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LEGAL AND HISTORICAL PERSPECTIVE ON PUBLIC CHARACTER OF CASSATION COMPLAINT IN POLISH CIVIL PROCEDURE

1. CASSATION BACKGROUND

Institutional formation of cassation, that took place in France, was preceded by centuries-old creation of two appeal entities. They were to challenge final (*en dernier ressort*) and enforceable judgments (*qui ont passé en force de chose jugée*). In the ordinance of 1667 the former, the so-called *proposition d'erreur* regarding actually erroneous decision was replaced with restitution (*requête civile*) challenging legal errors in the course of a trial.¹ Furthermore, the evocations addressed to *curia regis* due to contradictions between parliamentary decisions and the law were crucial for the development of cassation. Cassation appeals were governed in detail by both the regulation of 1738 and other acts of law. In fact, the latter did not limit the grounds for cassation to legal faults in appealed decisions. Nonetheless, the differentiation between action and legal errors constitutes the foundation of the institution of cassation.

On 1 December 1790 the Legislative Assembly set up the Cassation Tribunal that was separated from Curia under the Act of 27 November. The Constitution of 16 September 1807 changed its name to Cour de Cassation, i.e. the Court of Cassation. Regulations on jurisdiction and procedure of the Court of Cassation were not covered by the Code of Civil Procedure of 1806² but by other legal and administrative acts.³

¹ W. Sobociński, *Kasacja a restytucja w systemie sądowo-odwoławczym Księstwa Warszawskiego*, "Annales UMCS, sectio G, (Ius)" 1988, Vol. XXXV, p. 98. Restitution was transpositioned into the Napoleonic Code of Civil Procedure, having been just slightly adjusted.

² In French Code *de procedure civile* only article 54 applied to the procedure of cassation. Within the meaning of that article "In the court of last resort contradictory judgements between the same parties and the analysis of the same principles by different courts may bring about the cassation procedure. The case is to be examined in conformity with the rules of the court of cassation."

³ J. J. Litauer, *Sąd Kasacyjny Księstwa Warszawskiego*, "Themis Polska" 1915, Vol. V, parts one and two, p. 194.

The need for law and order as well as effectiveness of procedure underlay the objectives that gave rise to the French cassation system. Thus, two courts of instance were established. The court of appeal allowed to correct parties' and judges' mistakes made in the course of first instance procedure, which referred to both the law itself and specific facts. However, the court of cassation did not constitute a higher level of court jurisdiction in the true sense of the word but it was an institution established outside the judiciary.⁴ Neither a trial nor individual cases but the analysis of contentious issues was the objective of the court of cassation. On that account the basic reason for lodging a cassation complaint stemmed from violation of law (*violation de la loi*), including contradiction to the binding law as well as ignorance or violation of rules of procedure. The following instances of violations were defined: incompetent court, power abuse and inconsistency of judgments pronounced by different courts with regard to the same case. Over the course of time other reasons for appeal evolved such as misinterpretation or misapplication of law, that gained great significance. The court of cassation was to control courts exclusively to the extent that their judgments do not infringe law. In such cases problematic judgments were dismissed and were to "safeguard law against abuse of authority or power".⁵

Protection of law, which was based on ensuring lawfulness of an appealed judgment, underlies the cassation system in the French legislation. In such a situation individual interest was the starting point to fulfil the imperative of law analysis and execution.⁶ Thus, the Tribunal was the body whose role was to supervise the legality of court decisions so as to protect the public interest, i.e. to establish universal law. That is why cassation prosecutor's office was established; above all, a prosecutor was liable for protection of state interests and was competent to table motions. A prosecutor was entitled to lodge a complaint to protect legal action when parties failed to appeal in a due course of time, a decision contravened the law or the code of conduct or when a judge abused power. However, parties were bound by the effects of a flawed decision.⁷

The main function of the French Tribunal (Court) of Cassation was to ensure the due application of law and the uniformity of judgments. Consequently, the right to revoke court decisions that were classified as illegal was reduced. In the case of cassation ruling the Tribunal did not examine the merits of the case but passed it to a court of the same instance where an appealed decision was made to

⁴ See. W. Bendetson, *O kasacji według kodeksu postępowania cywilnego*, "Palestra" 1933, No. 1–2, p. 27; J. Skąpski, *System środków prawnych w projekcie polskiej procedury cywilnej*, Lwiv 1927 (a photocopy from "Głos Prawa", No. 12).

⁵ J. Skąpski, *System środków prawnych...*, p. 429.

⁶ J. J. Litauer, *Z dziejów sądownictwa kasacyjnego w Polsce*, Sąd Najwyższej Instancji, "Kwartalnik Prawa Cywilnego i Handlowego" 1917, Rok II, p. 493.

⁷ W. Sobociński, *Sądownictwo Księstwa Warszawskiego a problem kasacji. Pierwsze pomysły i zaczątki organizacji kasacyjnej*, "Czasopismo Prawno-Historyczne" 1982, No. 2, p. 157.

be adjudicated in a substantive manner. In the structure of “pure” cassation independent courts did not have to follow legal decisions made by the Court of Cassation being an institution that was not a part of the judiciary and that could not limit the independence of the judiciary.

In fact, it was difficult to reach the status of legal stability in cases when decisions were revoked by the court of cassation, whereas independent courts that dealt with a case and took substantive decisions, sustained their previous stance. The French legislature adhered to such a system until 1832.⁸ Independence of courts and their detachment from second instance of the Tribunal was basically maintained. Legal decisions were acknowledged as legally binding when the court of cassation, after repeated appeal, sustained its stance by a decision issued in a session of joined chambers (*Chambres Réunies*), on condition that the court of cassation’s decision was not taken into consideration.

The Tribunal’s right to suspend execution of appealed decisions in some categories of cases⁹ was another concession in the structure of cassation. However, inadmissibility of such suspension was maintained even if a defendant might suffer irretrievable harm.¹⁰

Cassation constituted an extraordinary legal remedy applied regardless of the value of the subject matter. However, there were some restrictions resulting from clear grounds for lodging appeal. There were causes (*les causes*), overtures (*ouvertures*) or, more generally, causes (*moyens*). Violation of law (*violation de la loi*), such as violation of substantive or procedural law in particular cases, incompetent court abusing power, and inconsistency of decisions regarding the same, case were the main grounds for cassation. Apart from that, other grounds for cassation, such as misinterpretation of an act of law or misapplication, evolved over the years.

The French system of cassation became a source of inspiration for systems of appeal in many countries because of clear rules and simplicity of construction. Polish legislators developing the code of civil procedure regarded the French cassation procedure as an example to follow. The high esteem of the system of cassation in Poland in the Duchy of Warsaw was expressed by Tsar Alexander who said: “And we shall achieve the excellence that we desire. Among us we shall establish the institution that would unify lofty and necessary ideals of the existing judiciary [...], control the application of law. This is the aim of cassation.”¹¹

⁸ See: J. Gudowski, *Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego (z uwzględnieniem aspektów historycznych i prawnoporównawczych)*, “Przegląd Legislacyjny” 1999, No. 4, p. 18, and J. Skąpski, *System środków procesowych...*, p. 429; other date (1 September 1837) is given in W. Bendetson, *O kasacji...*, p. 27.

⁹ The categories applied to cases of divorce and separation, allegation of fraud, and those where financial damages were ruled for the State Treasury or administrative bodies.

¹⁰ W. Bendetson, *O kasacji...*, p. 27.

¹¹ W. Sobociński, *Sądownictwo...*, p. 142.

2. EVOLUTION OF CASSATION IN POLAND

2.1. BEGINNINGS OF POLISH CASSATION

The system of cassation that originated in France in the 18th century was an absolute novelty in Poland. A part of legislation regarding cassation was preceded by a few centuries-old evolution of the judiciary. In the First Polish Republic the Parliament was vested with the capacity of the court of cassation, that is why decisions of the tribunal of Piotrków and the tribunal of Lublin were appealed as their decisions were the acts of law.¹² After revoking an erroneous decision, a case was supposed to be judged during a subsequent session of the tribunal. The above-mentioned procedure did not incorporate the basic differentiation between a substantial mistake and a mistake relating to the content of legal action as far as the “pure” cassation is concerned.

The issue of cassation was suggested in an earlier draft of the judicial proceedings ordinance tabled by senator castellan Jan Tarnowski during the sessions of Sejm in 1558 and 1559.¹³ The draft of the judicial proceedings ordinance provided for the establishment of a court that would be competent to make decisions on revoking or sustaining decisions made in courts of lower instance with no competence to alter such decisions (*non per modum meliorationis, sed per modum approbationis aut cassationis*), however it disregarded the essential feature of cassation arising from the differentiation between the flawed law and a mistaken action.

Resolutions of the Permanent Council regarding cases finished by decisions that could not be appealed were kindred to the concept of cassation.¹⁴

New regulations regarding the cassation system were not implemented by three superpowers that participated in the partitions of Poland. They relied on the institution of appeal.¹⁵

2.2. JUDICIARY IN THE DUCHY OF WARSAW

Under Napoleon’s decree of 14 January 1807 a temporary governing board had been formed before the Duchy of Warsaw was formally established.¹⁶ Then

¹² W. Sobociński, *Sądownictwo...*, p. 147.

¹³ Such a view was expressed by Prof. Oswald Balzer in the treatise of 1886, entitled *Geneza trybunału koronnego*, see. J. J. Litauer, *Sąd Kasacyjny...*, p. 186.

¹⁴ W. Sobociński, *Sądownictwo...*, p. 148.

¹⁵ See. J. Bardach, M. Senkowska-Gluck (eds.), *Historia państwa i prawa Polski*, Vol. III, Warsaw 1981; D. Makiła, *Historia prawa cywilnego i procedura cywilna na ziemiach polskich*, Vol. 4, Toruń 1994.

¹⁶ J. J. Litauer, *Sąd Kasacyjny...*, p. 187.

temporary judicial organisation started evolving on the basis of Prussian and earlier Polish law; however, it did not encompass the system of cassation. As far as the civil procedure is concerned, the Prussian appeal regulations were fully preserved, having been complemented to a small extent with relevant acts and having been simplified to the extent of regulations of the judicial proceeding ordinance of 1793.

On 16 January 1807, just two days after the establishment of the temporary governing board, general rules of the judiciary were enacted to provide for the Final Tribunal in Warsaw that had 12 members and a chairman.¹⁷ According to the act of 6 May 1807 that detailed the judicial organisation, the Tribunal functioned as a court of third instance; it heard civil cases in which the value of the subject matter surpassed 3000 PLN, that were filed against the decisions of the second instance court in Prussia. In consequence, it replaced the Berlin Review Tribunal that had been a court of review to examine the case. The concept of cassation was not manifested by the Final Tribunal that heard cases and made judicial decisions without the right to supervise lower instances. However, the quality of revision and control were highlighted along with the right to use all the means necessary to find out the truth and to adjust cases to be in conformity with legal regulations.¹⁸

The organisational structure of the temporary court, established under the rules of the temporary governing board, functioned until 1808 when it was replaced with courts set up under the regulations of Title IX of the Constitution of the Duchy of Warsaw signed in Dresden on 22 July 1807 and announced by Napoleon, who reported on the implementation of the French civil code and independent judiciary.

