects. Thus, a void judgment could not be appealed, since it was treated as if it never existed. The essence of the Roman nullity and the way it was used in court procedure was reflected in the belief that *appelare necesse non est*, and only an unjust decision should be appealed.[8] A party who believed that the judgment was void could bring a new action in an already adjudicated matter.[9] In addition, it was possible to raise an objection of nullity (*exceptio nullitatis*) against a request for judgment enforcement.[10] Reconsideration of an already decided case confirmed the nullity of the prior judgment. There is no doubt that Roman private law did not use the concept of nullity which could then be transferred to modern procedural law systems. Therefore, the question arises as to when and how the concept of nullity emerged in civil procedure.

III. THE EVOLUTION OF NULLITY

In the Middle Ages, the understanding of nullity originating in Roman law was generally upheld. Nonetheless, it is also in this period that the action of nullity

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4 R. Taubenschlag, W. Kozubski, *Historia i instytucje rzymskiego prawa prywatnego* [*History and Institutions of Roman Private Law*], Warszawa 1947, pp. 89 et seq.

5 T. Giaro in: W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego* [*Roman Law. The Foundations of Private Law*], Warszawa 2009, p. 135.

6 Lack of competent judge, lack of capacity to be a party in civil proceedings, or adjudicating in a case that has already ended with a final judgment.

7 A.H.J. Greenidge, *The legal procedure of Cicero's time*, New Jersey 1999, pp. 287 et seq.

8 A. Skedl, *Die Nichtigkeitsbeschwerde in ihrer Geschichtlichen Entwicklung* [*Action of Nullity and Its Historical Development*], Leipzig 1886, p. 4.

9 W. Litewski, *Rzymskie prawo prywatne* [*Roman Private Law*], Warszawa 2003, p. 411.

10 E. Waśkowski, *Podręcznik procesu cywilnego* [*A Textbook of Civil Procedure*], Wilno 1932, p. 250.

(*querela nullitatis*) emerged.[11] This was when the idea was considered in procedural law of whether a void judgment could be corrected, amended, or even affirmed by the judge adjudicating on nullity. The medieval complaint against the judgment, a surrogate for appeal, was the starting point of a dynamic evolution of legal remedies, which then morphed into complex systems in individual countries. The action of nullity (*Nichtigkeitsbeschwerde* or *Nichtigkeitsklage*) currently present in some legal systems emerged from the medieval statutes of Italian municipalities and was then developed in Germanic law in both court practice and legal theory. This process occurred above all in customary law. Its progress was slow and not uniform.

A breakthrough in the perception and understanding of the institution of nullity took place in the mid-12th century. Slowly, means of challenging court decisions were subdivided into those against unfair and those against invalid judgments. With regard to the concept of *appellatio*, the construction of *sententia nulla*, which in ancient Rome meant that the judgment was in fact non-existent and had no legal force, was distinguished from *sententia iniqua*. It was noticed that judicial decisions could be *non valent*. Differentiating between the concepts of *nullitas* and *iniquitas* brought about the emergence of a separate action of nullity, independent of appeal, which could be filed on its own. This remedy, however, did not serve to declare a judgment non-existent, but – analogically to appeal – made it possible to challenge the decision if errors of procedure had been ascertained.

The issue of nullity as an action was the subject of considerations and discussions in the areas of legal procedure, legal history, and even philosophy of law. It was sometimes argued that "it would be no exaggeration to claim that this concept is the least transparent in the entire area of civil procedure."[12] The gradual transformation of nullity encountered certain opposition. Obviously, it was a complex and drawn-out process, not free from internal discrepancies and inconsistencies.[13] There were attempts to transfer the civilistic constructions of nullity from private law to procedural law. The latter, however, could not encompass the institution of *ex lege* nullity. The decisive moment was when the principle of formal validity (*Prinzip der Formalkraft*) crystallised. It meant that each court decision that was not challenged became incontestable.[14] Attempts to reconcile nullity in the classic sense with Germanic legislation based on the principle of formal validity of the judgment were

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11 K. Weitz, *Skarga o wznowienie postępowania* [*Action of Revision of Judgment*] in: *System Prawa Procesowego Cywilnego* [*The System of Civil Procedure Law*], ed. T. Ereciński, vol. III, chapter 2, *Środki zaskarżenia* [*Means of Challenge*], ed. J. Gudowski, Warszawa 2013, p. 1107.

12 A.W.S. Franke, *Beitrag zur Lehre von der Nichtigkeitsbeschwerde* [*A Contribution to the Doctrine of the Action of Nullity*], Archiv für civilistische Praxis, vol. 19, Heidelberg 1836, p. 385.

