STUDIA PRAWNICZE THE LEGAL STUDIES

2019, No. 4 (220), pp. 107–132
ISSN 0039–3312
doi 10.5281/zenodo.3694912

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# Extraordinary remedies in Polish civil procedure[1]

**Abstract**
The article's objective is to present the essence of the system of extraordinary remedies in the Polish civil procedure, as well as a characterization of the particular remedies comprising that system. Application of the dogmatic method has also verified the hypothesis according to which the Polish legislator, in giving those remedies (including extraordinary ones) a normative structure, has in view that their objective is to seek a change in or to set aside the contested ruling. The article accents particularly regulation of the extraordinary grievance, considering its status as novel legislation giving rise to numerous doubts and reservation, as the normative shape of that remedy constitutes a source of collision between two values – the stability if a judicial ruling, and its lawfulness. The emergence of this remedy has led to the conclusion that there is a need to review the existing position of the civil procedure doctrine concerning respect for the principle of exclusivity adopted in our system of remedies.

[1] The framing of the issue of extraordinary legal remedies in this article corresponds to a large extent to the approach taken in T. Wiśniewski, R. Bełczącki, *Skarga nadzwyczajna w świetle systemu środków zaskarżenia w postępowaniu cywilnym*, Warszawa 2019, p. 310.

## I. Introductory remarks

This article offers a brief characterisation of the remedies available in the Polish civil procedure for reviewing final judgements in civil cases. In the doctrine, these remedies – distinctly from standard remedies – are referred to as extraordinary. This distinction is made according to the criterion of the suspensive effect[2]. Standard remedies are applicable to non-binding judgements, and when the relevant application is lodged, it prevents the judgement from becoming binding. Before describing the particular extraordinary remedies, it would seem appropriate to give at least a brief presentation of the typology of standard remedies. This will aid the reader in gaining a general understanding of the entire system of remedies in the Polish legal order.

In general, the standard remedies are distinguished by their devolutive effect and divided into appeals and other remedies[3]. Under the present Code of Civil Procedure from 1964 (CCP), the concept of "appeal" is of a normative nature, and encompasses both appeals and complaints[4]. As for fact-finding civil procedure, an appeal may be brought against a verdict (in a trial) or a judgement on the merits of the court of the first instance (in non-contentious proceedings), which can be either a district or circuit court (Art. 367, 505[9], 518 CCP). Complaints, however, may be filed against specified rulings of a formal nature[5], issued by either the court of the first or the second instance. The institution of the

2 The devolutional effect on the group of exceptional legal remedies in force is not universal.

3 In the Polish doctrine, there is also a slightly different classification of legal remedies for challenging judgments not yet final. These measures are collectively referred to as "remedies" and are subdivided into appeal measures *sensu largo* and appeal measures *sensu stricto*. The former include all measures which the parties are entitled to take under procedural laws to obtain an annulment or amendment of the contested judicial decision, while the latter seek to amend or annul the contested judicial decision by leading to a higher instance decision. It is characteristic of that position that the concept of remedies is also used for the purposes of creating a suspensive effect, and is divided into ordinary and extraordinary remediep. See W. Siedlecki [in:] J. Jodłowski, W. Siedlecki, *Postępowanie cywilne. Cześć ogólna*, Warszawa 1958, p. 414 et seq. Cf. M. Michalska-Marciniak, *Konstytucyjne podstawy środków zaskarżenia w prawie polskim* [in:] Id. (ed.), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym*, Sopot 2015, p. 25 et seq.

4 See also T. Ereciński, *System zaskarżania orzeczeń* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 1, Warszawa 2013, p. 67 et seq., and also M. Malczyk, *Zażalenie w postępowaniu cywilnym do Sądu Najwyższego jako gwarancja konstytucyjnego prawa do sądu – uwagi na tle art. 394[1] § 1 KPC (Czego oczekujemy od przyszłego Kodeksu postępowania cywilnego*) [in:] K. Markiewicz, A. Torbus (ed.), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego w Katowicach-Kocierzu (26–29 września 2013 r.),* Warszawa 2014, p. 858 et seq.

5 The reservation "in principle" is necessary in view of the *de lege lata* admissibility of appealing to the Supreme Court also against substantive decisions of the courts of second

complaint is thus presently not uniform in nature; what is more, the criteria of devolutionality in respect to this remedy is not authoritative in each case. Complaints encompass *inter alia* complaints to another panel of the second instance (so-called horizontal complaint), which should rather be considered another standard remedy, since the act of lodging it does not lead to the case being transferred to a higher instance. It should also be pointed out that with regard to some forms of complaint, we are dealing with only relative devolutionality, as the court of the first or second instance which issued the ruling against which the complaint is lodged can acknowledge it in the event of invalidity of proceedings or when it is obviously justified (see Art. 395 § 2 CCP).

The complaint as an appeal remedy can be considered in respect of an enumerated list of decisions issued in the course of both trial and non-contentions proceedings by a court of the first instance, particularly decisions concluding proceedings in the case (Art. 394 § 1 and Art. 394 § 1 in conjunction with Art. 13 § 2 CCP); however, in non-contentious proceedings, this can also occur in other cases indicated in law (Art. 518 CCP). Additionally, attention should be paid to complaints addressed to the Supreme Court. Such a complaint is admissible in many different and distinct cases detailed in Art. $394^1$ CCP. Pursuant to § 1, a complaint to the Supreme Court may be lodged against a decision by a court of the second instance rejecting a cassation appeal, and against a decision of the first or the second instance rejecting an appeal to declare incompatibility of a final judgement with the law. A complaint to the Supreme Court is also admissible in respect of some other decisions of the court of the second instance concluding proceedings in a case (Art. $394^1$ § 2 CCP)[6]. Particular attention should be given to a complaint to the Supreme Court regarding the overturning by the court of the second instance of a verdict issued by the court of the first instance and referring it back to that court for judgement (Art. $394^1$ § $1^1$ CCP). This remains a sort of legislative novelty, introduced into the Code of Civil Procedure on 3 May 2012. It provokes controversy in both scholarship and in practice. Its objective is to ensure review of the proper functioning of the court of the second instance in the full appeal model, in which the role of that court's rulings is essentially reformatory, with cassation as the exception[7].

instance of a cassation nature, referring the case to the court of first instance for reconsideration (Art. $394^1$ § $1^1$ Code of Civil Procedure).

6 I leave aside the fact that the presented state of affairs with regard to the form of complaints will change to some extent as of 7 November 2019 as a result of the entry into force of the procedural amendment in the form of the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts (OJ L item 1469).

7 More on the subject T. Zembrzuski, *Dopuszczalność zażalenia* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 1…, p. 448 et seq.

Apart from the indicated appeals, standard complaints include:
- objection to judgement by default (Art. 344 CCP),
- complaint to another panel of the court of the second instance (Art. $394^2$ CCP),
- charges against order for payment issued in payment order proceedings (Art. 493 CCP),
- objection to order for payment issued in writ of payment proceedings (Art. 503 CCP),
- objection to order for payment issued in European payment order proceedings (Art. $505^{19}$ CCP),
- objection to order for payment issued in electronic payment order proceedings (Art. $505^{35}$ CCP),
- complaint against ruling of a referendary (Art. $398^{22}$, $518^1$ CCP)[8].

