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CASSATION ATTORNEYS IN THE POLISH CIVIL PROCEEDINGS

The aim of this paper is to present selected issues connected with the parties' obligatory representation in the Polish cassation proceedings. Most notably I will depict the present regulation against a historical and comparative background. As its shape kept evolving over the years, its premises have been regularly revisited in the course of a doctrinal discussion.[1] In the recent time especially one question came to prominence. It touches upon an idea to introduce a special group of legal representatives who would be endowed with an exclusive right to act in the proceedings before the Supreme Court. In this paper I will try to recreate the historical background of this institution in the Polish law and analyse the present state, taking into account the nature of the cassation proceedings, as well as the prospects of introducing such a legal specialisation in the future.

As regards the historical background, cassation attorneys acted in the proceedings before the Cassation Court in the former Duchy of Warsaw.[2] Not surprisingly, the organisation of the judicial system in the Duchy of Warsaw was

[1] T. Ereciński, *Kilka refleksji o przymusie adwokacko-radcowskim [Several remarks on the parties' obligatory representation by attorneys and legal advisors]*, (in:) *XX lat samorządu radców prawnych 1982–2002 [Twenty years of the legal advisors' self-governance 1982–2002]*, Warsaw 2002, pp. 55 ff.; J. Żuławski, *Czy zawody prawnicze potrzebują elity? [Is the legal profession in need of an elite?]*, "Radca Prawny" 2003, No. 4, pp. 142 ff.; K. Osajda, *Pełnomocnicy uprawnieni do wnoszenia kasacji i występowania przed najwyższymi organami sądowymi [Attorneys entitled to lodge cassations and act in the proceedings before the highest judicial organs]*, "Palestra" 2004, No. 11–12, pp. 126 ff.; M. Pilich, *Pełnomocnicy procesowi dopuszczeni do działania przed sądami najwyższymi (analiza problemu na tle prawnoporównawczym) [Representatives authorized to act before the Supreme Courts (a comparative analysis)]*, (in:) K. Ślebzak (ed.), *Studia i analizy Sądu Najwyższego [Studies and analyses of the Supreme Court]*, Vol. VI, Warsaw 2012, pp. 191 ff.

[2] The Duchy of Warsaw was established in 1807 under the terms of the Treaties of Tilsit. The constitutional act of the Duchy of Warsaw of 22 July 1807 introduced in its title IX the so-called "court order" based on the French solutions and provided the Council of State with the role of a cassation court. See J. Gudowski, *Skarga kasacyjna [Cassation complaint]*, (in:) J. Gudowski (ed.), *System Prawa Procesowego Cywilnego. Środki zaskarżenia [The System of Civil Procedural Law. Appellate measures]*, t. III, Warszawa 2013, p. 886.

inspired by the French solutions.[3] On 3 April 1810 Frederick Augustus I issued a decree[4] based on the draft prepared by the Minister of Justice Feliks Łubieński with a view to putting into effect the general provisions of the Constitution of the Duchy of Warsaw, promulgated by Napoleon on 22 July 1807.[5] The decree included provisions which set out the organisational structure of the Cassation Court. It stipulated that the claimants would be obligatorily represented by one of only twelve counselors (in Polish: *mecenasi*) who were based at the Cassation Court.[6] These counselors had an exclusive right to sign and file cassations called "recourses".[7] According to article 46, these attorneys were appointed by the King on the motion tabled by the Minister of Justice. The introduction of *numerus clausus* of cassation counselors was connected with an idea that only the best lawyers could exercise this profession. Their promotion was dependent upon a solid theoretical background as well as practical experience. In order to become a cassation lawyer, a candidate had to pass a special exam called "judicial exam", involving both theory and practice, and had to perform the function of a patron, an attorney or a different legal profession for at least two years prior to the promotion.[8] The day-to-day activities as well as the quality of cassation attorneys' work was subject to constant and strict control.[9] If it was not sufficiently good, the Cassation Court was empowered to give them a warning or a reprimand. If the wrongdoing

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[3] M. Makuch, *Wpływ francuskich rozwiązań ustrojowych na organizację sądownictwa cywilnego w Księstwie Warszawskim [Influence of the French solutions on the organization of civil judicial system in the Duchy of Warsaw]*, (in:) E. Kozerska, P. Sadowski, A. Szymański (eds.), *Ze studiów nad tradycją prawa [Studies on the legal tradition]*, Warsaw 2012, pp. 75 ff.; cf. M. Rogacka-Rzewnicka, *Instytucja kasacji we Francji (Institution of cassation in France)*, "Państwo i Prawo" 1994, No. 3, pp. 69 ff.

[4] S. Car, *Zarys historii adwokatury w Polsce (zeszyt pierwszy) [Outline of the history of the attorney's profession in Poland (part 1)]*, Warsaw 1925, pp. 93 and 96; Dziennik Praw Księstwa Warszawskiego [Journal of Laws of the Duchy of Warsaw], Vol. 2; J. J. Litauer, *Sąd Kasacyjny Księstwa Warszawskiego [The Cassation Court in the Duchy of Warsaw]*, "Themis Polska" 1915, Vol. 5, p. 196.

