Teka Komisji Prawniczej PAN Oddział w Lublinie
vol. XVIII, 2025, no. 2, pp. 101–114
https://doi.org/10.32084/tkp.10270

EXTRAORDINARY APPEAL AS AN EFFECTIVE INSTRUMENT FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS

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Abstract. An extraordinary appeal is one of the extraordinary remedies, historically the "youngest" in the current system of domestic legal remedies available against decisions made in court proceedings. The main argument accompanying the introduction of this institution into the Polish legal system was the belief that court judgments should be fair, issued on the basis of correctly reconstructed legal norms, and correspond to correctly collected and assessed evidence. Its primary function was to correct final court judgments. The idea was that it would become a remedy allowing for the effective protection of the rights and freedoms guaranteed in the Polish Constitution. The adopted structure of the constitutional complaint does not allow for verification of the correctness of the court ruling itself, which may have been issued on the basis of a provision consistent with the Constitution, but at the same time interpreted in a manner inconsistent with the principles or freedoms and rights of human beings and citizens set out in the Constitution. In this respect, an extraordinary appeal is a special form of pro-constitutional interpretation of the law and also allows for verification of the correctness of its application by common and military courts. A detailed analysis of this institution carried out in this study also indicates that it has many shortcomings. However, the legitimacy of introducing extraordinary appeals into the catalogue of domestic extraordinary remedies is undoubtedly confirmed with each new ruling of the Supreme Court.

Keywords: appeal; extraordinary appeal; protection of constitutional rights and freedoms.

1. PRELIMINARY REMARKS

The extraordinary appeal, introduced into the national legal system by the Act of 8 December 2017 on the Supreme Court,[1] is still classified as a new extraordinary appeal in the system of national legal remedies available against decisions made in court proceedings. In the literature, it has been classified as a kind of second-order extraordinary control measure, thus emphasising its extraordinary nature [Kotowski 2018, 51-52]. The explanatory

[1] Journal of Laws of 2021, item 1904 as amended [hereinafter: the Supreme Court Act].

ISSN 1899-7694
e-ISSN 2719-7379

memorandum to the 2018 draft law on the Supreme Court clearly states that the purpose of extraordinary appeals is to correct final court rulings. The main motive behind the introduction of the institution of extraordinary appeal was the belief that court judgments should be fair, issued on the basis of correctly reconstructed legal norms, and correspond to correctly collected and assessed evidence. *A contrario*, it was considered that judgments that did not meet these standards, and were therefore inconsistent with the basic criteria of justice, required correction, even if they were already final.[2]

The place of extraordinary appeals in the system of legal remedies is primarily determined by their public law function. Already in the justification of the judgment of the full bench of the Constitutional Tribunal of 19 February 2003, P 11/02,[3] it was clearly emphasised that the Polish legal system lacks an extraordinary appeal measure that would allow for the effective protection of the rights and freedoms guaranteed in the Polish Constitution.[4] The role of such a special instrument is not fulfilled by a constitutional complaint, which in the Polish legal system has been narrowly defined and is intended solely to remove from the legal system a provision that violates rights and freedoms, rather than – to correct defects resulting from the incorrect application of the law, even in situations where such defects are evident and have been noticed by the broadly understood judicial authorities (see also the justification for the decision of the full bench of the Constitutional Tribunal of 12 March 2003, S 1/03[5] and the decisions of the Constitutional Tribunal of 16 June 2014, Ts 33/14,[6] of 2 February 2012, SK 14/09,[7] of 18 October 2022, SK 72/21,[8] and of 8 November 2022, SK 7/22[9]).