## II. Exceptional remedies (general remarks)

Proceeding now to the issue of extraordinary remedies, it should first and foremost be emphasised that the Polish doctrine of civil procedure defines these as legal measures aiming at altering or overturning judicial rulings despite their being binding. There is also acceptance for the position that while it is not stated *expressis verbis* in any piece of legislation that this system of legal measures should be characterised by exclusivity of particular remedies in respect to the subject of the remedy (exclusivity of one sole remedy), meaning that they should be characterised by the absence of competition among them[9]. The considerations presented in the following passages will demonstrate that the recent amendments to procedural rules and the introduction of the institution of the extraordinary grievance are proof of the legislator's lack of respect for that postulate.

8 Cf. T. Ereciński [in:] *System zaskarżania orzeczeń*…, p. 57 et seq.; W. Broniewicz [in:] W. Broniewicz, A. Marciniak, I. Kunicki, *Postępowanie cywilne w zarysie*, Warszawa 2016, p. 152.

9 For more on the understanding of the principle of exclusivity of remedies see W. Siedlecki, *System zaskarżania orzeczeń sądowych w postępowaniu cywilnym* [in:] W. Berutowicz, W. Siedlecki (ed.), *Zaskarżanie orzeczeń sądowych*, Wrocław 1986, p. 38 et seq. and M. Michalska-Marciniak, *Zasady zaskarżania orzeczeń* [in:] Id. (ed.), *Wokół problematyki*…, p. 90 et seq.

## III. Cassation appeal

I. Presentation of the institution of the cassation appeal demands attention be drawn to the fact that it was reactivated in the Polish legal order[10], initially referred to as cassation, on 1 July 1996, constituting together with the appeal a means of appeal available to parties within the framework of two-instance proceedings. As a result, the Supreme Court became a court of the third instance; however, the procedural construction of the grounds and scope of cassation review rendered the cassation an exceptional remedy. Indeed, this review was limited to a legal aspect of the challenged verdict, ignoring its substantive layer. This is also why the Supreme Court, if it desired to issue a reformational ruling, despite the fact that it was a court of higher instance, was absolutely bound by the facts of the case constituting the basis of the challenged verdict[11]. The extraordinary nature of cassation and the restricted scope of appeal review were also very precisely defined by the specific grounds for appeal. Other significant limitations were introduced concerning the permissibility of cassation against verdicts of courts of the second instance. These limitations in the permissibility of cassation concerned the value of the subject matter of the appeal (*ratio valoris*), and the type of case (*ratio materiae*)[12].

On 6 February 2005, modifications were introduced into the cassation remedy system[13]. The previous cassation was replaced by the cassation appeal; however, this was more than a mere change in terminology, as it represented a fundamental transformation in the legal character of this remedy. However, the cassation appeal was designed as a legal remedy available against binding judgements. It thus constitutes a classic extraordinary remedy[14].

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10 After Poland regained independence in 1918, the cassation appeal was regulated as an appeal in the 1930 Code of Civil Procedure. The provisions relating to this complaint were in force until the entry into force of the Act of 20 July 1950, under which the complaint was replaced by the institution of revision.

11 T. Wiśniewski, *Przebieg procesu cywilnego*, Warszawa 2013, p. 397 et seq.

12 J. Gudowski aptly drew attention to the above aspects of the issue, formulating a general thesis that in the then legal status the Supreme Court, as a court of cassation, did not adjudicate cases as such, but only controlled the lower courts as to whether they did not offend the law with their judgments, and in the case of a found offence, it set aside defective judgmentp. See J. Gudowski, *Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego (z uwzględnieniem aspektów historycznych i prawnoporównawczych)*, "Przegląd Legislacyjny" 1999, no. 4, p. 28 et seq. See also T. Wiśniewski, *Skarga kasacyjna* [in:] Id. (ed.), *Skarga nadzwyczajna w świetle…*, p. 82 et seq.

13 Under the Act of 22 December 2004 amending the Code of Civil Prodcedure and the Common Courts Act (OJ L 2005, No. 13, item 98).

14 T. Zembrzuski, *Dostępność skargi kasacyjnej w procesie cywilnym*, Warszawa 2008, p. 35.

The procedural amendment retains the core of existing regulations governing the course of cassation proceedings, the rights of the parties, grounds of appeal, the Supreme Court's cognizance and the selection mechanism in the form of the so-called pre-court[15]. Moreover, in line with the previous legal state, the subject matter of cases in which cassation is admissible in general has been limited by law. Thus, the cassation system in force is not universal in nature.

In trial proceedings, pursuant to $398^1$ § 1 the Code of Civil Procedure, a cassation appeal to the Supreme Court can be brought against a final judgment or decision on rejection of the claim or discontinuance of the proceedings ending the proceedings in the case, unless a special provision provides otherwise. Such a special provision is the following article of the Code of Civil Procedure, namely Article $398^2$, which excludes the admissibility of a cassation appeal due to either the value of the object of the appeal or the nature of the case. A cassation appeal is inadmissible, inter alia, in property rights cases where the value of the object of the appeal is lower than PLN 50,000, and in labour and social security law cases when lower than PLN 10,000. An appeal in cassation is also inadmissible in cases: 1) for divorce, for separation, for maintenance, for rent or lease and for infringement of property ownership; 2) concerning disciplinary sanctions, certificate of employment and related claims as well as for allowances in-kind or their equivalent; 3) adjudicated in summary proceedings.

Also in non-contentious proceedings – pursuant to Article $519^1$ of the Code of Civil Procedure. – numerous deviations were introduced from the basic assumption that an appeal in cassation is permissible with respect to a decision on the merits of the case issued by the court of second instance and to a decision on the rejection of the application and discontinuance of proceedings concluding proceedings in cases related to personal, property, and inheritance law, as well as family and guardianship law. For example, in the latter group of cases, an appeal in cassation shall be admissible only in cases of adoption and division of joint property after the cessation of joint property between the spouses, if the value of the object of the appeal is not less than PLN 150,000. An appeal in cassation may also be made in cases for the removal of a person who is subject to parental authority or is under the custody of a person, conducted under the Hague Convention of 1980.

Standing to lodge a cassation appeal is in principle vested in the parties (in non-contentious proceedings – each participant), as well as in the Prosecutor General, the Commissioner for Human Rights, and the Children's Rights Commissioner, with the proviso, however, that the bringing of a cassation complaint

15 T. Wiśniewski, *Skarga nadzwyczajna*…, p. 86.

by a party excludes – to the extent contested – the bringing of a cassation complaint by the aforementioned public law entities (Article $398^1$ § 2 of the Code of Civil Procedure).