[5] The decree of 3 April 1810 put into effect certain provisions of the Constitution of the Duchy of Warsaw which was promulgated by Napoleon on 22 July 1807 in Dresden with regard to the organization of the Cassation Court of the Duchy of Warsaw; M. Makuch, *Wpływ... [Influence...]*, p. 79.

[6] H. Konic, *Sąd Kassacyjny za czasów Księstwa Warszawskiego i jego jurysprudencja [The Cassation Court during the times of the Duchy of Warsaw and its jurisprudence]*, "Gazeta Sądowa Warszawska" 1891, No. 14, p. 214; J. J. Litauer, *Sąd Kasacyjny...*, p. 197; M. Makuch, *Wpływ... [Influence...]*, p. 89.

[7] S. Car, *Zarys... [Outline...]*, p. 93.

[8] *Ibidem*, pp. 92–93.

[9] Cf. J. J. Litauer, *Fragmenty z dziejów polskiego sądownictwa porozbiorowego [On the history of the Polish post-partition judicial system]*, Warsaw 1915, p. 17; J. Gudowski, *Skarga... [Cassation...]*, footnote 24, p. 888.

recurred, the king could remove them from the cassation counselors' list on the Cassation Court's motion.[10]

When the Kingdom of Poland was created in 1815 by the resolutions of the Congress of Vienna, the profession of cassation counselors was maintained. The Constitution of 1815 and the Organic Statute of the Kingdom of Poland dating from 1832 did not introduce any major changes in the organisation of the attorneys' profession in comparison to the one existing in the former Duchy of Warsaw. On 21 September 1815 the Provisional Government of the Kingdom of Poland created the Court of Highest Instance instead of the Cassation Court. This is where the cassation lawyers were affiliated from then on. When the 9th Department of the Governing Senate was established in 1842, the name *mecenasi* was abandoned and replaced by the title "the defendors by the Warsaw Departments of the Governing Senate".[11] They were appointed by the Governmental Commission of Justice. Interestingly, they were entitled to act not only at the Court of Highest Instance, but also in the proceedings before the lower instance courts.

The idea to reintroduce "cassation lawyers" in the post-partition civil proceedings was subject to an animated debate too. The discussion was sparked in the 1920s when the work was underway to introduce a new attorneys' code. Throughout the 1920s and 1930s the distinguished authors such as Z. Nagórski,[12] J. Sławski[13] and E. Waśkowski[14] presented a wide range of arguments in favor of putting this idea into practice.

They unanimously claimed that the cassation attorneys provide a fresh, new perspective to the case as well as the ability to evaluate the cassation's grounds in an objective, unbiased way. Such a sober view of the circumstances of an individual case would spare a claimant the unnecessary input of time and cost if the cassation did not hold any promise of success. According to a common view, the "non-cassation" or "regular" lawyers, who acted in the first and second instance proceedings, lacked the ability to properly evaluate the pros and cons of the case. The arguments presented in the course of the proceedings before the courts of general jurisdiction were frequently reiterated before the Supreme Court.

A major argument ensued from the fact that cassation proceedings require a different approach to the case, i.e. a more abstract one, based exclusively on the legal perspective ensuing from the proper application and interpretation

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[10] J. J. Litauer, *Sąd… [The Cassation…]*, p. 199.

[11] E. Waśkowski, *Adwokatura przy Sądzie Najwyższym [Attorneys based at the Supreme Court]*, "Gazeta Sądowa Warszawska" 1937, No. 21, p. 303; S. Car, *Zarys... [Outline...]*, pp. 95–96; T. Ereciński, *Kilka... [Several...]*, p. 59.

[12] Z. Nagórski, *Wyodrębnienie adwokatów przy najwyższych instancjach sądowych [Creating a group of attorneys based at the highest court instances]*, "Głos Prawa" 1925, No. 17–18, pp. 378 ff.

[13] J. Sławski, *Wyodrębnienie adwokatury przy najwyższych instancjach sądowych [Creating a group of attorneys based at the highest court instances]*, "Palestra" 1925, pp. 1063 ff.

[14] E. Waśkowski, *Adwokatura… [Attorneys…]*, pp. 301 ff.

of law.[15] Touching upon the sphere of facts as well as engaging in polemics over the evaluation of evidence is inadmissible since the Supreme Court deals exclusively with juridical issues. Therefore, a cassation attorney should be particularly skilled at distinguishing these two spheres.

In view thereof, the most relevant and indisputable argument in favor of introducing a group of attorneys who specialise exclusively in the cassation proceedings was as follows: the role of the parties' representatives in such proceedings is incomparable to the function performed in the proceedings before the courts of first instance and the courts of appeal. While the former deal exclusively with interpreting the law, the latter bring into focus the sphere of facts and evidence. Such a distinction ensues from a conviction that a two-instance proceedings, including *appellatio cum beneficio novorum*, is amply sufficient to judge a case in a due and proper way. The shape of the appeal proceedings is supposed to enable the court of second instance to thoroughly examine the case without restricting itself to a merely formal control of the judgment passed by the court of first instance.[16] The court of appeal provides an additional forum where the evidential proceedings may be reviewed, reevaluated, and – to some extent – supplemented.