The explanatory memorandum to the draft law states that, in this respect, the institution of extraordinary appeal not only does not conflict with constitutional appeal (Article 79(1) of the Polish Constitution), but also fills the gap left by it. The constitutional complaint was constructed in such a way that any ruling by the Constitutional Tribunal would boil down to a hierarchical review of norms, taking place in isolation from a specific case, even though that case was the basis for the complaint [Czeszejko-Sochacki 2003, 82]. The adopted structure of the constitutional complaint does not allow for verification of the correctness of the court ruling itself, which may have been issued on the basis of a provision consistent with the Constitution, but at the same time

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[2] Sejm print no. 2003, Sejm of the 8th term, Draft Act on the Supreme Court, Justification, p. 4.
[3] OTK-A 2003, No. 2, item 12.
[4] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: Polish Constitution].
[5] OTK-A 2003, No. 3, item 24.
[6] OTK-B 2014, No. 5, item 478.
[7] OTK-A 2012, No. 2, item 17.
[8] OTK-A 2022, item 67.
[9] OTK-A 2022, item 68.

interpreted in a manner inconsistent with the principles or freedoms and rights of human beings and citizens set out in the Constitution. In this respect, an extraordinary appeal is to be a special form of applying a pro-constitutional interpretation of the law, as well as verifying the correctness of its application by common and military courts [Michalak 2019, 90]. Pro-constitutional interpretation consists in shaping a legal norm in such a way that it reflects the constitutional context, including in particular the principles and rights and freedoms of human beings and citizens, while remaining within the limits set by the wording of the legal provision [Szczucki 2015, *passim*].

As a result of observations made in the course of legal practice, it was decided that it was necessary to introduce a legal measure allowing for the review of judgments from the point of view of their compliance with the Polish Constitution. In the explanatory memorandum to the draft law on the Supreme Court, introducing the institution of extraordinary appeal, it was emphasised that "in legal transactions, there are final judgments that fall far short of the expected standards, i.e. the fairness of court judgments, their basis on correctly interpreted legal provisions, and their reflection of the collected and correctly assessed evidence," but the primary power to consider a new means of reviewing court judgments consists in "the extraordinary review of final court rulings on the grounds that they are grossly unjust or lead to the violation of human and civil rights and freedoms enshrined in the Polish Constitution."[10]

Pursuant to Article 89(1) of the Supreme Court Act, if necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice, an extraordinary appeal may be lodged against a final ruling of a common court or military court concluding proceedings in a case, provided that: the ruling violates the principles or freedoms and rights of human beings and citizens set out in the Polish Constitution, or the ruling grossly violates the law through its incorrect interpretation or improper application, or there is an obvious contradiction between the court's findings and the evidence gathered in the case – and the ruling cannot be overturned or amended by other extraordinary means of appeal.

The legislator has adopted solutions aimed at giving the extraordinary appeal an exceptional character, applied subsidiarily, especially when it is still possible to correct errors resulting from a court ruling without causing new unjust consequences of a flawed judgement. Undoubtedly, the legislator has given priority to the principle of justice, understood as issuing a ruling that is free from defects, consistent with substantive and procedural law, and based on correctly collected and verified evidence. The structure of the extraordinary appeal reveals mechanisms aimed at ensuring the stability of final court rulings to the extent that this is compatible with the main objective of the measure being introduced [Szczucki 2021, 478].

[10] Sejm print no. 2003, Sejm of the 8th term, Draft Act on the Supreme Court, Justification, p. 5.

The purpose of this instrument is to ensure that judgments which should not be handed down in a democratic state governed by the rule of law and implementing the principles of social justice, i.e. judgments which grossly violate the law or are based on findings of fact that are clearly contrary to the evidence, can be removed from legal circulation. In this way, the extraordinary appeal implements the constitutional principle of the reliability of public institutions (expressed in the preamble to the Polish Constitution), the principle of a just state (Article 2 of the Polish Constitution) and the principle of legality (Article 7 of the Polish Constitution). At the same time, however, an extraordinary appeal constitutes a departure from the constitutional principle of the stability of legal relations established by final court rulings (Articles 2 and 45 of the Polish Constitution). The structural assumption of an extraordinary appeal is therefore to define its premises in such a way that it serves to eliminate court rulings with particularly serious defects from circulation, as well as its relatively subsidiary nature. For this reason, the legislator made the admissibility of an extraordinary appeal dependent on the unavailability of other means of appeal (Article 89(1) *in fine* of the Act on the Supreme Court), and also narrowly defined its subjective and objective scope, granting the right to lodge it only to selected public authorities (Article 89(2) of the Act on the Supreme Court) and limiting its application to the most serious cases of violation of the law (Article 89(1) points 1-3 of the Supreme Court Act).

