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THE RIGHT TO A COURT IN CIVIL PROCEEDINGS AGAINST THE BACKGROUND OF THE CASSATION APPEAL INSTITUTION

PRAWO DO SĄDU W PROCESIE CYWILNYM NA TLE INSTYTUCJI SKARGI KASACYJNEJ

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Abstract

This paper addresses the issue of the institution of cassation appeal in civil cases against the backdrop of the constitutional and conventional standards of the right to a court. The aim of the analysis is to discuss the right to a court in constitutional and conventional case-law with reference to the principles of two-instance proceedings and review of judgments. The considerations also involve an assessment of how recent amendments introducing new remedies against final judgments may affect the coherence of the legal system and the complementarity of limitations on access to the cassation appeal institution in civil cases.

Keywords: cassation appeal, right to a court, civil proceedings

Abstrakt

Opracowanie podejmuje zagadnienie instytucji skargi kasacyjnej w sprawach cywilnych na tle konstytucyjnego i konwencyjnego standardu prawa do sądu. Celem przeprowadzonej analizy jest omówienie prawa do sądu w orzecznictwie konstytucyjnym i konwencyjnym z odniesieniem do zasady dwuinstancyjności i zasady kontroli orzeczeń. Rozważania dotyczą również oceny, na ile ostatnie nowelizacje, wprowadzające nowe środki zaskarżenia od orzeczeń prawomocnych, dezaktualizują spójność systemu prawa i komplementarność ograniczeń w zakresie dostępu do instytucji skargi kasacyjnej w sprawach cywilnych.

Słowa kluczowe: skarga kasacyjna, prawo do sądu, postępowanie cywilne

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Introduction

It is generally accepted that the basis of a democratic legal order is the right to a court, which is expressed in Article 45 of the Constitution of the Republic of Poland.[1] According to this provision, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. For the first time, the legislature decided to regulate this right *expressis verbis* in a separate provision of the constitution, as previously the discussed norm was derived from the content of Article 1 of the Constitution of 1952.[2] which referred to a democratic rule of law, realising the principles of social justice [Kubiak 2006, 55; Mądrzak 1997, 187].[3] An interpretative directive was also derived from the constitutional model of the rule of law, prohibiting a restrictive interpretation of the right to a court.[4] The inclusion of the right to a court in a separate provision does not lead to the exclusion, in assessing the model of a democratic rule of law, of a violation of the principle expressed in Article 45(1) of the Constitution of the Republic of Poland.

Thus, in its historical development, the right to a court has undergone an evolution: from the right to protect individuals from the arbitrariness of power to the right of access to the judicial system. Both of these aspects are still rooted in the constitutional norm in question [Garlicki and Murzynowski 1989, 16-55].[5] When assessing the constitutional standard of the right to a court, both institutional and procedural elements

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[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483 [hereinafter: Constitution of the Republic of Poland].

[2] Constitution of the Polish People's Republic of 22 July 1952, Journal of Laws of 1952, No. 33, item. 232.

[3] Act of 29 December 1989 on amending the Constitution of the Polish People's Republic, Journal of Laws of 1989, No. 75, item 444.

[4] Judgment of the Constitutional Tribunal of 21 January 1992, K 8/91, OTK 1992, no. 1, item 82; judgment of the Constitutional Tribunal of 29 September 1993, K 17/92, OTK 1993, no. 2, item 308; judgment of the Constitutional Tribunal of 8 April 1997, K 14/96, OTK ZU 1997, no. 2, item 122.

[5] The aforementioned aspects of the right to a court are referred to, inter alia, in the judgments of the Constitutional Tribunal of 12 May 2003, SK 38/02, OTK-A 2003, no. 5, item 38 and of 24 October 2007, SK 7/06, OTK-A 2007, no. 9, item 108.

are recognised. The former indicate the exclusive role of the court as a body adjudicating the case and meeting the criteria of jurisdiction, impartiality and independence. The latter point to the obligation to ensure an open, prompt, and fair procedure [Skorupka 2013, 138; Florczak-Wątor 2016, 47-66].