II. The correctness of submission of an appeal in cassation as a pleading depends on the applicant's compliance with the statutory editorial structure and prescribed form (Art. $398^4$ Code of Civil Procedure). This distinction of the broadly understood formal side of a cassation complaint is significant from the point of view of Article $398^6$ § 2 of the Code of Civil Procedure. The sanction provided for in that provision for failure to comply with the requirements as to the construction of the appeal in cassation (designation of the decision against which it is brought, indicating whether it is contested in whole or in part; citation of the grounds of cassation and their justification; application for quashing or revocation and amendment of the decision, indicating the scope of the quashing and amendment sought) is rejection of the appeal in cassation *a limine*, since that error cannot be remedied. However, avoiding this defect is to be facilitated by the requirement of compulsory representation by lawyer in the submission of the complaint. An appeal in cassation brought by a party in breach of this rule is also inadmissible *a limine*[16].

With regard to the general formal requirements for an appeal in cassation, the complainant shall, if necessary, be called upon to remedy the deficiencies within a week's time limit under pain of rejection of the application (Art. $398^6$ § 1 Code of Civil Procedure).

An appeal in cassation shall be lodged with the court which issued the contested decision within two months from the date of service of the decision with reasons on the applicant (Article $398^5$ § 1 Code of Civil Procedure). However, the time limit for submitting an appeal in cassation by authorised public law entities (the Prosecutor General, the Commissioner for Human Rights and the Children's Rights Commissioner) is six months from the date on which the decision becomes final and, if a party has demanded that the decision with a statement of reasons be served on it, from the date of service of the decision on the party (Art. $398^5$ Code of Civil Procedure). This provision should also be borne in mind in non-contentious proceedings, except that in cases involving the removal of a person who is subject to parental authority or

16 Some individuals are exempt from the obligation to act in proceedings before the Supreme Court only through an attorney. The provision of Article $87^1$ § 1 of the Code of Civil Procedure does not apply if the party, its body, statutory representative or proxy is a judge, prosecutor, notary public or professor or habilitated doctor of legal sciences, as well as if the party, its body or statutory representative is an advocate, legal adviser or advisor to the State Treasury General Prosecutor's Office (§ 2). Furthermore, § 1 is not applicable when the State Treasury is represented by the General Prosecutor's Office of the Republic of Poland (§ 3).

is in custody under the 1980 Hague Convention, the time-limit for the submission of an appeal in cassation by the abovementioned public law entities is four months from the date on which the order becomes final and binding (art. $519^1$ § $2^2$ Code of Civil Procedure).

III. Its grounds are undoubtedly decisive for the assessment of the essence and legal nature of a cassation appeal, as well as for the scope of the Supreme Court's cognizance, and they are in principle binding on the Supreme Court. Pursuant to Article $398^{13}$ § 1 of the Code of Civil Procedure, the Supreme Court shall examine an appeal in cassation within the boundaries of the appeal and of the grounds. There is one exception to this general rule. This exception applies to the invalidity of proceedings, which the Supreme Court, always within the boundaries of an appeal, considers *ex officio*.

As already mentioned, the cassation procedure, as opposed to the appeal procedure, addresses purely questions of law. The grounds for an appeal in cassation are both the defectiveness of the judgment itself and the proceedings before the court of second instance. This includes both substantive and procedural law violations. Pursuant to Article $398^3$ § 1 of the Code of Civil Procedure, a party may base an appeal in cassation only on two grounds: (1) infringement of substantive law by misinterpretation or misapplication, and (2) infringement of procedural rules, if that defect could have had a significant effect on the outcome of the case.

Further cassation grounds are provided for public law entities. The Prosecutor General may base a cassation complaint on generally indicated grounds, if the issuing of a ruling has led to a violation of fundamental principles of the legal order; the Commissioner for Human Rights – if the issuing of a ruling has led to a violation of constitutional freedoms or human and civil rights; and the Children's Rights Commissioner – if the issuing of a ruling has led to a violation of a child's rights (Art. $398^3$ § 2 Code of Civil Procedure).

An appeal in cassation cannot be based on objections concerning findings of fact or evidence (Article $398^3$ § 3 of the Code of Civil Procedure). This prohibition is consistent with the Supreme Court's cognizance regulations, since in cassation proceedings the Supreme Court is bound by the findings of fact which form the basis of the contested decision and the parties are prohibited from invoking new facts and evidence (Article $398^{13}$ § 2 of the Code of Civil Procedure).

IV. As far as cassation proceedings before the Supreme Court are concerned, attention should first of all be paid to the obligatory stage related to the consideration (in closed session and by a single judge) of the matter of acceptance or refusal of an appeal in cassation for consideration (art. $398^9$ § 2 Code of Civil

Procedure). At this stage, the appeal in cassation is evaluated from the point of view of the public-law premises referred to in art. $398^{9}$ § 1 Code of Civil Procedure[17]. The mechanism of selection of cassation complaints is that the Supreme Court accepts a cassation complaint for consideration if it is: 1) there is an important legal issue in the case; 2) there is a need to interpret legal provisions that raise serious doubts or cause discrepancies in the jurisprudence of the courts; 3) the proceedings are invalid or 4) the appeal in cassation is clearly justified.

An order refusing to accept an appeal in cassation is an order terminating the proceedings and is not subject to appeal.

If a complaint in cassation is accepted for consideration, the President shall refer it to a closed session, which is the rule, or to a hearing. This action may be combined with a request to the Prosecutor General to take a position in writing on the appeal in cassation lodged by a party and on any reply to the appeal already lodged (Article $398^{8}$ § 1 of the Code of Civil Procedure). The Supreme Court shall examine the cassation complaint in a panel of three professional judges (Article $398^{10}$ of the Code of Civil Procedure).

An appeal in cassation shall be dismissed if there are no well-founded grounds or if the contested decision, despite an erroneous statement of reasons, is well founded in law (Art. $398^{14}$ Code of Civil Procedure).

It is also permissible, but only at the applicant's request, to set aside the judgment under appeal and to rule on the substance of the case (Art. $398^{16}$ Code of Civil Procedure). When making a reformatory ruling, the Supreme Court, at the request of the applicant, shall apply Article 415 of the Code of Civil Procedure and shall rule on the reimbursement of the benefit provided or enforced or on restitution[18].

If an appeal in cassation is upheld, the Supreme Court shall set aside the appealed judgment in whole or in part and refer the case back to the court that issued the judgment or to another equivalent court for reconsideration. By declaring the proceedings null and void, the Supreme Court, along with the reversal of the appealed judgment, also cancels the proceedings to the extent affected by the nullity. The Supreme Court may also quash, in whole or in part, the judgment of the court of first instance and refer the case back to the same or an equivalent court for reconsideration. The court to which the case has been referred is bound by the Supreme Court's interpretation of the law in the case and the parties cannot base a future appeal in cassation on a judgment rendered

17 In legal jargon, this institution is referred to as "prejudication".

18 Where the issuance of a restitutional judgment requires the taking of evidence, the Supreme Court may send the application to the court of first instance. Cf. T. Wiśniewski, *Przebieg…*, p. 436 et seq. and Id., *Skarga kasacyjna…*, p. 136.

after rehearing the case on grounds inconsistent with the Supreme Court's interpretation of the law in the case (Art. $398^{20}$).

If a statement of claim was rejected or there were grounds for discontinuance of proceedings, the Supreme Court shall set aside the judgments in the case and reject the statement of claim or discontinue the proceedings (art. $398^{19}$ Code of Civil Procedure,).