According to Articles 16 and 72 of the Constitution, the Council of State functioned as the last instance in the capacity of a court of cassation. The council was comprised of Ministers and a chairman.¹⁹ Bernard Maret, the constitution's editor, recommended the "chamber of requests" to be set up on the grounds of the French *chambres des requêtes* of judicial clerks chaired by the Minister of Justice who would decide on the admissibility of cassation complaints.²⁰

In the period between incorporating a new judicial organisation into the constitution and its actual enforcement, there were still temporary courts – the final tribunal being an exception – set up under the regulations issued by the temporary governing board. However, at the beginning of 1808 cassation complaints started

¹⁷ *Ibidem.*

¹⁸ W. Sobociński, *Sądownictwo...*, p. 149.

¹⁹ Such a composition of members had some political background, yet it undermined the independence of the judiciary. However, there was the need to attract people who would be able to build the authority of the court of cassation, as lawyers lacked such authority at that time. Compare J. J. Litauer, *Sąd Kasacyjny...*, pp. 188–189.

²⁰ J. J. Litauer, *Sąd Kasacyjny...*, p. 189.

to be lodged to the Council of State that served such purposes, then complaints were passed to the Minister of Justice in order to inform a petitioner that the court had not started operating yet. A detailed bill of civil court organisation of 13 May, drafted by Minister of Justice Feliks Łubiński, came into force on 4 July 1808;²¹ the draft referred to the provisions of the law. At that time apart from the constitution such issues were governed only by “the instruction regarding civil procedure” published by the Minister of Justice on 23 May 1808 with regard to the French provisions of law. The latter did not govern competence and procedure of the court of cassation.

The Court of Cassation was not based on the judicial organisation of 1808, which was too general and did not allow for an effective implementation.²² The act of 3 April 1810²³ developed and complemented the issue of judicial organisation. The enacted organisation of the Court of Cassation in the Duchy of Warsaw was supported by the king who stated in the decree of 1 June 1810 that the actual day for the inception of the Court of Cassation in Poland was 19th June of that year.

The act of law consisted of four chapters that governed the following issues: 1) composition of the court of cassation, 2) subject matter of the court of cassation's procedures, 3) modes of procedures in the court of cassation, 4) miscellaneous.²⁴ Following the main principles of the French cassation, a lot of unique state and procedural regulations, such as development of grounds of cassation in the Duchy of Warsaw, were implemented. When cassation-related organisational framework and procedures were adapted to a different situation in Poland, the Court of Cassation was the body of royal authority, to which it was subordi-

²¹ From the formal point of view it was to be temporary legal framework, i.e. until a new judicial organisation was enforced, which actually turned out to be sustainable judicial organisation.

²² On 19 March 1808 (even before presenting the bill of the judicial organisation) the position of the Prosecutor General was offered to the leader of the Opposition, Józef Kalasanty Szaniawski. In fact, the prosecutor did not start performing the duties and responsibilities at the court of cassation until June 1810, i.e., when the court of cassation started operating. In July 1811 after the conflict with the Minister of Justice, the Prosecutor General resigned from his position upon the king's consent. The next Prosecutor General, Michał Woźnicki, was appointed under the decree of 14 August 1811; before that since 4th August 1810 he had been working as a law clerk in the court of cassation. See. J. J. Litauer, *Sąd Kasacyjny...*, pp. 191–192, 205–206, W. Sobociński, *Sądownictwo...*, p. 160.

²³ The drafted bills governed the competence of the court of cassation; including the bill of 1808 drafted by Józef Kalasanty Szaniawski, the prosecutor for the court of cassation and the next one drafted by the committee appointed upon the initiative of the king in order to consider the previous bill. In July 1809 the bill that combined the above mentioned documents was presented by Feliks Łubiński, the Minister of Justice. See. J. J. Litauer, *Sąd Kasacyjny...*, pp. 191–192, 205–206, W. Sobociński, *Sądownictwo...*, p. 160.

²⁴ Accordingly, since there was no court of cassation, it was agreed that in cases when cassation could not be lodged by parties, time limit for lodging cassation starts when the act of law comes into force. The date to file cases of cassation was 1 June 1810 which was set by the royal decree of 1 June 1810. Compare. J. J. Litauer, *Sąd Kasacyjny...*, pp. 197 and 202.

nated within the limits of its procedures except for cassation procedures. Apart from legal and supervisory functions, the Court of Cassation assisted in exercising power especially as far as legislature was concerned.²⁵

In the first chapter the above-mentioned act regulated, *inter alia*, the status of law clerks in the court of cassation, defining their functions as clerks who explained and presented the case. It was decided that the court might adjudicate when there were at least five members, while there were altogether twelve lawyers at the court of cassation. A prosecutor was obliged to lodge a cassation in the interest of law itself even when the parties were passive. What is more, he was allowed to table motions concerning all cases.

The basic judicial role of the court was to differentiate between cassation and decisions passed by last instance. Causes of appeal may be enumerated as follows: 1) violation of substantive law, 2) misbehaviour, 3) abuse of authority or arbitrary limitation of authority by court, 4) incompetence of court, 5) inconsistency of decisions regarding the same case issued by different courts, 6) two persons being sentenced by different courts for the same offence.²⁶

Filing a civil cassation did not stop the execution of an appealed decision except for divorce cases according to the basic structure of cassation. However, in case the execution might have caused the subject matter to be forfeited, a petitioner was in a position to obtain security for mitigation purposes.

The cassation procedure was initiated by lodging a complaint signed by a lawyer within 3 months following delivery of a decision.²⁷ After a prosecutor's approval, a complaint was passed to the committee of requests and instructions that followed the model of the French chamber of requests (*chambre des requêtes*); this is where the document was initially analysed by a court clerk on the basis of its lawfulness, i.e. it was stated whether an appeal is justified according to the causes of cassation or "illegal". In the latter case, the committee presented the report to the court of cassation that decided whether to accept or revoke a cassation. When a cassation was legally justified, it was passed to the stage of written instruction that consisted in exchanging documents of the case between the parties. At the end of that phase the committee made a report that was entered into the register of cassation. Then, during the public session the report of the committee of requests and instructions was read. Afterwards, the subject matter was briefly presented by a clerk. Defence counsels were not allowed to voice objections; they could only submit a note with facts that were not fully or thoroughly presented. A prosecutor presented his remarks verbally. The procedure ended with a public

²⁵ W. Sobociński, *Sądownictwo...*, p. 177.

²⁶ J. J. Litauer, *Sąd Kasacyjny...*, p. 198.

²⁷ Because of some formal mistakes regarding the lodged complaint on the part of the defence counsel he could be warned, reprimanded, even excluded from the list of defence counsels (art. 29 of the act of 3 April 1810).

announcement of a decision during the same session or the next one (when a case was complex). Decisions were publicly available.

Neither could the Court of Cassation analyse a case regarding its subject matter, nor change a decision partially or fully. The court was supposed to indicate the legal regulations that were violated by an appealed decision, revoke a decision or pass a case for trial to other courts. The latter did not have to apply to the stance of the court of appeal. Thus, a decision could be re-appealed on condition that injunctions given by the court of cassation were not taken under consideration, i.e. both cases referred to the breach of the same legal regulations. Then a case was heard by a larger group of at least 9 people. When a case was appealed for the third time, the Council of State presented it to the king whose interpretation of law was considered to be binding. The function of the court of cassation clearly determined the objective of cassation that was to ensure uniformity of law application.

Given the French model, the court of cassation did not only serve the purpose of cassation but it also supervised the courts. As a superior court it heard judicial disputes between the courts of different category. As far as disciplinary matters are concerned, the court of cassation exercised the right to discipline and chasten judges of the court of appeal and the magistrates' court by suspension from office or dismissal resolved by the king himself after a direct petition.²⁸

The Court of Cassation was obliged to provide the king with the annual reports, including remarks and opinions concerning some imperfections in the legislature as well as possible suggestions of amendments.

Stanisław Potocki became the president of the Court and Feliks Łubieński – the Minister of Justice – was vested with the position of vice-president.

Passing an act on organisation of the Court of Cassation was an incentive for the Council of State which during the session on 7 May 1810 announced that “the court of cassation has the capacity to examine complaints that the parties file”. Under the Royal Command the ceremony of opening of the court took place in Warsaw at the Palace on the Krasiński Square on 19 June 1810.²⁹ The Minister of Justice of that time, Tomasz Łubieński, had a chance to deliver his speech

²⁸ J. J. Litauer, *Sąd Kasacyjny...*, pp. 193–194.

²⁹ That day at 11 o'clock, the court of cassation started operating in Poland. See. J. J. Litauer, *Sąd Kasacyjny...*, p. 202 along with the source mentioned in the footnote 4.

It should be noted that when the court of cassation started operating, lands recently incorporated in the Duchy of Warsaw under the treaty of Vienna of 14 October 1809 were outside the court jurisdiction. However, under the royal decree of 9 June 1810 the organisation of the judiciary in the Duchy of Warsaw (including the jurisdiction of cassation) was also formally transferred on the lands that were recently incorporated; but the actual change took place on 15 August 1810. Until that date the judiciary in Poland was based on the contemporary regulations of the Austrian and Galician law where the system of cassation was not mentioned. It means that from the moment of the annexation to the Duchy territory until 15 August 1810 the four departments – under the Austrian partition were deprived of cassation.

which characterised the court of cassation as “a safeguard of rights” and a perfect institution established to hear complaints about injustice. The main function of the court was to gather experience regarding law in order to improve it.³⁰ Unfortunately, the first Polish Court of Cassation functioned until the end of 1812 and its regular sessions ended in November of that year. The court discontinued its operations on 15 January 1813.³¹

The two-year period in which the first Polish Court of Cassation operated is considered to be a glorious and fruitful time, yet short. The court passed 163 cassation decisions (70 of which concerned civil cases³²) based strictly on the grounds of cassation.³³ Judges’ impartiality and conscientiousness should be noted as well as the fact that their top priority was to respect the law. The Court of Cassation in the Duchy of Warsaw was not only acclaimed by many lawyers who considered the court’s decisions to be a valuable achievement of the Polish legal system³⁴ but it was also a milestone in the Polish cassation system.