An extraordinary appeal is an instrument with a narrowly defined subjective scope. It may only be lodged by entities with special standing: the Ombudsman, the Prosecutor General, and (within the scope of their competence) the President of the General Prosecutor's Office of the Republic of Poland, the Ombudsman for Children's Rights, the Patient Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium-sized Enterprises, and the President of the Office of Competition and Consumer Protection (Article 89(2) of the Supreme Court Act). With regard to judgments that became final before the entry into force of the Supreme Court Act (i.e. before 3 April 2018), only the Ombudsman and the Prosecutor General are entitled to lodge an extraordinary appeal (Article 115(1a) of the Supreme Court Act).

2. THE SCOPE OF EXTRAORDINARY APPEALS HAS ALSO BEEN NARROWLY DEFINED

According to Article 89(1) of the Supreme Court Act, an extraordinary appeal may be lodged only if it is necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice (general basis) and provided that it is demonstrated that

there has been: a violation of the principles or freedoms and rights of human beings and citizens specified in the Polish Constitution; a gross violation of the law through its incorrect interpretation or improper application; an obvious contradiction between the relevant findings of the court and the content of the evidence gathered in the case (specific grounds).

First and foremost, however, in accordance with the wording of Article 89(1) *in principio* of the Supreme Court Act, an extraordinary appeal may only be lodged "if it is necessary to ensure that the final judgments of common and military courts comply with the principle of a democratic state ruled by law, which implements the principles of social justice."

Each extraordinary appeal must therefore be based on a general ground and at least one of the three specific grounds listed in Article 89(1) of the Supreme Court Act.

In light of Article 398^4(1)(2) of the Code of Civil Procedure in conjunction with Article 95(1) of the Supreme Court Act, an extraordinary appeal should contain not only a statement of its grounds, but also their justification.[11] The complaint should therefore contain a statement of the grounds and a separate argument – justification of the grounds for the complaint. Merely referring to a general ground and one of the three specific grounds, without a specific explanation of why they require the reversal of the judgment in the case, does not constitute a justification for the complaint, but at most a statement of the grounds. The complainant should explain in a factual and comprehensive manner what the violation of the law consists of. Otherwise, it is not possible to assess the merits of the extraordinary complaint at all, and the letter itself remains only a substitute for an appeal. The lack of an exhaustive and coherent justification of the grounds on which the complainant bases the complaint constitutes a defect disqualifying the pleading and must lead to the rejection of the complaint without calling on the complainant to remedy the deficiencies.[12]

The general basis for lodging an extraordinary appeal, as formulated in Article 89(1) *in principio* of the Supreme Court Act, clearly refers to the

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[11] Supreme Court decision of 30 June 2020, ref. no. I NSNp 3/19; judgment of the Supreme Court of 25 June 2020, ref. no. I NSNc 21/20; judgment of the Supreme Court of 3 June 2019, ref. no. I NSNc 7/19.