In the case-law of the Constitutional Court and extensive literature, the principle of the right to a court is identified with the concept of procedural fairness, expressed in the possibility of protecting interests through an adequate judicial route,[6] or the concept of fair trial used interchangeably [Grzegorczyk 2010, 118-23; Kociubiński 2009, 598-99].[7] The case-law of the Constitutional Tribunal to date has developed the following three elements constituting the constitutional right to a court. Firstly, one distinguishes the right of access to a court *sensu stricto* (i.e. the right to initiate proceedings before an impartial and independent court). Secondly, the right to shape the judicial procedure appropriately, in accordance with the requirements of justice and transparency, is mentioned. Thirdly, one should mention the right to a judicial decision (i.e. the right to obtain a binding decision on a given matter by the court).[8] In this part of the discussion, the focus will be on the first of these elements – the right of access to a particular court, which is the court of cassation, which cannot take place without reference to the principle of review, and in a broader scope, to the principle of instance.

It is worth noting from the outset, however, that the right to a court in civil procedure is understood somewhat differently from its treatment in criminal sciences, and therefore primarily boils down to the right to initiate proceedings before a court. On the other hand, access to a court in criminal matters mainly signifies the guarantee of protection of the rights of the accused, whose case will be examined fairly by an independent and impartial court within a reasonable time frame, with an audience.

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[6] Judgment of the Constitutional Tribunal of 11 May 2007, K 2/07, OTK-A 2007, no. 5, item 48.

[7] Judgment of the Constitutional Tribunal of 16 April 2008, K 40/07, OTK-A 2008, no. 3, item 44.

[8] Judgment of the Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998, no. 4, item 50.

1. Principles of two-instance proceedings and review of judgments

An essential reinforcement of the right to a court is the aforementioned principle of review (the right to appeal to a court against judgments and decisions issued in the first instance) and the principle of two-instance proceedings (indicating that judicial proceedings are at least two-tiered), stipulated respectively in Article 78 and Article 176(1) of the Constitution of the Republic of Poland, which collectively guarantee the scrutiny of judicial proceedings, thereby preventing errors and arbitrariness in the administration of justice.[9]

The principle of review, as the right to appeal against judgments, has been broadly encapsulated at the constitutional level, as the legislature recognised the potential for realising procedural justice through the possibility of lodging an appeal.[10] By including Article 78 of the Constitution of the Republic of Poland in the chapter dedicated to the means of protecting freedoms and rights, this principle additionally expresses an inherent subjective right, subject to protection also in the procedure of constitutional complaint.[11] It applies to all judgments and decisions of the first instance, without specifying that they must be solely judicial decisions, and it extends to each party involved in the proceedings. Similarly, based on the constitutional standard arising from Article 78 of the Constitution of the Republic of Poland, the review encompasses both principal decisions and incidental decisions of a secondary nature. The suability of decisions therefore depends solely on whether the subject of the decision falls within the scope of a case as defined in Article 45(1) of the Constitution of the Republic of Poland. Within such a mechanism of review, suability is permitted regardless of whether the supervising body is hierarchically positioned above the reviewed body, as the legislature, using the general

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[9] Judgment of the Constitutional Tribunal of 13 November 2009, SK 46/08, OTK – A 2009, no. 7, item 109.

[10] Judgments of the Constitutional Tribunal of: 16 November 1999, SK 11/99, OTK 1999, no. 7, item 158; 3 July 2002, SK 31/01, OTK-A 200, no. 4, item 49; 8 December 1998, K 41/97, OTK 1998, no. 7, item 117; 12 June 2002, P 13/01, OTK-A 2002, no. 4, item 42. See Zieliński 2005, 8.