2.3. CASSATION JUDICIARY IN THE 19TH CENTURY

2.3.1. CHANGES AT SUPERIOR COURT UNDER SUPREME PROVISIONAL COUNCIL AND PROVISIONAL GOVERNMENT

After Tsar Alexander’s victory over Napoleon in the Duchy of Warsaw, the Supreme Provisional Council was established on 15 April 1813; unique and temporary organisation of the Council prevented it from performing cassation functions. Since such a situation was regarded as a social disadvantage, under the act of 29 March 1814 the Council entitled the Court of Appeal to fulfil cassation functions regarding criminal, police reformatory and peace making matters.³⁵ In order to expand its functions, the Council took over the responsibilities and rights of the court of cassation regarding civil cases and at the same time the committee was appointed to decide on the administrative matters.³⁶

³⁰ W. Sobociński, *Sądownictwo...*, p. 178.

³¹ J. J. Litauer, *Sąd Kasacyjny...*, p. 207.

³² About 40% of decisions passed in civil cases were revoked. J. J. Litauer, *Sąd Kasacyjny...*, p. 211.

³³ Moreover, the court passed 5 decisions unpublished, including 4 regarding matrimonial matters. All in all, from 4 September 1812 (the day of submitting the report to the king by the court’s writer) the court of cassation judged 194 cases. However, some of them did not end with a decision (for instance because of the reconciliation between the parties). Compare J. J. Litauer, *Sąd Kasacyjny...*, pp. 209–210.

³⁴ See J. J. Litauer, *Sąd Kasacyjny...*, p. 212; K. Fierich, *Sąd trzeciej instancji i Najwyższy Sąd Sejmowy na tle całokształtu organizacji sądownictwa Rzeczypospolitej Krakowskiej 1815–1833*, Cracow 1917, p. 28.

³⁵ J. J. Litauer, *Z dziejów...*, p. 314.

³⁶ In urgent and important matters the committee made the decision whether the cassation complaint was valid, on the grounds of which the Council decided to put it at the instructive stage

The organisational structure of the judiciary was changed when the Provisional Government of the Kingdom of Poland was appointed on 20 May 1815. Under the decree of 21 September 1815 the Court of Last Instance was established to hear civil cases following the procedure of appeal and cassation, and to perform supervisory functions; the court was supposed to apply regulations of the decree of 3 April 1810 to previous and pending cases upon condition that no organisational changes were made.³⁷ The function of cassation was still performed but at the same time many amendments were enforced to empower the court to make final decisions about cases “in merito”. Thus, art. 19 of the decree of 21 September 1815 states that if a decision was revoked, a case was finally decided by the Court of Last Instance. The cassation for retribution of law was repealed (*in satisfactionem legis*).

Due to these amendments, the third instance procedure acquired features of an appeal, and in consequence, the basic function of the Superior Court was no longer to safeguard the law but the individual interest. As a result of combining the procedure of cassation and appeal, decisions lacked both legal value and actual analysis.³⁸ Then it was advocated that the court of last instance “which after revoking a decision, hears a case ‘in merito’ lowers its status as the court of last instance and replaces a court whose decision was revoked.”³⁹

Among other amendments that accompanied the establishment of the court of last instance, a prosecutor’s office was replaced with the right to appoint a defence lawyer. A reporting judge’s responsibility was to “analyse reasons and evidence presented by the parties, act in the name of law and clarify all the factors that might lead to legal conclusions” (art. 6 of the decree of 21 September 1815). The initial analysis procedure for cassation and a decision taken during a closed session stating whether cassation can be submitted for further analysis proved subordination of the court of last instance to the public interest.⁴⁰ Then the trial dossier was exchanged and a case was referred to a reporting judge in order to reach a legal opinion (art. 14 of the decree of 21 September 1815); subsequently, an open session was held in a way that differs from today’s sessions. At that moment lawyers presented their legal stances, a judge reported a case and then by asking questions aimed at reaching a decision (art. 16 of the decree of 21 September 1815).

in order to stop the execution of the appealed decision (but not to start and finish the preparatory stage since the committee of requests and instructions, responsible for that, ceased to function), or suspended the decision when the committee opted for revoking the appeal (the court of cassation which was to revoke the complaint did not exist).

³⁷ W. Sobociński, *Kasacja a restytucja...*, p. 122.

³⁸ J. J. Litauer, *Z dziejów...*, p. 502.

³⁹ Records of the committee of justice regarding the organisation of the Court of Last Instance of the Kingdom of Poland 18/8/26/II; quote from J. J. Litauer, *Z dziejów...*, p. 493.

⁴⁰ The procedure is similar to today’s preliminary examination.

The Court of Last Instance started operating on 3 November 1815.⁴¹

The concept of last instance realised by the Provisional Government was the basis of “the supreme tribunal in the Kingdom of Poland that hears all civil and criminal cases in last instance”⁴² established under art. 151 of the Constitution of the Kingdom of Poland of 27 November 1815.⁴³

2.3.2. CHANGES IN THE CASSATION JUDICIARY IN THE KINGDOM OF POLAND

The uprising of 1830 interrupted operations of the last instance court that ceased to function following the dissolution of the Sejm. On 13 June 1831 a draft bill⁴⁴ concerning establishment of the last instance court was tabled, yet to no avail.

Only after the failure of the uprising, the act of 14 February 1832 entitled judges of the last instance court to adjudicate in panels of seven judges, yet only in the case of appeal’s acceptance or rejection. Consequently, the suspension of its actions lasted for one and a half years, which resulted in last instance court’s instructive activities, yet its core operations were still suspended.⁴⁵

On 8 January 1833 the *status quo* was restored by the Council’s resolution which referred to art. 67 of the Organic Statute which was about to enforce the act on “the highest court chamber”. The issue was not regulated until 18 September 1841 when Tsar’s ukase dissolved the Council of State and the court of last instance⁴⁶ that was replaced with IX (civil) and X Warsaw Department of the Governing Senate. In fact, the court operated until 2 October 1842, i.e. the moment when the court of the last instance and cassation departments at the court of appeal were abolished and when the organisational structure of the department was enacted.

The Organic Statute of Warsaw departments cancelled the rule of cassation that had been in force in the Kingdom; the statute provided for the chair

⁴¹ On that day the first decision was passed considering father Czaplński who acted in the name of the church of Oszkowice against Antoni Brochocki over tithes. See J. J. Litauer, *Z dziejów...*, pp. 500–501.

⁴² Apart from offences against state and crimes of high state officials (senators, minister, heads of state department, state counselor and referendary) that in accordance with art. 116 and 152 of the constitution were heard by the Sejm court.

⁴³ J. J. Litauer, *Z dziejów...*, p. 496. In subsequent decrees and regulations some minor organisational changes were made with regard to, *inter alia*, the order of precedence for senators at court (royal order of 17 January 1817), *vacatio legis* (governor’s resolution of 26 July 1817), the rights and responsibilities of the court’s president (governor’s resolution of 13 January 1818) and the establishment of the second department of the court (royal resolution of 18 July 1826).

⁴⁴ Prepared by a member of parliament Kajetan Kozłowski. See J. J. Litauer, *Z dziejów...*, p. 497.

⁴⁵ The Court was additionally empowered to hear the cases of incidental conflicts under the act of 25 April 1832, as well as cases of disciplinary problems concerning court officials under the act of 16 November 1832. Compare J. J. Litauer, *Z dziejów...*, p. 498.

⁴⁶ The composition of the court is illustrated by J. J. Litauer, *Z dziejów...*, p. 499.

of the Ruling Committee to be assisted by general prosecutors and to be responsible for supervising the observance of the court procedures and the uniformity of judgments.

That situation lasted until July 1876 when the Russian act on civil procedure, that referred to many structural elements of the 1806 French code of civil procedure, came into force. The change resulted in the restoration of cassation, the absence of which was felt after the Last Instance Court was established in 1815. Appeal could be based on the grounds of violation of substantive law, incorrect interpretation, and violation of procedural provisions or when court abused its power.

The Russian act on civil procedure partially departed from a model of “pure” cassation, providing for the following:

- contrary to the French Tribunal of Cassation, the Supreme Court was a part of the judiciary,
- proceedings at the Superior Court were a part of the civil court procedure, and there was no difference in that respect,
- decision of the Court was binding for the court of second instance in a given case,
- lodging a cassation complaint as a standard form of appeal did not result in suspension of enforceability of contested decision by legal reasons; however, under provisions of an act of law enforceability could be discontinued until cassation complaint was resolved.

Cassation motion was examined by a group of Justices of Peace or a civil cassation department of the Governing Senate in Petersburg. After nullifying a decision, a case was returned to be re-examined at the judging meeting or in the Court Chamber in Warsaw⁴⁷.

2.3.3. JUDICIARY IN THE REPUBLIC OF CRACOW

The Republic of Cracow, created at the Congress of Vienna in 1815, devised an original organisational structure of the superior court. The Court of Appeal was started with an enlarged composition of members who adjudicated the case. Elements of the French cassation system, the German judicature in which university law departments presented initial opinions as well as some Polish arrangements were incorporated. It adjudicated as a court of last instance when the decision of the Court of Appeal passed in the second instance proceedings differed substantially from the decision of the first instance.⁴⁸ Not only did the Court serve the function of cassation but it also adjudicated on the merits.

⁴⁷ A. Korobowicz, W. Witkowski, *Historia ustroju i prawa polskiego (1772–1918)*, Kraków 2001, p. 169.

⁴⁸ The fact that different laws are applicable at the first and second instance (the so-called *ratione iudicati conditon*) pre-conditioned the admissibility of lodging a cassation, which was the phenomenon in the Polish history of cassation.

The Law Department of Cracow University, having examined a case and given an opinion of one of the professors, pronounced a violation of substantive law or of procedural provisions by the lower instance. Thus, the department played an important role for the cassation procedure. Nonetheless, opinion of professors and doctors of law, by whom the violation was pronounced, was not binding for the last instance. The lack of such a statement made it impossible to lodge a cassation complaint.

The Constitution of May 1833 served the legal grounds for replacement of the Court of Appeal with Third Instance Court adjudicating in a reduced composition without a Justice of Peace and arbitrators appointed by the parties. Moreover, the Law Department was no longer obliged to deliver its opinion.

In 1842 further changes in court's organisational structure of the Republic of Cracow were made. The previous Court of Appeal and the Court of Third Instance were replaced with the High Court which was an instance of appeal in cases involving issues of a higher priority, and the cassation procedure – was waived.

