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SOME REMARKS ON THE EXTRAORDINARY COMPLAINT AGAINST THE VALID JUDICIAL DECISIONS IN CIVIL PROCEEDINGS PERTAINING TO CASES WITHIN THE SUBJECT-MATTER AND SCOPE OF LABOUR LAW

Abstract

This article concerns an extraordinary complaint which is a new remedy in Polish civil procedural law against legally valid judicial decisions terminating proceedings. The authors analyse pivotal issues related to the manner of shaping this measure against the background of other extraordinary remedies, with particular emphasis on the specificity of the application of this complaint in cases within the subject-matter and scope of labour law. An important issue of a general nature raised in the article is the impact of the new measure on the principle of finality of valid judgments established at the constitutional level and its impact on selected paramount principles of substantive and procedural labour law. These considerations lead the authors to a critical evaluation of the introduced regulation in terms of its legislative correctness, coherence with other extraordinary means of appeal, and in particular the principle of finality of valid judicial decisions.

Słowa kluczowe: skarga nadzwyczajna, nadzwyczajne środki zaskarżenia, trwałość prawomocnych orzeczeń

Key words: extraordinary complaint, extraordinary appellate measures, legal remedies, finality of valid judicial decisions

Introduction

Finality (stability) of valid (legally binding) courts decisions, especially those resolving disputes on its merits, plays a fundamental role in the civil procedural law, as part of the legal system in a democratic state ruled by law.[1] The possibility of vacating it should

[1] See, in particular: P. Grzegorczyk, *Stabilność orzeczeń sądowych w sprawach cywilnych w świetle standardów konstytucyjnych i międzynarodowych*, in: *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego, Serock k. Warszawy, 24–26.09.2009 r.*, T. Ereciński, K. Weitz (eds.), Warszawa 2010, p. 106 *et seq.*; A. Olaś, *Res iudicata pro veritate habetur? Rzecz o erozji stabilności prawomocnych orzeczeń: apologia powagi rzeczy*

therefore be rigorously limited. Validity of judgments – generally speaking – should be understood as an obstacle to the re-examining the case which was resolved in a valid judicial decision (*ne bis in idem* principle) and the obligation to respect the state of affairs established or shaped in the operative part of the legally valid court decision (*res iudicata pro veritate habetur* principle).[2]

The institution of extraordinary complaint which was introduced by the Act of 8 December, 2017 on the Supreme Court,[3] being in force as of 3 April, 2018 constitutes an extraordinary appellate measure (legal remedy), which in accordance with the motives of the bill,[4] shall serve as a new means of reviewing court decisions, the purpose of which is to exercise the so-called "corrective justice". In essence it consists in undertaking, in the course of extraordinary proceedings, the review of final court judgments on the grounds of its flagrant unfairness or that they lead to violation of freedoms and human and civil rights expressed in the Polish Constitution[5] if such review is necessary to uphold the principle of a democratic state ruled by law that implements the principles of social justice (art. 2 of the Constitution).

The introduction of a new measure enabling the challenging of final court decisions has already raised a number of controversies with regard to its merits and substance.[6] The authors and promoters of the draft are also criticised for expeditious (or indeed: hasty) pace of introducing this extraordinary measure, lack of proper public consultations (in particular with major stakeholders i.e. organizations representing judges and other legal professions) and, consequently, the deficiency of the entire legislative process that led to its establishment into the Polish legal system.[7]

Finally, a fundamental question arises whether an existing catalogue of measures enabling to overcome the finality of valid court judgments was not sufficient and whether in fact adoption of a new extraordinary legal remedy was genuinely needed in

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osądzonej a poszukiwanie trzeciej drogi, in: *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu*, M. Tomalak et al. (eds.), Warszawa 2017, p. 420.

[2] P. Grzegorczyk, *Stabilność…*, p. 108.

[3] The Act of 8 December, 2017 on the Supreme Court (the Journal of Laws of 2018, item 5, as amended), hereinafter referred to as the "ASC'.

[4] Bill, 2003, http://orka.sejm.gov.pl/Druki8ka.nsf/0/5AB89A44A6408C3CC12581D800339FED/%24File/2003.pdf (accessed: 20.06.2018).

[5] The Constitution of the Republic of Poland Act of 2 April, 1997 (The Journal of Laws of 1997, no 78, item 483, as amended), hereinafter referred to as the *Constitution*.

[6] See e.g. M. Balcerzak, *Skarga nadzwyczajna do Sądu Najwyższego w kontekście skargi do Europejskiego Trybunału Praw Człowieka*, Palestra 2018, 1–2, p. 11 *et seq.*; Opinion of the Center for Research, Studies and Legislation of the National Council of Legal Advisors of November 12, 2017, presented in the course of legislative process on the draft act on the Supreme Court (Druk Sejmowy 2003), p. 5 and the detailed opinion regarding the extraordinary complaint contained therein, p. 1 *et seq.*, http://orka.sejm.gov.pl/Druki8ka.nsf/0/E66C50917165F34EC12581DF005090EC/%24File/2003-001.pdf (accessed: 27.06.2018); Opinion of the National Council of the Judiciary of December 2017 presented in the course of legislative process on the draft law on the Supreme Court (Druk Sejmowy 2003), p. 4 *et seq.*, http://orka.sejm.gov.pl/Druki8ka.nsf/0/3A4D2E88432A209DC12581EE0051B0D4/%24File/2003-003.pdf (accessed: 27.06.2018).

[7] See e.g. M. Balcerzak, *Skarga nadzwyczajna…*, p. 11.

this context. Last but not least, establishment of a new extraordinary appellate measure begs to ask – probably a most salient question – namely, whether its introduction poses a significant threat of undermining the very notion of the validity of judicial decision in its entirety, in particular due to a long time-limit for lodging such a measure, a broad delineation of the objective scope of appeal, i.e. judicial decisions contestable by this remedy (on the one hand, the admissibility of submitting extraordinary complaint against final court judgments issued by the court of first instance not appealed in the course of the instance, and on the other, against valid judgments issued by the Supreme Court as a result of the appeal in cassation)[8] and evenly broad grounds on which this complaint can be based.[9]

The following analysis is aimed at addressing the above-mentioned pertinent issues, taking into account the mentioned principle of finality of valid judicial decisions, with particular emphasis on the specificity of disputes in the field and scope of labour law.

[8] Except that pursuant to the art. 90 § 2 ASC the extraordinary complaint cannot be based on the objections that were the subject of the appeal in cassation which was accepted for examination by the Supreme Court which will be discussed further on.

[9] These fundamental objections were raised both by a number of Polish and European entities in the course and after the conclusion of the legislative process. See e.g. Opinion of the Supreme Court of Poland to the draft law on the Supreme Court submitted by the President of the Republic of Poland as of 2 October, 2017, http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2017.10.06_Opinia_do_prezydenckiego_projektu_ustawy_o_SN.pdf (accessed: 4.07.2018); Opinion of the Legislative Commission at the Supreme Bar Council as of 17 October, 2017 to the draft law on the Supreme Court submitted by the President of the Republic of Poland and to the presidential draft la amending the act on the National Council of the Judiciary and some other acts of 26 September, 2017, http://www.adwokatura.pl/admin/wgrane_pliki/file-opinia-krs-i-sn-20995.pdf (accessed: 4.07.2018); European Commission for democracy through law ("Venice Commission") opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organization of ordinary courts adopted by the Venice Commission at its 113th Plenary Session (8–9 December, 2017), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e (accessed: 4.07.2018); Commission Recommendations (EU) 2018/103 of 20 December, 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H0103&from=PL#ntr46-L_2018017EN.01005001-E0046 (accessed: 5.07.2018). Note however, that most of the harshest criticism relates to the original regulation of this remedy as enacted on the 8 December, 2017, which provided for, *inter alia,* broader than those currently in force grounds of appeal as well as catalogue of entities entitled to lodge this measure. The currently binding shape of regulation results from subsequent amendments adopted mainly in the Act of 10 May, 2018 amending the Act on the Organization of Ordinary Courts, Act on the Supreme Court and some other Acts (The Journal of Laws of 2018, item 1045) which were supposed to answer some of the concerns raised in the comments made to the initial bill. One must underline that this paper refers only to that final shape of the extraordinary complaint which has become binding as of 16 June, 2018.