In contrast, the primary goal of the cassation proceedings is to act in the public – not private – interest with a view to ensuring the uniformity of case law and the development of law.[17] Therefore, the Supreme Court's activity takes into focus the examination of contentious issues or previously unresolved juridical conundrums. One might add that according to the present regulation, a cassation complaint cannot be based on the claims relating to the establishment of facts or evaluation of evidence (article 398^3 § 3 the Polish Code of Civil Procedure: hereinafter PCCP). The cassation grounds revolve around the infringement of the substantive law by its incorrect interpretation or improper application (article 398^3 § 1 PCCP) as well as the infringement of the procedural law provided that the infringement could exert a significant impact on the final outcome of the case (article 398^3 § 1 point 2 PCCP).

[15] Cf. G. Wielikowski, *O czystość rozumowania kasacyjnego [For the purity of the cassation reasoning]*, "Głos Sądownictwa" 1935, No. 11, pp. 778–779.

[16] Decision of the panel of seven judges of the Supreme Court of 23 March 1999, III CZP 59/98, OSNC 1999, No. 7–8, item 124; decision of the panel of seven judges of the Supreme Court of 31 January 2008, III CZP 49/07, OSNC 2008, No. 6, item 55.

[17] Cf. A. Galič, *A civil law perspective on the Supreme Court and its functions*, *passim* (published in this book), Paper to be presented at the conference: "The functions of the Supreme Court – issues of process and administration of justice" Warsaw, 11–14 June 2014, http://colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/Ales-Galic.pdf. Cf. P. Rylski, *Ochrona interesu publicznego w postępowaniu cywilnym – przyczyny, przejawy, skuteczność [Protection of the public interest in the civil proceedings – causes, examples, efficiency]*, (in:) T. Giaro (ed.), *Interes publiczny a interes prywatny w prawie [Public interest versus private interest in law]. XIII Konferencja Wydziału Prawa i Administracji Uniwersytetu Warszawskiego 24 lutego 2012 roku*, Warsaw 2012, *passim*.

It needs emphasising that the examination of the cassation's legal grounds is preceded by the so-called "pre-trial procedure", in which one judge evaluates whether a cassation complaint deserves to be substantially reviewed by a panel of three judges of the Supreme Court. The positive outcome of this evaluation is dependent upon the fulfillment of additional conditions, which can be referred to as "pre-trial prerequisites". Namely, (1) the case should involve a legal issue of significant importance; (2) there is a need to interpret legal provisions that give rise to significant doubts or cause discrepancies in the case law; (3) the proceedings are deemed invalid; (4) the cassation complaint is evidently justified. The cassation complaint can be accepted for further examination provided that at least one of these prerequisites is fulfilled.

Therefore, effective submission of a cassation complaint should be preceded with an objective evaluation of the case and an unbiased assessment whether any of these prerequisites exist under the given circumstances. In order to perform such an assessment, a lawyer must apply a more abstract, objective and public interest-oriented mode of thinking. A great deal of knowledge and experience is also indispensable. The correct evaluation of the cassation prerequisites may be effectively performed only by a lawyer who is knowledgeable about the latest judicial trends and doctrinal views, and is able to approach the case bearing in mind the specific nature of the cassation proceedings.[18] Otherwise, it is nearly impossible to assess whether a dispute in question involves "a significant legal issue" or gives rise to "discrepancy in the case law".

These remarks lead to a conclusion that filing a cassation and representing parties before the Supreme Court should take the shape of a legal specialisation. Attorneys who opt for pursuing this professional path are supposed to constantly hone their skills, improve the technique of writing cassation complaints and raise the level of oral pleadings performed before the Supreme Court, constantly having in mind that the institutional function of the highest instance court is not primarily about the private interests of the litigants, but about the public interest connected with the development of law and unification of case law.[19]

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[18] Cf. T. Zembrzuski, *Ewolucja charakteru skargi kasacyjnej w polskim postępowaniu cywilnym [Evolution of the character of the cassation complaint in the Polish civil proceedings]*, (in:) H. Dolecki, K. Flaga-Gieruszyńska (eds.), *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych [Evolution of the Polish civil proceedings against a political, social and economic background]. Materiały konferencyjne Ogólnopolskiego Zjazdu Katedr Postępowania Cywilnego, Szczecin-Niechorze 28–30.9.2007*, Warsaw 2009, *passim*; J. Gudowski, *Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego z uwzględnieniem aspektów historycznych i prawnoporównawczych [Cassation in the light of the draft of the Codification Commission of Civil Law against a historical and comparative background]*, "Przegląd Legislacyjny" 1999, No. 4, *passim*.

[19] W. Sanetra, *O roli Sądu Najwyższego w zapewnianiu zgodności z prawem oraz jednolitości orzecznictwa sądowego [On the role of the Supreme Court in ensuring accordance with law and uniformity of case law]*, "Przegląd Sądowy" 2006, No. 9, p. 19; W. Santera, *Sąd Najwyższy*

A situation in which an exclusive right to act in the cassation proceedings would rest solely with cassation attorneys, would undeniably benefit both the Supreme Court and the litigants. Such attorneys would cherish a greater deal of independence, because they would be less "soaked" by their clients' expectations and wishes. In all probability, they would be able to efficiently discern whether a cassation complaint bodes well or whether it is utterly unfounded. In the latter case, if it is evident from the very outset that the chances of success are scarce or virtually non-existent, they would spare the parties an unnecessary input of time, cost and false hopes.