2.4. CASSATION IN THE SECOND REPUBLIC OF POLAND

After regaining independence in 1918, various modes of court civil proceedings, previously implemented by the partitioners, were followed in the Polish territory. The procedure was modelled on the French legislation and based on the same system of cassation⁴⁹ applied in the central and eastern voivodeships, whereas the system of appeal dominated in the southern and western voivodeships.⁵⁰ After its rebirth, the Polish state faced the necessity of unifying law and making the judiciary uniform. The latter had been gradually implemented since September 1917 when the Provisional Council of the State enacted provisional regulations on the organisational framework of the judiciary in the Kingdom of Poland. New regulations provided for the establishment of the Supreme Court with its seat in Warsaw. It followed the example of French models constituting superior instance of cassation. The new court had the authority to revoke deci-

⁴⁹ For example the Russian act of civil procedure of 20 November 1864 (applicable in the Polish territory from 1875) provided for the appeal, as far as complaints are concerned, and cassation modelled on the French system. Cassation functioned as special means along with the restitution and the opposition of the third. See. J. Gudowski, *Kasacja w świetle projektu...*, p. 11.

⁵⁰ In the territory under Prussian rule the concept of appeal against the decisions of the court of appeal was in force under the act on civil procedure of 30 January 1877; in the territory under Austrian rule so-called "Klein's procedure" had applied since 1 August 1889 and was promoted by the Vienna University professor F. Klein; the procedure provided for the appeal against the decisions of the court of appeal and was governed by the act of 1 January 1885 on the court procedure in civil conflicts. See. J. Gudowski, *Kasacja w świetle projektu...*, p. 12.

sions of the second instance in cases of substantive law or procedural provisions violation.⁵¹

The March Constitution of 1921 established the Supreme Court that dealt with civil and criminal cases, following the judicial model from 1917, while the mode of actions and judicial organisation conformed to the legislation. The model of courts' organisational structure was discussed in the years to come, and was finally settled by the Polish President's regulation on the system of common courts on 6 February 1928.⁵² However, no changes concerning the status and function of the Supreme Court as a court of cassation were made; only the courts of general jurisdiction were within the Supreme Court's jurisdiction.

Means of appeal gave rise to much controversy during the efforts to codify the Polish law of civil procedure.⁵³ Such activities started in 1917 when the commission of civil law was set up upon the initiative of the president of the Department of Justice at the Provisional Council of State. The commission consisted of the most prominent lawyers from Warsaw and was chaired by J. J. Litauer.⁵⁴ In its final version, passed on 21 December 1929 and published as the Polish President's regulation on 29 November 1930,⁵⁵ members of the Codification Commission opted for the French and Russian model of the court of cassation that controlled and revoked decisions of the court of appeal on the grounds of violation of law but without a chance for significant analysis of a case.⁵⁶ Thus, the system of "pure" cassation was appreciated with its long-standing tradition ingrained also in the history of Polish judiciary. It was stated that according to the chosen model of cassation, the Supreme Court was supposed to safeguard the uniformity of law; whereas neither the litigants nor the individual cases were judged, the other courts' decisions were supervised in order to check if they did not violate the law.⁵⁷ The Supreme Court was not obliged to hear a case, i.e. to examine the trial dossier, allegations and evidence; its role was limited to the examina-

⁵¹ The first meeting of the Civil Chamber of the Supreme Court took place on 14 December 1917; see L. Garlicki, Z. Resich, M. Rybicki, S. Włodyka, *Sąd Najwyższy w PRL*, Wrocław 1983, p. 16.

⁵² Journal of Laws No. 12, item 93.

⁵³ Called at that time "the means of law" similar to *Rechtsmittel* used in German, Austrian and Hungarian procedure.

⁵⁴ See more about the draft of codification of the Polish civil procedure in J. Gudowski, *Kasacja w świetle projektu...*, p. 13.

⁵⁵ Journal of Laws No. 83, item 651; the text with further amendments was announced by the Minister of Justice in the proclamation of 1 December 1932 (Journal of Laws No. 112, item 934); it encompassed the order of the Polish President's Regulation on court execution procedure of 27 September 1932 (Journal of Laws No. 93, item 803).

⁵⁶ J. Gudowski, *Kasacja w świetle projektu...*, p. 17.

⁵⁷ Reports from the formal civil law department meetings – the supplement to the study "Polska procedura cywilna. Projekty referentów z uzasadnieniami", Vol. 2, Cracow 1923, p. 9. Quote from J. Gudowski, *Kasacja w świetle projektu...*, p. 16.

tion of controversial issues from a purely legal perspective.⁵⁸ The dogmatic vision of “pure” cassation was only a point of reference in terms of activities concerning arrangements about the final form of the Polish cassation, which also incorporated an element of retrial.

The most significant features taken from the model of retrial were as follows:

- acceptance of a decision that changes the decision of the first instance court when substantive law is violated (art. 439, according to the document with further amendments of 1932), at the same time an appropriate motionsubmittedby the parties is not required,

- court of lower instance which hears a case has to observe interpretation of law included in the judgement of the Supreme Court,⁵⁹

- possibility of suspension of enforcement of a contested decision.

In addition to that, some restrictions on applying cassation were implemented, such as:

- cassation complaint was not admissible in cases in which value of controversy was below 500 zlotys (with the exclusion of cases of harm made to citizens by state bodies or municipalities and related illegal actions or improper official duties), in cases of restoring the previous state as well as in the execution proceedings,⁶⁰

- grounds for judicial control of cassation were restricted as compared to the judicial control of appeal,

- only legally invalid decisions pronounced in the second instance could be appealed,

- it was necessary for a lawyer to prepare a cassation and to pay a cassation deposit in order to limit the number of cassation complaints.⁶¹

Deviations from “pure” cassation were justified by the procedural economy; at the same time some basic rules of cassation were undermined. The final compromise that allowed for adjudicating in the third instance was seen as “a victory

⁵⁸ S. Gołąb, *Prawa Państwa Polskiego* (in:) W. L. Jaworski (ed.), *Ustrój sądów cywilnych*, z. VII A, Cracow 1922, p. 403. Quote from J. Gudowski, *Kasacja w świetle projektu...*, p. 17.

⁵⁹ In France, it took place in 1832, when it was concluded that the decision of cassation given twice and regarding the same matter is binding for the court of lower instance. See J. Gudowski, *Kasacja w świetle projektu...*, p. 18.

⁶⁰ W. Siedlecki was against cassation in the execution procedure, supporting his viewpoint with the argument that the Supreme Court had too many responsibilities. Actually, some overburdening of the Court took place during 1937–1939, as a result of which under the decree of the Polish President of 21 November 1938 regarding the improvement of the court procedure (Journal of Laws No. 89, item 609) (the so-called Lex Grabowski) the value of the object of controversy regarding cassation complaint was tripled, i.e. it amounted to 1500 PLN. According to J. Gudowski (*Kasacja w świetle projektu...*, p. 20), who based his calculation on Statistical Yearbook of 1939, the average salary of office workers was 360 PLN per month.

⁶¹ See L. Garlicki, Z. Resich, M. Rybicki, S. Włodyka, *Sąd Najwyższy...*, pp. 18–19; J. Gudowski, *Kasacja w świetle projektu...*, p. 18, Z. Hahn, *Kasacja wedle polskiego projektu postępowania cywilnego*, “Czasopismo Sędziowskie” 1932, No. 1–2, p. 4.

of the retrial model⁶² or “a chance for the Supreme Court to perform all its functions such as ensuring uniformity of judgments and supervising lawfulness of decisions”⁶³ was a divergence from the traditional cassation model. In fact, the possibility of retrial meant “the obligation”⁶⁴ which led to the institution of third instance that examined a case on its merits, aiming not only at uniformity of the judicature but also at judging individual cases.

The presented model of cassation functioned until 5 September 1939 when the Supreme Court was evacuated after Poland had been attacked by the Nazis. The Court was not re-established under the Nazi occupation. The only document that mentioned the Supreme Court was the General Governor’s order of 19 February 1940 regarding the Polish judiciary. It was stated that the Supreme Court was temporarily closed and the rulings of the second instance became finally enforceable.⁶⁵

2.5. JUDICIARY REFORMS OF 1949–1950

The system of three instances of appeal and cassation was excluded from the Polish civil procedure in 1950 due to the reorganisation of the judiciary which was aimed at the adaptation to the new political system.⁶⁶ Two instances were implemented, with the second instance of appeal having been supplemented by the so-called extraordinary revision, independent from other instances. The latter constituted an element of judicial supervision over valid decisions of common courts of all instances. The Minister of Justice, the Public Prosecutor General and the First President of the High Court were entitled to lodge an extraordinary revision when a decision violated the law to a significant extent or when it was deemed to contravene the interests of the People’s Republic of Poland. Extraordinary revision served the purposes of the state where ideology – and not the objective of uniformity of judgments – played a crucial role. The interest of the state was not linked with the moment when the revised decision was pronounced but with the moment when an extraordinary revision was examined by the Supreme Court.⁶⁷ In consequence, a valid decision might have been revoked or adjusted within the period of six months following the date when the decision became finally enforceable.

⁶² J. Skąpski, *System środków prawnych...*, p. 430.

⁶³ W. Bendetson, *O kasacji...*, p. 35.

⁶⁴ J. Skąpski, *System środków prawnych...*, p. 431.

⁶⁵ L. Garlicki, Z. Resich, M. Rybicki, S. Włodyka, *Sąd Najwyższy...*, p. 20.

⁶⁶ By the act of 20 July 1950 on changes in regulations concerning civil procedures (Journal of Laws No. 38, item 349).

⁶⁷ W. Siedlecki, *System zaskarżania orzeczeń sądowych w kodeksie postępowania cywilnego PRL*, “Państwo i Prawo” 1957, No. 6, p. 1139 along with the judgment of the Supreme Court of 18 January 1954 (I C 1699/53, “Nowe Prawo” 1954, No. 10, p. 92).

The crowning achievement of the system of revision was article 51 of the Constitution of the People's Republic of Poland of 1952,⁶⁸ which stated that: "The Supreme Court is the principal court which supervises all the other courts as far as the judicature is concerned." The act on the Supreme Court of 15 February 1962⁶⁹ introduced provisions regarding the supervisory role of this court. Yet the act did not contravene the changes implemented by the judiciary reforms of 1949–1950.

3. APPEAL-RELATED AMENDMENTS TO THE CODE OF CIVIL PROCEDURE OF 1964

The system implemented in 1950 was basically adopted by the code of civil procedure of 1964⁷⁰ which provided for the extraordinary revision as a measure of correction functioning until the 90s.

First changes undertaken to restore the system of three instances were made in 1990.⁷¹ The changes provided for the establishment of a common court of third instance, i.e. courts of appeal which examined ordinary revisions according to the already existing system, but these efforts opened the door to restitution of the system of cassation and appeal which existed in Poland under the provisions of civil procedure of 1930.

The necessity for the fundamental reform of the appellate measures was justified by striving to ensure the stability of valid court decisions that examined a case on the merits. Extraordinary revision as a nondemocratic institution, which allowed the state to manipulate valid decisions and hinder the revision of the parties, posed a great danger to the stability and effectiveness of the judiciary. The final reform of the system of appeal was implemented under the amendment of 1996⁷² which, as far as the measures of cassation are concerned, was based to a great extent on regulations of the code of civil procedure of 1930. Cassation was supposed to be an appellate measure which transmitted the dispute to the Supreme

⁶⁸ Journal of Laws. No. 33, item 232.