[11] Judgment of the Constitutional Tribunal of 18 October 2004, P 8/04, Journal of Laws of 2004, no. 232, item 2338.

term 'appeal,' did not specify the character and attributes of the supervising body (undoubtedly including features of devolution or suspension), which consequently leads to the distinction of the so-called 'horizontal control' (horizontal instantiation).[12]

The right to review has its firmly established place in international law as well. Here, in particular, mention should be made of Article 2(3) of the International Covenant on Civil and Political Rights,[13] which guarantees measures to protect the rights enshrined in the Covenant, as well as Article 13 of the European Convention on Human Rights,[14] which states that wveryone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority (i.e. the right to an effective legal remedy). The issue of an effective legal remedy is regulated somewhat more narrowly under Article 47(1) of the Charter of Fundamental Rights, where everyone whose rights and freedoms guaranteed by Union law have been violated shall have the right to an effective remedy before a court. Unlike the regulations mentioned earlier, all extra-judicial control, including administrative control, is excluded from the scope of this provision [Półtorak and Wróbel 2019, 1108-238; Hofmański and Zabłocki 2013, 361-407]. In the case-law of the European Court of Human Rights, the effectiveness of a legal remedy is understood as adequacy, meaning deciding on the essence of the violation of a specific freedom or right, and efficiency (leading to reformation – remedying the violation found). Otherwise, the review is considered illusory and thus does not meet the standard set out in Article 13 of the Convention.[15]

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[12] Judgments of the Constitutional Tribunal of: 11 May 2004, K. 4/2003, OTK-A 2004, no. 5, item 41; 15 December 2008, P. 57/2007, OTK-A 2008, no. 10, item 178; 13 March 2013, K. 25/2010, OTK-A 2013, no. 3, item 27.

[13] International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, Journal of Laws 1977 no. 38, item 167 [hereinafter: ICCPR].

[14] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284 [hereinafter: Convention].

[15] Judgments of the European Court of Human Rights of: 3 May 2007 in *Bączkowski and Others* v. Poland, application no. 1543/06, Art. 81; 21 October 2010 in *Alekseyev* v. Russia, application no. 4916/07, 25924/08 and 14599/09, Art. 99; 12 June 2012, *Genderdoc-M* v. Moldova, application no. 9106/06, Articles 35 and 37.

Undoubtedly, the principle of two-instance proceedings, as expressed in Article 176(1) of the Constitution of the Republic of Poland, plays a significant role. As emphasised in the literature, cassation review is one of the conditions for proper adjudication, as it provides both parties with the guarantee of being able to appeal a judgment and examine the correctness of the first-instance decision. Furthermore, it serves as a stimulating factor, as it reinforces the self-control of the court of first instance, which must consider the possibility of its judgment being subject to appellate review. Thus, the principle of two-instance proceedings serve as a mechanism enabling control and the elimination of procedural judgments based on errors [Marszał 2000, 701].

It should be noted that B. Banaszak also recognises in this principle a reinforcement of the principle of judicial independence [Banaszak 1999, 308]. According to A. Gaberle, the distinction of two-instance proceedings allows the realisation of several functions: corrective function (correcting errors), stimulating function (encouraging greater diligence by courts in decision-making) and precedential function (establishing patterns of conduct). Whereas T. Wiśniewski suggests treating the correction of a judgment as a further effect of appellate review, leading him to use the term 'control function' instead of 'corrective function,' and 'standardisation of case-law function' instead of 'precedential function,' to avoid associations with *common law*. Additionally, he mentions two other functions of appellate review: the signalling and educational function and the instructional function, which manifest through providing guidance to lower courts on further proceedings [Wiśniewski 2005, 297-98]. To the presented views, one can add the systematic classification of functions presented by M. Michalska-Marciniak, which distinguishes the fundamental functions of cassation review as: control, prevention (preventing the introduction of defective judgments into legal circulation), stimulation, and unification of case-law [Michalska-Marciniak 2013]. The diversity of perspectives on the functions of cassation review highlighted in the literature underscores the significant role this phenomenon plays in the entire justice system. The Constitutional Tribunal, however, particularly emphasises the aspect of correcting flawed judgments of lower instance courts as the main rationale for the existence of successive instances

in the procedural system.[16] Furthermore, Michalska-Marciniak observes that some differences in the understanding of cassation review arise from considering it in the context of the legal system in which it is adopted and the specific statutory solutions.