If a legal issue that gives rise to serious doubts emerges during the examination of a cassation appeal, the Supreme Court may postpone its ruling and refer the issue to an enlarged panel of that Court for decision (Art. $398^{17}$ § 1 Code of Civil Procedure). Where a panel of seven judges of the Supreme Court considers that the importance for judicial practice or the serioSCAess of the doubts that exist justifies it, it may refer the legal question to the entire chamber, and the chamber to a panel of two or more combined chambers, or to the full college of the Supreme Court (Art. 86 of the Supreme Court Act of 8 December 2017). A resolution of the enlarged Supreme Court is binding in a given case (Art. $398^{17}$ § 2 Code of Civil Procedure).

## III. Action for ascertainment of unlawfulness of a final judgement

I. As a result of Article 77, paragraph 1 of the Constitution of the Republic of Poland of 2 April 1997, according to which "Everyone has the right to compensation for damage caused to him/her by the unlawful action of a public authority", and its statutory concretisation in the Civil Code (Article $417^1$ § 2), a normative necessity arose to create an appropriate procedural instrument which would serve the injured party to obtain, through civil proceedings, compensation due. This instrument was adopted on 6 February 2005 in the form of the action for ascertainment of unlawfulness of a final judgement (art. $424^1$–$424^{12}$ Code of Civil Procedure).

Under the Code of Civil Procedure, the object of an action for ascertainment of unlawfulness of a final judgement is regulated by several provisions. The most significant provisions are Art. $424^1$ and $519^1$ Code of Civil Procedure. The first article indicates the admissibility of the complaint in trial proceedings, while the second article indicates the admissibility of the complaint in the non-contentious proceedings. Under Art. $424^1$ § 1 Code of Civil Procedure, an ascertainment of unlawfulness of a final judgement of a court of second instance closing the proceedings in a case may be sought if damage has been caused to the party by the judgment and it was and is not possible to amend or set aside that judgment by means of the legal remedies available to the party. The same solution applies in non-contentious proceedings with regard to orders on the merits

of the case (art. $519^1$ § 1 Code of Civil Procedure). In both cases, when assessing the question of admissibility, it is therefore necessary to consider whether it was not and is not possible to amend or set aside the judgment (order on the merits) by means of legal remedies available to the party. The situation is different in the exceptional circumstances mentioned in Art. $424^1$ § 2 and $519^1$ § 2 Code of Civil Procedure. According to these provisions, when the unlawfulness results from a violation of fundamental principles of the legal order or constitutional freedoms or human and civil rights, the unlawfulness of a final judgment (a final decision on the merits) of the court of first or second instance concluding the proceedings in a case may also be sought if a party has not availed itself of the remedies available to it, unless the judgment can be amended or revoked by other remedies available to the party. As can be seen, subsidiarity of the action is also provided for in exceptional cases, but in a more lenient form, since the complaint is admissible even though the party did not make use of the legal remedy available to it in due time (the action is even permissible against a final judgment of the court of first instance). It is, however, inadmissible if it is still possible to amend or set aside the judgment by means of other legal remedies available to the party.

Let us add that we are presently discussing a specific legal measure, as it is situated between a validly concluded proceeding and a new proceeding that may be pending between one of the parties to that proceeding and the State Treasury in a damages case[19]. The Supreme Court, in accepting the action, confines itself to stating that the decision is unlawful to the extent contested (art. $424^{11}$ § 2 Code of Civil Procedure). Only in a situation where the case, due to a person or subject matter, was not subject to the jurisdiction of the courts at the time of ruling, the Supreme Court – declaring the ruling illegal – quashes the appealed ruling and the ruling of the court of first instance and rejects the claim or discontinues the proceedings (art. $424^{11}$ § 3 Code of

19 There is a dispute in the doctrine of civil procedure as to whether the complaint in question can be regarded as a remedy at all. This classification is made according to the criterion which assumes that the purpose of such measures is to set aside or modify the contested decision. An action for an ascertainment of unlawfulness does not seek to challenge the contested decision, but to establish its unlawfulness and can only exceptionally lead to its annulment. On the other hand, it is acknowledged that the present action does not differ from the remedies in that it also has an element of review of the judgment. Furthermore, as is well known, appeals are also classified according to the criterion of the validity of the judgment, whether or not it is contested. From this point of view, an action for ascertainment of unlawfulness should be brought against final decisionp. It should therefore ultimately be accepted, despite the questionable nature of the issue, that this complaint can ultimately be included in the group of extraordinary remedies under the traditional scheme. More broadly, see T. Wiśniewski, *Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* [in:] Id. (ed.), *Skarga nadzwyczajna w świetle…*, p. 170 et seq. and the literature cited therein.

Civil Procedure). Therefore, leaving aside the above exception, the finding that a particular final judgment is unlawful does not eliminate it from the legal system. The judgment, despite its obvious defectiveness, still binds the parties and produces legal effects in civil law transactions. In other words, the judgment under appeal continues to be valid in full force both as regards its validity and its effectiveness and enforceability[20]. The decision of the Supreme Court prejudicating the principle of the State Treasury's liability for a judicial tort creates a prejudicial effect on the injured party in a future compensation process[21].

It should be pointed out that, under the current state of law, extraordinary remedies in the form of an appeal in cassation and an application for resumption of proceedings serve the function of an action for ascertainment of unlawfulness of a final decision, since the relevant decisions granting both these actions are equivalent to a decision granting an action for ascertainment of unlawfulness of a final decision[22].

Requiring a prejudication in the form of a Supreme Court ruling, in other words, a two-stage procedure for the liability of the State Treasury for a judicial tort is not always necessary. This is elucidated in Art. $424^{1b}$ Code of Civil Procedure, which provides that, in the case of final judgments against which the present action is not permitted[23], compensation for damage caused by a final unlawful decision may be sought without the unlawfulness of the decision being previously ascertained in the action unless the party has failed to avail himself of the remedies available to him.

The time limit for bringing an action for ascertainment of unlawfulness of a final judgment is set out in Article $424^{6}$ § 1 of the Code of Civil Procedure This provision sets a two-year time limit for its submission. The beginning of the two-year period is linked to the date on which the judgment under appeal became final.

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20 Cf. A. Miączyński, *Orzeczenie Sądu Najwyższego* [in:] W. Berutowicz, W. Siedlecki (ed.), *Zaskarżanie orzeczeń…*, p. 569.

21 T. Ereciński, *Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Warszawa 2005, p. 1002.

22 J. Gudowski [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Vol. 3. Postępowanie rozpoznawcze*, Warszawa 2016, p. 478. Cf. T. Wiśniewski [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego. Vol. 2. Artykuły 367–505*[37], Warszawa 2013, p. 362 et seq.

23 It follows from our earlier reasoning that an action for ascertainment that a final decision is unlawful may be brought only against decisions in the form of a judgment or an order on the substance of the case.

