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MANDATORY REPRESENTATION BY AN ATTORNEY OR LEGAL COUNSEL AND ACCESS TO THE COURTS IN CIVIL CASES

1. INTRODUCTION

The right to enjoy assistance of a professional representative for the purpose of litigation in civil matters in some cases transforms into an obligation conditioning the effectiveness of certain procedural steps. Consequently, legal limitation of the capacity to bring proceedings in the Polish legal system is essential for access to the courts at certain stages of civil proceedings, as well as in certain categories of cases. As provided by Art. 87^1 § 1 of the Code of Civil Procedure (hereinafter CCP), representation of parties by attorneys and legal counsels is obligatory in proceedings before the Supreme Court. This applies to the proceedings initiated by a cassation appeal (Art. 398^1 *et seq.* CCP), an action for finding a final decision unlawful (Art. 424^1 *et seq.* CCP), initiated by a complaint filed at the Supreme Court (Art. 394^1 CCP), by an action for reopening proceedings brought to the Supreme Court (Art. 412 § 4 CCP). As K. Knoppek rightly pointed out, this mandate also applies to the proceedings conducted by the Supreme Court in civil matters in the formal sense (art. 1 *in fine* CCP), for example in case of questioning the validity of parliamentary and presidential elections brought before the Supreme Court Chamber of Labour, Social Security and Public Affairs[1]. The obligation to establish a professional representative for the purpose of litigation also applies to procedural steps relating to the proceedings before the Supreme Court taken before a court of lower instance. These steps are steps in the so-called pre-instance proceedings caused by bringing – via a lower instance court – a legal remedy before the Supreme Court[2].

The provision also applies to a situation when the Supreme Court examines a complaint against the excessive length of proceedings, regulated by the Act of 17

[1] K. Knoppek, *Komentarz do art. 87(1)*, (in:) *Kodeks postępowania cywilnego*, LEX 2013.
[2] H. Pietrzkowski, *Metodyka pracy sędziego w sprawach cywilnych*, Warszawa 2011, p. 203.

June 2004 on an appeal against a breach of the right of a party to have their case heard in preparatory proceedings conducted or supervised by a prosecutor and judicial proceedings without undue delay[3]. Also in accordance with Art. 4 para 4 of the Act of 17 December 2009 on pursuing claims in class actions[4] a claimant must be obligatorily represented by an attorney or a legal counsel, unless the claimant is an attorney or a legal counsel.

However, this paper will be narrowed down to the issues of proceedings before the Supreme Court, in particular in relation to the proceedings initiated by lodging a cassation appeal.

There is no doubt that the importance of mandatory representation by an attorney or legal counsel for access to courts in civil cases is expressed mainly in the problem of costs of establishing a professional representative for the purpose of litigation, which is a barrier to access to courts for persons with low income, insufficient to establish a professional representative out of choice.

Due to the current structure of attorney–legal counsel mandatory representation, a number of doubts arise. First of all, with regard to the validity of application of this limitation, as well as the personal and material scope of its introduction. Personal aspects relate to the circle of professional representatives who should be authorised to provide legal assistance in cases falling under mandatory representation, while material problems relate to stages of proceedings or category of cases in which mandatory representation should apply, despite the specified limitation in access to the courts. As indicated in the jurisprudence of the European Court of Human Rights, the right to justice is not absolute – it may be subject to specific limitations. Due to its nature it requires regulation by the state, and is also dependent on the time and place, and suitably adapted to the needs and capabilities of communities and individuals[5]. The introduction of such solutions is the responsibility of countries that can apply most effective regulations in this respect. However, the final assessment of the validity limiting access to the courts lies with the Court as its task does not entail acting in place of national authorities in assessing the best possible policy in this area[6], but determining and verifying this policy for the citizens of the State responsible for the action. The Court must be certain that the applied limitations do not restrict or narrow access to the courts for an entity in such a way or to such an extent that the very essence of the right to the courts would be violated. Furthermore, the limitation will not be in accordance with Art. 6 para 1 of the Convention if a reasonable relation-

[3] Journal of Laws, No. 179, item 1843 as amended.

[4] Journal of Laws of 2010, No. 7, item 44; SC resolution of seven judges – legal principle of 17 November 2004, III SPP 42/04, SC Bulletin 2004, No. 11, item 20.

[5] Golder v. Great Britain judgment of 21 February 1975, 4451/70, § 38.

[6] Klass and others v. Germany judgment of 6 September 1978, 5029/71, § 49.

ship of proportionality between the employed remedies and the aim sought to be achieved has not been reached[7].

Such a perception of access to courts and its limitations also applies to regulations covering restriction of the capacity to bring proceedings through the introduction of mandatory performance of procedural steps involving professional representatives for the purpose of litigation. Undoubtedly, excessive expansion of the personal scope of this constraint, thus reducing the possibility of independent acting before a court (or the use of assistance of non-professional representatives), especially with improper use of the so-called law of the poor, can be judged as a restriction of access to courts in civil cases. Hence the need to balance this structure and, above all, use mandatory representation in proceedings of a special nature, distinctive for their complexity and precedential character, including proceedings before the courts of high status in the national justice system examining extraordinary legal remedies.

The subject of this paper is to consider the optimal shape of mandatory representation by an attorney or a legal counsel, justified in view of the increased formalism of certain proceedings in civil cases, but at the same time retaining an appropriate scope of access to courts in these cases, also with appropriate employment of the institution of legal aid *ex officio* as a mechanism extending access for this kind of procedural measures for persons with low incomes (under the so-called law of the poor).