⁶⁹ Journal of Laws. No. 11, item 54.

⁷⁰ The act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws, No. 43, item 296) which came into force on 1 January 1965.

⁷¹ The act of 13 July 1990 on formation of courts of appeal and amending the Act – the judicial organisation of common courts, the Code of Civil Procedure, Penal Code, the Act on the Supreme Court, the Act on Supreme Administrative Court of Poland and the Act on National Council of the Judiciary of Poland (Journal of Laws No. 53, item 306).

⁷² The act of 1 March 1996 concerning amendments to the code of civil procedure, Polish President's orders – bankruptcy and composition law, the code of administrative procedure, acts on court fees in civil cases and other acts (Journal of Laws No. 43, item 189).

Court as the court of third instance.⁷³ The measure was accessible directly to the parties and it corresponded to decisions or rulings of the second instance which were finally enforceable. Thus, cassation did not apply to decisions concerning incidental matters. However, basically modelled on the French law according to the pre-war standards, cassation had some elements of retrial, as a result of which, on the one hand, the procedure was more effective but basic premises of cassation were undermined as the Supreme Court was to make the judiciary uniform and control its legality, on the other. Following the above-mentioned amendment, the Supreme Court is now allowed not only to revoke an appealed decision, which constitutes its basic jurisdictional function, but it may also examine a case on its merits provided that the substantive law was violated; in the latter case the actual state of affairs determined in an appealed decision is binding for the court. The departure from the authority of cassation on the part of the Supreme Court is not of great importance as examination of the merits is subjected to a party's motion. Despite the fact, that cassation lost its extraordinary nature as parties were entitled to lodge a cassation complaint and justify its grounds by themselves, such a change did not transform cassation into a measure verifying the accuracy of facts.⁷⁴ The basic objective of cassation is the supervision of accurate application of law that allowed for one category of legal mistakes; the control is performed on the basis of procedural material established by a court of second instance. The cassation must be lodged by an entitled party in his or her own interest, obligatorily represented by a professional attorney. Such an organisation of the cassation proceedings, consisting in the examination of a complaint along with the claims and grounds of a cassation, enables the Court to perform a uniform interpretation of law.

As a result of the amendment of 1996, the Supreme Court is entitled to revoke appealed decisions and reject claims without referring a case to a lower instance court, which is another difference in comparison with the traditional model of cassation. Moreover, a court where a case was referred to, is obliged to treat interpretation of the Supreme Court as binding.

The changes concerning the Polish law of civil procedure that were undertaken, should be considered of great importance, as they strived to reach the standards adopted in the European Union Member States. Nevertheless, wide

⁷³ Italian and Spanish civil procedure, where cassation constitutes common measures of court appeal, is similar. Compare W. J. Habscheid, *Cywilnoprosesowe systemy środków odwoławczych w Europie*, (in:) M. Sawczuk (ed.), *Jednolitość prawa sądowego cywilnego a jego odrębności krajowe*, Lublin 1997, p. 198.

⁷⁴ Mistakes made by the court of second instance in determining facts regarding the grounds for the appealed decision can justify its revocation only indirectly when the mistakes are results of law violation. The Supreme Court is entitled to analyse the accuracy of determining facts if it is necessary to prove the violation of procedures which significantly affected the decision. See T. Ereciński, *O nowelizacji kodeksu postępowania cywilnego w ogólności*, "Przegląd Sądowy" 1996, No. 10, p. 14.

access to the third instance, which constituted a constitutional right of a citizen,⁷⁵ resulted in an excessive number of cases and led to lengthy proceedings hindering the administration of justice.⁷⁶

4. AMENDMENT TO THE CODE OF CIVIL PROCEDURE OF 24 MAY 2000

In practice, the abovementioned regulations proved cassation faulty and made “the Supreme Court deal with unimportant and trivial matters which do not contain judicial problems and do not promote legal action that would create or make the judicature of common courts uniform.”⁷⁷ Constitutional and statutory functions of the Supreme Court were hampered by an excessive workload of the Supreme Court. That implied that the examination of cassation complaints should be dependent on specific circumstances. For legal and practical reasons it was advocated that cassation should be attributed features of an extraordinary appellate measure in accordance with its specific functions. Specialists referred to the pre-war viewpoint which considered cassation to be unnecessary in the system of instances where there is an appeal *cum beneficio novorum*, which allowed for second instance re-examination of a case on the merits. According to the abovementioned opinion, the institution of cassation is justified on only one ground; that is when it serves the interests of the state, i.e. uniform interpretation and application of law.⁷⁸ In such a situation restrictions of access to cassation, which did not undermine the rule of two-instance system for court procedures,⁷⁹ were believed to be necessary for presentation of serious cases of important matters before the Supreme Court. As a result, interpretation of law was meant to be created and developed.⁸⁰

⁷⁵ Art. 77 section 2 and art. 78 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483).

⁷⁶ Waiting time for the examination of cassation was over 13 months whereas the number of outstanding complaints was over 6000; about 2500 cases were examined a year; see Z. Strus, *Zmiany postępowania cywilnego dokonane w nowelizacji k.p.c. z 2000 r.*, “Palestra” 2000, No. 7–8, p. 12 as well as the justification of a draft bill of 24 May 2000.

⁷⁷ The justification of the bill of amendments concerning the Code of Civil Procedure on appeal and cassation. Version of 24 July 1998, the head law clerk, T. Ereciński, “Przegląd Legislacyjny” 1998, No. 1–2, p. 118.

⁷⁸ A. Akerberg, *Środki odwoławcze. Komentarz do art. 393–441 kodeksu postępowania cywilnego*, Warsaw 1933, p. 97.

⁷⁹ Art. 176 section 1 of the Constitution of Poland.

⁸⁰ T. Ereciński, *Dopuszczalność kasacji w sprawach cywilnych (kilka uwag de lege lata i de lege ferenda)*, (in:) *Symbolae Vitoldo Broniewicz dedicatae. Księga Pamiątkowa ku czci Witolda Broniewicza*, Łódź 1998, p. 86.

Such demands resulted in passing the act of 24 May 2000 which amended the code of civil procedure⁸¹ and aimed at the following:

- cassation as an institution of law that enables the Supreme Court to supervise the accuracy of law application and uniformity of the judicature,
- facilitating the Supreme Court's activities by adjusting the number of examined cassation complaints to its capacities.⁸²

The analysis of the above-mentioned amendments gave rise to a heated discussion in circles of lawyers who either supported or criticised the changes.⁸³ During the discussion it was emphasised that on legal and historical basis cassation was a trial measure that served the state, whereas the cassation's objective was to supervise the law application and its uniform interpretation.⁸⁴ The court of cassation was not meant to judge cases within the framework of two-instance system of common courts that served this function to a sufficient extent with an unlimited "full" appeal *cumbeneficio novorum* which makes it possible to re-hear the case on the merits. Such a procedure in typical cases secures sufficiently the interests of both parties.⁸⁵ Concurrently, the role of the Supreme Court is restricted to settling juridical controversies but it is realised by means of a cassation as a supportive measure that may capture private interests of the parties, provided it serves the purpose of general interest or sets an example to the courts of general jurisdiction.⁸⁶ Thus, judges of the court of cassation are not obliged to

⁸¹ The act of 24 May 2000 on amending the act – The Code of Civil Procedure, the act on registered pledge and its register, the act on court fees in civil cases and the act on court bailiffs and execution (Journal of Laws No. 48, item 554 as amended).

⁸² See M. Piotrowski, *Warunki dopuszczalności kasacji*, "Monitor Prawniczy" 2000, No. 12, p. 797 and Z. Strus, *Zmiany postępowania cywilnego...*, p. 9.

⁸³ See T. Ereciński, *Na programową niechęć nie ma rady*, "Rzeczpospolita" 1999, No. 174; J. Gudowski, *Trafne i potrzebne rozwiązania*, "Rzeczpospolita" 1999, No. 181; A. Zieliński, *A jednak – nieszczególny*, "Rzeczpospolita" 1999, No. 174; *idem*, *Na pierwszy rzut oka – nieszczególny: projekt nowelizacji kodeksu postępowania cywilnego*, "Rzeczpospolita" 1999, No. 137. E. Łętowska in a gloss to the act of the Supreme Court of 17 January 2001 (III CZP 49/00, "Przegląd Sejmowy" 2001, No. 4, p. 192) treats the amendments with reserve. She states: "The amendment to the act on cassation was a practical and forced effort. It turned out that the Court of Cassation was showered with cassation complaints, which hampered effective work (...). It is an open secret that falling behind over the years does not result from meticulousness of lodged cassations; compulsory presence by a lawyer did not prevent mediocrity of legal work. In that situation the idea of initial selection proved to be necessary evil. The restriction, which was a surrender of lofty idea of wide access of court control, is absolutely indispensable under present circumstances. That is why I would defend the idea of preliminary examination as a tool of *faute de mieux*."

⁸⁴ J. Gudowski, *Kasacja w postępowaniu cywilnym po zmianach dokonanych ustawami z dnia 12 i 24 maja 2000 r.*, "Przegląd Sądowy" 2001, No. 2, p. 6.

⁸⁵ The viewpoint was proved by the increase of judicature of second instance; for example in 1998 only 16.5% of lodged cassation complaints were accepted. A. Wypiórkiwicz, *Dokąd zmierzasz kasacja? Wymiar sprawiedliwości. Skarżący bacznie śledzi kolejność umieszczenia spraw na wokandzie*, "Rzeczpospolita" 1999, No. 144.

⁸⁶ J. Gudowski, *Kasacja w postępowaniu cywilnym...*, p. 6.

settle controversies over facts and in consequence, their focus on law interpretation promotes objective decisions, which is indispensable, considering the role of supervision of all the other courts aimed at ensuring accuracy and uniformity of the judicature and law interpretation.

With regard to the traditional model of cassation and according to the amendment of 24 May 2000, cassation served the interest of the state.⁸⁷ By taking the main public objective into consideration, the amendment resulted in more selective criteria concerning cassation, and elimination of cases lacking social gravity. As a result, the Supreme Court is entitled to exclude complaints that are irrelevant or lack precedential value. Preliminary examination is supposed to fulfil the above-mentioned goals. Cassation should be perceived neither as a widely accessible measure which guarantees an unlimited access to the Supreme Court as “a third instance”, nor as a remedy for all imperfections of the Polish judiciary.

The demand for regulations that limit the range of cassation admissibility and apply cassation only to decisions of highest social and legal gravity turned out to be justified. The role of the Supreme Court regarding legal controversy⁸⁸ was consolidated and the related changes were to facilitate court actions. As a result, restoration of cassation does not guarantee a fair trial and it should be treated as a measure of last resort.