II. It follows from settled case-law on the interpretation of the phrase "unlawfulness" that the concept cannot be regarded as synonymous with either unlawfulness linked to general civil liability for damages or unlawfulness distinguished by doctrine and case-law in relation to liability for tort. It is also stressed that when defining the notion of "unlawfulness", it should be kept in mind that it is intended to refer to judicial activity based on the principle of judicial independence. The concept of "a single correct and accurate judgment" should also be ruled out, otherwise, any inconsistency in judicial decisions should be considered to be an infringement of the law. As a result, the Supreme Court adopts the principle of "multiple judgments" in the broadest sense, which allows that even if the same or similar factual and legal decisions are made, conflicting court judgments are not considered unlawful and do not therefore constitute a judicial tort[24]. Ultimately, a unified position was forged in the judicature of the Supreme Court, based on the relevant acquis of doctrine and jurisprudence of the Constitutional Tribunal, according to which an unlawful decision is a decision that is undoubtedly contrary to fundamental and uniformly interpreted provisions, to generally accepted standards of adjudication, or is the result of a particularly grossly incorrect interpretation or application of the law[25]. According to this position, unlawfulness in this sense can only result from manifest errors of the court, caused by a blatant violation of the principles of interpretation or application of law, the understanding of which is not in doubt[26].

## IV. Application for resumption of proceedings

I. In civil proceedings, the application for resumption of proceedings shall in principle be available to final judgments and orders for payment (art. 399 § 1 and $353^2$ Code of Civil Procedure)[27]. In one case only may proceedings be resumed if

24 T. Wiśniewski, *Kodeks postępowania cywilnego*…, p. 359; Cf. J. Gudowski, *Dopuszczalność skargi o stwierdzenie niezgodności z prawem prawomocnego orzeczenia* [in:] J. Gudowski (ed.), *Środki zaskarżenia*. Part 2, Warszawa 2013, p. 1572.

25 See Supreme Court verdicts: of 31 March 2006, IV CNP 25/05, OSNC 2007, No 1, item 17 and of 7 July 2006, I CNP 33/06, OSNC 2007, No 2, item 35. See also critical gloss to those verdicts of Ł. Kozłowski, PS 2008, no. 7–8, p. 184 et seq. Also, Cf. T. Wiśniewski, *Kodek*s…, p. 359 et seq. and Id., Skarga nadzwyczajna…, p. 186.

26 The Supreme Court thus ruled in its verdict of 4 January 2007, V CNP 132/06, OSNC 2007, no. 10, item 174.

27 As far as the admissibility of challenging orders for payment by way of a resumption of proceedings is concerned, it should be noted that these may be any order for payment issued in separate civil proceedings such as an order for payment, a writ of payment procedure and an electronic writ of payment procedure, whereas such a possibility has been excluded, pursuant to Article 20 of Regulation (EC) No 1896/2006 of the European Parliament and of

they are concluded by a decision of a procedural nature, namely if the Constitutional Tribunal has declared a normative act incompatible with the Constitution, a ratified international agreement or a law on the basis of which it was issued (art. 399 § 2 in conjunction with art. 401[1] Code of Civil Procedure)[28] The basis for reopening, taking into account the relevant decision of the Constitutional Tribunal, obviously includes, as a general rule, also situations in which proceedings were concluded with a substantive decision, i.e. a judgment or an order for payment.

However, an application for resumption is not admissible against a judgment pronouncing a marriage annulment or divorce or establishing the non-existence of a marriage if even one of the parties has entered into a new marriage after it has become final and binding (art. 400 Code of Civil Procedure).

The resumption of proceedings which have been concluded by a final judgment upon an application for resumption is inadmissible (Art. 416 § 1 Code of Civil Procedure), subject to the restriction that this provision does not apply – Art. 416 § 2 Code of Civil Procedure – if the application for resumption was based on the basis of resumption as set out in Art. 401[1] Code of Civil Procedure. In this case, exceptionally, we may be dealing with an extraordinary complaint to resume proceedings.

In non-contentious proceedings, pursuant to Article 524 § 1 of the Code of Civil Procedure, the principle is adopted that a party to proceedings may request the resumption of proceedings concluded with a final decision on the merits of the case, but such resumption is not permissible if the decision ending the proceedings may be modified or set aside[29]. However, in accordance with paragraph 2 of that Article, an interested party who was not a party to proceedings which was concluded with a final decision on the merits may request the resumption of those proceedings if that decision infringes his rights. In such a case, the provisions on resumption of proceedings for incapacity to act shall apply.

An application for resumption shall be made within a period of three months, calculated from the date on which the party becomes aware of the ground for resumption and, where the ground is lack of capacity or representation, from the date on which the party, its body or its legal representative became

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the Council of 12 December 2006, as regards the European order for payment. On the admissibility of an application for a resumption of proceedings against a final order for payment see K. Weitz, *Dopuszczalność skargi* o w*znowienie postępowania* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 2…, p. 1184.

28 More on the subject see A. Olaś, *Wznowienie postępowania zakończonego orzeczeniem niemerytorycznym – uwagi de lege lata i de lege ferenda* [in:] K. Markiewicz, A. Torbus (ed.), *Postępowanie rozpoznawcze…*, pp. 675–690. See also K. Weitz, *Dopuszczalność skargi…*, p. 1177 et seq.

29 Detailed examples of cases in which an application for resumption of proceedings is excluded in non-contentious proceedings on the grounds of the possibility of amending or repealing final decisions on the merits of the case, are indicated and discussed at length by Ibid., p. 1185 et seq.

aware of the judgment (art. 407 § 1 Code of Civil Procedure). However, in the situation indicated in Article 401[1] of the Code of Civil Procedure, the application for resumption is in principle lodged within three months of the entry into force of the decision of the Constitutional Court (Art. 407§ 2 Code of Civil Procedure). No resumption may be requested more than ten years after the judgment has become final, except in cases where the party was prevented from acting or was improperly represented (Art. 408 Code of Civil Procedure). The indicated deadlines – three months and ten years – are independent of each other. Failure to meet either of them will result in rejection of the application.

II. On the basis of the Code of Civil Procedure we distinguish three groups of causes for resumption of proceedings. The first one is related to procedural defects that led to the invalidity of the proceedings; the second one takes into account the existence of the so-called restitution causes; while the third cause can be called constitutional, although it is present in a slightly broader legal context, not only constitutional[30].

The specific grounds for invalidity of the proceedings justifying an application for resumption of the proceedings are set out in Article 401 of the Code of Civil Procedure. They are as follows:

a) if the composition of the court included an unauthorized person or if a judge excluded by virtue of the Act adjudicated and the party could not file for disqualification before the judgment became final,
b) if the party did not have judicial or procedural capacity or was not properly represented, or if, as a result of an infringement of the law, it was deprived of the opportunity to act; however, no resumption may be requested if, before the judgment has become final, the inability to act ceased or the lack of representation was raised by way of a plea or the party confirmed the procedural steps.

Restitution grounds are regulated in Article 403 of the Code of Civil Procedure. They allow for the resumption of proceedings if:

a) the judgment is based on a forged or falsified document or on a criminal conviction, subsequently revoked, or
b) the judgement was obtained by means of an offence (§ 1),
c) such facts or evidence were subsequently discovered, i.e. after the judgment under appeal became final, as could have had an impact on the outcome of the case and could not have been used by the party in previous proceedings (§ 2), or

30 Cf. K. Piasecki, *Postępowanie sporne rozpoznawcze w sprawach cywilnych*, Warszawa 2011, p. 540.

d) a judgment which came before than the judgment under appeal and which has the same legal relationship is found to be final (§ 3).