[12] Similarly: resolution of the seven-judge panel of the Supreme Court of 30 April 1938, ref. no. C III 319/37, and judgments of the Supreme Court: of 8 February 1935, ref. no. III C 778/34; of 9 March 1936, ref. no. C III 915/35; of 21 October 1938, ref. no. C II 325/38; of 25 April 2013, ref. no. I UK 572/12; of 16 July 2014, ref. no. II PK 266/13; of 24 June 2015, ref. no. I PK 227/14; of 3 June 2019, ref. no. I NSNc 7/19; Supreme Court rulings of: 6 November 1996, ref. no. II UKN 12/96; 20 November 1996, ref. no. I PKN 22/96; 11 March 1997, ref. no. III CKN 13/97; 13 June 2008, ref. no. III CSK 104/08; 28 April 2010, ref. no. II PK 326/09; 27 January 2012, ref. no. V CSK 174/11; 30 June 2020, ref. no. I NSNp 3/19.

principle of a democratic state ruled by law, implementing the principles of social justice, as expressed in Article 2 of the Polish Constitution. As clearly emphasised in case law, Article 89(1) *in principio* of the Supreme Court Act must be interpreted in accordance with the Polish Constitution, taking into account the rich body of legal scholarship and case law, which has derived numerous detailed derivative principles from Article 2 of the Polish Constitution, such as: the principle of procedural justice, the principle of protecting citizens' trust in the state, the principle of protecting legitimately acquired rights, the principle of protecting interests in progress, the principle of non-retroactivity of the law, the principle *of ne bis in idem*, and the prohibition of excessive interference [Banaszak 2017, 181; Sokolewicz and Zubik 2016, 127-30]. In the justification of the general basis for an extraordinary appeal, it is necessary to explain specifically how the contested decision is inconsistent with the principle of a democratic state ruled by law that implements the principles of social justice, in particular by: indicating the violated derivative principle derived from Article 2 of the Polish Constitution and the manner of its violation. When constructing the general basis for the complaint, the complainant is not limited to the catalogue of derivative principles formulated in case law, so he may also refer to another derivative principle, provided, however, that he presents in detail the line of reasoning by which he derived such a principle from Article 2 of the Polish Constitution.

The procedural structure of an extraordinary appeal in terms of the grounds for this remedy is, on the one hand, closely related to the structure of the grounds for other remedies adopted by the legislator, both ordinary remedies (appeal, complaint) and extraordinary remedies (cassation, cassation appeal). This undoubtedly makes it easier for entities filing extraordinary appeals to formulate allegations that correspond in form to the allegations based on the grounds for appeals that have been well known to all court procedures for years. The normative similarities between the grounds for extraordinary complaints indicated in points 2 and 3 (but also in point 1 of Article 89(1) of the Supreme Court Act and the grounds for cassation specified in the Code of Civil Procedure (the provision of Article 89(1) point 2 of the Supreme Court Act corresponds in a significant extent to Article 398^3 point 1 of the Code of Civil Procedure, Article 523(1), first sentence, of the Code of Criminal Procedure and Article 438 points 1-2 of the Code of Criminal Procedure; the parallel between Article 89(1) point 3 of the Supreme Court Act and Article 438 point 3 of the Code of Criminal Procedure is very clear).

The Supreme Court Act requires the entity filing an extraordinary appeal to indicate in it the occurrence of one of the legal violations referred to in points 1-3 of Article 89(1) of the Supreme Court Act.

While all the grounds for an extraordinary appeal listed in points 1-3 of Article 89(1) of the Supreme Court Act – due to their far-reaching convergence with the grounds for cassation or appeal can be treated as violations constituting grounds for the entity entitled to lodge an extraordinary appeal to raise objections to the ruling, the issue of the correct interpretation of Article 89(1) *in principio* of the Supreme Court Act is not so clear. As indicated in the case law of the Supreme Court, pointing to one of the irregularities specified in Article 89(1) points 1-3 of the Supreme Court Act is a necessary but insufficient condition for the admissibility of an extraordinary appeal and, in the further procedural perspective, its effectiveness. The complaint must refer to the condition referred to in Article 89(1) *in principio* of the Supreme Court Act.[13]

The legislator has determined that an extraordinary appeal may only be lodged "if it is necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice."