It needs emphasising that such a solution would be very profitable to the Supreme Court as well. Thanks to it, the highest instance court would not waste valuable time and energy on a futile examination of dozens of cases which do not fulfill the basic prerequisites (article 398^9 § 1 point 1–4 PCCP). This argument has become even more relevant ever since the Supreme Court was obliged to draw up written explanations of the reasons behind the refusal to accept the case for further examination.

The institution of "cassation attorneys" has been introduced in many European countries. In the Polish literature, the references to the procedural law of *inter alia* Germany, France and Austria-Hungary served as a frequent source of inspiration in this regard. Not surprisingly, the example of France was invoked in the first place.[20] France is traditionally viewed as a cradle of cassation proceedings and the organisation of the *Cour de cassation* served as an eminent example to many procedural systems in which the profession of cassation attorneys was adopted. Since 1817 the parties have been obligatorily and exclusively represented in the proceedings before the *Conseil d'Etat* and the *Cour de cassation* by a group of specialised counselors, who create an independent profession called *L'Ordre des Avocats au Conseil d'État et à la Cour de Cassation*. The number of *avocats* is limited, as it amounts only to 60. They are appointed by the Minister of Justice on the motion tabled by a special commission consisting of the judges of the *Cour de Cassation*, the *Conseil d'État*, university professors as well as the members of the *L'ordre des Avocats*. Additionally, the *Procureur Général* and the First President of the Cassation Court also present their opinion on the candidates. In order to join the ranks of this prestigious profession one is also obliged to serve a three-year apprenticeship and pass a special exam. The *L'Ordre des Avocats au*

w systemie wymiaru sprawiedliwości [The Supreme Court in the judicial system], "Przegląd Sądowy" 1999, No. 7–8, p. 7; B. Szmulik, *Pozycja ustrojowa Sądu Najwyższego w Rzeczypospolitej Polskiej [The constitutional position of the Supreme Court in the Republic of Poland]*, Warsaw 2008, *passim*; A. Górski, *Uwagi o sprawowaniu wymiaru sprawiedliwości przez Sąd Najwyższy [Remarks on dispensing justice by the Supreme Court]*, (in:) J. Gudowski, K. Weitz (eds.), *Aurea theoria, aurea praxis. Księga pamiątkowa ku czci prof. T. Erecińskiego*, Vol. 2, Warsaw 2012, pp. 2807 ff.

[20] Z. Nagórski, *Wyodrębnienie... [Creating...]*, pp. 380–381

Conseil d'État et à la Cour de Cassation cherishes a long tradition in France. The main rules connected with the legal situation of this group of counselors are stipulated in an *ordonnance* which dates as far back as 10 September 1817, including subsequent amendments.

As regards Germany, the counselors who are empowered to act in the proceedings before the Federal Supreme Court are appointed by the Minister of Justice on the motion put forward by a special commission. The candidates are proposed by different attorneys' chambers as well as the Attorneys' Chamber instituted by the Federal Supreme Court. An attorney needs to be at least 35 years old and work in this capacity for at least five years in order to act in the proceedings before the Federal Supreme Court.

Examples of Netherlands, Italy, England and Wales were also analysed in the Polish literature as a possible source of reference.[21] The example of the Netherlands, where only the attorneys based in the Hague are taken into consideration, was considered undemocratic and unfair.[22] In Italy every attorney who has exercised a legal profession for at least 12 years can act in the cassation proceedings. As far as England and Wales are concerned, there is a traditional differentiation between barristers and attorneys and only the latter can act in the proceedings before the highest judicial instance.

Despite the rich foreign references and a nearly unanimous support manifested for this idea in the literature, a regulation regarding the introduction of obligatory representation by "cassation counselors" was never enacted in the Polish Code of Civil Procedure of 1930,[23] nor in the legal acts specifying the rules of the attorneys' profession. Instead, a distinctive emphasis was put on the need to introduce the parties' obligatory representation by "regular" attorneys to a relatively wide extent.

The Code of 1930 stipulated in article 86 that the absolute mandatory representation of the parties by professional proxies was required in the proceedings before the Supreme Court, the courts of appeal, as well as the regional courts, whenever a regional court examined the case in the first instance proceedings. If a case was examined in the first instance by a district court, the legal representation of the parties was mandatory only in the event of filing an appellate measure to the Supreme Court.

[21] E. Stawicka, *Uprawnienie adwokatów do uczestniczenia w cywilnych procedurach kasacyjnych w wybranych państwach europejskich [Entitling attorneys to act in the civil cassation proceedings in the selected European countries]*, "Palestra" 2002, No. 7–8, pp. 137–138; M. Pilich, *Pełnomocnicy... [Representatives...]*, *passim*; K. Osajda, *Pełnomocnicy... [Attorneys...]*, pp. 133–134; T. Ereciński, *Kilka... [Several...]*, pp. 57–58; Z. Nagórski, *Wyodrębnienie... [Creating...]*, pp. 380–381.