Although the principle of two-instance proceedings is closely linked to the principle of judicial review, the standard set forth in Article 176(1) of the Constitution of the Republic of Poland is significantly higher. Unlike Article 78(1) of the Constitution of the Republic of Poland, which primarily treats the principle of two-instance proceedings as a structural principle defining the procedures of the judiciary, with its guaranteeing character being secondary, Article 176(1) emphasizes the institutional aspect, considering the guarantee as a complementary aspect and specification of the principle of judicial review.

While Article 176 of the Constitution of the Republic of Poland does not directly impose limitations, the principle of two-instance proceedings may be restricted during times of war, when emergency procedures may be established, essentially resulting in single-instance adjudication (Article 233 of the Constitution of the Republic of Poland). Nevertheless, the Constitution of the Republic of Poland establishes a relatively high minimum standard regarding access to second-instance courts, whereas the constitutional frameworks of other countries do not address this issue at the constitutional level. This difference is even more pronounced when comparing international treaty regulations.

In international law, the right to a second instance is regulated non-uniformly, as the requirement for two-instance judicial proceedings is stipulated only for criminal cases. The content of Article 2(1) of Protocol no. 7 to the European Convention on Human Rights, stating that 'everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal,' or the almost identical sounding Article 14(5) of the ICCPR[17], cannot be interpreted differently.

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[16] Judgments of the Constitutional Tribunal of: 8 December 1998, K 41/97, OTK 1998, no. 7, item 117; 10 July 2000, SK 12/99, OTK 2000, no. 5, item 143.

[17] See Steinborn 2005, 368.

2. Right to a court after the judgment has become final

Translating the above considerations into the realm of cassation control, it should be noted that Article 176(1) of the Constitution of the Republic of Poland does not guarantee access to the entire instance proceedings. Its interpretation leads to the conclusion that in judicial proceedings, only the appeal against a decision rendered in the first instance is ensured [Michalska-Marciniak 2015, 23-55]. Therefore, it is impossible to argue for the right to have a case heard in cassation proceedings because although the legislature did not exclude the possibility of creating additional control, it left the decision in this regard to ordinary statutory regulation. There is thus no basis to claim that the renunciation of extraordinary appeal proceedings would be impermissible in light of constitutional provisions.[18] In this sense, cassation is also not an effective means of appeal within the meaning of Article 78 of the Constitution of the Republic of Poland. From this perspective, one cannot speak of a constitutional guarantee consisting of the obligation to shape in the law another level of control over judgments – this time final judgments – in the form of cassation control. The admissibility of cassation appeals is therefore not subject to verification in terms of the right of access to a court, i.e. to initiate proceedings before a court, as consistently upheld in numerous statements by the constitutional court.[19] Therefore, the right to file a cassation appeal in civil proceedings does not constitute a necessary element of the right to a court, and the exclusion of certain cases from cassation control does not violate the right to a court as defined by the current constitution.[20] According to the Tribunal, individuals cannot demand the shaping of procedural provisions in a way that guarantees the consideration of every case by the cassation court.[21]

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[18] Judgment of the Constitutional Tribunal of 6 October 2004, SK 23/02, OTK ZU 2004, no. 9/A, item 89.

[19] See Zembrzuski 2011.

[20] Judgment of the Constitutional Tribunal of 10 July 2000, SK 12/99, OTK 2000, no. 5, p. 819.

[21] Judgments of the Constitutional Tribunal of: 6 October 2004, case ref. no. SK 23/02, OTK ZU 2004, no. 9/A, item 89; 1 July 2008, SK 40/07, OTK ZU 2008 no. 6/A, item 101; 22 September 2015, case ref. no. SK 21/14, OTK ZU 2015, no. 8/A, item 122; 21 June 2016, SK 2/15, OTK-A 2016, item 45.