The essence of the principle of finality of the valid court decisions and its limits

For setting the scene for further deliberations, it is purposeful to briefly explain the concept of finality of valid judicial decisions. The Polish jurisprudence of the law of civil procedure draws distinction between the substantive and formal validity of judgments.[10] The former concerns the binding legal effects of a decision as provided for in its contents (operative part of the judgment), while the latter refers to the non-appealability of a valid judicial decision in the course of the instance, i.e. by means of ordinary appellate measures.[11]

Two avoid any misconceptions one should clarify however that these two distinctive concepts should be perceived as two complementary and strongly intertwined dimension of the notion of the validity of the judgments as such (so as to say: "two sides of the same coin") rather than two truly autonomous or, indeed, separate concepts. Precisely, the substantive validity of judicial decision is a direct result of its formal validity. Judicial decision becomes substantively valid if it cannot be appealed or otherwise contested with the use of ordinary appellate measures (art. 363 § 1 of the Polish Code of Civil Procedure[12]).

Broadly speaking, pursuant to the Polis civil procedural law, substantive validity of judgments embodies two distinctive types of effects: a positive one referring to the binding force of the operative part of the formally valid judicial decision (art. 365 of the CCP) and a negative one (the force of *res judicata*): consisting in inadmissibility of re-examining the case which was finally resolved or contesting decisions that have become final with a view of its repealing or reversing (art. 366 in connection with the art. 199 § 1 point 2 of the CCP).

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[10] W. Siedlecki, in: W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Warszawa 2004, p. 283. In addition, there are two distinctive theories of the validity of judgments: the substantive theory of validity of judgments and the procedural theory; see Z. Resich, in: *System prawa procesowego cywilnego*. Vol. II. *Postępowanie rozpoznawcze przed sądami pierwszej instancji*, W. Berutowicz (ed.), Warszawa 1987, p. 383. The substantive theory submits that the judgment affects directly the legal relationship that is the subject of the proceedings. The validity of the judgment, solidifies the legal state of affairs that existed outside the procedure and was impacted by the issuance of this judgment (i.e. in the substantive legal relationships), creating a new legal basis for it (*res iudicata ius facit inter partes*). Thus, under this theory, a valid judgment is an independent phenomenon (legal fact) regulating the parties' legal relationships anew. The procedural theory of the validity of judgments encompasses two divergent variants: positive and the negative. According to the former, the judgment does not affect the substantive legal relationship, and the validity of the judgment has its direct effects only within the realms of procedural law. Negative theory, rejecting the two previous ones, claims that validity of judgment constitutes a negative condition, occurrence of which precludes re-conducting of the proceedings and re-examining the case validly adjudicated (*ne bis in idem*) see: Z. Resich, *Res iudicata*, Warszawa 1978, p. 7 *et seq.* and the literature cited therein.

[11] W. Siedlecki, p. 283.

[12] The Act of November 17, 1964 Code of Civil Procedure, (the consolidated text: the Journal of Laws of 2018, item 155, as amended), hereinafter referred to as *CCP*.

As rightly pointed out in the academia, validity of judicial decisions implies the necessity of resigning at a certain stage of the process from striving for a correct decision. Such waiver is a high but at the same time indispensable cost of obtaining legal certainty and final resolution of a case within a reasonable time.[13] It is unthinkable to devise a legal system in which proceedings could last forever as a result of the lack of definitive character of judgments putting an end to this proceedings at a certain stage, resulting in the possibility of unrestricted (or at least unlimited in time) challenging and, from time to time, overturning valid decisions issued in its course which are supposed to finally conclude proceedings and close a case.[14]

One should also clarify that further remarks offered in this paper will only concern the substantive validity of judgments, which is warranted by the fact that availability of an extraordinary complaint which is extraordinary means of appeal, by its very nature, does not overcome formal validity of a judgment within a meaning ascribed to this term pursuant to the Art. 363 CCP.

According to the jurisprudence of the Polish Constitutional Tribunal the finality of valid judgments amounts to an integral element of the principle of the right to a court and fair trial[15] (Art. 45 sect. 1 and Art. 77 sect. 2 of the Constitution of the Republic of Poland), the principles of legalism[16] (Art. 7 of the Constitution) and even constitutional

[13] P. Grzegorczyk, *Stabilność…*, p. 110.

[14] A. Olaś, *Res iudicata…*, p. 398.

[15] The judgment pronounced without undue delay, deciding the case on its merits as the third element of the triad constituting the right to a court and fair trial must have a binding and final character; see e.g. judgment of the Constitutional Tribunal of June 9, 1998, case no. K 28/97, OTK 1998, no. 4, item 50; judgment of the Constitutional Tribunal of November 8, 2001, case no. P 6/01, OTK 2001, no. 8, item 248; judgment of the Constitutional Tribunal of June 9, 2003, case no. SK 5/03, OTK-A 2003, no. 6, item 50; judgment of the Constitutional Tribunal of December 4, 2006, case no. P 35/05, OTK-A 2006, no. 11, item 167. The constitutional right to court implies the requirement of finality of valid judicial decisions, which determines the legal certainty and the safety of commerce and the dealings in civil matters; see e.g. judgment of the Constitutional Tribunal of February 19, 2003, case no. P 11/02, OTK-A 2003, no. 2, item. 12; judgment of the Constitutional Tribunal of March 12, 2003, case no. S 1/03, OTK-A 2003, no. 3, item. 24. The principle of finality of valid judgments as an immanent element of the right to court was explicitly indicated in the following Constitutional Tribunal's decisions: judgment of the Constitutional Tribunal of Mai 22, 2007, case no. Ts 245/06, OTK-B 2007, no. 6, item 280; judgment of the Constitutional Tribunal of November 14, 2007, case no. SK 16/05, OTK-A 2007, no. 10, item. 124; judgment of the Constitutional Tribunal of August 7, 2009, case no. S 5/09, OTK-A 2009, no. 7, item 121; judgment of the Constitutional Tribunal of January 12, 2010, case no. SK 2/09, OTK-A 2010, no. 1, item. 1. See also judgment of the Constitutional Tribunal of April 1, 2008, case no. SK 77/06, OTK-A 2008, no. 3, item 39. In the last of the judicial decisions referred to above, it was explicitly stated that the right to obtain a binding and final decision, that is, which will definitively adjudicate on a given case, will be enforceable and may not be changed, except for exceptional situations, is one of the elements of the right to court in the sense of the art. 45 sect. 1 of the Constitution.

[16] Judgment of the Constitutional Tribunal of October 24, 2007, case no. SK 7/06, OTK-A 2007, no. 9, item 108; judgment of the Constitutional Tribunal of March 5, 2008, case no. SK 95/06, OTK-A 2008, no. 2, item 35. In these decisions, the requirement of finality of valid decisions was also linked to the principle of a democratic state ruled by law and the principle of the right to court. Origins of the principle of finality of valid decisions in the constitutional principle of legalism, meaning *verba legis*, the obligation

"overarching principle", according to which the Republic of Poland is a democratic state governed by the rule of law, implementing the principles of social justice[17] (Art. 2 of the Constitution).

Also in the case-law of the European Court of Human Rights the finality of valid judgments is considered to be an integral part of the right to court and a fair trial as provided for under Art. 6 ECHR. In absence of finality of valid judicial decisions, the above-mentioned right would become ineffective and illusory amounting to just another empty phrase.[18] According to ECHR The principle of finality draws upon the broader and more general principle of legal certainty. The power of review by higher courts should be exercised, in principle, by way of ordinary means of appeal and cassation proceedings, with a limited number of instances and foreseeable time-limits.[19]

The Court of Justice of the European Union also upholds in its jurisprudence the importance of giving effect to and respecting the finality of valid judicial decision within the framework of the EU legal order and in the national legal systems of the Member States. It stresses that in due to ensure legal certainty (stability of the law and legal relations) as well as for the sound administration of justice it is essential that judicial decisions, which became valid after exhausting the remedies available or after the expiry of definite time-limits set out for these measures, were incontestable.[20]

The above findings, however, do not mean an absolute inability to overturn a valid court decision in case of a gross and glaring flaws of the judicial process (in particular

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of organs of public authority to act on the basis and within the limits of the law, was aptly criticized by P. Grzegorczyk; see P. Grzegorczyk, *Stabilność*…., p. 136–137.