[22] K. Osajda, *Pełnomocnicy... [Attorneys...]*, p. 134.

[23] Dziennik Ustaw [Polish Journal of Laws] 1932, No. 112, item 934.

Generally, the mandatory legal representation is connected with the parties' inability to effectively perform actions and act in the proceedings on their own.[24] Such an inability may be caused by either factual or legal reasons. As far as the latter are concerned, the law may demand that professional legal representation is either absolute or relative. The absolute legal representation means that if the parties perform actions on their own, they will be devoid of legal significance.

The interwar Codification Commission which prepared the draft version of the Code of 1930 explained that whenever the matters of considerable legal significance and complexity are examined, it is recommended that such cases should be dealt with by professionals who have a considerable grasp of legal knowledge and are able to critically evaluate the sphere of facts.[25] It needs emphasising that restricting this view to "regular" attorneys was deemed sufficient to guarantee a smooth course of the proceedings and a correct application of law by the courts of general jurisdiction. According to the interwar Codification Commission, the mandatory representation of the parties by professional lawyers was supposed to decrease the flow of lawsuits and the number of appellate measures such as appeals and cassations.[26] It was presumed that the parties would be more inclined to renounce from instituting judicial proceedings upon a consultation with a lawyer. The mandatory representation meant that a party who appeared in court without an attorney was considered absent (cf. art. 359 of the Code of 1930) and the actions performed by such a party were deemed non-existent.[27]

By the Act of 20 July 1950 the provisions which called for a mandatory professional representation of the parties were repealed. Soon afterwards, in the 1950s this issue was revisited in the course of a doctrinal discussion. The lack of the obligatory professional representation raised doubts with regard to the principle of the parties' equality and the substantive dimension of the judicial proceedings.[28] Having said that, the mandatory professional representation was

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[24] J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne [Civil proceedings]*, Warsaw 2009, p. 214; H. Dolecki, *Postępowanie cywilne. Zarys wykładu [Civil proceedings. An outline]*, Warsaw 2005, p. 94; W. Broniewicz, *Postępowanie cywilne w zarysie [An outline of the civil proceedings]*, Warsaw 2006, p. 160.

[25] F. K. Fierich, *Strony i ich zastępcy [Parties and their representatives]*, (in:) *Polska procedura cywilna. Projekty referentów z uzasadnieniem [The Polish civil procedure. Speakers' drafts with explanation]*, Cracow 1921, pp. 71 ff.

[26] *Ibidem*, p. 71.

[27] L. Peiper, *Komentarz do Kodeksu postępowania cywilnego (część pierwsza) [Commentary on the Code of civil proceedings (part one)]*, Kraków 1934, p. 254.

[28] M. Sychowicz, *Przymus adwokacko-radcowski w postępowaniu cywilnym [Obligatory representation of the parties by attorneys and legal advisors in the civil proceedings]*, "Palestra" 1996, No. 7–8, p. 28; Cf. J. Kopera, *O kilka zmian w k.p.c. [For a few amendments in the Polish Code of civil procedure]*, "Nowe Prawo" 1957, No. 9, p. 82; Z. Krzemiński, *Adwokat w projekcie kodeksu postępowania cywilnego [An attorney in the draft of the Polish Code of civil procedure]*, "Palestra" 1960, No. 10, p. 16; W. Siedlecki, *Projekt kodeksu postępowania cywilnego PRL [The draft of the Code of civil procedure of the Polish People's Republic]*, "Państwo i Prawo" 1960,

not reinstated until the mid-1990s, when the institution of cassation was reintroduced to the Polish Code of Civil Procedure by the act of 1 March 1996. In this way, the mandatory representation by "regular" attorneys (and legal advisors) reappeared in the Polish law after almost 46 years of absence.[29] According to article 393^{2} § 1 of the Code, as introduced by the Act of 1 March 1996, the mandatory professional representation concerned only one activity performed before the Supreme Court, i.e. "filing the cassation". The Supreme Court explained that the activity of writing and signing a cassation should be understood under this term.[30] The introduction of this provision was motivated by the desire to avoid burdening the Supreme Court with cassations which would not be based on the legal grounds stipulated by the Code. Its introduction aimed at raising the level of cassations as far as the substantive and formal requirements were concerned, as well as facilitating their examination by the Supreme Court.

In 2005 article 87^{1} § 1 PCCP was introduced in order to broaden the scope of obligatory legal representation.[31] Article 87^{1} prevents the parties from performing procedural activities on their own. The representation of the parties by professional attorneys or legal advisors is mandatory in the cassation proceedings. This obligation also concerns additional activities related to the proceedings before the Supreme Court, which are performed in the courts of general jurisdiction. Article 87^{1} § 2 states that this rule does not extend itself to cases when the parties or their representatives are: a judge, a public prosecutor, a notary public, a professor or a habilitated doctor of law, an attorney, a legal advisor or a solicitor of the State Treasury Solicitors' Office.