2. ACCESS TO COURTS IN TERMS OF LEGAL AID IN CIVIL MATTERS – BASIC ISSUES

The right to justice is not a right of a singular nature but an aggregate of partial entitlements between which there is a feedback loop. This feedback means that inadequate implementation of one of these powers affects negatively the actual provision of the employment of another right by individuals seeking legal protection, and vice versa – appropriate standards of one entitlement positively affect the proper execution of another (it is sufficient to analyse such a relationship between the right of access to courts and the right to a fair hearing). These interactions between elements of the right to justice mean that effective state action must have only a coherent and systemic nature, relating to all aspects of this right equally. Concentration of state action only on some elements of the right to justice results in this right not being fully realised. The Constitutional Court points

[7] I.a. Winterwerp v. The Netherlands judgment of 24 October 1979, 6301/73, § 60 and 75, ZNP v. Poland judgement of 21 September 2004, 42029/98, §§ 28–29.

out in its case-law that the right to justice in international law and constitutional terms comprises in particular:

1) the right of access to courts, i.e. the right to initiate proceedings before a court (independent and impartial);

2) the right to a relevant shape of the judicial procedure, in accordance with the requirements of fairness and openness;

3) the right to a court judgment, i.e. the right to obtain a binding settlement of the case by the court[8].

One of the barriers to access to courts in addition to the issue of costs of proceedings is a mental barrier resulting from a lack of confidence in state authorities and lack of comprehension of formalised court procedures. Hence, the participation of a professional representative for the purpose of litigation, in some cases court-assigned, becomes essential. There is an established view in the literature that an attorney (presently a legal counsel as well) plays an extremely important role of the party's interpreter of the barely comprehensible legal language[9]. This is all the more important in the Polish legal system – which, regrettably, features very difficult legal language that becomes less and less comprehensible to a "grey" citizen, and legal acts are indeed supposed to regulate social life. It is difficult to keep the citizens in touch with their content (too many "technical" changes in the formulated regulations)[10]. Therefore, one should consider as accurate the position of the Court saying that failure to provide the applicant with legal aid may violate Art. 6 of the Convention when the presence of a professional representative is necessary for effective access to a court, or when legal representation is considered mandatory in various types of disputes because of the complexity of proceedings or type of case[11]. However, the state has no obligation to provide, using public funds, free legal aid to a person wishing to initiate cassation proceedings, nor to provide equality of opportunity between the person using such assistance and the opposing party if each of them had the opportunity to present their case under conditions that do not place them under significant disadvantage in relation to the adversary[12]. Thus, it is necessary to talk about the need to ensure a representative for the purpose of litigation only to the person who is entitled to benefit from the so-called law of the poor. A different approach should be considered in terms of inability to defend their rights by a party, and this is in clear contradiction with the idea of the right to justice. The duty of the state is not abso-

[8] CT judgment of 9 June 1998, K 28/97, OTK 1998, No. 4, item 50 and the literature quoted there.

[9] E. Wengerek, *Dostępność procesu cywilnego w krajach socjalistycznych*, "Palestra" 1977, No. 11, p. 10.

[10] P. Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym*, Warszawa 2005, p. 91.

[11] Laskowska v. Poland judgment of 13 March 2007, 77765/01, § 51.

[12] M. A. Nowicki, *Komentarz do art. 6*, (w:) *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, LEX 2013.

lute and therefore in each individual case, also in relation to initiating proceedings before the Supreme Court, the legitimacy of establishing legal aid *ex officio* for the purposes of these proceeding should be assessed.

This does not mean, however, that the role of the state is to oblige the attorney, whether court-assigned or not, to institute any proceedings or bring any legal remedies against his opinion on the chances of success of such an action or measure. From the nature of things, such powers of the State would be detrimental to the essential role of independent legal professions in a democratic society, which is based on trust between attorneys and their clients. The Court emphasises that the State is responsible for ensuring necessary balance between, on the one hand, effective use of access to justice, and on the other hand, the independence of the legal profession[13].

The presence of a professional representative for the purpose of litigation is particularly important in those proceedings and categories of cases in which we deal with increased formalism. Formalism is an intrinsic feature of proceedings and, in the case of a fair procedure, the determinants of its limits are equality of parties, efficiency and rationality of proceedings. As indicated by S. Cieślak, procedural formalism is a guarantee of protection of proceedings-related interests of the persons acting in the proceedings and ensures predictability of proceedings (stabilisation of the legal situation of individuals acting in proceedings). Thanks to this characteristic (trait) of civil procedure, that is its formalism, actions taken by individuals can be properly regulated and performed, and their procedural interests can get proper protection[14]. However, the levels of formality at different stages and types of proceedings sometimes vary depending on the assumptions of the legislature, and therefore we deal with proceedings of reduced levels of formalisation (an example of which is separate proceedings in matters of labour and social security law), but also with proceedings of high degrees of formality due to their specific nature – as is the case in proceedings before the Supreme Court. With regard to the latter, it seems that the application of mandatory representation by an attorney or legal counsel is not so much a limitation but a solution beneficial for the party who thus obtains a guarantee of representation of their interests by a professional and not a person whose preparation to participate in such proceedings is at least questionable (in practice this is currently the case of pseudo-professional representatives operating under the "permanent mandate contract relationship" with the party).

To sum up, in a democratic society the right to a fair trial takes such an important place that any interpretation restricting Art. 6 para 1 of the Convention corresponds to neither the purpose nor the nature of this article. It is therefore applied at the level of the highest judicial authority in a manner dependent on

[13] Staroszczyk v. Poland judgment of 22 March 2007, 59519/00, § 133.

[14] S. Cieślak, *Formalizm postępowania cywilnego*, Warszawa 2008, p. 119.

the special function of the proceedings. Due to the special role of these courts, the proceedings that take place before them may be more formalised than in other courts, especially with the involvement of mandatory representation by an attorney or a legal counsel. Restrictions may not, however, lead to a restriction or reduction of access to courts in a manner or to an extent resulting in violation of the substance of that right. Restrictions are not in accordance with Art. 6 para 1 of the Convention if they do not pursue a legitimate aim or if there is no reasonable proportion between the employed remedies and the aim to be achieved[15].

As indicated, the introduction of a higher level of formality in proceedings before the Supreme Court is certainly justified by the extraordinary nature of the remedies. Thus, the introduction of mandatory representation by an attorney or a legal counsel on the one hand is a restriction of access to the courts, but on the other hand – assuming proper functioning in a given legal system of the so-called law of the poor – is an important instrument to support the parties (participants) of proceedings who without appropriate qualifications would not be able to effectively act on their own in such a formalised procedure.