Referring to the relationship between the conservatively constructed grounds for this appeal listed in points 1-3 of Article 89(1) of the Supreme Court Act and the initial part of this provision, which makes the admissibility (and, in the longer term, its possible validity) of an extraordinary appeal dependent on it is "necessary to ensure compliance with the principle of a democratic state governed by the rule of law, which implements the principles of social justice," the Supreme Court indicated that "Article 89(1) *in principio* of the Supreme Court Act defines – in a somewhat unusual form, unknown to procedural laws – the basis for appeal. The systemic placement of the fragment of the provision referring to ensuring compliance with the principle of a democratic state ruled by law that implements the principles of social justice (immediately before and on a par with the abstractly characterised violations referred to in the provisions of Article 89(1) points 1-3 of the Supreme Court Act) clearly indicates that the legislator's intention was to formulate in this fragment of the editorial unit of the Supreme Court Act the basis for an extraordinary appeal equivalent to those referred to in points 1-3 of the provision."[14]

As clearly emphasised in case law and literature, attention should be paid to the use of the phrase "if" in the structure of the provision, connecting the first part of the sentence, which forms the original premise, with the second part of the sentence, in which the specific grounds for lodging an extraordinary appeal are listed in three points. The phrase *o ile* used by the legislator clearly indicates that it is necessary for the original premise and at least one of the "specific" grounds for an extraordinary appeal listed in Article

[13] See the decision of 3 April 2019, ref. no. I NSNk 1/19.

[14] Ibid.

89(1) points 1-3 of the Supreme Court Act to exist simultaneously. If the legislator's intention was to assume that the three grounds listed in Article 89(1) points 1-3 of the Supreme Court Act are only examples of the original condition (i.e. lodging an extraordinary appeal if it is necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice), it would have used the term "by" (or through)" instead of the conjunction "if". In the case of an extraordinary appeal, both its admissibility (as well as, in the further procedural perspective, its effectiveness) depends on the (combined) fulfilment of the following conditions: (1) the complainant demonstrates that the original condition of "necessity" to ensure compliance with the principle of a democratic state governed by the rule of law that implements the principles of social justice has materialised, and (2) the complainant demonstrates that any of the specific conditions listed in Article 89(1) points 1-3 of the Supreme Court Act have been met. This approach constitutes a completely new procedural development from the point of view of the normative schemes for the construction of grounds for appeal adopted by the legislator to date and the legislative technique used by the legislator.

If the reference to the need to ensure compliance with the principle of a democratic state governed by the rule of law, which implements the principles of social justice, is not to be merely declarative in nature, and this condition is not to be a purely symbolic element of an extraordinary appeal, which in reality has no greater procedural significance, then this requirement must be satisfied by the author of the extraordinary appeal being obliged to indicate the state of violation of the principle of a democratic state governed by the rule of law, which implements the principles of social justice, caused by the contested decision. In other words, the author of the extraordinary appeal should indicate (and demonstrate) a violation of a specific principle of a democratic state governed by the rule of law, which implements the principles of social justice, and specify this violation in a reasoned allegation in the extraordinary appeal.[15] Therefore, the basic condition for the admissibility of an extraordinary appeal specified in Article 89(1) *in principio* of the Supreme Court Act, taking into account the nature of the extraordinary appeal, which is, after all, directed against a specific, final judgment of a common court or military court – should be understood as a requirement for the entity filing the extraordinary appeal to indicate a violation in the form of the contested ruling being inconsistent with the principle of a democratic state ruled by law that implements the principles of social justice (violation by the contested ruling of the principle of a democratic state ruled by law that implements the principles of social justice),

[15] Ibid.

supplemented by an indication of the materialisation of one (or more) of the violations specified in Article 89(1) points 1-3 of the Supreme Court Act.

The author of an extraordinary appeal cannot limit himself to a mechanical citation of terms referring to the grounds for an extraordinary appeal specified in the Act: he is obliged to cite and justify the grounds for lodging an extraordinary appeal (Article 95(1) of the Act on the Supreme Court in conjunction with Article 398^4(1)(2) of the Code of Civil Procedure). They are also obliged to specify in the petition the remedy sought and the nature of the violation referred to in Article 89(1) *in principio* of the Supreme Court Act (based on the facts of the specific case).