The amendment to the code of civil procedure of May 2000 provided for regulations which aimed at balancing the public interest (law interpretation) with private interest (parties' efforts to obtain as desirable decision as possible) and it met the European standards. A comparative legal analysis, including the latest reform of civil procedure, is not only of a theoretical significance, and therefore it should be thoroughly explored.

In a number of modern appeal systems, the traditional model of cassation underlines its significance in terms of judicial control of law application and making interpretations uniform. The protection of the public interest is a fundamental, law-dogmatic constituent of the model. Such a protection underlines the unique nature of cassation and is supported by a tendency to impose restrictions governing a cassation complaint.

In the French *Code de procedure civile* cassation complaint (*pourvoi en cassation*) fits its “pure” model and constitutes an extraordinary measure of appeal against decisions of last instance, namely when a case is heard by a court of appeal or only by a judge of first instance.⁸⁹ The complaint is referred to the Court

⁸⁷ The judgment of the Supreme Court of 4 February 2000, PART II 178/98, OSNC (Civil Law Chamber) 2000, No. 7–8, item 147.

⁸⁸ See W. Sanetra, *Sąd Najwyższy w systemie wymiaru sprawiedliwości*, “Przegląd Sądowy” 1999, No. 7–8, p. 6 and T. Wiśniewski, *Wybrane problemy procesowe po majowej nowelizacji przepisów o postępowaniu apelacyjnym i kasacyjnym w sprawach cywilnych*, “Radca Prawny” 2000, No. 6, p. 31.

⁸⁹ J. Vincent, S. Guinchard, *Procédure civile*, Paris 2001, p. 1003.

of Cassation (*Cour de Cassation*) which decides on legal matters only. When an act of law is misinterpreted while being applied to a *status quo*, the court can revoke appealed decision by referring it to a lower court for examination on the merits. Lower court is not bound by grounds of cassation complaints. A decision of the Court of Cassation becomes legally binding only after re-appeal of the same decision.⁹⁰

Cour de Cassation is not classified as highest in the judicial rank as its function is to ensure uniform application and interpretation of law. To a large extent cassation safeguards state interests; thus, a prosecutor, representing the parties, is entitled to use it in specific situations. Accessibility of cassation is now restricted by the following: rejection of inadmissible or insufficiently justified complaints (*les pourvois irrecevables ou non fondés un moyen sérieux de cassation*),⁹¹ the obligatory representation by a lawyer listed by the Council of State and the Court of Cassation as well as a fine up to 3000 euro, which is a consequence of the violation of the law.⁹²

Under Italian⁹³ and Belgian civil procedure cassation is a measure of ordinary appeal, yet cassation prevents divergence concerning the judicature and law interpretation. Provided that a complaint is classified as admissible and justified, an appealed decision is revoked and referred to the court of equal status with the one where decision has been published, whereas decision of a court is binding.⁹⁴

Cassation which serves the interest of law⁹⁵ is lodged by a prosecutor on condition that time limit for complaints is missed or the right to cassation has not been

⁹⁰ W. J. Habscheid, *Cywilnoprawne systemy...*, p. 203–205.

⁹¹ The decision regarding the issue is made by three judges. Com. art. L 136-6 du Code de l'organisation judiciaire.

⁹² See M. Biedka, *Kasacja w sprawach cywilnych we Francji*, "Przegląd Sądowy" 2004, No. 9, p. 140.

⁹³ Art. 11 section 7 of the Italian Constitution guarantees the right to file cassation complaint regarding the violation of the law against all decisions and judgments. In result, it is difficult to implement some restrictions on its admissibility. However, in 2009 some restrictions started to appear, namely, in case of being inadmissible, lacking of essential legal ground or in case of being unjustified. Compare S. Caporusso, (in:) T. Cipriani (ed.), *La riforma del giudizio di Cassazione*, Padova 2009, p. 149 quoted by T. Zembruski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym*, Warsaw 2011, p. 99.

⁹⁴ W. J. Habscheid, *Cywilnoprawne systemy...*, p. 207 and Z. Resich, *Nadzór judykacyjny Sądu Najwyższego*, (in:) L. Garlicki, Z. Resich, M. Rybicki, S. Włodyka, *Sąd Najwyższy...*, p. 158.

⁹⁵ French *cassation dans l'intérêt de la loi*, Italian *ricorso in interesse d'ella legge* or Belgian cassation concerning divergence of law interpretation (*divergences d'interprétation persistantes sur un point de droit*); see K. Piasecki, *Podstawy kasacji według polskiego kodeksu postępowania cywilnego w świetle porównawczoprawnym*, (in:) A. Marciniak (ed. and intro.), *Symbolae Vitoldo Broniewicz dedicatae. Księga pamiątkowa ku czci Witolda Broniewicza*, Łódź 1998, pp. 294–295. Similar measures are taken in the Spanish law (appeal on the interest of the law lodged to the Supreme Court); see: *International Civil Procedure*, S. R. Grubbs (ed.), Hague–London–New York 2003, p. 699.

exercised by the parties. In that case revoking a decision by the court of cassation has no influence on the parties's situation as the decision remains legally valid.

In German and Austrian legislation which provide for re-trial in the Federal Court of Justice of Germany (*Bundesgerichtshof* – BGH) and the Supreme Court of Justice in Austria (*Oberster Gerichtshof* – OGH) some methods of selection similar to the institution of preliminary examination were implemented. In the German system an appeal will be accepted for examination by the court of appeal which has issued an appealed decision, provided that a case concerns a legal subject matter of great importance, decision needs to be enhanced, law needs to be developed or the judgments needs to become uniform.⁹⁶ Appeal under the Austrian civil procedure is admissible when an outstanding issue of legal procedure or substantive law is to be settled in order to ensure legal uniformity or develop jurisprudence.⁹⁷ The restriction of *Rationae iudicati* which regards divergence between decision of first and second instance is characteristic for the Austrian procedure.⁹⁸

Analysing amendments of May 2000 implemented in the Polish code of civil procedure, English and Scandinavian regulations also seem to be interesting. The characteristic feature of these two systems is the supervision over law uniformity vested in the highest judicial body (in Great Britain the *Supreme Court of the United Kingdom* since 2009, before that it was the House of Lords⁹⁹ which had served the purpose of the highest judicial body for over 600 years) as well as the restriction on admissibility of a measure of appeal in last instance which was a permit in public interest from the court.¹⁰⁰ In France according to similar regulations of 1938–1947, complaint had to be first referred to the Chamber of Requests (*Chambre des requêtes*) which made first assessment of complaints checking whether they are admissible, based on righteous grounds or may be possibly examined with possibly positive result.¹⁰¹ Hindrance to the procedure before the highest judicial body is surely meant to enhance its position. In consequence,

⁹⁶ L. Rosenberg, K. H. Schwab, P. Gottwald, *Zivilprozessrecht*, München 2004, p. 999.

⁹⁷ E.-M. Bajons, *Austria*, (in:) J. A. Jolowicz, C. H. van Rhee (eds.), *Recourse against Judgments in the European Union. Voies de recours dans l'Union européenne. Rechtsmittel in der Europäischen Union*, Hague–London–Boston 1999, p. 36.

⁹⁸ T. Ereciński, *Selekcja kasacji w sprawach cywilnych z perspektywy prawnoporównawczej*, (in:) *Ars et usus. Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego*, Warsaw 2005, p. 97.

⁹⁹ <http://www.supremecourt.gov.uk/about/appellate-committee.html> (accessed: 1 September 2012).

¹⁰⁰ Rulings of the English Court of Appeal may be appealed by the parties in the Supreme Court only if there is inconsistency of law interpretation or the matter is of social gravity. In Norway, the Supreme Court department of complaints decides on admissibility. See W. J. Habscheid, *Cywilnoprawne systemy...*, p. 213; Z. Resich, *Nadzór judykacyjny Sądu Najwyższego*, (in:) *Sąd Najwyższy...*, p. 159.

¹⁰¹ T. Ereciński, *Selekcja kasacji...*, p. 98. In the draft of the Polish code of civil procedure of 1964 clear reference is made to this arrangement.

the number of lodged complaints is lower and some of them, which do not need interpretation of law or are not complicated, are refused.

In order to prevent lodging a cassation of dubious legitimacy, legal regulations governed some restrictions based on rationale of value concerning subject matter (*ratione valoris*), subject matter itself (*rationes materiae*) or relation of decisions of lower instances (*rationes iudicati*). Financial restriction refers to the obligation to pay cassation deposit or the risk of a fine which is the case in some European countries and is imposed in the case of abusing the right of appeal.¹⁰²

The above outline of selected European procedures leads to the conclusion that restrictions on access to cassation are not exceptional. Moreover, the forms are similar and are justified by public interest which is the main criterion of cases to be heard by a court of cassation. Thus, the aim to introduce means to prevent abusing the right to lodge an appeal is commonly justified and practised in many Member States of the European Union.

The changes are also compatible with the European legal standards. Poland, being a signatory of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰³ and a member of the Committee of Ministers of the Council of Europe, is obliged to put the standards into practice. Surely, the presentation of the standards, exclusively based on article 6 of the above-mentioned Convention, which provides for the right to trial as well as fair and public hearing within reasonable time, is not sufficient. The criticism of lengthy proceedings, which results *inter alia* from a wide access to three instances, is also proved by the judicature of the European Court of Human Rights in Strasbourg. The Court explicitly pronounces that the right to trial can be respected even when only one instance is provided by the legal system. Moreover, when an appeal to the Supreme Court is possible, the national system can introduce some restrictions and set the mode of applying the appeal.¹⁰⁴

The above-mentioned opinion was also reflected in one of the judgments of the Constitutional Tribunal where the regulations of the code of civil procedure concerning admissibility of cassation were defined as pursuant to the constitution. It *inter alia* reads: "One may claim that if the code of civil procedure did not provide for control over decisions of third instance, the regulation would be included in the constitutional right to trial." The Polish legislature, having followed the foreign examples, implemented special control over decisions issued in the second

¹⁰² In Art. 628 the recent French Code of Civil Procedure provides for giving a fine to the party who lodged cassation complaint in order to postpone or abuse pecuniary penalty, or regardless of such a fine, compensation for the benefit of the counter-party. The Belgian code includes similar regulations. J. Gudowski, *Kasacja w świetle projektu...*, p. 30.

¹⁰³ In 1992 Poland joined the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Journal of Laws of 1993, No. 61, item 284); W. Góralczyk, *Prawo międzynarodowe publiczne*, Warsaw 2001, p. 278.