The requirement of representation by an attorney (legal counsel) before the cassation court cannot in itself be regarded as contrary to Art. 6 of the Convention. It is in an obvious way considered to be consistent with the role of the Supreme Court as the court investigating remedies as regards the law, which is a common feature of legal systems of some Member States of the Council of Europe[16]. Hence the need to balance the structure of mandatory representation by an attorney or legal counsel in connection with an acceptable level of increased formality of proceedings before the Supreme Court.

3. THE ESSENCE OF MANDATORY REPRESENTATION BY AN ATTORNEY OR LEGAL COUNSEL IN THE POLISH LEGAL SYSTEM

The essence of mandatory representation by an attorney or a legal counsel entails excluding in proceedings before the Supreme Court the capacity to bring proceedings or the capacity to personally take procedural steps by the party, their authority, legal representative and representatives who are not attorneys or legal advisers. Mandatory representation by an attorney or a legal counsel is not only a limitation of the capacity to bring proceedings, but also narrows the circle of persons who may be representatives for the purpose of litigation in civil proceedings to attorneys and legal counsels. Its role was perfectly depicted by

[15] SC decision of 23 August 2002, I PZ 72/02, OSNP 2004, No. 11, item 196.

[16] E.g. Gillow v. Great Britain judgment, 9063/80, § 69.

F. X. Fierich stating that in the interests of the parties themselves, for the control and help of the judge, in the interests of the proper conduct of the proceedings, the participation of an attorney (now also a legal counsel) is desirable as a representative in the proceedings, even in those ones that are based on the principle of oral proceedings[17].

Mandatory representation by an attorney (or attorney or legal counsel) in different legal systems may take different forms and may have different personal and material scope. T. Zembrzuski accurately states that within the institution of attorney–legal counsel mandatory representation relative and absolute ones are distinguished. The first one does not limit the possibility of taking procedural steps by the party personally; however, it means that if a party wishes to use the services of a representative, he may only be a professional representative, i.e. an attorney or a legal counsel. In turn, absolute mandatory representation means that the actions of parties to proceedings do not produce any legal effect and their interests can be represented only by attorneys and legal counsels. It is an exception which results from the assumption that mandatory representation cannot be imposed on parties in normal, regular suits[18]. The first form of mandatory representation is most common in the *common law* system, and the second one occurs in the states of continental procedural law, including the Polish legal system.

In accordance with Art. 1 of the Act of 23 November 2002 on the Supreme Court[19], the Supreme Court is the judicial authority, established, inter alia, to administer justice by ensuring, within supervision, compliance with the law and the uniformity of jurisprudence of common and military courts by recognizing cassation appeals and other remedies (in the case of civil proceedings – extraordinary legal remedies). Thus, the systemic function of the Supreme Court is to exercise judicial supervision, including ensuring uniformity of jurisprudence of common courts of law. The introduction of mandatory representation by an attorney or a legal counsel is justified by the fact that control of a contested decision in the framework of the cassation proceedings concerns only the question of a legal nature, often with a very complex character[20]. Essential for the implementation of this task is the material level of remedies filed to the Supreme Court and other pleadings going beyond the individual interest of the applicant, and also based on legal foundations strictly defined by the law. Participation of a professional representative for the purpose of litigation is supposed to ensure an appropriate level of professionalism in a situation where the party (a participant

[17] F. X. Fierich, *O stronach i zastępcach*, Kraków 1905, p. 85.

[18] T. Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym*, Warszawa 2009, p. 330 and the literature quoted there.

[19] Consolidated text, Journal of Laws of 2013, No. 499 as amended.

[20] A. Góra-Błaszczykowska, *Środki zaskarżenia w postępowaniu cywilnym. Komentarz do art. 367–424[12] k.p.c.*, Warszawa 2014, p. 230.

in the non-litigious proceedings) intends to perform actions before the Supreme Court.

Art. 87[1] § 1 CCP specifies that a party can be obligatorily represented by an attorney or a legal counsel. On the other hand, §§ 2 and 3 of this provision state that this restriction does not apply in the proceedings for exemption from court costs and the establishment of an attorney or a legal counsel, or when the party, their organisational unit, their statutory representative or proxy is a judge, a public prosecutor, a notary public, or a professor or a habilitated doctor of law, and also where one of the parties, their organisational unit or their statutory representative is an attorney, a legal counsel or a counsellor of the General Prosecutor's Office of the State Treasury. Mandatory representation does not apply either when the representation of the State Treasury is performed by the General Prosecutor's Office of the State Treasury. It is worth noting that exemption from attorney–legal counsel mandatory representation also includes foreign lawyers named in this provision, provided they fulfil conditions laid down in the Act of 5 July 2002 on the provision of legal aid by foreign lawyers in the Republic of Poland. These exclusions should be considered correct, because since at the basis of mandatory representation by an attorney or legal counsel lies ensuring a proper level of professionalism, certainly persons indicated in these regulations hold qualifications comparable to an attorney or a legal counsel acting as a representative of the party.

It is worth noting that an entity mentioned in Art. 87[1] § 2 CCP acting in the case as a representative for the purpose of litigation (Art. 87 § 1 CCP) may bring a cassation complaint also on behalf of the represented party[21]. Thus, a legal counsel representing their parents and other relatives mentioned in Art. 87 § 1 CCP may lodge a cassation appeal on their behalf[22]. Similarly, a legal counsel may be a representative of an employee in matters of labour law when acting as a representative of a trade union (Art. 465 § 1 sentence 1 CCP) and if he is a legal counsel of a trade union he may, on behalf of the employee, also lodge an appeal in cassation (Art. 465 para 1 sentence 1 CCP)[23].