13 A. Skedl, *supra* n. 8, pp. 6 et seq.

14 J.W. Planck, *Die Lehre vom Beweisurtheil. Mit Vorschlägen für die Gesetzgebung* [*The Doctrine of Evidence-based Judgment. With Legislative Proposals*], Göttingen 1848, pp. 32 et seq.; R. Sohm, *Die Fränkische Reichs- und Gerichtsverfassung* [*The Frankish Imperial and Judicial Constitution*], Weimar 1871, pp. 130 et seq. See also A.S. Schultze, *Privatrecht und Process in ihrer Wechselbeziehung. Grundlinien einer geschichtlichen Auffassung des heutigen Civilprocessrechts. Zugleich ein Beitrag zur*

bound to fail and could result in nothing but "discrepancies and absurdities".[15] As time went by, the idea began to prevail that the nullity of civil proceedings could not be absolute.[16] Despite differences in beliefs and clashing ideas, it was agreed over the course of several centuries that an invalid judgment should achieve specific formal validity that has legal effects if a party omitted to file a specific means of challenge against it.[17] Thus, the legal thought continued to gradually move away from the Roman concept of nullity.

The civil procedure that had developed since the 16th century combined elements of family law and the Roman-canonical procedure. This was exemplified by the so-called common German civil procedure, which later became an inspiration for civil procedure codifications in Austria, Prussia and the German Empire. It was disputed at that time whether the concept of nullity had Roman origins or whether it was the product of German legal theory,[18] reflected among others in the *Reichskammergerichtsordnung* from 1555 and the *Jüngste Reichabschied* (*Recessus imperii novissimus*) from 1654.[19] Without prejudging the issue, it can be said that the theory of procedural law distinguished between *querela nullitatis sanabilis*, which made it possible to raise grounds for nullity that could be remedied and which was deemed tantamount to the *appellatio* of the time, and *querela nulitatis insanabilis*, which covered grounds for nullity that could not be remedied. The concept of nullity was construed in various ways. At times, the term was accompanied by adjectives: remediable, correctable, validatable (*heilbare Nichtigkeit*), which emphasised that nullity should not follow *ex lege*, but render it possible to challenge a null judgment by means of a suitable legal remedy. Over time, the addition "remediable" was dropped as being superfluous and producing a self-contradictory term.[20]

As it has been mentioned, over time, the image of nullity derived from old customary law, according to which a judgment that entailed an error being a ground for nullity could not become final at all, was gradually eradicated.[21] Jurists grew

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Lehre von den Rechtsquellen, insbesondere zur Lehre vom sogenannten Gewohnheitsrecht [*Private Law and Procedure and Their Interrelations. Elements of a Historical Theory of Modern Civil Procedure Law. With a Contribution to the Doctrine of Sources of Law, Especially the Doctrine of the So-called Customary Law*], vol. 1, Freiburg im Breisgau 1993, p. 147.

15 A. Skedl, *supra* n. 8, p. 111.

16 J. Bühn, *O skardze nieważności* [*On the Action of Nullity*], Reforma Sądowa 1905/1–2, pp. 1 et seq.

17 A. Skedl, *supra* n. 8, p. 4.

18 A.W.S. Franke, *supra* n. 12, pp. 385 et seq.

19 Legal scholars believe in the exceptional significance of the *Jüngste Reichabschied* (Youngest Recess) from the mid-17th century, which "resulted in the codification of the perception of legal matter and laid the cornerstone for the emergence of a common action of nullity." See A. Skedl, *supra* n. 8, p. 179.

20 A.W.S. Franke, *supra* n. 12, p. 413.

21 H.F. Gaul, *Zur Struktur und Funktion der Nichtigkeitsklage gemäß §579 dZPO* [*On the Structure and the Function of the Action of Nullity Under §579 dZPO*] in: *Festschrift für Winfried Kralik zum 65. Geburtstag. Verfahrensrecht – Privatrecht* [*In Honour of Winfried Kralik on His 65th Birthday. Procedural Law – Private Law*], ed. W.H. Rechberger, R. Welser, Wien 1986, pp. 162 et seq.

aware that a judgment containing an error qualified as a ground for nullity should be deemed valid and binding, but also actionable. It became necessary to refine the procedural instrument whose purpose was to declare a court judgment null.[22] This became possible only after the Roman principle of "absolute ineffectiveness of null judgments"[23] was definitely rejected. It was found that a court that entered a null judgment may and should reconsider the case. Thus, the construction of irrevocability of judgment was given up. Instead, the court could not only reconsider the case in the course of independent proceedings, but also reverse the earlier decision as invalid and enter a new judgment in its stead.[24]

The evolution of the institution of nullity was accompanied by a parallel process in which civil procedure became independent of material civil law. This development was part of the codification of procedural law in Europe. Over the course of centuries, legal systems developed a complex system of legal remedies aiming to transform nullity into a comprehensive system of means of challenge.