[17] Usually as an element constituting the order of the democratic state ruled by law, the principle of certainty, legal security and citizens' trust in the state and law; see e.g. judgment of the Constitutional Tribunal of Mai 20, 2003, case no. SK 10/02, OTK-A 2003, no. 5, item 41; judgment of the Constitutional Tribunal of Mai 17, 2004, case no. SK 32/03, OTK-A 2004, no. 5, item 44. In the judgment of the Constitutional Tribunal of May 8, 2000, case no. SK 22/99, OTK 2000, no. 4, item 107, it has been pointed out explicitly that the principle of finality of valid decisions is an important aspect of the democratic state ruled by law principle; similarly in the judgment of the Constitutional Tribunal of November 28, 2006, case no. SK 19/05, OTK-A 2006, no. 10, item 154, and the judgment of the Constitutional Tribunal of September 22, 2015, case no. SK 21/14, OTK-A 2015, no. 8, item 122.

[18] See e.g. ECHR decision of October 28, 1999, case no. 28342/95, Brumarescu v. Romania, HUDOC, § 61; ECHR decision of April 24, 2003, case no. 52854/99, Riabykh v. Russia, HUDOC, § 56; ECHR decision of October 26, 2004, case no. 13990/04, Międzyzakładowa Spółdzielnia Mieszkaniowa „Warszawscy Budowlani" v. Poland, HUDOC, § 42; ECHR decision of June 25, 2009, case no. 42600/05, OOO LINK OIL SPB v. RUSSIA, HUDOC, § 31.

[19] See e.g. D. Vitkauskas, G. Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, Strasbourg 2012, p. 32 and the ECHR cas-law cited therein.

[20] See, in particular, ECJU decision of September 30, 2003, case no. C-224/01, Köbler, § 38. As a result of respect for the *res iudicata* principle, EU law does not require a national court to refrain from applying domestic rules of procedure providing for the finality of given judgments even if such a derogation would allow to remove from a national legal order a situation that is incompatible with EU law and thus ensure full effectiveness of European law; see e.g. ECJU decision of June 1, 1999, case no. C-224/01, Eco Swiss China Time Ltd, § 46, 47; ECJU decision of October 6, 2009, case no. C-40/08, Asturcom Telecomunicaciones SL, § 35–37; ECJU decision of July 10, 2014, case no. C-213/13, Impresa Pizzarotti & C. SpA, § 59.

those amounting to denial of justice) and the judgment as its result. As rightly held in ECHR case-law however, any extraordinary review of final judicial decisions shall be strictly limited both in terms of its grounds (i.e. to most compelling circumstances, e.g. flagrant errors of the proceedings or glaring unfairness of judgments) and time-limits. Consequently it should not become yet another "an appeal in disguise".[21]

Also in the Polish jurisprudence and academia it is indisputable that the principle of the finality of valid judicial decisions is not absolute. Thus, in some exceptional circumstances the aforesaid principle shall give way to re-examination of a case and its resolution contained in the valid judgment aimed at removing the effects of qualified violations of the law and thus restitution of the lawful state of affairs. This re-examination may be instituted by way of specifically designed for these purpose extraordinary appellate measures.

In this regard it is also worth noting that in the Polish jurisprudence and academia the need to overturn finality of valid judicial decisions in exceptional circumstances is justified by the very same constitutional principles (right to court and fair trial,[22] the principle of democratic state ruled by law[23]) that underlie the analysed principle.[24] Since by virtue of the aforesaid constitutional principles, Poland is a democratic state based on the rule of law and realizing the principles of social justice, in which everyone has the right to a fair and public trial without unreasonable delay by a competent, impartial and independent court, it can be reasonably argued that it is incompatible with these principles to deprive the party whose right to hear and resolve the case in accordance with the above standards has been violated in a particularly gross and blatant manner in the proceedings concluded by the legally valid judgment, of the right to seek appropriate legal protection through contesting valid judgment issued in such circumstances.

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[21] See: D. Vitkauskas, G. Dikov, *Protecting…*, p. 32.

[22] That was clearly stated by the Constitutional Tribunal in the context of the right to request reopening of proceedings as set out in the art. 190 sec. 4 of the Constitution stemming from the judgment of the Constitutional Tribunal setting aside provisions being the legal basis of a final judgment due to their non-compliance with constitutional or other norms of higher rank; see e.g. judgment of the Constitutional Tribunal of March 2, 2004, case no. S 1/04, OTK-A 2004, no. 3, item 24; judgment of the Constitutional Tribunal of June 9, 2003, case no. SK 5/03, OTK-A 2003, no. 6, item 50; judgment of the Constitutional Tribunal of October 27, 2004, case no. SK 1/04, OTK-A 2004, no. 9, item. 96; judgment of the Constitutional Tribunal of November 28, 2006, case no. SK 19/05, OTK-A 2006, no. 10, item 154; judgment of the Constitutional Tribunal of October 20, 2009, case no. SK 6/09, OTK-A 2009, no. 9, item 137.

[23] See e.g.; judgment of the Constitutional Tribunal of February 22, 2000, case no. SK 13/98, OTK 2000, no. 1, item 5; judgment of the Constitutional Tribunal of Mai 15, 2000, case no. SK 29/99, OTK 2000, no. 4, item 110. In these judgments, it was pointed out that regulation of the catalogue, legal nature and admissibility of extraordinary appellate measures should be regarded in the context of the rule of law, which undoubtedly assumes that in a certain temporal and objective scope it should be possible to revoke valid judgments due to their qualified (gross) defects.

[24] See an in depth discussion of the complex relationship between constitutional principles and the finality of valid judgments and its limits in the context of the petition for reopening of proceedings in A. Olaś, *Res iudicata…*, p. 404 *et seq.*

A the same time in the literature it tends to be rightly emphasized that due to the constitutional basis of the principle of finality of valid judicial decisions, and above all its inseparable, praxeological connection with the rational shaping of the procedural law system, all measures allowing to pre-empt this principle should take into account its exceptional nature and character, both on the level of establishing, as well as the interpretation and application of the law governing these measures in individual cases.[25] Moreover in light of the principle of the finality of valid judicial decisions it is imperative that no extraordinary legal remedy should permit to challenge judgments for the indefinite period of time.[26] Unrestricted ability to initiate review of final judicial remedies, regardless of the passage of time and changes that it brings, violates the principle in question at its very core.

Therefore it is already worth noting at this point, that while the art. 89 § 3 ASC sets the deadline for lodging an extraordinary complaint (5 years from the day when the decision under appeal becomes final, and if appeal in cassation has been filed against the decision – within one year from the date of the termination of the cassation proceedings[27]), pursuant to art. 89 § 4 ASC, the extraordinary complaint can be accepted for review even after the lapse of 5 years from the validation of the challenged decision, if the principles or freedoms and human and civil rights set out in the Constitution favour granting such review (examining complaint and issuing decision with regard to its merits). As a consequence it therefore means, unlimited in time possibility of questioning valid judgments, *albeit* – at least verbally – restricted to completely exceptional circumstances warranted by the need to protect constitutional principles as well as fundamental rights and freedoms.

Having introduced this general background of a new regulation one should examine how extraordinary complaint fits into the pre-existing system of extraordinary appellate measures allowing to challenge valid court decisions under the Polish civil procedural law. This analysis shall allow to formulate and express a properly reasoned opinion

[25] See e.g. A. Olaś, *Res iudicata*…, p. 404 *et seq.*

[26] *Ibidem.* See however the art. 408 CCP which stipulates that the petition for re-opening of the proceedings is inadmissible after ten years have passed from the date on which a ruling became final and binding, except in cases where a party had no capability to act or was not duly represented. Thus, in the situations covered by the latter part of this provision there is no strict time limit for lodging petition for re-opening of the proceedings, except general requirement that this extraordinary measure shall be filed within three months starting on the day on which the party learns about the grounds for the reopening or, if those grounds are the fact of a party being deprived of the ability to act or lack of proper representation, on the day on which the party, his authority or his legal representative became aware of the judgment (art. 407 § 1 CCP).

[27] Pursuant to the art. 398^5 § 1 CCP an appeal in cassation should be filed within two months from the date of serving the contested ruling, accompanied by its statement of reasons, on the appellant. Paragraph 2 of this provision stipulates that the time limit for the General Prosecutor, Ombudsman for Civil Rights or Ombudsman for Children's Rights to file an appeal in cassation shall be six months from the day of a ruling becoming non-appealable, or, if a party has requested to be served with a ruling accompanied by a statement of reasons, from the day of the delivery thereof to the party.

about the need of this new extraordinary legal remedy in the polish civil procedure, in particular in the cases within the subject-matter and scope of labour law.