It should be emphasized that the broad interpretation of the circle of entities named in Art. 87[1] § 2 CCP is in no case justified. Certainly this circle does not include lay judges, even if they hold a record of long service[24]. However, attorneys, legal advisers, and also retired judges, prosecutors and notaries do not only retain the professional title used so far, but belong to the class of persons specified in § 2 of art. 87[1] CCP, which is justified because the mere fact of retirement is not

[21] SC decision of 6 February 1997, II CKN 77/96, OSP 1997, No. 9, item 168.
[22] SC decision of 24 March1997, I CZ 15/97, Prok. i Pr. 1998, No. 3, p. 41.
[23] SC decision of 27 August 1996, I PKN 6/96, Legalis.
[24] SC decision of 17 December 1996, II UZ 8/96, OSNAPiUS 1997, No. 15, item 281.

equivalent to the loss of professional qualifications[25]. Thus, a retired legal counsel is entitled to filing of a cassation appeal personally in a case in which he is a party[26]. The adoption of this interpretation – in light of the content of Art. 87^1 § 2 CCP – cannot be extended in the event of a retired attorney (legal counsel) acting as a representative for the purpose of litigation, even if he represents a member of his immediate family under due authorisation[27].

As noted by A. Zieliński, a serious problem emerges in a situation when the party is represented by its organisational unit (Art. 67 § 1 CCP)[28]. In such situations, the Supreme Court held that mandatory representation by an attorney does not apply when a party acts through a single-person organisational unit, and the organisational unit performing the function is an attorney or a legal counsel. According to the theory of a body, an action of the body is treated as an action of a legal person (Art. 38 of the Civil Code). Then it is reasonable to assume that the situation is analogous when the party in a case is an attorney or legal counsel. The state of affairs needs to be assessed differently when the party's organisational unit is composed of multiple persons. The Supreme Court discussed this issue on the example of a residential community board. In accordance with Art. 21. Para 1 of the Act on the Ownership of Premises, if the board is composed of several persons, a declaration of intent is given by at least two of its members on behalf of the residential community. This way of representation implies interaction of at least two representatives. With such an understanding of a joint representation, action, both of substantive and procedural law, constitutes an act of a party only when it is performed by two people. If one statement only comes from an attorney or legal counsel and the other from a person who does not have such status, the statement of that other person, under the conditions of existence of mandatory representation by an attorney, remains ineffective[29].

At the outset of this discussion the material scope of an attorney or a legal counsel mandatory representation was outlined. Due to the fact that – as already specified – this mandatory representation limits the capability to bring proceedings, its scope cannot be interpreted broadly. One should agree with P. Telenga, according to whom disputable seems the view that procedural steps taken before a court of a lower order and relating to the proceedings before the Supreme Court should already include filing of an application for the delivery of the judgment together with the reasons because this act is addressed always and solely to the court that delivered the judgment, and not to the Supreme Court, and if

[25] More in K. Flaga-Gieruszyńska, *Glosa do uchwały SN z 21.10.1997, III ZP 16/97*, "Rejent" 1998, No. 9, p. 105.

[26] SC judgment of 24 November 1997, II CKN 270/97, OSNC 1998, No. 5, item 82.

[27] SC decision of 20 July 2012, II CZ 68/12, Legalis.

[28] A. Zieliński (in:) A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2014, p. 199.

[29] SC decision of 23 February 2012, V CZ 136/11, LEX No. 1265590.

the judgment is not challenged, this act will remain in no relation to the proceedings before the Supreme Court[30]. Similarly, the Supreme Court emphasised that the request for delivering the judgment of the court of second instance together with the reasons filed under Art. 387 § 3 of the CCP is not a procedural step relating to proceedings before the Supreme Court within the meaning of Art. 871 § 1 CCP [31]. On the other hand, the obligation of maintaining attorney–legal counsel mandatory representation also applies to a pleading connected to complementing formal deficiencies of the cassation[32]. In the literature, the acts named in Art. 87^1 § 1 CCP, taken before a court of lower instance, include: all procedural steps to remedy formal deficiencies of a cassation appeal or a complaint (with the exception of filing an application for exemption from court costs and for establishing an attorney or a legal counsel), and furthermore, steps in the proceedings initiated by restoring the time limit for lodging an appeal in cassation appeal, as well as those related to filing a complaint against the dismissal of a cassation[33].

An important issue is the situation of a person who previously, in the absence of such an obligation, acted in the proceedings without an attorney or a legal counsel if this person does not have sufficient funds to establish such a representative. The question arises whether the construction of attorney–legal counsel mandatory obligation will not result in closing access to proceedings before the Supreme Court for such a person. In this case, however, there is no such danger, because during the course of the time period for lodging a cassation appeal, the holder may request the establishment of a court-assigned attorney or legal counsel. As a result, the time limit for lodging a cassation appeal runs only from the date of delivery of the judgment together with the reasons on the court-assigned representative, if established (Art. 124 § 3 CCP). In addition, involuntary difficulties in obtaining legal assistance to prepare and lodge a cassation appeal may justify restoring the time limit (Art. 168 CCP)[34]. However, the court of appeal has no statutory obligation to establish a court-assigned representative for the party in proceedings before the Supreme Court only because the party has used such a representative in the proceedings before a court of first and second instance[35]. In this case, general rules for granting legal aid based on an analysis of the individual circumstances of the applicant apply.

Directly related to this issue is the problem of assessing by the court-assigned representative whether there are objective grounds for bringing an extraordinary

[30] P. Telenga, *Komentarz aktualizowany do art. 87(1) Kodeksu postępowania cywilnego*, LEX 2014.

[31] SC decision of 16 May 2006, III UZ 6/06, OSNP 2007, No. 11–12, item 174.

[32] SC decision of 9 January 1998, I CKN 334/97, OSNC 1998, No. 7–8, item 126.

[33] M. Manowska, *Zmiany w Kodeksie postępowania cywilnego wprowadzone w 2004*, "Przegląd Sądowy" 2005, No. 5, p. 3.

[34] SC decision of 22 May 1997, III CZ 62/97, MoP 1998, No. 3, p. 4.