A model mechanism that made it possible to reverse a final judgment for procedural reasons, i.e. on account of an infringement of formal, not material law, as a result of an action emerged in Germanic law. Such instruments were the Austrian action of annulment (*Nullitätsbeschwerde*),[25] introduced by Holy Roman Emperor Joseph II in the General Rules of Court from 1781,[26] as well as the subsequent action of nullity (*Nichtigkeitsklage*) under the Code of Civil Procedure (ZPO) from 1895. The German code of procedure, in turn, distinguished two types of the so-called revision of judgment (*Wiederaufnahme des Verfahrens*), namely the action of nullity (*Nichtigkeitsklage*) and the action of restitution (*Restitutionsklage*).[27] They were treated as two kinds of actions that rendered it possible to revise a judgment. The action of restitution was filed on grounds of equity,[28]

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22 M. Allerhand, *Nieważność wyroku z powodu nienależytego obsadzenia sądu* [*The Nullity of Judgment on the Ground of Defective Composition of the Court*], Przegląd Prawa i Administracji 1909/52, pp. 800 et seq.

23 A. Bálasits, *Nieważność i zarzuty w procesie cywilnym austriackim* [*Nullity and Grounds in Austrian Civil Procedure*], PSiA 1886, no. 26, p. 206.

24 A. Skedl, *supra* n. 8, p. 172.

25 J. Trutter, *Das österreichische Civilprocessrecht in systematischer Darstellung* [*A Systematic Presentation of Austrian Civil Procedure Law*], Wien 1897, p. 581.

26 W.H. Rechberger, *Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa* [*Franz Klein's Ideas and Their Impact on the Development of Civil Procedure Law in Europe*], Ritsumeikan Law Review 2008, pp. 101 et seq.

27 J. Braun, *Rechtskraft und Restitution* [*Legal Effect and Restitution*], Part II, *Die Grundlagen des geltenden Restitutionrechts* [*The Foundations of the Current Restitution Law*], Berlin 1985, p. 76.

28 H.F. Gaul, *Die Grundlagen des Wiederaufnahmerechts und die Ausdehnung der Wiederaufnahmegründe. Zugleich ein Beitrag zum Problem der Analogie beim enumerativen Ausnahmerechtssatz* [*The Foundations of the Right to Revision of Judgment and the Expansion of the Grounds for Revision. With a Contribution to the Issue of Analogy in the Enumerative Exemption Clause*], Bielefeld 1956, p. 217.

while the action of nullity served as means of challenging the most serious errors of procedure.[29]

The action of nullity in Germanic countries became an extraordinary legal measure that enabled a party to challenge a court decision after it became final.[30] Creating a special action as an element of the system of challenge measures that would be independent of the revision of a judgment was supposed to provide legal security and stability of judgments on the one hand and make it possible to challenge a judgment after it became final on the other hand. The measure was applicable in the event of "violation of cardinal procedural provisions".[31] The institution of the action of nullity resulted in the emergence of two types of grounds for nullity[32] that were described as the most serious violations of procedural law. They could be deemed the classic grounds for nullity serving to challenge a final court decision. They concerned the issues of partiality of the judge and appearance in the proceedings of a person who had no due representation.

Bringing an action of nullity and setting aside a defective judgment from case law were not related to the interest in challenging the decision or to loss caused by the decision. A renewed action in a matter that was subject to a final judgment in a situation when procedural law provided for the possibility of challenging the judgment and reversing it as a result of a legal challenge became not only unnecessary, but also inadmissible. A judgment was annulled in connection with an action and the ensuing proceedings. The decision consisted in declaring the challenged judgment and the related proceedings null and void.

The institution of nullity in procedural law continued to shift and change. The emergence of nullity as an action that was a means of challenging final decisions turned out to be insufficient. The need to facilitate the proceedings was related to the issues of ordinary means of challenge. Action on the grounds of nullity became connected with appeal by means of the possibility to incidentally claim for nullity.[33] Some errors of procedure were deemed significant in so far as they should not only determine that the decision was defective, but also, at this stage of the proceedings, constitute grounds for examination by the court of its own motion (*ex officio*). Thus, the appeal procedure gained an additional instrument that facilitated its course.

Contemporary nullity owes its form to depriving the instrument of nullity of its character as a pure action and merging it with other means of challenge. In some legal systems, however, it was found that the construction of the action of nullity should be maintained, because proceedings before a court of last instance may also

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29 The parallel French institution of *requête civile* was a peculiar combination of the action of nullity and the action of restitution. H.F. Gaul, *supra* n. 21, pp. 157 et seq.