In proceedings on the application for resumption, the rules of procedure at first instance shall apply mutatis mutandis, unless specific provisions provide (art. 406 Code of Civil Procedure).

If the inadmissibility of the application is established, it is subject to rejection (Article 410 § 1 of the Code of Civil Procedure. Otherwise, the court shall assess the merits of the application for resumption of proceedings, except that there is an exception to this rule for the Supreme Court, which, if it has jurisdiction, shall rule only on the admissibility of the resumption and shall refer the case to the court of second instance. After re-examining the case, the court, according to the circumstances, either dismisses the application for resumption of the proceedings or, taking it into account, amends or revokes the appealed decision and, if necessary, dismisses the claim or discontinues the proceedings (art. 412 § 2 Code of Civil Procedure).

## V. Application to the Supreme Court for annulment of a final decision

An application to the Supreme Court for annulment of a final judgment is an institution regulated in Article 96 of the Supreme Court Act of 8 December 2017 (hereinafter: SCA)[31]. Only the Prosecutor General has standing to submit such an application. The Supreme Court, at the Prosecutor General's request, annuls a final decision issued in a case which, at the time of the ruling, a person was not subject to the jurisprudence of Polish courts, or in which the judicial process was inadmissible at the time of the ruling, if the decision cannot be otherwise abolished under procedures provided for in legislation governing court proceed-

[31] OJ L 2018, item 5 as amended. As far as the historical development of this proposal is concerned, its origins are to be found in Article 77 of the Regulation of the President of the Republic of 6 February 1928 – Act on the Common Court System (OJ L No. 12, item 93.), which entitled the Supreme Court to annul the decision, at the request of the first prosecutor, if it was issued, inter alia, against a person who was not subject to the jurisdiction of common courts in a given case. The contemporary institution of the motion in question is considered in detail by Grzegorczyk, *Geneza i charakterystyka wniosku o unieważnienie orzeczenia* [in:] J. Gudowski (ed.), *Środki zaskarżenia*. Part 2…, p. 1640 et seq.; See also A. Góra-Błaszczykowska, *Skarga nadzwyczajna i wniosek o unieważnienie prawomocnego orzeczenia według ustawy o Sądzie Najwyższym z 8.12.2017 r.* [in:] *Ars in vita. Ars in iure. Księga jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu*, Warszawa 2018, p. 67 and T. Wiśniewski, W*niosek do Sądu Najwyższego o unieważnienie prawomocnego orzeczenia* [in:] Id. (ed.), *Skarga nadzwyczajna w świetle…*, p. 213 et seq.

ings (art. 96 § 1 SCA). Both these grounds are linked with the broadly understood competence of Polish courts. The former refers to relations with foreign courts, while the latter to relations with respect to domestic administrative procedures[32].

In filing the application, the applicant seeks to have the contested judgment eliminated from the legal system[33], since granting the application is, in terms of its effects, tantamount to setting aside that judgment[34]. It is irrelevant whether it is a final decision of the court of first or second instance, and in what procedural circumstances the decision became final. The legislature did not condition the admissibility of the application on the prior use by the party of available legal remedies by which the defective decision could be set aside. An application is, however, a subsidiary measure, since it can only be validly submitted if there is no possibility of setting aside the judgment by another type of extraordinary remedy[35].

It is noted that the application for a declaration of annulment may be filed at any time, since there is no statutory deadline for an appeal. This is unusual under the provisions on appeals, but nevertheless is worthy of approval.

Pursuant to Art. 96 § 5 SCA, after considering the case, the Supreme Court either accepts the application and annuls the contested decision or rejects the application. A cassation decision with simultaneous referral of the case for retrial is out of the question[36].

## VI. Extraordinary complaint

I. In the current system of appeals against judicial decisions in civil proceedings, extraordinary complaints occupy a special place[37]. This is a new legislative development, which entered into force – on the basis of the Supreme Court Act – on

32 Id., W*niosek do Sądu Najwyższego*…, p. 221.

33 P. Grzegorczyk, *Geneza i charakterystyka wniosku*…, p. 1647; A. Góra-Błaszczykowska, *Skarga nadzwyczajna…,* p. 67.

34 P. Grzegorczyk, *Geneza i charakterystyka wniosku…,* p. 1647.

35 T. Wiśniewski, W*niosek do Sądu Najwyższego*…, p. 219.

36 P. Grzegorczyk, *Rodzaje, podstaw i skutki rozstrzygnięcia Sądu Najwyższego* [in:] J. Gudowski (ed.), *Środki zaskarżenia.* Part 2…, p. 1724. See also T. Wiśniewski, W*niosek do Sądu Najwyższego*…, p. 222.

37 It follows from the justification of the draft Supreme Court Act presented by the President of the Republic of Poland that the institution of an extraordinary complaint is to implement the postulate that court judgments should be just, issued on the basis of properly interpreted legal regulations and reflect the evidence collected and properly assessed, even at the expense of the stability of final court judgments, and, moreover, it is to fill a gap in the current system of extraordinary remedies, as the basis for the complaint may be not only a gross violation of the law but also contradiction of essential court findings with the content of the evidence collected in a given case. For more, R. Bełczącki, *Skarga nadzwyczajna* [in:] T. Wiśniewski (ed.), *Skarga nadzwyczajna w świetle…*, p. 223 et seq.

3 April 2018[38]. In the Polish legal doctrine, this complaint gives rise to numerous doubts and objections, as its normative form creates a collision of two values which are of great importance to the legal order – the stability of a judgement and its rule of law[39]. Furthermore, it is also stressed that the extraordinary complaint led to a revision of the position taken to date in our civil litigation doctrine on complementarity and competition between extraordinary remedies, and to respect the principle of exclusivity adopted in our system of appeals[40].

A special feature of the extraordinary complaint is its subsidiarity. It results from Art. 89 § 1 SCA that it is admissible if the judgment cannot be set aside or modified by other extraordinary remedies[41]. On the other hand, the inadmissibility of an extraordinary complaint is not determined by the fact that the party did not take advantage of the ordinary or extraordinary remedies available to it within a reasonable period of time and, as a result, not only did it lose the right to a procedural remedy, but it also deprived itself of the possibility of any correction of the defective judgment. The subsidiarity of an extraordinary complaint means that, in principle, all other possible and admissible extraordinary measures and other legal remedies take precedence over it[42]. This means, for example, that if the expected result in removing the defectiveness of the judgment can be achieved by means of an application for resumption of proceedings, an appeal in cassation, or an application for reinstatement, this excludes the admissibility of an extraordinary

38 It should be noted that the extraordinary complaint was introduced at the same time in criminal proceedings on the above date. In both cases, it was based on the institution of extraordinary review, which was removed from the Polish legal system in criminal cases on 1 January 1996, and in civil cases on 1 July 1996. The roots of the extraordinary complaint date back to the legal order of the USSR. It was, therefore, the creation of a totalitarian state. For more, T. Ereciński, K. Weitz, *Skarga nadzwyczajna w sprawach cywilnych*, "Przegląd Sądowy" 2019, no. 2, p. 10 et seq.; T. Zembrzuski, *Wpływ wprowadzenia skargi nadzwyczajnej na skargę o stwierdzenie niezgodności z prawem prawomocnego orzeczenia*, "Przegląd Sądowy" 2019, no. 2, p. 23 et seq.; T. Wiśniewski, *System środków zaskarżania orzeczeń w postępowaniu cywilnym* [in:] Id. (ed.), S*karga nadzwyczajna w świetle…*, p. 13 et seq.