¹⁰⁴ T. Ereciński, *Na programową niechęć...*

instance proceedings. It is cassation. In cases where cassation does not apply, supervision of the Supreme Court is in place. The court of the second instance can refer issues of serious doubt to the Supreme Court. The Tribunal states that exclusion of some cases from cassation control does not infringe the right to trial which is defined by the constitution in force. Inadmissibility of cassation complaint in some categories of cases is within the standards of international law. The ruling of the Tribunal of Strasbourg is worth mentioning. It states that the right to trial is not infringed by the situation when national regulations exclude the possibility to lodge a cassation in cases of lesser importance (the ruling of the European Court of Human Rights of 19 December 1997 concerning Bruella Gomez de la Torre, Spain, complaint No. 26737/95, Reports 1997 – VIII).

The tendency to restrict the admissibility of cassation in the Polish law and to subordinate it to the public interest was highly influenced by the recommendations of the Committee of Ministers of the Council of Europe. An overall analysis shows that:

– restriction of the right to appeal in the case of conflicts over a small amount of money or the object of low value is justified when parties can continue the case in a court without covering costs disproportionate to the sum in question and when it prevents the procedure from being lengthy (compare rules 10 and 15 of the Recommendation No. R(81)7 of the Committee of Ministers to the member states on measures facilitating the access to justice adopted by the Committee of Ministers on 14 May 1981, at the 68th meeting),¹⁰⁵

– the right to appeal to a court of higher instance is not restriction-free, which is justified *inter alia* by the need to reduce duration of proceedings as well as related costs. In order to counteract appeals that are intended exclusively to prolong the proceedings, some measures to discourage the parties from the malpractice of appealing against judicial decisions are available, for instance a requirement to get a permit for appeal. As it may be read in an explanatory memorandum: “In that way unjustified appeals would be rejected on condition that there are no clear grounds to appeal against the decision.” Furthermore, “appropriate sanctions such as fines or compensations may be implemented by the state, whenever it is concluded that an appeal was lodged only to prolong the proceedings” (regulation 7 No. R (84)5 of the Committee of Ministers to Member States on the principles of civil procedure designed to improve the functioning of justice on 28 February 1984 at the 340th meeting of the Ministers’ Deputies),¹⁰⁶

– “allocating to the judiciary the necessary means to deal effectively with the increasing number of court proceedings and non-judicial tasks, to consider the advisability of pursuing objectives as a part of their judicial policy”: the Council of European Committee of Ministers to Member States concerning measures to

¹⁰⁵ J. Jasiński, *Standardy prawne Rady Europy. Zalecenia. Sądownictwo. Organizacja – Postępowanie – Orzekanie*, Vol. IV, Warsaw 1997, pp. 212–232.

¹⁰⁶ *Ibidem*, pp. 253–267.

prevent and reduce excessive workload in the courts adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies),¹⁰⁷

– ineffective or inadequate procedures and the right to appeal abused by the parties cause unjustified delays and may bring the system of justice into disrepute, so some measures necessary to facilitate the functioning of justice should be implemented. The measures necessary to facilitate appeal procedures in civil cases are to serve both the parties and the judiciary; standards that govern appeal to the third instance indicate that cases already heard by two instances were subject to a thorough and objective evaluation, thus “appeals to a third court should be used for example in cases that would develop law or that would contribute to uniformity of law interpretation. They might also be limited to appeals where a case concerns a point of law of general public importance. An appellant should be required to state the reasons why a case would make a relevant contribution” (Recommendation No. R(95)5 of the Committee of Ministers to Member States concerning implementation and improvement of functioning of appeal systems and procedures in civil and commercial cases adopted by the Committee of Ministers on 7 February 1995 at the 528th meeting of the Ministers' Deputies),¹⁰⁸

in some cases the unlimited right to control decision by a higher court is not in a party's interest and the situation may result in delays of justice; in fact, the delay undermines the principle of justice. Thus, an appeal should be possible in those cases which need one more hearing, subject matter of which is of great importance, such as violation of basic regulations, disrespect for essential principles. Moreover “in order to limit the number of faulty appeals, the system is to ‘sift’ the cases, i.e. preliminary control undertaken by a court of first or second instance may be implemented under national regulations, after that the decision to allow for appeal may be made”. However, “States which do not admit a system of permission to appeal to third instance court or which do not admit competence for third instance court to reject part of appeal, could consider such systems aiming at limiting the number of cases meriting third judicial review”. Recommendation No. R(95)5 of the Committee of Ministers to Member States concerning implementation and improvement of the functioning of appeal systems and procedures in civil and commercial cases adopted by the Committee of Ministers on 7 February 1995 at the 528th meeting of the Ministers' Deputies.

¹⁰⁷ *Ibidem*, pp. 241–251.

¹⁰⁸ *Ibidem*, pp. 268–290.

5. CONTEMPORARY CASSATION COMPLAINT IN POLAND AND ITS HISTORICAL DETERMINANTS

After the amendment of 24 May 2000¹⁰⁹ that had given rise to the institution of preliminary examination of cassation it was said that lodging a cassation was not a constitutionally guaranteed right but it was an extraordinary¹¹⁰ legal measure that was supposed to serve the public interest above all and was not a common instance of appeal.¹¹¹ Thus, legislative action was undertaken with a view to account for a specific public and legal nature of cassation, referring to the role of the Superior Court, which safeguards the observance of law and uniformity of its interpretation. Taking the above into consideration, the only step to take was to sanction extraordinary nature of cassation and to take advantage of it within the framework of a trial by placing this measure of appeal outside the course of instance.

Nowadays a cassation complaint initiates a separate procedure that is not a continuation of a case. The latter ends with the pronouncement of a legally binding decision in a common court. That is why exemption from court costs and warrant of attorney that occurs at courts of first and second instance does not apply to the procedure in the Supreme Court.

Admissibility of cassation complaint is dependent on exhausting the course of instance as cassation complaint applies to legally binding decisions¹¹² which are final in the case pronounced by a court of second instance. The above regulation emphasises that a cassation complaint, a legal measure of special status, refers exclusively to decisions of greatest legal gravity. This category encompasses decisions according to which subject matter is adjudicated in the examination proceedings, i.e. judgments on the merits and decisions concerning subject matter in non-litigious proceedings, and additionally formal decisions which finish a case as a whole.

¹⁰⁹ I.e. on 6 February 2005.

¹¹⁰ Not because of its legal nature and the position among measures of appeal but because of its nature.

¹¹¹ T. Ereciński, *Odmowa przyjęcia kasacji*, "Gazeta Prawna", No. 16 (445) of 7–8 February 2001.

¹¹² Nowadays in some legal systems lodging a cassation complaint is possible (Greece, Italy, Spain, Holland) or similarly, appeal (Germany, Japan) bypassing the appeal procedure (the so-called leap-frog procedure). Compare M. Beltramo, N. Frangakis, N. Kazantzi, H. Saounatsou, (in:) Ch. Campbell (ed.), *International Civil Procedure*, Vol. 1, Yorkhill 2007, pp. 102, 292, 322; I. Quintana, E. de Nadal, J. F. Cortes, (in:) Ch. Campbell (ed.), *International Civil Procedure...*, p. 370; Y. Hasebe, (in:) A. A. Zuckerman (ed.), *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, Oxford 1999, p. 237; J. A. Jolowicz, (in:) J. A. Jolowicz, C. H. van Rhee (eds.), *Recourse...*, p. 3.

Further selection of cassation complaints was made by means of implementation of restrictions concerning subject matter (*ratione materiae*) or value (*ratione valoris*).

Directory of complaints that are not subject to cassation includes cases that require a prompt closure of proceedings (e.g. to protect personal or family rights) or the proceeding of mass nature which is not complex (the case is subject to summary procedure). The restrictions respond to public and legal nature of a cassation complaint which should initiate the proceedings on condition that private interest is linked to general and social interest.

Presently, in principle, cassation complaint is also inadmissible in execution proceedings¹¹³ as well as in bankruptcy and rectification proceedings.¹¹⁴

The other method, provided for in an act of law, is to restrict admissibility of cassation complaint according to the criteria of value (*ratione valoris*), which are based on the assumption that in the majority of cases which pertain to assets, importance of a case depends on the amount in controversy.¹¹⁵ Such a time-serving assumption results from the need to adopt effective measures of negative selection of cases. However, there is no correlation with the regulatory aspect of cassation complaint. Yet it is employed in many legislatures.¹¹⁶ As a result, the role of highest judicial bodies, functioning of which is more significant than the need to protect private interests, is highlighted.

¹¹³ Pursuant to the amendment of 2 July 2004 the complaint was totally excluded from execution proceedings. Before, cassation applied to adjudication of property purchased at auction and to the distribution of the sum obtained from execution procedure among the creditors.

Cassation complaint refers to, according to general principles, decisions of second instance courts resulting from adverse claim (art. 840–843 c.c.p.). Although the decisions are related to execution proceedings, they are of intrinsic nature.

¹¹⁴ Exceptionally cassation complaint is admissible in cases concerning exclusion of assets from bankruptcy estate (art. 74 of law on corporate bankruptcy and reorganization), the bankrupt's liability shall be decommitted (art. 370 section 2 of law on corporate bankruptcy and reorganization), the prohibition of conducting economic activity (art. 376 section 3 law on corporate bankruptcy and reorganization).

¹¹⁵ In the interwar period it was pointed out by S. Machalski, who wished to make the amount in controversy higher, which was a pre-condition of admissibility of cassation complaint, in order to facilitate the functioning of the Supreme Court. In fact, it occurred pursuant to the decree of the President of the Republic of Poland of 21 November 1938 on facilitating civil procedure. (Journal of Laws No. 89, item 609 as amended). In accordance with the above decree the amount increased from 500 to 1500 PLN. However, S. Machalski admitted that for the rich the cases regarding significantly higher amounts seem minor, whereas for the destitute significantly lower amounts may constitute fortune. Compare S. Machalski, *Jakich zmian można dokonać w k.p.c., aby uniknąć zaległości w Sądzie Najwyższym?*, "Głos Sądownictwa" 1938, No. 3, p. 216.

¹¹⁶ For example in France, Austria, Spain, Switzerland, Singapore (T. Ereciński, *Selekcja kasacji...*, p. 96; L. Hofmann, (in:) Ch. Campbell (ed.), *International Civil Procedure*, Vol. 1..., p. 38; A. Vinal, G. Naeglli, G. Nater-Bass, M. Orelli, N. Herzog, (in:) *International Civil Procedure*, Vol. 2, ed. Ch. Campbell, Yorkhill 2007, pp. 209, 293; T. Frad, G. Asokan, J. Low, (in:) *International Civil Procedure...*, pp. 69, 651).

Cassation procedure cannot be initiated *ex-officio*, i.e. by the Supreme Court. The party (the participant) to the proceedings,¹¹⁷ an intervening party, joining in as an accessory before termination of the proceedings at the court of second instance, Attorney General, Ombudsman, Ombudspersons for Children have the right to lodge the cassation.