30 A. Skedl, *supra* n. 8, pp. 120 et seq.

31 J. Bühn, *supra* n. 16, p. 554.

32 H.F. Gaul, *supra* n. 21, p. 157.

33 A. Skedl, *supra* n. 8, p. 172.

involve grounds for nullity, which otherwise could not be challenged.[34] In some countries, action against null judgments disappeared completely, i.e. was engulfed by means of challenge.[35]

IV. TWO MODELS OF NULLITY

We can distinguish two groups of legal systems according to the model of nullity they employ, namely Germanic and Romanic systems. Both affect the solutions adopted in procedural law in individual countries with regard to challenging court decisions.

Nullity in the Germanic form refers to the proceedings as a whole and entails invalidating defective proceedings. Nullity in the Romanic form is construed in the context of individual steps taken in the proceedings and provides for the possibility to correct the errors.[36] In the first case, nullity results in cassating, reversing, annulling – it is an instrument of rehearing. In the second instance, it is possible to amend a defective decision, i.e. to review the case and enter a new judgment on the merits. In principle, it is not possible to combine the two approaches to nullity in one legal system. It is, however, possible to exclude or omit the institution of nullity altogether.

V. NULLITY IN THE GERMANIC FORM

The model involving the nullity of proceedings can be exemplified by the solutions adopted in Austrian and German legislation. Austrian law is distinguished by the twofold examination of the grounds for nullity as the ground of appeal. Special errors of procedure classified as grounds for nullity of proceedings[37] do not result in finding

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34 C. Hahn, *Die gesamten Materialien zur CPO* [*Complete Materials on the Code of Civil Procedure*], Berlin 1880, p. 379.

35 N. Picardi, *Manuale del processo civile* [*A Textbook of Civil Procedure*], Milano 2010, pp. 126 et seq.; G. Tarzia, *Lineamenti del processo civile di cognizione* [*Outline of the Civil Procedure*], Milano 2009, p. 132.

36 In Romanic legislations, nullity is perceived differently; it does not refer to the proceedings as a whole, but to individual procedural steps. There is no nullity of the proceedings, but an error in a procedural step in the form of voidness. Annulment has the effect that a single step or steps become void, but the remaining ones remain valid. The same is true for the entire proceedings, unless the effects of declaring a specific step null affect the entire proceedings. In this case, nullity is not strictly related to the actionability of court decisions, although it can be the subject of an appeal. Here, the annulment of the challenged judgment by the appeal court on the grounds of nullity is only a secondary function of the measure.

37 Pursuant to the Austrian Code of Civil Procedure, a judgment is null when: it was rendered by a court that included in its composition a judge who had been disqualified by operation of law or

the judgment non-existent. Nullity is not established *ex lege*, but needs to be declared by the court, provided that a party files an admissible and duly prepared remedy and that a revision procedure is carried out.[38] This refers to both appeal (*Berufung*) and review (*Revision*) proceedings before the Supreme Court of Justice (*Oberster Gerichtshof*). The latter has been shaped differently and based on different principles.[39] In each case, the grounds for nullity are examined by the court *ex officio*, and the court is also obliged to examine these reasons when the parties do not explain them clearly.[40] If an admissible remedy is used and proceedings before an appeal court are completed, grounds for nullity may result in reversing the judgment and annulling the proceedings. Annulment requires a decision in the rehearing (cassation) mode: the court has to reverse the judgment, annul the proceedings to the extent affected by nullity and remit the case for reconsideration or dismiss the action.[41]

Nowadays, the action of nullity (*Nichtigkeitsklage*)[42] is present in the Austrian law independently of review (*Revision*). Consequently, it is possible to reverse a judgment for two particularly important grounds for nullity under §529 ZPO, which are described as "the most serious violations of procedural law".[43] The selection of specific errors of procedure as grounds for the action is determined by the actual needs of legal practice.[44] These errors are related to the already mentioned issues with the impartiality of a judge (*iudex inhabilis*) and lack of due representation.

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who had been disqualified from adjudicating in that matter (§477(1) ZPO); the composition of the court hearing the case was contrary to the provisions of law (subsection 2); it was rendered by a court which did not have domestic jurisdiction, the jurisdiction of the court did not follow from an agreement and this circumstance was not corrected (subsection 3); as a result of unlawful acts, a party was deprived of the possibility to defend itself before the court, in particular because it was not served as required by law (subsection 4); a party lacking capacity to be a party in civil proceedings or capacity to act in court proceedings was not duly represented or the legal representative did not appear in the case, and this lack was not subsequently remedied (subsection 5); the judgment was rendered in a case in which no court action was available (subsection 6); the public was unjustifiably excluded (subsection 7); the provisions on taking the minutes were violated (pertains to parties submitting into the record drafts of the minutes of the proceedings drawn up by them) (subsection 8); the wording of the jurisdiction was defective so that it cannot be reviewed with certainty or the judgment is inconsistent or contains no statement of reasons (subsection 9).