The legislator's inclination to ensure the obligatory professional representation before the highest instance court is motivated by the desire to establish a higher standard and a better quality of procedural pleadings addressed to the Supreme Court. On the one hand, it aims at raising the merits-related dimension of the legal aid, which undeniably serves the better protection of the parties' interests. However, pursuing this direction serves well the public interest too. The fewer low-quality, groundless cassation complaints are filed to the Supreme Court, the better the quality of the Supreme Court's work itself.

The reintroduction of cassation in 1996 once again sparked the discussion regarding the creation of a special group of counselors who would represent

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No. 3, p. 447; W. Siedlecki, *Z prac Komisji Kodyfikacyjnej nad nowym kodeksem postępowania cywilnego PRL [On the work of the Codification Commission on the new Code of civil procedure of the Polish People's Republic]*, "Studia Cywilistyczne" 1961, Vol. 1, p. 281.

[29] M. Sychowicz, *Przymus... [Obligatory...]*, p. 27.

[30] Decision of the Polish Supreme Court of 19 March 1998, I CZ 18/98, LEX No. 1228318.

[31] Dziennik Ustaw [Polish Journal of Laws] 2004, No. 172, item 1804; T. Zembrzuski, *Kilka uwag o przymusie adwokacko-radcowskim w postępowaniu przed Sądem Najwyższym po nowelizacji kodeksu postępowania cywilnego [Several remarks on the obligatory representation of the parties by attorneys and legal advisors in the civil proceedings]*, "Przegląd Sądowy" 2006, No. 1, p. 122.

the parties exclusively in the cassation proceedings. In recent years there were several attempts to introduce such an amendment in the Polish code of civil proceedings. Most notably, in January 2002 the governmental draft contained a proposal to change the content of article 87^1 PCCP. The envisioned amendment stipulated that “in the cassation proceedings the parties can be represented exclusively by the attorneys or legal advisors based at the Supreme Court”. This amendment generally aimed at limiting the number of attorneys who are entitled to draw up cassation complaints and perform other activities in the cassation proceedings. The purpose of the draft was also directed at broadening the scope of obligatory representation of the parties by professional attorneys and legal advisors in the proceedings before the courts of appeal. However, this legislative attempt turned out to be unsuccessful and it was not adopted.

In the light of these remarks, the incentives aimed at introducing a special group of “cassation lawyers” have been resumed on a regular basis ever since the interwar period. In view thereof, one might pose the following questions: firstly, why the representation of the parties by “regular” attorneys and legal advisors is deemed unsatisfactory and insufficient, and secondly, why all these attempts do not come to fruition?

As regards the first question, it is worth mentioning that the Polish Supreme Court has stated on several occasions that the quality of cassation complaints has been continuously deteriorating. Most notably, it remarked in its annual report of 2010 that the level of cassation complaints is worryingly unimpressive and over the years it has not shown any sign of improvement.[32] According to the Supreme Court’s report, cassation complaints are frequently prepared in an ill-considered, unprofessional manner, which adversely affects not only their persuasive force, but also their substantive quality. The report also highlighted the fact that the distinctive feature of this extraordinary appellate measure, i.e. the conciseness of the charges, is lost and, as a consequence, it frequently occurs that a number of charges is unduly exaggerated. Even though the cassation complaints are written by professional representatives, i.e. attorneys and legal advisors, it frequently happens that they are formulated and justified erroneously. For instance they are either disrespectfully short or, on the contrary, exceedingly long, containing footnotes and references to different scholarly publications.[33] As a consequence, the cassation complaints often resemble scientific works rather than appellate measures.[34] This is frowned upon by the Supreme Court’s judges because a cassation complaint should be concise. Its strength should be associated with the precision of the charges and the power of the arguments.[35]

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[32] http://www.sn.pl/osadzienajwyzszym/SitePages/Sprawozdania_z_dzialalnosci.aspx.

[33] *Ibidem.*

[34] *Ibidem.*

[35] J. Gudowski, *Pogląd na kasację [A view on the cassation]*, (in:) P. Grzegorczyk, K. Knoppek, M. Walasik (eds.), *Proces cywilny. Nauka – kodyfikacja – praktyka. Księga jublieuszowa*

This state of affairs translates into a high percentage of cassations (circa 60%) which are dismissed during the pre-trial examination, preventing them from being accepted for a full review by the Supreme Court. Unfortunately, as it was already emphasised, the majority of cassation complaints are filed on a special wish of a client, notwithstanding the role of the Supreme Court and its public functions. It should be stressed that the panel of seven judges of the Supreme Court passed a resolution on 21 September 2000, III CZP 14/00,[36] in which it stated that a lawyer should advise a client against filing a cassation if it lacks grounds in an outright manner. Regrettably, attorneys are not inclined to act against their client's whims and they outpour the Supreme Court with obviously groundless cassations, lacking any substantiation whatsoever. The parties, as well as their legal representatives, have difficulty in detaching themselves from the unfounded perception that the access to the Supreme Court is allegedly a matter of a constitutionally guaranteed right and, consequently, they perceive the cassation proceedings as a continuation of the merits-based proceedings that took place before the courts of general jurisdiction.