Extraordinary complaint within the system of extraordinary appellate measures

The Polish civil procedural law has so far provided for three extraordinary means of appeal, namely: appeal in cassation (Articles 398^1–398^{21} CCP), a petition for re-opening of proceedings (Articles 399–416^1 CCP) and a plea for declaring a final judgment unlawful (Articles 424^1–424^{12} CCP). Importantly, the relationship between these remedies was principally[28] shaped on the basis of their exclusivity (mutual and respective non-competitiveness) and complementarity. This means in essence that each of these extraordinary appellate measures shall have its distinctive aim and a function within the civil procedure and consequently the application of these remedies should not lead to its overlap (as a result of its admissibility based on the same subjective and objective scope of application, grounds of appeal, effects and time-limits).

According to the justification (motives) of the act introducing the extraordinary complaint, while the finality of valid judicial decisions is undoubtedly rooted in the Constitution, its confrontation with occurrence of grossly unfair judgments based on misinterpreted provisions and factual circumstances of a case established in blatant contradiction with the content of the evidence gathered in the proceedings, leads to the conclusion that one cannot uphold this principle in all events and at any cost. In the legislator's opinion, this justifies the introduction of the analysed measure, which – according to the authors of the bill – fills the gap in the current system of extraordinary remedies, as the extraordinary complaint may be based not only on the plea of gross violation of the law (be it substantive or procedural rules), but also on the flagrant contradiction of the court's findings with the evidence collected in the files of the case at hand.

The referred-above somewhat brief (or indeed – laconic) justification raises the need to confront the substantive grounds of the application of the institution in question against the background of existing extraordinary appellate measures.

Pursuant to the art. 89 § 1 of the ASC an extraordinary complaint may be lodged against a valid decision of the common or military court terminating the proceedings, if it is necessary to ensure rule of law and social justice and:

1) the decision violates the principles or freedoms and human and civil rights specified in the Constitution;
2) the decision is in gross violation of the law by its erroneous interpretation or improper application;

[28] With a rather minor overlap between appeal in cassation and petition for the re-opening of proceedings which is possible on grounds of the invalidity of proceedings referred to in the art. 401 CCP.

3) there is an obvious contradiction between the significant findings of the court and the content of the evidence collected in the case;
   – and the valid decision in question cannot be repealed or changed by other extraordinary appellate measures.

First of all, it should be noted that, due to the final part of the provision quoted above, the extraordinary complaint, even in the most general sense of the term, only partly complies with the exclusivity requirement (non-competitiveness of means of appeal) in the sense that the possibility of obtaining reversal of a given judgment under other extraordinary appellate procedures, excludes the admissibility of this measure. Partially, because of the model of a plea for declaring a final judgment unlawful, which – unlike the other extraordinary remedies, including an extraordinary complaint – in principle, does not allow to repeal or overturn the contested valid judgment.[29] Therefore the admissibility of the former of the above-mentioned remedies does not preclude the possibility of lodging an extraordinary complaint. The manner of shaping the mutual relations between these measures raises doubts also in the context of their respective grounds for challenge, as discussed in more detail later.

Confronting the requirements as provided for in the art. 89 § 1 ASC, for the admissibility of the extraordinary complaint, including the grounds of this complaint with those concerning the appeal in cassation which constitutes the basic extraordinary remedy in the contemporary Polish civil procedural law,[30] it should be noted that they partially overlap. Pursuant to the art. 398^3 § 1 CCP an appeal in cassation can be based solely on the alleged violation of substantive law through its erroneous interpretation or misapplication (point 1) or infringement of procedural provisions, if the failure could have a significant impact on the outcome of the case (point 2). Concurrently, by virtue of the art. 398^3 § 3 CCP allegations against the establishment of facts or evaluation of evidence may not serve as a basis for an appeal in cassation. Finally, according to the art. 398^{13} § 2 CCP it is inadmissible to bring new facts or evidence in cassation proceedings,

[29] Pursuant to art. 424^{11} § 3 CCP If a case did not fall under the jurisdiction of Polish courts or did not qualify for legal action in civil proceedings, the Supreme Court shall establish the unlawfulness of a judgment and set aside that judgment as well as the judgment of the court of the first instance, and reject a complaint or terminate proceedings. Except for cases covered by this provision however, the acceptance of this plea by the Supreme Court results only in a binding declaration that the judgment is unlawful, which opens the party the opportunity to claim compensation from the State Treasury pursuant to art. 417 *et seq.* of the Civil Code, while the contested valid judgment remains in force; see in this regard e.g. R. Dul, *Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia a skarga kasacyjna w procesie cywilnym*, Warszawa 2015, p. 33 *et seq.* In the opinion of W. Sanetra, due to the inability to repeal or amend the contested decision by means of this measure, the plea for declaring the unlawfulness of a valid judgment from the point of view of the function is in principle not a means of appealing, but rather a specific kind of action (lawsuit) which allows obtaining a preliminary ruling in relation to the case before the court of general jurisdiction for compensation from the State Treasury for a defective judicial decision. See: W. Sanetra, *Uwagi o skardze o stwierdzenie niezgodności z prawem prawomocnego orzeczenia – ze szczególnym uwzględnieniem spraw z zakresu prawa pracy*, Przegląd Sądowy 2005, 9, p. 7.

[30] With regard to the current appeal in cassation model, see e.g. J. Gudowski, *Pogląd na kasację*, Przegląd Sądowy 2013, 2, p. 7 *et seq.*

and the Supreme Court examining appeal in cassation shall be bound by the findings of facts which form the factual basis for the contested ruling.

In the context of the extraordinary complaint, the most important difference in relation to the appeal in cassation is therefore the possibility of questioning the inconsistency of the court's findings with the content of the evidence collected in the case. Thus, while the basic assumption of the whole model of appeal in cassation in the Polish legal system is to limit the review exercised under this measure solely to legal issues (*questiones iuris*), with complete exclusion of verification of factual findings and assessment of evidence (*questiones facti*),[31] the catalogue of grounds for the extraordinary complaint clearly provides for the possibility of basing this remedy on the plea of contradiction of the findings of fact on which the challenged decision was based with the collected evidence (and, consequently, the possibility of subjecting the factual grounds of judgment to review – *albeit* limited to blatant and obvious flaws and deficiencies in the factual findings adopted in contested decision).

In view of the above, in terms of the grounds for the challenge and the scope of control initiated by lodging a given remedy, above-discussed extraordinary measures are at least to a certain degree complementary. In this context, however, two basic questions arise. First, whether from the point of view of the need to protect the finality of valid judgments, it is in fact justified to introduce this additional ground for extraordinary appeal (i.e. possibility of review of factual findings), which will, by its nature, weaken the finality of judicial decisions, through broadening the possibility of challenging valid judgments. Secondly, in the case of a positive answer to the first question, one should ask whether the adopted solution is indeed the most appropriate one as, due to the considerably longer deadline for filing an extraordinary complaint in comparison to the appeal in cassation (or even the plea for declaring a final judgment unlawful), it also leads to a substantial delaying of the final and definite resolution of the dispute. Thus, alternative proposal would be to consider modification of the existing appeal in cassation model by extending the grounds for lodging this extraordinary measure to allow, in exceptional cases, review of the factual findings and assessment of the evidence on which the contested judgment was based, i.e. if the applicant is able to demonstrate – to the satisfaction of the Supreme Court – its allegations of glaring contradiction of the findings with the collected evidence.

[31] The court of cassation in the Polish legal system is a court of law, not facts, and is bound by factual findings made by the lower courts. As the Supreme Court has rightly pointed out in its decision of January 9, 2008, case no. III UK 88/07, Legalis 491819, each allegation raised in the appeal in cassation, which is aimed at challenging the findings of the court of second instance under the guise of the objection of misinterpretation or misapplication of certain provisions of substantive law, due to its inconsistency with the art. 398^3 § 3 CCP is inadmissible, and if the appeal in cassation is based only on such grounds, it is subject to rejection without examination of its merits. Opposing, erroneous, position on the alleged convergence of both means was expressed in this regard in the cited above Opinion of the Center for Research, Studies and Legislation of the National Council of Legal Advisors of November 12, 2017, p. 8.

In the context of the grounds for the admissibility of both legal recourse based on legal issues (*questiones iuris*), one cannot lose sight of the fact that, as far the appeal in cassation is concerned, any violation of substantive law as well as such breaches of procedural provisions which could have relevant impact on the outcome of the case may constitute its basis, while the extraordinary complaint can be lodged only if the decision infringes the principles or freedoms and human and civil rights set out in the Constitution (the art. 89 § 1 point 1 ASC) or grossly violates the law by erroneous interpretation or misapplication (the art. 89 § 1 point 2 ASC).