However, in the context of the principle of two-instance proceedings, case-law has developed the position that when the legislature creates the institution of cassation, even in an extra-instance procedure, it must respect the principles of procedural justice and principles of decent legislation. In other words, whenever the legislature decides to guarantee access to cassation, it must regulate it in accordance with constitutional norms, principles, and values, and in this sense, it is not completely exempt from constitutional control.[22] The legislative discretion ends when the regulation of another instance of adjudication control is established in the system, providing the possibility of appeal. This means that cassation proceedings, if provided for by the legislature in the adjudication control system, are covered by the right to a fair (equitable) procedure as one of the elements of understanding the right to a court. In this regard, the assessment of this reliability and the quality of the applied procedure becomes a constitutional issue falling within the scope of the right to a court.

The Constitutional Tribunal, when assessing the right to a court, perceives that the right to obtain a binding settlement of the case and the principle of speed, which constitutes one of the elements of the right to an appropriately shaped court procedure, cannot be detached from the fundamental right stemming from Article 45(1) of the Constitution of the Republic of Poland, which is to arrive at a just decision. In the collision of such significant constitutional goods and values as legal certainty and legal security with the need to challenge a final court decision, the primacy still lies in ensuring a fair decision. This approach allows the conclusion that the right to obtain a binding court decision is limited by cassation control, prolonging the path to achieving such a decision after the previous appeal and annulment of the final court decision.

Similarly, the regulation concerning the right of access to cassation control compares with international treaty standards, particularly Article 6 of the Convention and Article 14 of the ICCPR, which do not guarantee access to the entire instance in criminal cases. In this regard, one can

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[22] Judgments of the Constitutional Tribunal of: 31 March 2005, SK 26/02, Journal of Laws of 2005, no. 68, item 609; 6 October 2004, SK 23/02, OTK ZU 2004, no. 9A, item 89; 16 January 2006, SK 30/05, Journal of Laws of 2006, no. 15, item 118 and the decision of the Constitutional Tribunal of 10 August 2001, Ts 58/01, OTK ZU 2001, no. 6, item 207.

speak only of the right to a second instance, with some exceptions [Flaga-Gieruszyńska 2015, 50-57].

In the standards of international law, both the absence of shaping cassation control and the inadmissibility of cassation in certain categories of cases are included.[23] Arguments derived from international case law in civil proceedings remain relevant in the context of criminal cassation as well.[24] As rightly pointed out in the literature, although the Constitution of the Republic of Poland provides the legislature with autonomy in shaping the means of appealing judgments issued in the second instance, this does not mean that it can act on the basis of complete arbitrariness, regardless of whether the cassation appeal takes the form of an appellate remedy initiating proceedings before a court of further instance or constitutes an extraordinary means of appealing final court decisions. Along with the decision to grant access to cassation proceedings, the legislature must shape this procedure in a way that complies with the standards arising from the principle of a fair trial [Grzegorczyk and Weitz 2016]. It is therefore excluded to leave the decision to initiate cassation proceedings to the arbitrary discretion of the courts or in a manner that violates the principle of equality.[25]

Summary

The primacy of considering a cassation appeal over other simultaneously filed means of appeal is clearly emphasised by both case-law and legal literature. In relation to the reopening of civil proceedings, cassation holds priority in consideration because it is functionally and procedurally more connected to the ongoing proceedings. However, this still does not imply a right to access cassation court, even if the cassation appeal is considered in this regard as a natural continuation of the proceedings at the extraordinary stage, after the judgment has become final [Manowska 2006, 65].

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[23] Judgment of the European Court of Human Rights of 19 December 1997, *Bruella Gomez de la Torre* v. Spain, application no. 26737/95, Lex no. 400869.

[24] Judgment of the European Court of Human Rights of 26 October 2004, Międzyzakładowa Spółdzielnia Mieszkaniowa Warszawscy Budowlańcy v. Poland, application no. 13990/04.

[25] Judgment of the Constitutional Tribunal of 10 July 2000, SK 12/99, OTK 2000, no. 5, p. 819.