38 H. Pimmer in: *Kommentar zu den Zivilprozeßgesetzen* [*A Commentary on Civil Procedure Legislation*], ed. H.W. Fasching, Wien 2005, p. 124.

39 E.-M. Bajons, *Austria* in: *Recourse against Judgments in the European Union*, ed. J.A. Jolowicz, C.H. van Rhee, The Hague 1999, pp. 36 et seq.

40 A. Deixler-Hübner, T. Klicka, *Zivilverfahren* [*Civil Procedure*], Wien 2010, p. 156.

41 E. Kodek in: *ZPO Zivilprozessordnung. Kommentar* [*ZPO Code of Civil Procedure. A Commentary*], ed. W.H. Rechberger, Wien 2006, p. 1541; A. Zechner in: *Kommentar zu den Zivilprozeßgesetzen* [*A Commentary on Civil Procedure Legislation*], ed. H.W. Fasching, Wien 2005, p. 426.

42 The action of nullity replaced the earlier action of annulment (*Nullitätsbeschwerde*) effective under the General Rules of Court from 1781 (*Allgemeine Gerichtsordnung*).

43 W. Jelinek in: *Kommentar zu den Zivilprozeßgesetzen* [*A Commentary on Civil Procedure Legislation*], ed. H.W. Fasching, Wien 2005, p. 849.

44 J. Bühn, *O restytucyi podług obecnej procedury cywilnej* [*On Restitution according to Current Civil Procedure*], PPiA 1904/31, p. 554.

The concept of nullity is approached in German law in a manner similar to the Austrian system, although there is a difference in the manner in which the grounds for nullity are considered when a court decision is challenged and a review procedure is initiated. Nullity is applied not as grounds for nullity considered *ex officio* in the appeal procedure (*Berufung*); it appears only in the review procedure (*Revision*) before the Federal Court of Justice (*Bundesgerichtshof*) in the form of absolute grounds for review.

Absolute grounds for review may be taken into account in the context of the examination of an available and admissible review appeal brought by the applicant. They constitute an exhaustive list[45] concerning errors of procedure with regard to the composition of the court, due representation of a party in the proceedings, the principle of the public nature of the proceedings, and the statement of reasons for the judgment.[46] An absolute ground for review means there is an irrebuttable presumption of a causal link between the error and the content of the judgment. In that instance, it is deemed that the challenged judgment was based on a violation of law. When a court ascertains that absolute grounds for review are present, it is obliged to reverse the judgment and annul the proceedings to the extent they were affected by the error, as well as to refer the case for reconsideration.[47]

The German law likewise provides for the possibility of bringing an action of nullity (*Nichtigkeitsklage*). The German action of nullity under §579 ZPO[48] is an extraordinary means of challenge (*Rechtsbehelf*) of a final decision made in a case. The action results in a reversal of the decision. If it is admitted, it is possible to reconsider the case and enter a new judgment.[49] This measure concerns similar errors of procedure. It grants protection of the right to an impartial and independent lawful judge (*Prinzip des gesetzlichen Richters*), protection of a party with no due representation and protection of the right to a fair hearing before the court

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45 The list of absolute grounds for review is similar to the Austrian grounds for nullity. It is shorter, however, and deemed exhaustive.

46 Following §547 ZPO, a judgment is based on a violation of law when: the composition of the court was incorrect (subsection 1); a judge who was disqualified from the proceedings by operation of statutory law participated in the decision, if this error was not successfully asserted by means of a motion to disqualify the judge (subsection 2); a judge who was disqualified from the proceedings upon request of a party participated in the adjudicating procedure (subsection 3); a party was not duly represented, unless it explicitly or implicitly consented to the proceedings (subsection 4); the judgment was delivered in a hearing from which the public was unjustifiably excluded (subsection 5); the judgment contains no statement of reasons (subsection 6).

47 B. Ackermann in: *ZPO Kommentar* [*A Commentary on the Code of Civil Procedure*], ed. H. Prütting, M. Gehrlein, Köln 2010, p. 1324; P.L. Murray, R. Stürmer, *German Civil Justice*, Durham 2004, pp. 391 et seq.; L. Rosenberg, K.H. Schwab, P. Gottwald, *Zivilprozessrecht* [*Civil Procedure*], München 2018, pp. 983 et seq.

48 This measure is available next to the action for restitution under §580 ZPO (*Restitutionsklage*).

49 R. Greger in: *Zivilprozessordnung* [*Code of Civil Procedure*], ed. R. Zöller, Köln 2014, p. 1531; C. Meller-Hannich in: *ZPO Kommentar* [*A Commentary on the Code of Civil Procedure*], ed. H. Prütting, M. Gehrlein, Köln 2010, p. 1382.