39 More broadly A. Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warszawa 2018, p. 268 et seq.; T. Scheffler, *Skarga nadzwyczajna*, "Radca Prawny" 2018, no. 178, el.; T. Ereciński, K. Weitz, *Skarga nadzwyczajna…,* p. 7 et seq.; T. Zembrzuski, *Wpływ wprowadzenia skargi…,* p. 23 et seq.; A. Góra-Błaszczykowska, *Skarga nadzwyczajna…*, p. 67 et seq.; T. Wiśniewski, *System zaskarżania orzeczeń…*, p. 47 et seq.

40 T. Zembrzuski, *Wpływ wprowadzenia skargi…*, p. 28 and 36. Cf. T. Wiśniewski, *System zaskarżania orzeczeń…*, p. 51 et seq.

41 T. Ereciński and K. Weitz indicate that the extraordinary complaint is an extraordinary remedy of a complex nature and combines elements of the former extraordinary review and the cassation in defence of the law in some systems – T. Ereciński, K. Weitz, *Skarga nadzwyczajna…*, p. 8–9.

42 Cf. T. Zembrzuski, *Wpływ wprowadzenia skargi…*, p. 28.; T. Wiśniewski, *System zaskarżania orzeczeń …*, p. 49 et seq.

complaint. Only in the case of an application for a declaration of incompatibility of a final decision shall priority be given to an extraordinary complaint[43].

II. Article 89 § 1 SCA defines the main subject matter of review in proceedings conducted under an extraordinary complaint. It is: preservation of the principles or freedoms and human and civil rights set out in the Constitution of the Republic of Poland (point 1), correctness of the interpretation and application of the law (point 2), correctness of the findings adopted as the basis for the ruling in the light of the evidence gathered in the case (point 3)[44]. The three-faceted subject-matter of the judicial review discussed here is a derivative of the causes (grounds) for the extraordinary complaint set out in that provision. Under Art. 89 § 1 SCA, an extraordinary complaint is lodged if:

1) the judgment violates the principles or freedoms and human and civil rights set out in the Constitution or
2) the judgment is manifestly unlawful due to misinterpretation or misapplication of the law, or
3) there is a clear contradiction between the relevant findings of the court and the evidence gathered in the case.

The Supreme Court Act adopts the principle that an extraordinary complaint may be lodged against final decisions of a common court concluding proceedings in the case (art. 89 § 1 *princ.* SCA). This means that it is irrelevant whether the decision was issued by a court of first instance or second instance. There are no restrictions on the extraordinary complaint due to the type of case or the value of the object of the appeal. However, an extraordinary complaint is not admissible against a judgment establishing the non-existence of a marriage, a marriage annulment or a divorce, if one of the parties has concluded a marriage after such a judgment has become final, and against an adoption order (art. 90 § 3 SCA).

In cases heard in the course of the proceedings, it is permissible to lodge an extraordinary complaint against a judgment, a payment order, but also against an order terminating the proceedings in a formal manner (order rejecting the claim or discontinuing the proceedings). In non-contentious proceedings, on the other hand, the decision on the merits of the case and procedural decisions to reject an application or discontinue the proceedings are subject to appeal with the complaint under consideration here[45].

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43 T. Wiśniewski, *System zaskarżania orzeczeń…*, p. 50 and Id., *Skarga o stwierdzenie niezgodności…*, p. 200 et seq.

44 R. Bełzącki, *Skarga nadzwyczajna…*, p. 224.

45 Considering the limited framework of this statement, I do not elaborate on the admissibility of an extraordinary complaint in other civil proceedings. See on that subject Ibid., p. 230.

As a general rule, the Supreme Court's decisions, including reformatory judgements, are not subject to appeal. Moreover, it should be noted that an extraordinary complaint in certain procedural situations is a complementary measure to a cassation appeal[46]. Under Art. 90 § 2 SCA, an extraordinary complaint cannot be based on the charges which were the subject of a cassation complaint adopted for consideration by the Supreme Court. Other charges are therefore admissible. Nevertheless, a legislative novelty is the possibility of challenging the decision of a common court, in this case always a decision of a court of second instance, despite earlier appeals in cassation. However, if in a given case the Supreme Court refuses to accept a cassation appeal for consideration, overturns the decision of the second instance court and remits the case for reconsideration, or, alternatively, decides to reject the cassation appeal, the filing of an extraordinary complaint is not only admissible, but also there is no prohibition on repeating the charges made in the cassation appeal[47]. This state of affairs is manifestly incompatible with the requirement for an exclusive remedy against a particular type of judgment.

III. The legislator has defined precisely the list of entities entitled to file an extraordinary complaint (art. 89 § 2 SCA). The parties are excluded, but standing has been given to the following public law entities: the Prosecutor General, the Commissioner for Human Rights and, within the scope of their competence, to the President of the Prosecutor General's Office of the Republic of Poland, the Children's Rights Ombudsman, the Patient's Rights Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium Enterprises, and the President of the Office for Competition and Consumer Protection. Thus, we are dealing here with a multi-purpose public legitimacy, with different scopes of legitimacy to lodge an emergency complaint. The most extensive legitimacy is that of the Prosecutor General and the Ombudsman[48].

IV. The time-limit for filing an extraordinary complaint is laid down in art. 89(3) of SCA, according to which an extraordinary complaint must be lodged within five years of the date on which the contested decision became final[49]. If an appeal

46 Ibid., p. 227.

47 Ibid., p. 228.

48 It should be noted that during the transitional period – i.e., 3 years from the entry into force of the Supreme Court Act of 2017 – with regard to final decisions concluding proceedings in a case which have become final before the entry into force of this Act (i.e. before 3 April 2018), an extraordinary complaint may be brought only by the Prosecutor General or the Commissioner for Human Rights (115 § 1a SCA).

49 The rule laid down in Article 89 § 3 of the SCA on the time-limit for bringing an extraordinary complaint is subject to a serious derogation during a transitional period. Under

in cassation has been lodged against the decision, the time-limit for submitting an extraordinary appeal shall be one year from the day on which the appeal in cassation is decided[50]. Attention should be drawn to the specific situation in which an extraordinary complaint – lodged within the time-limit – is to be examined after five years from the date on which the contested judgment of the Republic of Poland becomes final and binding. In such a case, if at the same time the ruling has had irreversible legal effects, or such is supported by the principles or freedoms and human and civil rights set out in the Constitution, the Supreme Court – if it does not reject the extraordinary complaint – may limit itself to stating that the contested ruling was issued unlawfully and to specifying the circumstances on account of which it has thus ruled (art. 89 § 4 SCA)[51]. In this case, therefore, the Supreme Court, taking into account the extraordinary complaint, limits itself to the so-called "platonic" ("instructional") indicating to the court of a wrongful judgment[52].