The right of a party to initiate cassation proceedings is not dependant on prior lodging of a measure of appeal concerning a decision of a court of the first instance.¹¹⁸ It means that the above-mentioned right is not dependent on a party's current stance in a trial and a party is entitled to it also when appeal procedure was initiated by an opponent.

Regarding the public and legal nature of a cassation complaint, the right is ascribed to the above mentioned entities, the activity of which is linked with the protection of general public interest. The entities comprise the Attorney General,¹¹⁹ the Ombudsman, the Ombudsman for Children's Office. Their right to appeal is limited to the extent, to which a cassation has been lodged by the parties (art. 398¹ § 2 c.c.p.). It means that the right in that respect is broader and prior when compared to the right of eligible entities.

A trial connected with cassation procedure is subject to compulsory representation by a lawyer that is classified as an obligatory court representation.¹²⁰ It means that a cassation complaint has to be made, signed and lodged by a professional legal representative. Likewise, the parties have to be represented before the Supreme Court by a representative who is an attorney or a legal advisor¹²¹ entitled to act in the proceedings.¹²² When the parties undertake any

¹¹⁷ This is an expression of direct continuation of universal admissibility of cassation, as a measure of appeal which initiates the proceedings at the Supreme Court as a court of third instance in 1996–2005. This is both the consequence of normative tradition, which existed in Poland even before II World War, and which says that to start cassation proceedings, the initiation of the parties is necessary. Compare M. Waligórski, *Rewizja cywilna według znowelizowanego k.p.c.*, "Przegląd Notarialny" 1952, No. 1–3, p. 60. In 1950–1996 the parties did not have the right to lodge extraordinary appeal against final sentence. Only the Minister of Justice, the First President of the Supreme Court, Attorney General, Ombudsman, Mminister for Labour and Social Policy had the right to do so. Thus, the appeal enabled the state to control the number and quality of cases at the Supreme Court.

¹¹⁸ M. Michalska, *Legitymacja do wniesienia kasacji w postępowaniu cywilnym*, "Palestra" 2003, No. 5–6, p. 42.

¹¹⁹ And "common prosecutors" who operate pursuant to art. 60 c.c.p.

¹²⁰ In the pre-war code of civil procedure compulsory representation by a lawyer referred to proceedings in the Supreme Court but also in courts of appeal and district courts as courts of first instance. Pursuant to the act of 20 July 1950 regarding amendments to regulations on civil cases (Journal of Laws No. 38, item 349) compulsory representation by a lawyer was revoked and restored along with the system of cassation in 1996.

¹²¹ The obligation did not refer to the party such as a lawyer, a legal advisor, General Attorney of the Treasury, a judge, a prosecutor, a notary, a professor or an associate professor of law.

¹²² On issuance of power-of-attorney, a mandatory should entitle an attorney-in-fact to lodge cassation complaint and represent him at the Supreme Court. In order to do it new powers

of the above-mentioned actions by themselves, they bear no legal effect. When the regulations concerning compulsory representation by a lawyer are infringed, a cassation complaint is inadmissible and is rejected. The lack of financial means to pay a professional representative is not a factor preventing from negative consequences of personal acts. A party that cannot cover costs of representation (or costs of cassation procedure) is entitled to obtain legal help of a professional representative appointed by the court. The motion to appoint such a representative, as well as the motion to be exempted from costs regarding the cassation complaint, can be lodged by a party.

Implementation of compulsory representation by a lawyer arises from the procedure of lodging a cassation, which has become formalised. Besides, the formal structure of cassation has to meet strict requirements. It should be noted that the rule of compulsory representation by a lawyer, implemented in the Polish system of cassation and also in other countries¹²³ was not adopted in a radical form. In order to ensure a high standard of complaints, it was suggested to limit the catalogue of professional entities entitled to lodge a cassation complaint¹²⁴ to a list of lawyers of the Supreme Court.

6. CONCLUSION

It seems that consistently conducted transformation of the Polish cassation system has debunked the myth that the Supreme Court is a remedy that guarantees redressing mistakes made in the course of examination by the courts of first and second instance. Such a belief was a typical reaction of the Polish society, which after political transformations of 1989 was looking for a counterbalance to the former control exercised by people's government among new accessible legal measures. In 1996 cassation was restored and it became an opposite of the former extraordinary revision which fell beyond a party's discretionary powers.

of attorney should be issued. "Power of Attorney to represent in court proceedings does not include being entitled to lodge cassation complaint and to take part in cassation proceedings". See the act of the Supreme Court of 5 June 2008, III CZP 142/07, OSNC 2008, No. 11, item 122. After transforming cassation into extraordinary measure of appeal in 2005, the procedure is not continuation of trial.

¹²³ For example, in the French system of cassation complaint, which is a model for the system adopted in Poland, exclusively listed lawyers at the Council of State and the Court of Cassation (*avocat au Conseil d'Etat et à la Cour de Cassation*) can represent before courts. Those lawyers form only a small group. Compare T. Ereciński, *Kilka refleksji o przymusie adwokacko-radcowskim*, (in:) J. Żuławski (ed.), *XX lat samorządu radców prawnych. Księga jubileuszowa*, Warszawa 2002, p. 57.

¹²⁴ T. Zembrzuski, *Skarga kasacyjna...*, p. 485.

Soon after restoring the model of widely accessible cassation that was a measure of appeal initiating procedure before the Supreme Court, as the court of third instance, it was clear that such a cassation was going to be treated as a remedy against unfavourable decisions of the courts of general jurisdiction. As a result, private interests of the parties were exclusively secured. The consequences have two dimensions. First, the function of supervising court actions, performed by the Supreme Court, was disturbed. Meanwhile, unrestricted accessibility of cassation became a threat in itself to the effective functioning of the Supreme Court which was burdened with minor and legally uncomplicated cases.¹²⁵ Political and practical reasons resulted in limiting the accessibility of a cassation complaint. In accordance with the recommendations proposed by the Committee of Ministers of the Council of Europe and following foreign models,¹²⁶ pursuant to the amendment of 24 May 2000, the institution of preliminary examination was implemented in order to regulate the accessibility of cassation¹²⁷ (cassation complaint at present). Thanks to the procedure of preliminary selection of cases, 60–70% of complaints are not accepted for further examination.¹²⁸ Besides the above-mentioned factors, both absolute compulsory representation by an attorney or a legal advisor and the exclusive use of cassation grounds indicated in the act of law have an impact on the accessibility of a cassation complaint.

The above-mentioned restrictions, along with the extraordinary nature of a cassation complaint as a measure available outside the system of instances, leads to the conclusion that its accessibility is treated as a special entitlement.

¹²⁵ In the Civil Chamber of the Supreme Court it has led to excessive workload which amounted to 5000 cases at the end of 1999 and even 8000 cases at the end of 2000. Compare J. Gudowski, *Kasacja w świetle projektu...*, p. 40. Fears concerning a wide access to cassation complaint were also expressed by K. Kołakowski, *O dopuszczalności kasacji*, "Przegląd Sądowy" 1999, No. 9, p. 49.

¹²⁶ For example in France complaints not based on serious grounds to be appealed are not accepted to be examined because of being regarded as inadmissible ones (*non fondés sur un moyen sérieux de cassation*) (art. 1014 *du Code de procédure civile*). In Italy complaint is inadmissible in case of a serious legal issue or in case of being clearly groundless (*Il ricorso è inammissibile: 1) quando il provvedimento impugnato (...) 2) quando è manifestamente infondata*) (art. 360bis *Codice di procedura civile*), German (or similarly Austrian) appeal can be accepted to be examined if any of the pre-conditions is met: there is legal issue of great significance, admissibility of cassation is going to contribute to development of legal system, and judicature is to be made uniform (see L. Rosenberg, K. H. Schwab, P. Gottwald, *Zivilprozessrecht...*, p. 994; E. M. Bajons, *Austria*, (in:) J. A. Jolowicz, C. H. van Rhee (eds.), *Recourse...*, p. 36).

¹²⁷ T. Zembrzuski, *Skarga kasacyjna...*, p. 506.

¹²⁸ *Ibidem*. Data for years 2006–2010 according to studies published in the Bulletin of the Civil Chamber of the Supreme Court. After having implemented preliminary examination, excessive workload decreased. At the end of 2003 and 2010 it amounted to over 1600 cases and at the end of 2004 and 2009 to 1402 and 1227 cases respectively, at the end of 2005, 2006, 2007, and 2008 to fewer than 1000 cases were submitted for consideration. See statistical data published in the Bulletin of the Civil Chamber of the Supreme Court, J. Gudowski, E. Stan-Stanik (eds.), 2005 No. 1, 2006 No. 1, 2007 No. 1, 2008 No. 1, 2009 No. 1, 2010 No. 1 and 12.

However, at the beginning its function was the opposite. The scope of legal activities undertaken by the Supreme Court is limited due to the structure of cassation procedure when the Court examines cassation but not a case itself.

In the system of legal protection shaped by new regulations, the role of a cassation complaint was limited exclusively to decisions on issues of common law and of crucial social importance. The analysis of changes that have been made since 2000 proves the intention to limit the number of cases, in respect of which the decisions in the last instance were demanded. Accessibility of cassation and its exclusion from the course of instance was defined in the legislature as there was the necessity to facilitate the judiciary and to refute the belief that only the Supreme Court can thoroughly explain all the circumstances of a case according to the conception of truth propagated by a complainant. However, the court of cassation is not searching wonderful measures which prevent defectiveness of the judiciary in Poland, the standard of which depends more on the quality of the judicature and righteous qualifications of judges of all instances. The role of the court of cassation is to guarantee uniformity of law application by supervising decisions in cases which would lead to severe legal and social consequences.

Taking everything into consideration, the objective of cassation complaint is the final check whether appealed court decisions of second instance are legal. Thus, complaint is to serve both law and order as well as uniformity of the judiciary. At the same time the Supreme Court has the right to inspect the judicature of lower instances, which constitutes its function of judicial supervision.

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LEGAL AND HISTORICAL PERSPECTIVE ON PUBLIC CHARACTER OF CASSATION COMPLAINT IN POLISH CIVIL PROCEDURE

Summary

The text offers an overview of the evolution of cassation in Poland and its historical background from the 19th century until the present time. The author argues that consistently conducted transformation of the Polish cassation system has changed the perception of cassation which was widely spread after the political transformation of 1989. She points out that such elements as: the procedure of preliminary selection of cases, absolute compulsory representation by an attorney or legal advisor, and the exclusive use of cassation grounds indicated in the Code of Civil Procedure exert an impact on the accessibility of a cassation complaint. She demonstrates a far-fetching evolution of this appellate measure over the years, considering the fact the beginning of its function was quite the opposite.

KEYWORDS

cassation, cassation complaint, reform, Supreme Court

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kasacja, skarga kasacyjna, reforma, Sąd Najwyższy