(*rechtliches Gehör*) by a party not competent to act in the proceedings.[50] It should furthermore be considered that §826 of the German Civil Code (BGB) allows final judgments reached through subversive actions of parties to be overturned.[51]

The automatic character of the proceedings specific for the Germanic model seemingly does not facilitate a faster resolution, since it is an instrument of cassation of the judgment and the related proceedings that led to it. It extends the time from the moment the action is brought to the arrival at a decision on the merits. Still, this mechanism facilitates the revision proceedings. If acknowledging a ground for nullity results in a reversal of the challenged decision, it also accelerates the inevitable effect related to the occurrence of specific errors of procedure selected by the legislature. Thus, it not only serves to reinforce certain guarantees, but also increases the rationality and efficiency of court proceedings.

VI. NULLITY IN THE ROMANIC FORM

In the other model, which is characteristic of Romanic law states, nullity takes a different form in the system of means of challenge. In this case, we are dealing with the nullity of a step taken in the proceedings. In order to illustrate this model of nullity, we should briefly analyse the solutions adopted in French and Italian law.

Modern French procedural law is characterised by the tendency to limit the possibilities of avoiding steps in the proceedings on account of errors of procedure.[52] The purpose of the institution of nullity is to establish the framework for the steps taken by the parties in civil proceedings.[53] The consequences of nullity are most often limited to a single step that was challenged or examined *ex officio*. Annulment has the effect that a single step or steps become void, yet the remaining ones remain valid. The same is true for the entire proceedings, unless the effects of declaring a specific step null affect the entire proceedings.[54] Nullity is a sanction for a failure to meet the requirements set by law. It seldom affects the proceedings as a whole, but mostly only individual procedural steps.

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50 An action of nullity may be brought when: the composition of the court was incorrect (subsection 1); a judge who was disqualified from the proceedings by operation of statutory law participated in the decision, if this error was not successfully asserted by means of a motion to disqualify the judge (subsection 2); a judge who was disqualified from the proceedings upon request of a party participated in the adjudicating procedure (subsection 3); a party was not duly represented, unless it explicitly or implicitly consented to the proceedings (subsection 4).

51 L. Rosenberg, K.H. Schwab, P. Gottwald, *supra* n. 47, pp. 997 et seq.

52 S. Guinchard, C. Chainais, F. Ferrand, *Procédure civile. Droit interne et droit de l'Union européene* [*Civil Procedure. National Law and EU Law*], Paris 2012, p. 657.

53 J. Vincent, *Procédure civile* [*Civil Procedure*], Paris 1978, p. 545.

54 L. Cadiet, E. Jeuland, *Droit judiciare privé* [*Civil Procedure Law*], Paris 2013, p. 340.

Italian procedural law follows the principle called the *principio di conservazione*. Along lines that are similar to French law, it provides for legal solutions to restrict the extent of nullity and its effects.[55] Procedural law requires the party that brings the action to indicate a specific error of procedure[56] that should in their opinion render the procedural step null. It is believed that the nullity of a procedural step does not affect preceding steps or subsequent independent steps, i.e. those that were not related to the defective step.[57] In addition, it is possible to convert a void procedural step into a valid one. Moreover, renewed completion of the step (*la rinnovazione*) may serve to remedy the nullity. Solutions of this type help maintain the validity of defective steps in the proceedings to a possibly broad extent.[58]

The review-centred character of the recourse procedure and the opportunities to correct errors of procedure that can result in the nullity of a procedural step evidence the similarity between the Italian regulation and the French model, for both the court and the parties are expected to undertake preventive or remedial measures. The proceedings render it possible to repeat any defective steps and to remedy nullity, including at the stage when the means of challenge are examined.

VII. POLISH PERSPECTIVE

The above considerations suggest that the evolution of nullity of proceedings outlined at the outset principally characterises Germanic legal systems. In this model of nullity, a specific list of errors of procedure with particular significance is specified. A ground for nullity has the effect that the decision has to be reversed without the need to examine the relation between the error and the content of the challenged decision. A judgment is set aside no matter whether the errors of procedure objectively affected its content, and the ruling may not be upheld, irrespective of whether or not it complies with material civil law. The grounds may be considered by the court of its own motion or upon the applicant's request. Nullity is examined as part of revision proceedings resulting from a party bringing an ordinary means

55 C. Taraschi, *Dritto processale civile* [*Civil Procedure Law*], Palermo 2014, p. 262.

56 Three types of errors of procedure (*l'invalidità*) are distinguished, namely *l'irregolarità*, *la nullità* and *l'inesistenza*. The first one covers minor errors that do not affect the validity of a step. Then, *la nullità* means (real) nullity of a procedural step. Such an act can have no effects in court proceedings. Finally, *l'inesistenza* means the non-existence of a procedural step (a non-act). G. Balena, *Elementi di dritto processuale civile* [*Elements of Civil Procedure Law*], Bari 2006, pp. 267 et seq.