V. In connection with issues concerning the proceedings and types of rulings issued by the Supreme Court in proceedings triggered by an extraordinary complaint, attention should first of all be paid to the conciseness of the regulation of this institution. This explains the importance of the reference contained in Art. 95 point 1 of the SCA, based on which, to the extent not regulated by the provisions of the Act on extraordinary complaints, the provisions of the Code of Civil Procedure concerning a cassation complaint are applicable in the proceedings on this complaint, excepting art. $398^4$ § 2 and $398^9$. However, in general terms, the legislator has adopted the cassation procedural model for the extraordinary complaint itself[53], accompanied by some procedural innovations. Thus, Article 93 of the SCA introduces a legislative novelty in the form of the institution of the public interest ombudsman[54]. According to this article, if the First President of the Supreme

Article 115 § 1 of the SCA, for a period of three years from the date of entry into force of that law, an extraordinary action may be brought against final decisions concluding proceedings in cases which have become final after 17 October 1997.

50 For more, Ibid., p. 235 et seq.

51 See also art. 115 § 2 SAC, applicable during the transition period.

52 Cf. K. Piasecki, *Postępowanie sporne…*, p. 533 and A. Miączyński, *Orzeczenia Sądu Najwyższego…*, p. 515, przypis 96.

53 It should be noted with surprise that the reference in Article 95 of the SCA to the provisions relating to an appeal in cassation does not state that these provisions apply mutatis mutandis. This is a clear oversight by the legislator, since the nature and scope of the review triggered by the bringing of an extraordinary complaint are different from those of the review in the cassation procedure. Moreover, the wording of Art. 91 § 1 SCA, according to which the Supreme Court's ruling in a reformational rather than a cassation manner has priority, is not irrelevant to the subject matter in question.

54 In the current state of law, the social interest in civil proceedings, if necessary, was protected only by the prosecutor (Art. 55 et seq. Code of Civil Procedure).

Court or the President of the Supreme Court considers that the protection of the rule of law and social justice justifies it, particularly in the case of an extraordinary complaint, he may appoint a participant in the proceedings acting as a public interest ombudsman, in particular a person fulfilling the requirements for holding office as a judge of the Supreme Court. The public interest ombudsman aims to make the principles of the rule of law and social justice a reality (§ 1). The public interest ombudsman shall be notified of hearings of the Supreme Court in the case to which he was appointed. The public interest ombudsman may make written statements, attend hearings, and make oral statements (§ 2).

The solution set out in Art. 94 SCA concerning the composition of the court ruling on an extraordinary complaint is unique. The extraordinary complaint is reviewed by the Supreme Court in a panel composed of two Supreme Court judges adjudicating in the Chamber of Extraordinary Review and Public Affairs and one Supreme Court juror (§ 1). However, if an extraordinary complaint concerns a ruling issued as a result of proceedings in the course of which the Supreme Court issued a judgment, the case is examined by the Supreme Court in a panel composed of five Supreme Court judges adjudicating in the Chamber of Extraordinary Review and Public Affairs and two Supreme Court jurors (§ 2).

Although the provisions applied to proceedings on an extraordinary complaint – to the extent not regulated by the provisions of the Supreme Court Act of 2017 – are those applicable to cassation proceedings, the nature and shape of these proceedings is different from cassation proceedings. This is a consequence of the axiological justification for the introduction of the extraordinary complaint into our legal order. The point is that, in the proceedings on such a complaint – as opposed to the cassation procedure – the correctness of the established factual basis of the contested decision is also a protected value. For this reason, the extraordinary complaint may also be based on the allegation that essential findings of the court are contradictory to the evidence gathered in the case, and the Supreme Court, if the appealed decision is overturned and the case is referred back to the court for reconsideration, has the power to give the court that issued the decision guidance on further proceedings[55]. It need not, therefore, like a court of cassation, confine itself to engaging in interpretation of the law (see Art. $398^{20}$ Code of Civil Procedure).

Article 91 § 1 SCA provides for certain general principles for ruling on an extraordinary complaint. The Supreme Court, when admitting such a complaint, annuls the appealed decision in whole or in part and, in accordance with the outcome of the proceedings, either remits the case to the competent court for reconsideration, if necessary also annuls the decision of the court of first

55 R. Bełczącki, *Skarga nadzwyczajna…*, p. 299.

instance, or discontinues the proceedings. If the Supreme Court finds that there are no grounds for reversal of the appealed decision, the Supreme Court shall dismiss the extraordinary appeal[56].

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56 More on the subject, R. Bełczącki, *Skarga nadzwyczajna*…, p. 287 et seq.

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## SUMMARY

Extraordinary remedies in the Polish doctrine of civil procedure are legal measures aimed at amending or overturning court decisions despite their force of law. Although by its very nature, the legal act appropriate for regulating the legal remedies admissible in civil proceedings is the Code of Civil Procedure, the above assumption has not been fully observed by the legislator, as the legal bases for two extraordinary remedies is contained in other legislation, in particular, in the Supreme Court Act of 8 December 2017 (OJ L 2018, item 5 as amended). These are the extraordinary complaint and application for annulment of a final judgment by the Supreme Court. The Code of Civil Procedure, on the other hand, regulates three extraordinary appeals: an appeal in cassation, an action for ascertaining the unlawfulness of a final judgment, and an application for resumption of proceedings. It should be pointed out that, as the law presently stands, extraordinary remedies in the form of an appeal in cassation and an application for resumption of proceedings serve the function of an application for ascertainment of unlawfulness of a final judgment, since the relevant judgments upholding both these applications are equivalent to a judgment upholding an application for ascertainment of unlawfulness of a final judgment. Particular attention has been paid to the legislative novelty of the extraordinary complaint. It is characterised by subsidiarity, as it is admissible if a judgment cannot be set aside or modified by other extraordinary remedies. Only statutorily designated public law entities have standing to bring such a complaint, and its grounds are strictly defined by law. Also, the procedure itself conducted on the basis of an extraordinary complaint is characterised by specificity. Only statutorily designated bodies governed by public law are entitled to bring this action. It is heard by the Supreme Court in a panel composed of two Supreme Court judges adjudicating in the Chamber of Extraordinary Review and Public Affairs and one Supreme Court juror. However, if an extraordinary complaint concerns a decision made as a result of proceedings in the course of which the Supreme Court issued a judgment earlier, the case is considered by the Supreme Court in a panel composed of five judges of the Supreme Court adjudicating in the Chamber of Extraordinary Review and Public Affairs and two jurors of the Supreme Court. A public interest ombudsman may take part in these proceedings.


**Keywords**: system of extraordinary remedies, appeal in cassation, application for ascertainment of unlawfulness of a final judgment, application for resumption of proceedings, application for annulment of a final judgment by the Supreme Court, extraordinary complaint