These findings warrant raising several additional issues. First of all the Art. 90 § 2 ASC which stipulates that the extraordinary complaint cannot be based on the allegations that were the subject of the appeal in cassation accepted for examination may be deemed questionable. *A contrario* it allow to lodge the extraordinary complaint on the same grounds that the previous appeal in cassation the hearing of which on its merits was refused by the Supreme Court during the preliminary examination of this remedy performed *in camera* pursuant to the Art. 398^9 CCP.[32] Therefore, this provision does not fully take into account the potential adverse effects of partial overlap (competitiveness) of both measures. While it protects the principle of finality of valid decisions (as well as the authority of the Supreme Court and the entire judiciary) against its most outrageous violation consisting in the possibility of challenging the valid judgment on the same grounds that were already considered and dismissed by the Supreme Court and consequently to review the lawfulness of the application of procedural and substantive law by the Supreme Court in its judgment contested through this complaint, at the same time it allow to lodge the extraordinary complaint on grounds that were previously considered by the Supreme Court as insufficient to warrant examination of the appeal in cassation on its merits. This, in turn, must lead to a confusion having in mind that the extraordinary complaint, envisaged as a "remedy of a last resort", should serve only as a recourse against most glaringly and flagrantly erroneous decisions, while the appeal in cassation is rightly perceived as most basic extraordinary appellate measure in the Polish legal system which should allow to repeal valid judgments based on the evident misapplication of substantive law or preceded by serious and obvious violations of procedure affecting the judgment. From the point of view of the delimitation of the above-mentioned extraordinary remedies in time, it is important however that in cases subject to appeal in cassation, as long as lodging of appeal in cassation is admissible, by virtue of the art. 89 § 1 ASC, it should be assumed that the extraordinary complaint (based on a different ground than point 3 of this provision which pertains to the challenge of factual findings) will not be allowed.

Secondly, the relationship between the scope of application of the art. 89 sect 1 points 1 and 2 ASC from the point of view of attempting to delimit both grounds is somewhat

[32] By the virtue of this provision, the Supreme Court shall accept an appeal in cassation for hearing only if: (1) a major legal issue is involved, (2) it is necessary to interpret legal provisions which cause major doubts or discrepancies in case law, (3) the proceedings were null and void, or (4) an appeal in cassation is evidently justified.

problematic. After all, the violation of the principles or freedoms and rights specified in the Constitution as provided for in the point 1 of the above article, appears to be clearly covered by the notion of a gross violation of law introduced under its point 2. The only reasonable way of interpreting these provisions is to say that the basis of the extraordinary complaint may be any violation of the principles or freedoms and human and civil rights set out in the Constitution, even if it would not be flagrant, while the violation of other rules (i.e. set out in statutes and other lower sources of law) must fulfil this additional requirement (i.e. must be sufficiently gross and flagrant). In addition, the indication in both provisions that the ruling shall violate the principles or freedoms and human and civil rights set out in the Constitution, or grossly violate the law by mistakenly interpreting it or improperly applying it, will inevitably lead to interpretation doubts whether the scope of application of this provision covers procedural errors pertaining to the course of the proceedings without an obvious and direct impact on the content of the issued judgment.

Finally, the wording of the art. 89 § 1 ASC requires the necessity of an extraordinary complaint to ensure the rule of law and social justice as a general prerequisite for the admissibility of this measure (regardless of which ground it was based on). Apart from obvious interpretation doubts related to the vagueness of the above-mentioned terms constituting general clauses, this wording undoubtedly confirms the conclusion that not every violation of substantive or procedural law that could justify the filing of a appeal in cassation will constitute a sufficient basis for lodging extraordinary complaint.

The above underscores the status of the extraordinary complaint as a so-called *ultima ratio* i.e. "remedy of the last resort" in the Polish system of the extraordinary appellate measures.[33] This element, in turn, brings an extraordinary complaint closer to a plea for declaring a valid judgment unlawful, which was already referred to above.[34] According to the predominant case-law of the Supreme Court, the unlawfulness of a valid judgment within the meaning of CCP should refer only to judgments which (1) are undoubtedly inconsistent with the basic provisions not subject to divergent interpretations or generally accepted standards of adjudication; (2) have been issued as a result of a particularly blatantly misinterpreted or improperly applied law; (3) violate the law clearly, without the need for a deeper legal analysis.[35] As already pointed out, the extraordinary complaint

[33] It is worth noting however that in cases in which appeal in cassation is inadmissible by virtue of exclusions (based on the value of the claim in dispute or its subject-matter) as provided for in the Art. 398^2 § 1 and 2 CCP and which go beyond grounds of the petition to reopen proceedings (which will be discussed briefly below) the extraordinary complaint becomes a measure of first – and at the same time – of last resort against the valid judgment sought to be repealed or overturned on the grounds of violation of substantive or procedural law.

[34] In this regard it is worth mentioning that before adoption of the extraordinary compliant it used to be the plea for declaring valid judgment unlawful that was considered a subsidiary extraordinary measure or the "remedy of the last resort"; see e.g. R. Dul, *Skarga o stwierdzenie*..., p. 25.

[35] See e.g. judgment of the Supreme Court of March 9, 2006, case no. II BP 6/05, OSNAPiUS 2007, no. 3–4, item. 42; judgment of the Supreme Court of March 31, 2006, case no. IV CNP 25/05, OSNC 2007, no. 1, item 17; judgment of the Supreme Court of July 7, 2006, case no. I CNP 33/06, OSNC 2007, no. 2, item 35; judgment of the Supreme Court of January 4, 2007, case no. V CNP 132/06, OSNC 2007, no. 11,

contains a similar condition for its application, namely a flagrant violation of the law by erroneous interpretation or misapplication (the art. 89 § 1 point 3 ASC). Verbally, it is narrower than the grounds for a plea for declaring a final judgment unlawful, but the commented-above restrictive interpretation of the concept of unlawfulness of the valid judicial decisions adopted by the Supreme Court considerably approximates (if not equals) the scope of application of both institutions.

Having that stated, one should note however that there are also more differences than similarities between the above-mentioned measures. First of all, since a plea for declaring a final judgment unlawful is funded on the model of appeal in cassation, just as in the case of the latter, the former measure cannot be based on objections regarding factual findings and the examination of evidence by the Supreme Court in these proceedings is completely excluded (the Art. 424^4 sentence II of the CCP). Concurrently, due to the specificity of the plea for declaring a final judgment unlawful, which, as already indicated, does not allow to repeal or overturn the contested ruling but only to establish grounds for subsequent claim for damages, additional requirement for filing this measure is to demonstrate damage incurred by the applicant as a result of the contested final decision (the Art. 424^4 sentence I of the CCP). A the same time, in the case of an extraordinary complaint, there is no such condition even if, due to the irreversible legal consequences of the contested valid decision, the passage of 5 year time-limit for its lodging or if the repeal of the decision would violate international obligations of the Republic of Poland, pursuant to the art. 89 § 4 ASC, the role of the Supreme Court is limited to declaring the contested decision in violation of the law (just as in the case of a plea to declare the final decision unlawful) without overturning it.[36] In this vain one should stress that, apart from the moral and symbolic dimension (certainly insufficient as justification for the introduction of a new extraordinary remedy), the only purpose of such a ruling in this case could be paving the way to claim damages against the State Treasury. It seems that the above inconsistency can be removed only by accepting that in these cases the damage suffered by a party as a result of issuance of the contested valid decision is an element determining the legal interest (*gravamen*) in filing extraordinary complaint and, therefore, its absence (safe for the specific public interest in conducting a review of the

item 174; judgment of the Supreme Court of Mai 17, 2006, case no. I CNP 14/06, Legalis; judgment of the Supreme Court of February 21, 2007, case no. I CNP 71/06, Legalis; judgment of the Supreme Court of February 26, 2008, case no. II BP 13/07, Legalis; judgment of the Supreme Court of December 13, 2005, case no. II BP 3/05, OSNAPiUS 2006, no. 21–22, item 323; judgment of the Supreme Court of April 26, 2006, case no. V CNP 79/05, Legalis; judgment of the Supreme Court of December 6, 2007, case no. IV CNP 168/07, Legalis; judgment of the Supreme Court of June 16, 2015, case no. IV CNP 72/14, Legalis.