[35] SC decision of 21 October 2010, IV CZ 77/10, Legalis.

remedy. The Supreme Court held that a court-assigned attorney is obliged to consider the circumstances of the case and to make a decision as to whether there are grounds for lodging a complaint. If he finds no grounds to complain, he acts in accordance with Art. 118 § 5 CCP. Another attorney is assigned for the party only if the opinion of no grounds for filing a complaint was prepared without observing principles of due diligence (Art. 118 § 6 CCP). Using legal assistance of a court-assigned representative paid from public funds does not mean that a party may seek a change of their designated representative when his assessment of grounds for bringing extraordinary means of appeal to the Supreme Court is different from the assessment presented by the party. Adopting such an assumption would constitute a denial of the point of the regulation of Art. 871 § 1 CCP and the institution of legal assistance offered by qualified representatives for the purpose of litigation itself[36].

It should be emphasised that pleadings covered by mandatory representation should be signed by an attorney or a legal counsel, therefore any indirect forms of participation of a professional representative in this area are insufficient. An attorney's (legal counsel's) "endorsement" of a cassation appeal brought by a party who does not hold qualifications under Art. 393^2 § 2 CCP does not meet the requirement of mandatory representation by an attorney or legal counsel[37]. Thus, a person holding a master's degree in law who does not practice the indicated profession is not entitled to file a pleading to the Supreme Court[38]. But there are no grounds to reject a cassation appeal in a situation where it has been signed by both the attorney or legal counsel and the party, because the requirement of mandatory representation by an attorney or legal counsel has been satisfied[39]. It is important that the court examining the formal requirements of the pleading does not examine who the real creator of the pleading is. This is due to the fact that even if the pleading has been drawn up with the participation of third parties, an attorney or legal counsel, by submitting his signature, takes full responsibility for its content and the fulfilment of formal requirements and is thus responsible for procedural effects of bringing this pleading. However, the very signature of the representative (and its significance) is not sufficient for maintaining mandatory representation by an attorney or legal counsel if the content of the complaint unequivocally demonstrates that it was drawn up by the parties themselves, and its substantive level does not conform to the requirements which can be set for even an average professional representative[40]. An opposite stance would be

[36] SC decision of 10 February 2012, II CZ 156/11, LEX No. 1254661.

[37] SC decision of 14 November 1997, III CZ 84/97, Prok. i Pr.-wkł. 1998, No. 5, p. 40.

[38] SC decision of 23 October 1996, II UZ 3/96, OSNP 1997, No. 10, item 175.

[39] Ł. Błaszczak, *Dopuszczalność skargi kasacyjnej w procesie cywilnym ze względu na wymagania formalne i konstrukcyjne*, part 1, "Radca Prawny" 2008, No. 3, p. 6.

[40] SC decision of 27 January 2012, II UK 244/11, Legalis.

in opposition to the idea of mandatory representation as a guarantee of professionalism of the filed pleadings.

It needs to be remembered, however, that – as rightly pointed out by I. Gil – drawing up a legal remedy is not a procedural step since it does not bring effect on pending proceedings, but only the filing of it initiates proceedings in terms of considering that remedy[41]. This author maintains a position already expressed in the literature that giving an attorney or a legal counsel authorisation for representation to represent a party merely for the purpose of preparing a cassation entitles the attorney (a legal counsel) only to review the case file at the Registry of the court, but does not empower him to lodge a cassation appeal[42]. A professional representative (an attorney, a legal counsel), in order to successfully bring a cassation should either hold the power of attorney granted in the proceedings of the first or second instance, the content of which should entail that he is also authorised to represent the principal before the Supreme Court, or – not having such a power of attorney – should attach to the cassation the power of attorney empowering him to take action in the proceedings before the Supreme Court. If the authorisation is not enclosed, the court will call the representative to remedy the formal deficiencies of the cassation (Art. 398^4 § 2 sentence 1 in conjunction with Art. 126 § 3 CCP and Art. 398^6 § 1 CCP)[43]. This position is justified by the fact that lodging a cassation appeal (just as an action for declaring a final judgment contrary to the law) is a step detached from the course of the instance, and thus proceedings before the Supreme Court do not constitute continuation of the proceedings that took place in the first and second instances.

Legal remedies brought before the Supreme Court by a person other than an attorney or a legal counsel shall be dismissed by the court (Art. 398^6 § 2 and 3, Art. 424^6 § 3 CCP). In contrast, other pleadings made in violation of Art. 87^1 CCP shall be returned without calling a party to eliminate these deficiencies (Art. 130 § 5 CCP). Lodging an appeal by the parties themselves (participants in the non-litigious proceedings), if they do not have appropriate qualifications, is not a formal deficiency remediable under Art. 130 § 1 CCP[44]. What is more, a cassation appeal which was filed personally by the party with a violation of the obligation of mandatory representation by an attorney or a legal counsel cannot be remedied by being signed by an attorney empowered to act on the party's behalf[45]. This is due to the fact that such a solution does not constitute a construction guaranteeing

[41] I. Gil, *Komentarz do art. 87(1)*, (in:) *Kodeks postępowania cywilnego*, Legalis 2014.

[42] W. Broniewicz, *Glosa do postanowienia SN z 14.12.1999, II CZ 139/99*, "Orzecznictwo Sądów Polskich" 2001, No. 2, item 25.

[43] *Ibidem*, p. 424.

[44] SC decision of 14 January 1997, I CZ 23/96, http://www.arslege.pl/orzeczenie/76984/postanowienie-sadu-najwyzszego-izba-cywilna-z-dnia-14-January-1997-r-i-cz-23-96/.

[45] SC decision of 24 April 1997, II UZ 25/97, OSNAPiUS 1997, No. 20, item 410.

an appropriate formal and substantive level of the pleading, and therefore denies the essence of mandatory representation.