Similarly, the author of a cassation appeal may not merely state that there has been a violation of substantive law through its incorrect interpretation or improper application (Article 398^3(1)(1) of the Code of Civil Procedure), but is obliged to specify the specific provision (or provisions) that has been misinterpreted or misapplied, similarly, the author of an extraordinary appeal is required to meet the obligation to concisely (but precise) explanation of the specific violations of law which he considers to be the infringements referred to in Article 89(1) of the Supreme Court Act, i.e., *verba legis*, "citing the grounds for cassation (extraordinary appeal") and their justification.[16]

The author of the extraordinary appeal is obliged to indicate *in concreto* how the contested judgment is inconsistent with the principle of a democratic state ruled by law that implements the principles of social justice, i.e. to indicate what the alleged violation consists of in this respect (Article 95(1) of the Supreme Court Act in conjunction with Article 398^4(1)(2) of the Code of Civil Procedure in conjunction with Article 89(1) *in principio* of the Supreme Court Act). Given the unusual legislative approach to the specific basis for an extraordinary appeal referring to the need to ensure compliance with the principle of a democratic state governed by the rule of law that implements the principles of social justice, this task is more difficult than articulating the grounds for an extraordinary appeal referring to points 1-3 of Article 89(1) of the Supreme Court Act. As pointed out in the case law of the Supreme Court, while in the case of the grounds for extraordinary appeals listed in points 1 to 3 of the cited provision, the formulation and specification of the allegation made in the appeal naturally facilitates a fairly precise formulation of the grounds for the appeal, which "profiles" or imposes a procedural scheme for the composition of the appeal (i.e. the need to refer in the petitum and justification of the appeal to a gross violation of a specific provision or provisions of law through their incorrect interpretation or improper application, or to indicate a specific significant factual finding

[16] See comments relating to the extraordinary appeal concerning criminal proceedings contained in the Supreme Court's decision of 3 April 2019, ref. no. I NSNk 1/19.

that contradicts a specific "excerpt" from the evidence gathered in the case), articulating an allegation referring to the basis of the extraordinary appeal indicated in the provision of Article 89(1) *in principio* of the Supreme Court Act is, in a sense, difficult. This is precisely because of the wording of this basis for the complaint, which, although it refers to a principle codified in one specific provision (Article 2 of the Polish Constitution), this provision is, firstly, very general in nature (establishing the principle of the state system in a manner susceptible to a variety of interpretations) and, secondly, the principle of a democratic state governed by the rule of law, which implements the principles of social justice, consists of a whole spectrum of other principles. These structural characteristics of Article 2 of the Polish Constitution alone make it difficult to compose an admissible extraordinary appeal. These difficulties are compounded by the need to link the principles derived from Article 2 of the Polish Constitution to the specific legal and factual circumstances underlying the contested ruling or rulings.

One of the issues raised is the very limited possibility of substantive examination of extraordinary appeals in criminal cases. It has been noted that the wording of the grounds for extraordinary appeals, as well as the provision of Article 90(2) of the Supreme Court Act, may lead to the effective elimination of the effectiveness of extraordinary appeals in criminal cases [Dziga 2019, 158]. It has also been argued that extraordinary appeals are not in fact a new concept, but rather an inconsistent compilation (a hybrid of civil and criminal law?) of existing solutions [Gruszecka 2018, 28].