57 E.g. the nullity of procedural step related to submission of evidence does not result in the nullity of the subsequent judgment, but can be an argument for the inaccuracy of the ruling. See G. Monteleone, *Manuale di dritto processuale civile* [*A Textbook of Civil Procedure Law*], vol. I, Padova 2007, p. 314.

58 C. Cechella, *Processo civile* [*Civil Procedure*], Milano 2012, p. 64.

of challenge. Some systems provide for an action of nullity (*Nichtigkeitsklage*) against final decisions.

In the light of the above, let us try to describe the place of nullity in the Polish classification. The beginnings of civil procedure in Poland date back to the 16th century, when the codification entitled the *Formula Processus* was introduced in 1523.[59] In order to examine the concept of nullity, it is necessary to analyse the legal solutions that emerged after the country regained its independence in 1918. Each territory of the former partitions had its own legal system imposed by the relevant partitioning power. Polish procedural law was based on solutions from both Germanic and Romanic systems, and the resulting legal institutions were often forged out of a compromise.[60] The institution of nullity emerged in Polish civil procedure at the very inception. It has remained almost unchanged, from the inter-war appeal and cassation model, through the review model based on the so-called socialist procedural law in the period of the People's Republic of Poland (1950–1996), up to modern times, after the solutions typical for procedure in free market states and the appeal and cassation model of means of challenge were reinstated.

The institution of nullity covering the nullity of both the judgment and the proceedings was adopted in Polish procedure primarily based on Germanic solutions and experience.[61] Nullity in the form of procedural grounds that are considered by the court of its own motion and that result in the need to reverse the judgment without examining the causal link between the ascertained error and the deficiency of the decision is an instrument of Austrian procedure. Interestingly, when shaping this means of challenge, the Polish legislature rejected the review-based Austrian model. Instead, it adopted the French model of appeal, the purpose of which is to reconsider the case and correct the errors made by the court and the parties.[62] In the Polish civil procedure, the nullity of proceedings is one of the means of challenge. Their system entails a broad possibility of cassation decisions, not only when a judgment on the merits was inadmissible, but also when the proceedings

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59 J. Gudowski, *Pogląd na apelację* [*A View on Appeal*] in: *Aurea Praxis Aurea Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego* [*Aurea Praxis Aurea Theoria. In Honour of Professor Tadeusz Ereciński*], vol. 1, ed. J. Gudowski, K. Weitz, Warszawa 2011, pp. 242 et seq.

60 J. Skąpski, *System środków prawnych w projekcie polskiej procedury cywilnej* [*The System of Legal Remedies in the Draft Polish Civil Procedure*], Gł.Pr. 1927/12, pp. 432 et seq.; W. Miszewski, *Polski kodeks postępowania cywilnego a procedura cywilna rosyjska* [*The Polish Code of Civil Procedure and the Russian Civil Procedure*], RPEiS 1932/1, p. 111.

61 X. Fierich, *Słowo wstępne* [*Foreword*] in: *Polska procedura cywilna. Projekty referentów z uzasadnieniem. Przedruk wyczerpanych druków z r. 1921 i 1923* [*Polish Civil Procedure. Clerk Drafts with Explanatory Memorandum. A Reprint from 1921 and 1923*], vol. II, Warszawa 1928, pp. V et seq.

62 T. Dziurzyński, *Apelacja* in: *Polska procedura cywilna. Projekty referentów z uzasadnieniem. Przedruk wyczerpanych druków z r. 1921 i 1923* [*Polish Civil Procedure. Clerk Drafts with Explanatory Memorandum. A Reprint from 1921 and 1923*], vol. II, Warszawa 1928, pp. 7 et seq.; W. Miszewski, *Proces cywilny w zarysie. Część pierwsza* [*An Outline of Civil Procedure. Part One*], Warszawa–Łódź 1946, pp. 214 et seq.

involved errors. With regard to the division of systems of recourse and the relevant means of challenge into means entailing rehearing and means entailing review,[63] it has to be noted that the institution of nullity of proceedings seems to belong to the latter category. The same pertains to the Austrian and the modern German model of appeal,[64] while the Polish model of challenge, like the French one, is an example of a rehearing system. The above shows that the nullity of proceedings in the Polish form is an efficient instrument that can work in various systems of means of challenge, whether they are based on review or on rehearing.