[36] In the case of an extraordinary complaint, according to the content of the provision referred to above, the declaration of the decision in violation of the law should be made with indication of the circumstances due to which the Supreme Court issued such a decision. The wording of this provision is very unfortunate, since its literal interpretation would mean transferring the motives of the decision to the operative part of the judgment, which seems to be a complete aberration.

legality of a given judgment which may justify such review *in lieu* of a legal interest of one of the parties to the dispute) leads to the rejection of the complaint as inadmissible.[37]

A significant element that distinguishes discussed above remedies from extraordinary complaint is also the requirement of the exhaustion of instances (or other legal means available to the party) as a prerequisite of their admissibility. The appeal in cassation can only be lodged from a valid judgment resolving the dispute on its merits issued by the court of second instance or a decision regarding the rejection of the lawsuit or discontinuation of the proceedings issued by the same court, which implies the need of previous exhasution of appropriate ordinary appeals against the decision of the court of first instance (by the applicant filing appeal in cassation, his or her opponent or other entitled entity). Meanwhile, the provisions on extraordinary complaint do not introduce such a requirement of exhaustion of the course of proceedings, since the literal wording of the art. 89 § 1 ASC allows to challenge with this measure any valid decision terminating proceedings in the case, and therefore – *lege non distinguente* – also a judgment of the court of first instance, if at the time of lodging this complaint, contested ruling can no longer be repealed or overturned by means of other extraordinary remedies. The above, contrary to the rules expressed in *iura scripta vigilantibus* and *ignorantia iuris nocet (neminem excusat)* paremies, will in some cases allow to claim for legal protection by negligent party, who failed to act with proper care and due diligence for its own interests by not taking use of ordinary appellate measures in due time, seeking relief at the expense of a party relying on a favourable valid decision that was left uncontested, thus justifying trust in its finality. Therefore apparently, this solution can be deemed as inconsistent with the principle of certainty of the law, protection of trust and as a consequence also prejudicial to the principle of the finality of valid decisions.

Due to the fundamental differences between the analysed measure and the petition for re-opening of proceedings, in terms of respective functions of these measures and the majority of grounds for their submission (which is discussed shortly below), any attempt to defend this solution through referral to art. 399 § 1 CCP would be erroneous and unfounded. Pursuant to this provision – *lege non distringuente* – a petition for re-opening of proceedings is also admissible from final decisions of the court of first instance terminating proceedings in the case. The admissibility of this measure without differentiating the stage at which contested valid judgment was issued (with the exception of limiting the admissibility of reopening proceedings after the previous reopening)[38] is a natural consequence of the characteristics and functions of this remedy.

[37] See: decision of the Supreme Court of Mai 15, 2014, case no. III CZP 88/2013, OSNC 2014, no. 11, item 108.

[38] See Art. 416 § 1 CCP which stipulates that it is inadmissible to re-open once again proceedings which have been terminated with a non-appealable ruling issued following a petition to re-open proceedings. Pursuant to § 2 of this article this shall not apply if a petition to re-open proceedings was founded on the grounds referred to in Article 401[1] CCP, i.e. the subsequent declaration of unconstitutionality of legal provisions which justified contested judgment.

As far as the plea for declaring valid judgment unlawful is concerned, by virtue of the art. 424^1 CCP, this remedy can be lodged only against the valid judgment of the court of the second instance, provided that, it was not and is not possible to have the judgment repealed or overturned by employing other legal measures to which the party was or is entitled. Pursuant to the second section of this provision, in exceptional cases, where unlawfulness of a valid judgment is due to violation of the basic principles of the rule of law or constitutional freedoms, or human or civil rights, measure in question can also be filed against valid judgment of the court of the first or second instance, even if a party did not employ the legal measures it was entitled to, unless it is possible to have a judgment set aside or modified by exercising other legal recourses to which the party remains entitled. In the context of the relationship between these measures, the question arises whether the admissibility of the extraordinary complaint (assessed *a priori* and *in genere*) in the current state of law does not exclude the admissibility of the plea for declaring the unlawfulness of the valid judgment, as the former remedy clearly allows to set aside or overturn the contested valid judgment (the art. 91 § 1 ASC).

The above would lead to the grave inconsistency of the system, because the time-limit for lodging an extraordinary complaint is significantly longer than the time limit for filing plea to declare unlawfulness of valid judgment,[39] despite the fact that the second of the above-mentioned remedy, in principle, is capable of causing less far-reaching consequences than the extraordinary complaint (as stated above the valid decision, despite declaration of its unlawfulness remains in force, except for the circumstances specified in the art. 424^{11} § 3 CCP). It seems, however, that the extraordinary complaint should not be treated as "other legal measures to which the party is entitled" within the meaning of the art. 424 § 1 and 2 CCP due to the party's lack of legal standing to bring such a complaint on its own. As opposed to the appeal in cassation, the plea to declare the final decision unlawful and the petition to reopen the proceedings, the legal standing to lodge the extraordinary complaint is vested solely on the entities listed exhaustively in the catalogue contained in the art. 89 § 2 ASC.[40] A party adversely affected by an unfavourable valid judgment ending the proceedings in the case is not therefore empowered to initiate extraordinary complaint proceedings before the Supreme Court. It can only request one of the authorized entity to use its legal standing in this regard and file the complaint in its favour. Therefore, in the strict sense, an extraordinary complaint is not a means of appeal to which the party is entitled, though its submission by an authorized entity may obviously affect that parties' legal position as a result of repealing or overturning the contested valid judgment.

[39] Pursuant to the art. 424^6 § 1 CCP a plea to declare unlawfulness of valid judgment shall be filed within two years from the date of the judgment becoming legally valid.

[40] E.g. Attorney General, Ombudsman and, within the scope of its authority, the President of the General Prosecutor's Office of the Republic of Poland, Ombudsman for Children, Patient Rights Ombudsman, Chairman of the Financial Supervision Commission, Financial Ombudsman, Spokesman of Small and Medium Entrepreneurs and President of the Office of Competition and Consumer Protection.

The clear purpose of the above-mentioned restriction of the legal standing to lodge an extraordinary complaint was to limit the availability of this measure, and consequently to prevent the Supreme Court being overwhelmed with the huge case-load caused by a flood of complaints brought directly by the parties. It is fair to assume that entities authorized to file an extraordinary complaint under the art. 89 § 2 ASC shall bear obligation to preliminary assess individual cases with regard to the admissibility and merits of an extraordinary complaint.[41] In spite of the fact that such obligation is not expressly stated, it is obvious though, that in the light of the constitutional principle of legalism requiring public authorities to act within the limits and on the basis of law, the competent entities should refrain from submitting inadmissible, obviously unfounded or for other legal reasons hopeless extraordinary complaints. On the other hand, based on the track-record of functioning of some of the authorities competent to exercise this measure, one may have doubts whether in practice the principle of legalism will in many cases not give way to pure opportunism displayed through mass (semi-automatic) refusals to lodge extraordinary complaints in order to avoid additional obligations related to their submitting and supporting in the Supreme Court or instances of adopting decisions as to whether the extraordinary complaint should be filed on the basis of motives of political or ideological nature or other non-legal grounds that should be beyond consideration.

The extraordinary complaint is also a completely different type of extraordinary remedy than the petition for re-opening of proceedings. The latter may be brought due to the establishment of the invalidity of the proceedings (the Art. 401 CCP), [42] so-called restitution grounds referred to in the art. 403 CCP[43] and when the Constitutional Tribunal declares the non-compliance of a normative act on the basis of which the contested judgment was issued with the Constitution of the Republic of Poland or

[41] This preliminary examination may be perceived as a kind of ersatz of the already mentioned preliminary review exercised by the Supreme Court pursuant to art. 398^9 CCP in due to decide whether to dismiss or accept an appeal in cassation for hearing on its merits.

[42] Pursuant to this provision it shall be possible to request the re-opening of proceedings on the grounds of the invalidity thereof: (1) if the court panel included an unauthorised person or a judge who should have been excluded by operation of this Act from the hearing of the case, provided that a party was unable to request the exclusion of such judge before the judgment became non-appealable; (2) if a party did not have the capacity to be a party to or conduct court proceedings, or was not duly represented, or was illegally deprived of the ability to act; however, it shall not be possible to request the reopening of a case if the party regained his ability to act before a judgment became non-appealable or if the lack of representation was brought as a plea, or if the party confirmed the procedural actions taken.