In case law and literature, the issue of the conflict between extraordinary appeals and appeals for a declaration of the unlawfulness of a final judgment is also very clearly highlighted. In case law, this issue was originally resolved in a way that *effectively* makes it difficult for the interested party to use the institution of a complaint for a declaration of the unlawfulness of a final judgment, which is intended to lead to obtaining a preliminary ruling necessary to initiate proceedings for damages against the State Treasury. The Supreme Court ruled that: "As of 4 April 2018, a party filing a complaint for a declaration of unlawfulness of a final ruling, in fulfilling the obligation provided for in Article 424^5(1)(5) of the Code of Civil Procedure, must prove that it has submitted a request to the competent authority (Article 89(2) of the Supreme Court Act) to lodge an extraordinary appeal and that this request has not been granted. Failure to demonstrate this circumstance, according to case law, should lead to the rejection of the complaint on the basis of Article 424^8(1) of the Code of Civil Procedure."[17] According to T. Zembrzuski, the possibility of effectively appealing to the Supreme Court for a declaration of the

[17] Supreme Court decision of 30 August 2018, ref. no. III CNP 9/18, OSNC 2018, No. 12, item 121. See also Supreme Court decision of 18 July 2019, ref. no. V CNP 8/19, Lex no. 2714703; Supreme Court decision of 22 November 2019, ref. no. V CNP 26/19, Lex no. 2772816.

unlawfulness of a final judgment arises only when (a *sine qua non* condition) when the interested party obtains a response from at least one legitimate entity refusing to file an extraordinary appeal on their behalf [Zembrzuski 2019, 35]. It is worth noting that in the resolution of seven judges of 15 October 2020, the Supreme Court ruled that: "A party filing a complaint for a declaration of unlawfulness of a final judgment (Article 424^1 of the Code of Civil Procedure) is not obliged to prove that it was not and is not possible to challenge the contested judgment by way of an extraordinary appeal; thus, the appeal is not subject to dismissal on the basis of Article 424^8(1) of the Code of Civil Procedure in conjunction with Article 424^5(1)(5) of the Code of Civil Procedure or Article 424^8(2) of the Code of Civil Procedure" (ref. no. III PZP 4/20). The Supreme Court decided to give the resolution the force of law and determined that the interpretation of the law adopted in the resolution is effective from the date of its adoption.

In its previous case law, the Supreme Court has also held that the subsidiary nature of a complaint seeking a declaration of the unlawfulness of a final judgment in relation to an extraordinary appeal results from Article 89(4) and 115(2) of the Supreme Court Act.

"Article 424^1(1) of the Code of Civil Procedure stipulates that one of the conditions for the admissibility of a complaint alleging the unlawfulness of a final judgment is that the complainant has exhausted all legal remedies available under the legal system (legal remedies) available under the legal system to correct an unlawful final judgment by amending or overturning it. The case law of the Supreme Court (Civil Chamber)[18] indicates that this solution corresponds to the subsidiary nature of a complaint seeking a declaration of unlawfulness of a final judgment, as an extraordinary legal remedy which does not serve to set aside or amend a final judgment, but initiates the first phase of proceedings aimed at enforcing the State Treasury's liability for damages on account of issuing an unlawful final court ruling (Article 417^1(2) of the Civil Code in conjunction with Article 77 of the Polish Constitution). This liability may only be enforced if the injured party has done everything possible to eliminate the source of the damage. Only the ineffectiveness of available procedural tools or their absence may, in the event of damage, justify a claim for compensation and, thus, the admissibility of a complaint seeking a declaration of the unlawfulness of a final and binding court ruling."[19]

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[18] Supreme Court decisions of: 30 May 2018, ref. no. IV CNP 2/18; 21 January 2020, ref. no. I CNP 15/19; 17 January 2020, ref. no. II CNP 36/19; Supreme Court ruling of: 15 January 2020, ref. no. I CNP 19/19; 9 January 2020, ref. no. III CNP 9/19; 5 November 2019, ref. no. V CNP 28/19; 26 September 2019, ref. no. V CNP 13/19.