The grounds for nullity of proceedings in the Polish Code of Civil Procedure[65] were listed in the provision on appeal proceedings (Article 379 Code of Civil Procedure) as grounds for challenge of a decision by a court of first instance that are considered *ex officio*, i.e. in a provision applied in proceedings resulting from other legal remedies. Currently, the nullity of proceedings occurs when: (1) legal action was inadmissible; (2) the party had no capacity to be a party in civil proceedings, capacity to act in civil proceedings, or a body appointed to represent it or a statutory representative, or the representative was not duly authorised; (3) the same claim between the same parties is already the subject of an earlier pending procedure or has already been settled with a final and binding decision; (4) the composition of the court was contrary to the provisions of law or included a judge disqualified by operation of statutory law; (5) a party was deprived of the opportunity to defend its rights; or (6) a district court adjudicated in a case in which a regional court had jurisdiction, regardless of the value of dispute. Pursuant to other provisions, other grounds for nullity include lack of domestic jurisdiction and hearing a case involving an infringement of immunity from legal proceedings.

The Germanic action of nullity was not introduced to the Polish system of means of challenge.[66] The legislature decided not to distinguish between the action of nullity and the action of restitution, but the institution of revision of judgment covered grounds for nullity and the remaining grounds for revision, called the actual grounds for restitution.[67] In this event, it is possible to request a revision of proceedings on

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63 J.A. Jolowicz, *The new appeal: re-hearing or revision or what?,* Civil Justice Quarterly 2000–01, no. 20; J.A. Jolowicz, *Civil Procedure and the Common and Civil Law* in: *Law, Legal Culture and Politics in the Twenty First Century*, ed. G. Doeker-Mach, K.A. Ziegert, Stuttgart 2004, pp. 72 et seq.

64 W. Lüke, *Zivilprozessrecht* [*Civil Procedure Law*], München 2006, pp. 392 et seq.

65 Act of 17 November 1964 Code of Civil Procedure (consolidated text, Journal of Laws from 2020, no. 1575, as amended).

66 S. Gołąb, *Wznowienie postępowania* [*Revision of Judgment*] in: *Polska procedura cywilna. Projekty referentów z uzasadnieniem. Przedruk wyczerpanych druków z r. 1921 i 1923* [*Polish Civil Procedure. Clerk Drafts with Explanatory Memorandum. A Reprint from 1921 and 1923*], vol. II, Warszawa 1928, pp. 83 et seq.

67 G. Krygier, *Wznowienie postępowania w polskim prawie procesowym cywilnym w latach 1933–1939* [*Revision of Judgment in Polish Civil Procedure in the Years 1933–1939*], AUWr Prawo 2015/319, pp. 195 et seq.

the grounds of nullity: when the composition of the court included an unauthorised person; when a judge disqualified by operation of statutory law (*iudex inhabilis*) adjudicated the case and the party was not in a position to request disqualification before the judgment became final; when a party lacked capacity to be a party in civil proceedings; when a party lacked capacity to act in court proceedings; when a party was not duly represented; or when a party was in no position to act as a result of a violation of the law.

The construction of the grounds for nullity in the Polish civil procedure demonstrates their connection with actionability, challenge and review of judgments with the use of available legal remedies. The nullity of proceedings is a verified instrument that has emerged from the tradition of proceedings and made itself a permanent place in the system of means of challenge.

VIII. SUMMARY

The above considerations serve to demonstrate that the Roman concept of a null judgment that has no legal effects *ipso iure* has over the course of centuries been replaced by the notion that the grounds for nullity should render a judgment not non-existent, but only actionable. This evolution in the understanding of nullity resulted in the adoption of the principle that a judgment involving grounds for nullity remains valid and can become final. A judgment exists as long as it is not set aside as a result of an ordinary or extraordinary means of challenge. Until then, it brings on all the effects of a judgment and a party may not cite the errors that justify a challenge, and even less so the nullity of the judgment and the proceedings.[68] Declaring a judgment null has become a "treatment of an incurable disease".[69] Rejecting the absolute character of nullity and limiting it to the issues of actionability ensures certainty of judgments and predictability of decisions.

A judgment may be declared null on the basis of an action that is available to a party once it was entered. According to the modern approach to nullity, a judgment may be declared null as a result of a review. The purpose of the challenge is to verify the judgment. Thus, the addressee of the challenge is the court competent to modify the ruling.

Nullity of proceedings is a characteristic instrument of the system of challenges in Germanic legal systems. Here, it is a ground for a challenge in the course of the proceedings in the current instance. It is examined in the review proceedings before courts of various instances as well as in proceedings before courts of higher instances as an extraordinary means of challenge of final judgments. The Polish civil

68 M. Allerhand, *supra* n. 22, p. 795.
69 A.W.S. Franke, *supra* n. 12, p. 412 et seq.

procedure draws from these solutions as well. The institution of nullity of proceedings is usually absent from Romanic legal systems. It takes a completely different form, namely that of nullity of a procedural step. In fact, it is not a strictly procedural institution, but is essentially related to the mechanism of nullity in private law. Some continental legal systems include no notion of nullity – neither in the Germanic nor in the Romanic form. Moreover, the institution of nullity is absent from common law, which provides for different solutions to the problem of challenging judgments.