The Supreme Court, describing the special role of cassation appeals in civil proceedings, indicates that its consideration is predominantly driven by the public interest element. There is no longer a verification of the accuracy of factual findings, and the focus shifts to the control of the correctness of the application of the law. The primacy of public interest means that the private interest of the appellant is considered in civil proceedings concerning cassation appeals when it also satisfies the general interest, including supervisory functions, ensuring correctness, and uniformity of legal interpretation and judicial practice [Pietrzykowski 2013, 745].[26] However, restrictions on admissibility in lodging cassation appeals should also stem from the constitutional role of the Supreme Court, which exercises oversight over compliance with the law and the uniformity of case-law, and decides on legal issues.[27] In another context, the same judicial body emphasises the contribution of the cassation court to the development of law and jurisprudence through the institution of cassation appeals.[28]

Consequently, the Constitution does not guarantee the right to lodge a cassation appeal[29] or to have a case heard by the Supreme Court, which carries out its supervisory functions in the context of adjudication only within the framework of the existing law and using the available legal and institutional tools.[30] Thus, the limitation of accessibility and admissibility of cassation appeals, although significantly expanded in civil proceedings, does not constitute a limitation on the constitutional right to a fair trial.[31] They have a quantifiable character here, taking into account the value of the subject being appealed as well as the substantive character, describing the types of cases in which a cassation appeal is inadmissible.

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[26] Resolution of the Supreme Court (7) of 5 June 2008, III CZP 142/2007, OSNC 2008, no. 11, item 122.

[27] Decision of the Supreme Court of 14 April 2015, II UK 310/14, Lex no. 1678078.

[28] Decision of the Supreme Court of 4 February 2000, II CZ 178/99, OSNC 200, no. 7-8, item 147.

[29] Judgments of the Constitutional Tribunal: of 10 August 2001, Ts 58/01, OTK 2001, no. 6, item 207; 18 September 2001, Ts 71/01, OTK 2002, no. 7, item 239, of 5 November 2001, Ts 95/01, OTK 2002, no. 1, item 74 or of 29 January 2002, Ts 95/01, OTK- B 2002, no. 1, item 75.

[30] Decision of the Supreme Court of 4 October 2002, III CZ 91/02, Lex no. 57230.

[31] Decision of the Constitutional Tribunal of 5 November 2001, Ts 95/01, OTK-B 2002, no. 1, item 74.

However, one cannot underestimate the role of this institution in the system of means of appeal and in the perspective of the development of law, especially in terms of the legislature creating other, competing means of appeal, such as extraordinary appeal, as provided for in Article 89 of the Act on the Supreme Court.[32]

The high degree of formalisation of cassation proceedings along with a series of limitations on access to this procedure remains in opposition to successive amendments expanding the system of means of appeal with additional institutions capable of controlling both the law and factual findings. The nature of the grounds that are to initiate the stage of control reserved for extraordinary appeals partly resembles cassation, thus replicating existing solutions, with general clauses borrowed from civil proceedings [Wiśniewski 2019, 249; Zembrzuski 2019, 20-28.]. If the aim was to complement the deficiencies of cassation control with the proposed solution, introducing a new form of extraordinary revision that once existed in our legal system was by no means the way to achieve this. The argument that was supposed to refute suspicions of the competitiveness of the discussed means in relation to cassation control was the reservation of the admissibility of appeals against judgments that cannot be changed by other extraordinary means of appeal and based on allegations that were not the subject of consideration in cassation. However, it should be recognised that this is a solution that can be successfully circumvented by means of an extraordinary complaint, if only in consideration of qualified entities that, by giving up cassation proceedings, may consider the new remedy a means of verifying the factual sphere and deciding in a reformatory manner, which is a clear limitation in the cassation complaint procedure [Zembrzuski 2022, 437-68; Asłanowicz 2023, 13-15]. This duality (non-complementarity) of adjudication regarding the same subject of appeal does not inspire acceptance, does not strengthen the significance of any of the analysed control means, and sheds new light on considerations regarding limitations on access to cassation court in civil cases.

[32] Act on the Supreme Court of 8 December 2017 Journal of Laws of 2023, item 1093 i.e. See Zembrzuski 2015, 229-58.

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