However, it should be remembered that mandatory representation by an attorney or a legal counsel not only covers bringing the pleading, but also refers to the proceedings initiated by it (e.g. a cassation appeal). It must therefore be regarded as accurate to say that at the hearing before the Supreme Court a party who is not a qualified lawyer under Art. 87^1 § 2 and 3 can only be physically present, but cannot make statements, submit requests or otherwise take the floor, which also includes making speeches. This is because all these steps are covered by absolute mandatory representation by an attorney[46]. Only in accordance with Art. 3982^1 CCP may a cassation appeal be also withdrawn by the party itself. According to J. Gudowski, the party may, in turn, undertake other steps that are not taken directly before the Supreme Court at the hearing (e.g. they can submit pleadings other than a cassation appeal or a complaint)[47]. In addition, I. Gil rightly argues that not only may the party (participant of proceedings) file the indicated declaration of withdrawal of a cassation appeal, but also take actions that cannot be directly classified as procedural steps, such as paying the fee on a cassation appeal or submitting copies of an already lodged appeal[48]. The ability to carry out an act of a dispositive nature and auxiliary acts (organisational and technical, one may say) is not in contradiction with the assumptions of mandatory representation by an attorney or a legal counsel because it does not affect the substantive level of the steps taken before the Supreme Court – it can at most nullify these steps by, for example, withdrawing or not paying a complaint fee.

4. CONCLUSIONS *DE LEGE FERENDA*

Proper preparation and then effective sustaining remedies and other actions taken before the Supreme Court requires appropriate professional qualifications, experience, and knowledge of not only provisions of the law, but also achievements of the doctrine and judicature[49]. In this case, the theory and line of the case law play a crucial role especially in relation to e.g. proper and effective formulation of a cassation appeal to be evaluated within the so-called pre-trial examination. As rightly argued by Z. Nagórski, beside the more theoretical knowledge what is

[46] K. Knoppek, *Komentarz do art. 87(1)*, (in:) *Kodeks*...

[47] The view of J. Gudowski on the grounds of previous legal state, *Kasacja w postępowaniu cywilnym po zmianach dokonanych ustawami z dnia 12 i 24 maja 2000*, "Przegląd Sądowy" 2001, No. 2, p. 3.

[48] I. Gil, *Komentarz do art. 87(1)*, (in:) *Kodeks*...

[49] More on these standards: K. Osajda, *Pełnomocnicy uprawnieni do wnoszenia kasacji i występowania przed najwyższymi organami sądowymi*, "Palestra" 2004, No. 11–12, pp. 130 ff.

needed here is a slightly different legal mind-set, one needs a more abstract and a more objective way of thinking[50]. This means that not every professional representative for the purpose of litigation (especially one who is inexperienced and without in-depth knowledge) is able to carry out a proper assessment of the case, and as a consequence – if justified – draw up a proper pleading initiating proceedings before the Supreme Court.

The party empowering an attorney or a legal counsel to represent him or her for the purpose of litigation has the right to expect and to require that the procedural steps, including the preparation of a cassation appeal, are performed with certain knowledge of the applicable law[51]. However, the mere fact of a flawed preparation of a cassation appeal by a professional representative that results in a dismissal of a complaint does not form a basis for liability for damages of this representative[52]. It appears that widespread faulty preparation of remedies by a professional representative calls into question his compliance with the standards of the profession, and that should become of interest to corporate bodies.

According to T. Zembrzuski, the purpose of the introduction of mandatory representation in question appears to be clear, the legislature seeks to ensure the proper preparation of cassations (and other pleadings addressed to the Supreme Court), so that they are formulated in a proper, professional manner. Mandatory attorney–legal counsel representation influences the assessment of the degree of formalisation of a cassation appeal. It is about raising its substantive value, manner of representation and proper, competent selection of arguments. This mandatory representation is also associated with the will to ensure efficiency of proceedings before the Supreme Court. The capacity of this Court is limited; therefore, the optimal and full use of its potential is necessary. It is expected that persons appearing before the Supreme Court will not require instructions or guidance, although the degree of difficulty and complexities of cases recognised by this Court are generally high[53]. Only such perception of mandatory representation by an attorney or a legal counsel justifies its existence in the context of limiting the capacity to bring proceedings, and going further – access to the Supreme Court. If this objective is not achieved, this mandatory representation becomes merely a restriction of the right to justice, not justified by the execution of other values important in a democratic rule of law.

Practice shows that the skills and in-depth knowledge are not a strong point of representatives who prepare pleadings initiating the proceedings before the Supreme Court. The report on the activities of the Supreme Court for 2013 found two important issues from the perspective of the practice of applying man-

[50] Z. Nagórski, *Wyodrębnienie adwokatów przy najwyższych instancjach sądowych*, "Głos Prawa" 1925, No. 17–18, p. 380.

[51] CS judgment of 14 August 1997, II CZ 88/97, OSNC 1998, No. 3, item 40.

[52] SC decision of 26 November 2006, V CSK 292/06, LEX No. 232807.

[53] T. Zembrzuski, *Skarga kasacyjna*..., p. 332.

datory representation by an attorney or a legal counsel. First, a significant number of complaints for declaring a final judgement unlawful and cassation appeals are filed "on a special request of the client", bypassing their objectives and functions, also the ones relating to the public law. Hence, most of them are unfounded. There is also a phenomenon of their abuse by the parties and their representatives for the purpose of litigation. In the Supreme Court's case law, there is a dominating view that the principle of due process also applies to the parties. Therefore, if a party fails to comply with the "procedural burden" imposed on him/her or takes actions that are prescribed by the law and formally admissible, but violating the rights of the other party in order to obtain effective legal protection, they have to face some negative procedural effects. Secondly, one can also observe a tend to draw more and more extensive appeals, which does not always affect their better quality. Frequently the number of charges exceeds the limits of the need in question, and the reasons are often closer to an academic dissertation than legal remedies[54]. Similarly, in the report for 2011, the Supreme Court emphasised that very extensive cassation appeals that are incorrectly worded or justified, including footnotes and quotations from literature and case law, are still being filed even by professional representatives. In such cases the basic value of a legal remedy, i.e. the substantiality of charges and the strength of arguments, is blurred. Therefore most of actions for declaring a final judgment unlawful are inadmissible, formally defective or filed injudiciously[55]. Likewise, in the report of 2010 this Court underlined the fact that cassation appeals, sometimes, too bulky where the basic value of a legal remedy, i.e. substantiality of charges, is blurred, are also brought before the Supreme Court. The Supreme Court opposed the abuse of the right to justice and wastage of considerable public funds, and also stood in defence of the seriousness and sense of the institution of mandatory representation by an attorney or a legal counsel in the proceedings before the Supreme Court. According to the Supreme Court, this once again justifies putting forward the postulate that actions under mandatory representation before the Supreme Court should be performed by a limited number of professional representatives. This solution would be beneficial primarily for the parties themselves, as a flawed formulation of the grounds of a legal remedy often prevents the desired outcome of the case[56]. In 2009 it was stated clearly that a part of cassations, and majority of them in the Criminal Chamber, as well as a significant part of actions for a declaration of a final judgment contrary to the law are at a low substantive and