[19] See Sejm document No. 2696 of the 4th term of the Sejm, point 4; in case law, see Supreme Court rulings of 30 August 2018, ref. no. III CNP 9/18, OSNC 2018, No. 12, item 121, and of

It should be clearly emphasised that an extraordinary appeal is one of the instruments enabling the enforcement of judgments of the European Court of Human Rights. In the context of proceedings before that Court, it is worth noting that it is not necessary to request a legitimate entity to lodge an extraordinary appeal in order to be able to effectively lodge a complaint with the European Court of Human Rights. Currently, therefore, an extraordinary appeal is not considered one of the available domestic remedies that must be exhausted before lodging a complaint with the Court [Balcerzak 2018, 12; Kluza 2020, 118]. At the same time, the Supreme Court's ruling granting the extraordinary appeal may be subject to review in proceedings before the European Court of Human Rights. It is an act of judicial power subject to review under the Convention for the Protection of Human Rights and Fundamental Freedoms. It should therefore be considered whether it is possible to give extraordinary appeals such statutory characteristics that, if fulfilled, would result in this institution being recognised as the final remedy in the system of domestic remedies, the use of which should ultimately precede the admissibility of an appeal to the Court.

The regulation concerning cassation appeals contained in the Supreme Court Act is not exhaustive. Practice, however, illustrates a number of problems that arise at the stage of applying this institution. There is therefore a need for comprehensive regulation of the procedure in these cases, or alternatively, for a reference to the provisions of the Code of Civil Procedure in a numerical manner, by listing in detail the provisions applicable to extraordinary appeal proceedings.

In particular, consideration should be given to extending the currently limited list of entities entitled to lodge an extraordinary appeal by including in this privileged group the party to the proceedings itself, represented by a qualified legal representative under the so-called mandatory representation by a barrister or solicitor.

An extraordinary appeal cannot be lodged again against the same ruling in a case in which such a measure has already been considered in the interest of a given party to the proceedings (Article 90(1) of the Supreme Court Act). However, the party on whose behalf the extraordinary appeal was lodged has no procedural rights to claim damages from the State Treasury in the event of incorrect drafting of such an appeal (from the point of view of the structural formal requirements of the appeal) by the entitled entity.

It should also be noted that, in the Act on the Supreme Court, unlike judgments issued as a result of the examination of a cassation appeal or cassation (*a contrario* to Article 90(2) of the Act on the Supreme Court in conjunction with Article 398^3(3) of the Code of Civil Procedure), there are no

20 December 2018, ref. no. III CNP 19/18, unpublished.

provisions providing for the possibility of lodging an extraordinary appeal against judgments of the Supreme Court issued as a result of the substantive examination of a complaint for a declaration of the unlawfulness of a final judgment, given that the grounds for an extraordinary appeal are broader than those for an appeal for a declaration of the unlawfulness of a final ruling, as can be seen from a comparison of Article 424^4 sentence 2 of the Code of Civil Procedure with Article 89(1) of the Supreme Court Act, and in accordance with Article 424^1(a)(1) of the Code of Civil Procedure, a complaint for a declaration of unlawfulness of a final judgment is not admissible against judgments of the court of second instance against which a cassation complaint has been lodged and against judgments of the Supreme Court.

Furthermore, the provisions of the Code of Civil Procedure concerning cassation appeals and appeals for a declaration of unlawfulness of a final judgment have not been adapted to the Act in question with regard to the grounds for appeal (cf. Article 398^3(1)(2) and (3) of the Code of Civil Procedure and Article 424^4 of the Code of Civil Procedure and Article 89(1) points 1-3 and Article 90(2) of the Supreme Court Act).

In view of the constitutional standard of the right to a court and the right to defence, it also seems reasonable to extend the extraordinary appeal to misdemeanours. In the cases indicated, human rights may also be violated in the course of court proceedings. The gravity of these acts is obviously less, but this does not justify depriving the lower courts of any control over their jurisdictional activities in the ordinary course of proceedings.

The problems indicated certainly do not exhaust all the observed needs of practice related to the application of legal regulations concerning the institution of extraordinary appeals. This is primarily due to the "novelty" of the presented appeal measure. Hence the need for further in-depth observation of this remedy, the legitimacy of which is undoubtedly still being confirmed with each new ruling of the Supreme Court.

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