[43] Pursuant to the Art. 403 § 1 CCP the re-opening of proceedings may be requested on the grounds that: (1) a judgment was founded on a falsified or modified document or on a verdict of guilty which was later repealed; (2) a judgment was obtained through an criminal offence. § 2 of this provision stipulates additionally that a re-opening of proceedings may be requested if a non-appealable judgment is discovered at a later date concerning the same legal relationship, or if facts or evidence are discovered which could have affected the outcome of a case, but which a party could not bring in the original proceedings. These grounds result, therefore, from events relating to proceedings concluded by a valid judgment but revealed after its validation; see in this regard e.g. M. Manowska, *Wznowienie postępowania w procesie cywilnym*, Warszawa 2008, p. 56.

a ratified international treaty (the Art. 401[1] CCP). Thus, the petition for re-opening of proceedings may not be based on a ground of a violation of substantive law.[44] For this reason, the scope of both remedies do not overlap (with the exception of the grounds for invalidity, which are the result of a violation of the rules of the proceedings), and in this sense they are, indeed, complementary. Regarding the grounds for invalidity, however, the relationship between these measures is far from transparent.

The admissibility of filing petition for reopening of proceedings on these grounds will certainly exclude the admissibility of the extraordinary complaint (see the art. 89 § 1 of the ASC), however, if the three-month period for submitting the former measure, counted as of the date when the applicant learned of the grounds for the reopening of proceedings (the art. 407 § 1 CC) has expired before the lapse of five years from the validation of the contested decision, the petition for the reopening of the proceedings will no longer be admissible, whereas the admissibility of the extraordinary complaint on these grounds cannot be excluded. The notion of the exclusivity (non-competitiveness) of these remedies is therefore only partially implemented, and in any event, in a manner far from perfect.

Summarizing the above remarks, comparing the institution of an extraordinary complaint to remaining extraordinary appellate measures already existing in the Polish civil procedure, one should submit the following. While the analysed remedy does not duplicate completely remaining extraordinary means of appeal, it constitutes quite peculiar combination of them with some novel elements added on top of that fusion. In sum, this measure undoubtedly complicates (or even partially disintegrates) the current (already not fully transparent) system of extraordinary appellate measures.

The extraordinary complaint against the valid judicial decisions in labour law cases

The comments of general nature made above should finally be referred to the proceedings concerning cases within the subject-matter and scope of labour law. As rightly noted by K.W. Baran,[45] the concept of a labour law case (case relating to employment relationships) as referred to in the Art. 1 CCP, shall be distinguished from the notion of the case within the subject-matter and scope of labour law within the meaning of the art. 476 § 1 CCP which defines this notion through introduction of the exhaustive list of matters covered

[44] M. Manowska, *Wznowienie…*, p. 56; K. Weitz, in: S*ystem prawa procesowego cywilnego. Środki zaskarżenia.* Vol. III, part 2, T. Ereciński (ed.), Warszawa 2013, p. 1130 *et seq.*. Petition for re-opening the proceedings, although functionally connected with the previous proceedings, formally initiates a new, separate proceedings, which is aimed at eliminating the irregularities affecting the proceedings terminated by the issuance of the contested judgment, based on the circumstances revealed after its valid termination. Petition to reopen the proceedings is therefore a remedy of reparatory function and nature; see e.g. M. Manowska, *Wznowienie…*, p. 59; K. Weitz, p. 1164 ff.

[45] K.W. Baran, *Sądowy wymiar sprawiedliwości w sprawach z zakresu prawa pracy*, Warszawa 1996, p. 34.

by the concept in question. This in turn, leads to the distinction of cases pertaining to claims for performance of some kind (e.g. payment or other action demanded by the claimant from the respondent) on the one hand and cases concerning determination of or shaping a legal relationship or right arising from the fact of performing a work under the employment relationship, on the other hand. The author indicates that in the logical sense, both categories of cases together make up the concept of labour law cases (cases relating to employment relationships)[46] and, as a consequence, adopts the concept of labour law cases *sensu largo* and labour law cases *sensu stricto*. Further discussion of this paper will refer to labour law cases in the narrower sense (*sensu stricto*) i.e. those examined in the separate proceedings pertaining to cases within the subject-matter and scope of labour law.

The Act on the Supreme Court does not provide for any special regulation regarding an extraordinary complaint in labour law cases, nor any specific exclusion in this area. Therefore the general rules governing this legal remedy will be directly applicable to these cases. Consequently also general remarks made above retain their validity in relation to labour law cases. Nevertheless, the following remarks specific to labour law cases are worth noting.

The scope of application of the extraordinary complaint against the appeal in cassation in labour law cases is quite specific due to the provisions set out in the art. 398^2 § 2 CCP for these matters. Pursuant to this provision the admissibility threshold for the appeal in cassation in accordance with the *ratione valoris* criterion is reduced from general level of fifty thousand to ten thousand zlotys, with the total exclusion of this measure in matters relating to penalties for breach of order in the work place, certificates of employment and related claims as well as benefits in kind or their equivalents and all civil cases recognized in the simplified proceedings[47]. The above regulation, in the context of the already discussed rule according to which the extraordinary complaint as a subsidiary measure (remedy of the last resort) is admissible only when the final judgment cannot be repealed or reversed with the use of other extraordinary appellate measures, clearly affects the availability of extraordinary complaint in labour law cases with the value of the subject of appeal below ten thousand zlotys and the categories of cases listed above, irrespective of the value of the subject of the dispute. In these cases the extraordinary complaint (except for the respective scope of petition for re-opening of proceedings) is available instantly upon the validation of the decision terminating proceedings (without the need to exhaust appeal in cassation or the lapse of time-limit for its filing).

Referring to the functions of the labour procedural law commonly recognized in the doctrine, in particular, the protective function in its organizational aspect, the essence

[46] K.W. Baran, *Sądowy*…, p. 35.

[47] As to the lack of legal obstacles to combining separate proceedings in cases within the subject-matter and scope of labour law and simplified proceedings, see M. Mędrala, *Kontaminacja postępowania sądowego w sprawach z zakresu prawa pracy z postępowaniem uproszczonym w relacji do funkcji ochronnej*, Studia z Zakresu Prawa Pracy i Polityki Społecznej 2010, p. 362. Opposing view was expressed by M. Manowska, *Postępowania odrębne w procesie cywilnym*, Warszawa 2012, p. 19.

of which is the organizational separation of labour courts as units of common courts and specialization of judges examining labour law cases in order to ensure taking into account the specificity of cases of this type and the high professional quality of the case law,[48] one may express serious doubts whether the assignment of examining and resolving all cases stemming from the extraordinary complaint to a newly established Chamber of Extraordinary Control and Public Affairs within the structure of the Supreme Court (the Art. 94 § 1 ASC) is indeed a well-advises and proper solution. It is a truism to say that labour law cases have a different specifics than, for example, criminal cases or cases in the field of intellectual property or capital markets law. Since the examination of the abovementioned extraordinary complaints clearly and inherently involves making complex legal assessments regarding compliance of the decision with legal norms from various areas of substantive law, as well as with general clauses, whose overtone and nuances may differ significantly within divergent legal fields, it seems that specialization would be highly recommended instead of indiscriminate attribution of all kind of cases to one group of judges serving on the Chamber of Extraordinary Control and Public Affairs. For the same reason one may raise similar concerns with regard to the composition of the courts hearing the extraordinary complaints which shall consist of two Supreme Court judges serving in the afore-mentioned Chamber and one juror (lay-judge) of the Supreme Court.[49]

Furtherly, the possibility of initiating proceedings from an extraordinary complaint for a period of 5 years from the validation of the contested judgment (and sometimes as provided for in the Art. 89 § 4 ASC – indefinitely!) by no means serves the principle of the efficiency and expeditiousness of proceedings (understood in this context as a directive to shorten the period from the initiation of the proceedings to its definitive ending with a valid and irrevocable ruling), qualified as one of the paramount principles of proceedings in labour law cases.[50] Of course, this principle does not constitute the goal of proceedings in itself and therefore it should not be given an absolute primacy, especially if the most glaring violations of law have occurred in the course of the proceedings amounting to a sheer denial of justice. Nevertheless, taking due account of a long and to some extent open-ended time-limit to submit extraordinary complaint, the realization of the principle of finality of valid judgments seems to be overly sacrificed at the altar of striving to the fulfilment of "corrective justice" referred to in the motives of the bill.

The vital question also arises whether the analysed institution does not violate the protective function of labour law by negating the right to permanent protection of the party who being the beneficiary of a valid judgment, as a result of the long and potentially

[48] M. Skąpski, in: *System prawa pracy.* Vol. VI. *Procesowe prawo pracy*, K.W. Baran (ed.), Warszawa 2016, p. 50; M. Mędrala, *Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy*, Warszawa 2011, p. 117.