[54] http://www.sn.pl/_layouts/SPZWebParts/download.aspx?id=72&ListName=Dzialalnosc_SN, p. 172.

[55] http://www.sn.pl/_layouts/SPZWebParts/download.aspx?id=63&ListName=Dzialalnosc_SN, p. 138.

[56] http://www.sn.pl/_layouts/SPZWebParts/download.aspx?id=62&ListName=Dzialalnosc_SN, p. 128.

technical level[57]. It seems that there is still a belief that a trivial reason may justify bringing an action for a declaration of a final judgment unlawful. According to the Supreme Court only a flagrant violation of the law, and only the one in which the damage caused to a party was substantiated, can lead to upholding the complaint. As a consequence, still a small number of actions are admitted for consideration and accepted[58].

Therefore, a fundamental question arises whether, given this state of affairs that lasts since the introduction of the construction of a cassation and an action for a declaration of a final judgment contrary to law as extraordinary appellate measures addressed to the Supreme Court – there is a need for a radical intervention of the legislator which could improve the formal and substantive quality of the pleadings brought to this court. It seems that a rational solution would be to create an elite group of attorneys and legal counsels who would retain (gain) the right to file pleadings covered by mandatory representation. Their specialisation can significantly increase the indicated value, and thereby streamline the course of proceedings before the Supreme Court, in such a case to a lesser extent burdened with recognition of cassation appeals subject to rejection (if not rejected by the court of second instance) or covered by a negative ruling in the so-called pre-trial examination.

Thus, validity of the following view by K. Kołakowski is retained: further disregard by those preparing remedies, even already established and not raising requirements to their level, will have to lead to submitting a proposal *de lege ferenda*. The author proposes that future selection of appropriate persons actually guaranteeing meeting expectations specified by us, should be done by appropriate authorities of both self-governing professional associations concerned[59].

The intention of creating a separate group of professional representatives for the purpose of litigation in the proceedings of a special nature, is not a solution unheard of in other European countries. An example is the French solution relating to proceedings before the Court of Cassation and the Council of State, in which only the attorneys that have been granted such an authorisation may participate. Attorneys appointed at the Council of State and at the Court of Cassation constitute a separate profession – they are ministerial officials appointed to their positions by the Minister of Justice. They have an exclusive right to be procedural representatives in the cases where this representation is mandatory. Their status stems mainly from the regulation of 10 September 1817 which establishes the Bar Association at the Council of State and the Court of Cassation under Decree No.

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[57] http://www.sn.pl/_layouts/SPZWebParts/download.aspx?id=67&ListName=Dzialalnosc_SN, p. 138.

[58] http://www.sn.pl/_layouts/SPZWebParts/download.aspx?id=61&ListName=Dzialalnosc_SN, p. 150.

[59] K. Kołakowski, *Środki odwoławcze po nowelizacji Kodeksu postępowania cywilnego z 2000 r.*, Warszawa 2000, p. 57.

91-1125 of 28 October 1991 on conditions for entering the profession, as well as Decree No. 2002 -76 of 11 January 2002 concerning disciplinary rules governing the profession. Since the entry into force of the order of 10 July 1814 dozens of attorney's offices have operated at the Council of State and the Court of Cassation. Decree of 22 April 2009, however, allows the Minister of Justice to create by way of regulation new attorney's offices at the Council of State and at the Court of Cassation due to the needs of good administration of justice, having regard to the growing number of cases brought before these courts[60]. Currently, there are 91 of them[61].

In the French system a cassation must contain a statement that the party has granted the power of attorney to a listed attorney and it must be signed by him or her[62]. An attorney may refuse to draft the cassation and represent the party if he considers that it would be ill-founded or would not have any prospect of a positive outcome. Interestingly, even this kind of limitation did not prevent the French Court of Cassation from excessive influx of cases, and as a consequence – a huge overload[63].

Similarly, in Luxembourg a separate list (the so-called List I) has been created listing attorneys authorised to practice before the higher courts (*avocat à la Cour*). Only attorneys entered in the attorney List I are entitled to use this title. In order to be included in this list, it is necessary: to have an entry on the List II of attorneys, to have accomplished a two-year court apprenticeship and to have passed an exam after its completion; or to have passed the examination provided for attorneys in other Member States of the European Union under the amended Act of 10 August 1991 which in relation to the profession of an attorney defines a general system of recognition of higher education diplomas in courses lasting not shorter than three years; or to demonstrate that the candidate as a European attorney who has received a license to practice under the professional title obtained in the country of origin practiced in an efficient and permanent manner in Luxembourg for at least three years dealing with Luxembourg law, including the law of the European Union, or that he is covered by Art. 9 para 2 of the amended Act of 13 November 2002 transposing into the Luxembourg law Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 on facilitating practice of the profession of lawyer in a Member State other than that in which the qualification was obtained[64].

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[60] https://e-justice.europa.eu/content_legal_professions-29-fr-pl.do?member=1.

[61] T. Ereciński, *Selekcja kasacji w sprawach cywilnych z perspektywy prawnoporównawczej*, (in:) *Ars et usus. Księga pamiątkowa ku czci sędziego Stanisława Rudnickiego*, Warszawa 2005, p. 100 and the literature quoted there.