The idea to create a special group of legal representatives acting exclusively before the Supreme Court has encountered a firm reluctance of the governing bodies of the associations which gather legal advisors and attorneys. Nowadays, the members of these two professions are entitled to represent parties in the cassation proceedings in Poland. The majority of attorneys and legal advisors perceive the discussed idea as undemocratic, and eventually leading to the emergence of a "legal aristocracy", a "cassation caste", an "elite" or a "privileged group" enjoying a monopoly on acting in the proceedings before the Supreme Court.[37] Regrettably, the negative attitude towards putting this idea into practice is also shared by some prominent journalists.[38]

The introduction of this regulation is also halted by numerous questions that surround the organisation scheme of the new legal profession. For instance, a doubt arises whether the number of cassation attorneys should be limited (as in France) or unlimited (as in Italy). The first solution would certainly contrib-

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dedykowana profesorowi Feliksowi Zedlerowi [The civil process. Doctrine – codification – practice. A book dedicated to professor Feliks Zedler], Warsaw 2012, pp. 168–169; T. Wiśniewski, *O swoistości postępowania kasacyjnego w sprawach cywilnych (zagadnienia wybrane) [On the specificity of the cassation proceedings in civil matters (selected issues)]*, (in:) P. Grzegorczyk, K. Knoppek, M. Walasik (eds.), *Proces cywilny. Nauka – kodyfikacja – praktyka. Księga jubileuszowa dedykowana profesorowi Feliksowi Zedlerowi [The civil process. Doctrine – codification – practice. A book dedicated to professor Feliks Zedler]*, Warsaw 2012, pp. 377 ff.

[36] OSNC 2001, No. 2, item 21.

[37] Cf. A. Bojańczyk, *Czy celowe jest wyodrębnienie wyspecjalizowanego korpusu obrońców kasacyjnych przy Sądzie Najwyższym? [Is it advisable to create a special group of cassation attorneys based at the Supreme Court?]*, "Palestra" 2011, No. 11–12, pp. 176 ff.

[38] Cf. E. Usowicz, *Kolejna kasta? [Another caste?]*, "Rzeczpospolita" of 24 October 2012, http://prawo.rp.pl/artykul/945339-Kolejna-kasta-.html.

ute to the "elite" character as well as prestige of the new profession. It would also guarantee a high level of professionalism of the "cassation lawyers", because the results of their work would be easier to assess and the quality of their performance would be constantly submitted for critical evaluation by all the interested parties, i.e. the litigants, the judges of the Supreme Court and the colleagues from the "cassation attorneys" community. Having said that, the second option might be perceived as more fair and democratic. However, the question remains whether the level of the cassation attorneys' work would be equally high as in the first model. Perhaps this uncertainty could be mitigated by the way in which the selection procedure is shaped. As far as this aspect is concerned, there are multiple paths to follow. The first of them consists in conditioning the access to the "cassation attorneys" profession upon taking and successfully passing a special exam. Another way of approaching this issue might lead to organising a contest in which the best candidates would be chosen by a special panel composed of the Supreme Court judges, university professors and, possibly, the representatives of the cassation attorneys community. The objectivity and transparence of such a procedure would be guaranteed by the members of this eminent panel.

While conceiving the organisational scheme of the cassation attorneys' profession, it is essential to take into account the constitutional aspects connected with it. This weighty issue has already sparked a reaction of civil procedure scholars, as well as the attorneys' and the legal advisors' governing bodies. As expected, the latter group approaches it with scathing criticism. By contrast, the Polish doctrine's stance on the constitutionality of the discussed idea is far more conducive. M. Pilich, who studied this issue quite extensively, is a proponent of the reform and he accepts its outcomes as long as the constitutional standards are safeguarded.[39] According to this scholar, one should evaluate whether the introduction of "cassation attorneys" group would be in accordance with such constitutional guarantees as the equality of everyone before the law (article 32 of the Polish Constitution), as well as the freedom to choose and to pursue one's profession and place of work (article 65 of the Polish Constitution). He claims that the specialisation of attorneys would serve well the interests of the litigants in the cassation proceedings. Therefore, putting this idea into practice is worth considering and should be regarded as fully justified. However, as required by article 31 item 3 of the Polish Constitution, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state of law. Therefore, it is of utmost importance to ensure that the selection criteria are objective and that they serve an important, general, public interest. According to M. Pilich, selection criteria such as: above-average expertise, outstanding theoretical knowledge and exquisite practical skills

[39] M. Pilich, *Pełnomocnicy... [Cassation...]*, pp. 231–233; M. Pilich, *Czy grozi nam prawnicza kasta [A threat of another legal caste?]*, "Rzeczpospolita" of 14 May 2014, http://prawo.rp.pl/artykul/1109337-Czy-grozi-nam-prawnicza-kasta.html.

of cassation attorneys would be appropriate and well-suited to the exceptional character of the cassation proceedings. Such criteria should be congruent with article 31 item 3 of the Polish Constitution. Moreover, as long as the selection criteria are transparent and objective, and there are no hidden or unjustified barriers in the process of accepting new adepts, the constitutional freedom of exercising the profession of "a cassation attorney" would not be violated. The author also underlines the fact that in some cases the public interest may demand that the status and the scope of duties of the "public trust" professions be varied.