[62] *Ibidem*, p. 100.

[63] More on the subject in: M. Biedka, *Kasacja w sprawach cywilnych we Francji*, "Przegląd Sądowy" 2004, No. 9, pp. 126 ff.

[64] https://e-justice.europa.eu/content_legal_professions-29-lu-pl.do?member=1.

Thus, only lawyers entitled to practice before courts of higher instances may perform acts for which the law and regulations establish mandatory representation by an attorney (i.e. represent parties before the Constitutional Court, administrative courts, the Supreme Court and district courts adjudicating in civil matters), take, on behalf of the parties, procedural decisions, receive pleadings and documents designed for the parties for the purpose of submitting them to the court, sign pleadings necessary to ensure compliance of proceedings with formal requirements and run the case until obtaining the judgment[65].

It seems that attempts to build this kind of system of legal aid in proceedings before the Supreme Court would benefit the effective use of mandatory representation by an attorney or a legal counsel for the purposes for which it was established.

As indicated by T. Ereciński, Polish law creates a system of selection of cassation appeals in civil cases taking into account constitutional tasks of the Supreme Court and corresponding to the trends observed in many other European procedural systems. It should be clearly emphasised that restriction of access to the Supreme Court and enabling this Court to select cases of utmost juridical importance can make the settlement of civil cases more just because it leads, within a reasonable time, to unifying judicial case law and to the development of the law.[66] Strengthening the system of selection of extraordinary remedies by revising the approach to the mandatory representation by an attorney or a legal counsel will also allow to really guarantee equality between the parties and the principle of adversarial proceedings before the Supreme Court by minimising the participation of attorneys or legal counsels who demonstrate *an* insufficient level of knowledge and competence. This is the essence and purpose of applying mandatory representation of the parties by an attorney or a legal counsel in the democratic rule of law.

BIBLIOGRAPHY

Biedka M., *Kasacja w sprawach cywilnych we Francji*, "Przegląd Sądowy" 2004, No. 9

Błaszczak Ł., *Dopuszczalność skargi kasacyjnej w procesie cywilnym ze względu na wymagania formalne i konstrukcyjne*, part 1, "Radca Prawny" 2008, No. 3

Broniewicz W., *Glosa do postanowienia SN z 14.12.1999*, *II CZ 139/99*, "Orzecznictwo Sądów Polskich" 2001, No. 2

Cieślak S., *Formalizm postępowania cywilnego*, Warszawa 2008

Ereciński T., *Selekcja kasacji w sprawach cywilnych z perspektywy prawnoporównawczej*, (in:) *Ars et usus. Księga pamiątkowa ku czci sędziego Stanisława Rudnickiego*, Warszawa 2005

[65] *Ibidem*.

[66] T. Ereciński, *Selekcja…*, p. 105.

Fierich F. X., *O stronach i zastępcach*, Kraków 1905
Flaga-Gieruszyńska K., *Glosa do uchwały SN z 21.10.1997, III ZP 16/97*, "Rejent" 1998, No. 9
Gil I., *Komentarz do art. 87(1)*, (in:) *Kodeks postępowania cywilnego*, Legalis 2014
Góra-Błaszczykowska A., *Środki zaskarżenia w postępowaniu cywilnym. Komentarz do art. 367–424[12] k.p.c.*, Warszawa 2014
Gudowski J., *Kasacja w postępowaniu cywilnym po zmianach dokonanych ustawami z dnia 12 i 24 maja 2000*, "Przegląd Sądowy" 2001, No. 2
Knoppek K., *Komentarz do art. 87(1)*, (in:) *Kodeks postępowania cywilnego*, LEX 2013
Kołakowski K., *Środki odwoławcze po nowelizacji Kodeksu postępowania cywilnego z 2000 r.*, Warszawa 2000
Manowska M., *Zmiany w Kodeksie postępowania cywilnego wprowadzone w 2004*, "Przegląd Sądowy" 2005, No. 5
Nagórski Z., *Wyodrębnienie adwokatów przy najwyższych instancjach sądowych*, "Głos Prawa" 1925, No. 17–18
Nowicki M. A., *Komentarz do art. 6*, (w:) *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, LEX 2013
Osajda K., *Pełnomocnicy uprawnieni do wnoszenia kasacji i występowania przed najwyższymi organami sądowymi*, "Palestra" 2004, No. 11–12
Pietrzkowski H., *Metodyka pracy sędziego w sprawach cywilnych*, Warszawa 2011
Pogonowski P., *Realizacja prawa do sądu w postępowaniu cywilnym*, Warszawa 2005
Telenga P., *Komentarz aktualizowany do art. 87(1) Kodeksu postępowania cywilnego*, LEX 2014
Wengerek E., *Dostępność procesu cywilnego w krajach socjalistycznych*, "Palestra" 1977, No. 11
Zembrzuski T., *Skarga kasacyjna. Dostępność w postępowaniu cywilnym*, Warszawa 2009
Zieliński A., (in:) A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2014

MANDATORY REPRESENTATION BY AN ATTORNEY OR LEGAL COUNSEL AND ACCESS TO THE COURTS IN CIVIL CASES

Summary

The text discusses the problem of mandatory representation by a lawyer as one of the legal solutions that are crucial for access to courts. The starting point for the author's deliberations is the analysis of the institution of legal aid of a professional representative in litigation, which – along with other constructions – constitutes a guarantee of effective implementation of the right to court in civil matters. Against the background of these considerations, the author presents the construction of mandatory representation

by a lawyer in the Polish legal system, with particular emphasis on its subjective and objective scope. These considerations are complemented by *de lege ferenda* conclusions, relating, among other things, to projects considered in the Polish doctrine concerning the extension of the scope of application of mandatory representation to proceedings before the court of second instance.

KEYWORDS

mandatory representation, legal aid *ex officio*, access to court

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obowiązkowe zastępstwo procesowe, pomoc prawna z urzędu, dostęp do sądu