Another controversial issue that may appear, is related to the parties' liberty to choose their representative in the cassation proceedings. Doubts may arise whether the parties' freedom of choice is not encroached upon in this respect. However, according to T. Ereciński such fears are illegitimate and unjustified, because no-one would impose on a party an obligation to be represented by a concrete cassation attorney.[40] The parties would be allowed to choose their representative and their freedom in this regard would be merely limited by the necessity of turning to a lawyer who exercises the profession of a cassation attorney.

It needs emphasising that the "cassation attorneys" profession would be perfectly congruent with the public interest incorporated in the adjudication by the highest instance court as well as the nature of the cassation proceedings which deals exclusively with juridical issues. The present model of cassation proceedings in Poland has a status of extraordinary appellate proceedings, which primarily serves the public function of adjudication by the Supreme Court, dealing with cases of precedential value, resolving complex juridical issues, interpreting the law and contributing to its development.

As regards certain circles' reluctance towards the discussed idea, one might remark that every novelty and every revolutionary change causes an understandable deal of caution and anxiety. However, it should be reminded that article 176 of the Polish Constitution sets the standard of two instance proceedings. As a matter of fact, the contemporary lawmakers accept the premise that substantive examination of the case in two instances amply secures the interests of the parties.[41] Therefore, it is worth underlining that the cassation proceedings in Poland are not designed to fulfill the role of the "third instance" examination meddling in the establishment of facts and evaluation of evidence, nor safeguarding the private interest of the parties in each individual case. Therefore, the constitutionally

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[40] T. Ereciński, *Kilka... [Several...]*, p. 63.

[41] M. Waligórski, *Podstawy kasacyjne procesu cywilnego w świetle różnicy pomiędzy faktem a prawem [Cassation grounds from the perspective of differentiation between facts and the law]*, Lviv 1936, p. 7; K. Osajda, *Zasada sprawiedliwości proceduralnej w orzecznictwie Trybunału Konstytucyjnego [The principle of procedural justice in the case law of the Constitutional Tribunal]*, (in:) T. Ereciński, K. Weitz (eds.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego [The case law of the Constitutional Tribunal and the Code of civil proceedings]. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego, Serock k. Warszawy, 24–26 września 2009 r.*, Warsaw 2010, p. 446 ff.

guaranteed right to hearing a case by a competent, impartial and independent court can be neither identified, nor equaled with the notion of unrestricted access to the Supreme Court. First and foremost, the access to the Supreme Court should be closely intertwined with the public interest as defined in the earlier remarks.

It should be emphasised that the effects of endowing the cassation attorneys with an exclusive right to act before the Supreme Court would be twofold. The cassation attorneys would serve as a filter that would sift through cases and provide the Supreme Court only with the relevant ones, whose examination would add a real value and contribute to developing the law. The risk of wasting the Supreme Court's valuable time on utterly groundless cases would be reduced. Furthermore, cassation attorneys would facilitate the Supreme Court to fulfill its fundamental role, i.e. examining the cassation complaints in the public interest. Ideally, as A. Galic stated in his paper, the effects of the Supreme Court's adjudication should be directed "at the future", and not "at the past". If the Supreme Court is allowed to fully concentrate its efforts on the public realm mentioned above, fewer lawsuits will be filed on an annual basis, as the number of divergences in the Supreme Court's adjudication will significantly decrease. Consequently, fewer cassations would be lodged to the Supreme Court, which would translate into the higher efficiency and a better quality of the Court's work.

As Z. Nagórski put it, the Supreme Court provides for a scene where the most intimate intercourse of legal theory and its practical application takes place.[42] Therefore, preparing cassation complaints and participating in the proceedings before the Supreme Courts should take the shape of a professional specialisation. As it was rightly observed in the interwar period, the role of "regular" attorneys and "cassation" attorneys should be clearly distinguished. In the first and second instance proceedings the attorneys concentrate on defending their clients' private interests and their strategy is intricately linked with the recreation of facts and evaluation of evidence. In contrast to it, the cassation proceedings is less spectacular, because only the finely elaborated, sublime and precise legal reasoning is of value there.

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CASSATION ATTORNEYS IN THE POLISH CIVIL PROCEEDINGS

Summary

The text presents selected issues concerning parties' obligatory professional representation in Polish cassation proceedings. It depicts the present regulation against a historical and comparative background. As its shape kept evolving over the years, its premises have been regularly revisited in the course of a doctrinal discussion. In recent times especially one question came to prominence. It touches upon an idea to introduce a special group of legal representatives who would be endowed with an exclusive right to act in the proceedings before the Supreme Court. The text recreates historical background of this institution in the Polish law and juxtaposes it with the present state, taking into account the nature of cassation proceedings, as well as the prospects of introducing such a legal specialisation in the future.

KEYWORDS

cassation attorneys, cassation proceedings, obligatory professional representation

SŁOWA KLUCZOWE

pełnomocnicy kasacyjni, postępowanie kasacyjne, obowiązkowe zastępstwo procesowe