[49] The declared purpose of is to realize and enhance constitutional principle of the participation of citizens in the administration of justice as provided for in the art. 182 of the Constitution, which – according to conventional wisdom – should improve its legitimisation in the overall society.

[50] K.W. Baran, *Sądowy…*, p. 229.

indefinite admissibility of challenging (and possibly reversing) this ruling can never fully count on the definiteness of the state of affairs hinging on the employment relationships determined or established in the operative part of the valid judicial decision. The above situation may lead to particular complications in employment relations, especially on the part of the employer, for whom the ability to plan the functioning of his or her company (or other work establishment) in a medium and long-term perspective (including with regard to human resources, payroll and other financial dimensions), is also contingent upon such factors as reliance on the effects of valid judicial decisions affecting the ongoing employment relationships (e.g. dismissal of the appeal against the termination of the employment contract along with a request to declare the termination to be ineffective, dismissal of the claim for reinstatement to work, dismissal of the action for payment of compensation for unlawful termination of the contract of employment).

In the context of this principle, however, it cannot be forgotten that the extraordinary complaint is a "double-edged" measure, in the sense that it may potentially lead to changes in the employment-related relationships established or shaped by a valid ruling not only for the benefit but also to the detriment of the employee as the weaker side of this relationship. That includes cases concerning matters which are often of vital or even existential importance, such as the complaint against the termination of a contract of employment, payment of remuneration or damages sought from the employee in connection with the accident in the workplace etc.). Although this remark can also be applied to other civil matters, in the case of labour law it seems particularly compelling (e.g. the situation of repealing a final judgment ordering reinstatement of the employment contract unduly terminated by the employer after several years under, when meanwhile an employee in reliance of a finality of such a valid judgment has made some significant and difficult to reverse (or irreversible) decisions affecting his or her professional career path or even personal life, for example by refusing the offer of attractive employment from another employer, by moving to another city in connection with a change of the place of work, etc.).

Finally bearing in mind the catalogue of entities vested with the authority to submit extraordinary complaint by virtue of the art. 89 § 2 ASC (e.g. such as Patient Rights Ombudsman, Chairman of the Financial Supervision Commission, Financial Ombudsman, Spokesman of Small and Medium Entrepreneurs and President of the Office of Competition and Consumer Protection within the scope of their respective authorities), one may argue that for the sake of internal consistency of this institution, in labour law cases, the legal standing to lodge extraordinary complaint should be granted to the Chief Labour Inspector. This would be warranted by the scope of responsibilities of the National Labour Inspectorate as public authority appointed to supervise and control compliance with labour law, in particular provisions and principles of occupational health and safety, as well as rules governing legality of employment.[51]

[51] See the art. 1 of the Act of 13 April, 2007 on the National Labour Inspectorate (the consolidated text: the Journal of Laws of 2018. item 623, as amended). See also the art. 63^1 § 1 CCP which stipulates

Conclusions

The finality of valid judicial decisions constitutes an important legal principle with strong constitutional as well as international (or even transnational) foundations. It serves to ensure the effectiveness of the resolution of the dispute, legal certainty and protection of the authority of the judiciary a well as the whole nation-state in the name of which it acts as part of its government divided in accordance with tripartite system. In order to challenge this finality, existing flaws and deficiencies in the proceedings or the valid judgment shall therefore be so grave that it would be outrageous and inconceivable to uphold the ruling.[52] For this reason, the introduction of any new measures aimed at challenging final judgments terminating judicial proceedings should be adopted with far-reaching caution preceded by scrupulous deliberation. The above analysis and considerations lead to the conclusion that the introduction of the extraordinary complaint fell short of these standards.

The extraordinary complaint is highly objectionable in terms of its wording (including compliance with standards of proper legislative technique) combination of the pre-existing extraordinary means of appeal with certain elements of novelty. More importantly, however, the model of this measure and its actual legal shape makes an impression that is not fully thought out from the point of view of its place and the role it should actually play in the system of extraordinary remedies under the Polish civil procedure and its interaction with remaining extraordinary means of appeal. For instance, despite being conceived as the remedy of the last resort, it is more far-reaching both in terms of its time-limits and effects than the plea for declaring the valid judgment unlawful which makes entire system of extraordinary appellate measures internally inconsistent. At the same time, regrettably, adoption of this peculiar measure fails to provide sufficiently persuasive reasons to convince about its fitness to fulfil the high hopes vested in it by the legislator as an important part of a major overhaul of the administration of justice in Poland.

More importantly, this raises absolutely fundamental doubts from the point of view of the principle of finality of valid judicial decisions. Despite the fact that the legal standing to lodge this measure is restricted to a relatively narrow group of entities (with the exclusion of the parties to the proceedings), the main reason for objection is the admissibility of submitting this measure (which may lead to setting aside or reversing valid judgment and thus changing the legal relationships established by its operative part) irrespective of the time-limit specified in the art. 89 § 3 ASC, and therefore indefinitely, based on vague conditions expressed in the art. 89 § 4 ASC. This provision allows the Supreme Court to disregard the lapse of the time-limit and accept the extraordinary

that in cases for determination of the existence of an employment relationship, labour inspectors may bring actions on behalf of citizens and, subject to the plaintiff's consent, join proceedings at any stage. Pursuant to the Art. 63^2 § 1 CCP in such cases as referred to in the preceding Article, provisions relating to the public prosecutor apply accordingly to labour inspectors.

[52] See: K. Weitz, p. 1103.

complaint when the principles or freedoms and human and civil rights set out in the Constitution favour review of a flawed by valid decision. This requirements in fact to large extent coincide with the general condition of admissibility of the extraordinary complaint under the art. 89 § 1 ASC, thus potentially rendering the time-limit as set out in the art. 89 § 3 ASC irrelevant and illusory.

In order to satisfy the need to vindicate social justice in its corrective aspect (which is undoubtedly a legitimate value and the Parliament has a constitutional mandate based on its democratic legitimacy to pursue this aim as part of its policy-making authorities), without undue prejudice to the constitutional principle of finality of valid decisions (and without unnecessary complications within the system of judicial remedies), the legislator should have rather consider some modifications in the model of existing extraordinary remedies, i.e. the appeal in cassation (e.g. admission of a limited, exceptional review of the factual grounds of contested decisions; departure from the limits of admissibility of appeal in cassation based on the somewhat arbitrary *ratio valoris* and *ratio materiae criteria* ad provided for in the art. 398^2 § 1 and 2 CCP) and the plea for declaring the valid judgment unlawful (e.g. extension of the time-limit for a plea to 5 years from the date when the contested decision has become valid; granting the Supreme Court power to award additional sum of money to the successful petitioner from the State Treasury, upon the declaration of unlawfulness of the valid judgment, without prejudice to the right to claim adequate damages under general rules).[53] The latter solution would pave victims of unlawful but valid and final decisions (much less steep and winding than today) way to the financial compensation without the simultaneous reversal of the legal situation already shaped in a certain way by a valid decision (and therefore without prejudice to the trust of the party relying on that final and valid judgment).[54]

The possibility of filing an extraordinary complaint despite the failure of a party dissatisfied with the decision to make use of ordinary means of appeal should also be considered as grossly objectionable and contradictory to above-mentioned principles. As in the case of broad and rather vague grounds for extraordinary complaint and the lack of definitely binding time-limit for bringing such a measure, this objection is only partially alleviated by the restriction of the group of entities authorized to lodge it.

If a party injured by a valid judgment is able to demonstrate that it was unable to properly lodge ordinary measure of appeal in due time with no fault of its own or failed to do so due to some exceptional impediments beyond its control, it is entitled to request from the court the reinstatement of the time-limit to submit such an ordinary measure on the basis of the art. 168 *et seq.* CCP. Supplementing such right with extraordinary complaint is unnecessary and distorts delicate *albeit* vitally important balance between

[53] The proposed solution could be modelled on the existing regulation which functions by virtue of the art. 12 sect. 4 of the Act of 17 June, 2004 on the complaint on the violation of the party's right to hear the case in preparatory proceedings conducted or supervised by the prosecutor and court proceedings without unreasonable delay (the consolidated text: the Journal of Laws of 2018. item 75, as amended).

[54] For the deeper justification of this proposal, including considerations for its law & economics aspects see: A. Olaś, *Res iudicata*…, p. 416 *et seq.*

the finality of valid judgments and the right to challenge those legally binding judicial decisions which are, allegedly grossly unfair or glaringly flawed.

The general criticism of the extraordinary complaint respectively pertains to its application in cases within the subject-matter and scope of labour law. The remedy in question seems to be irreconcilable with the protective function of labour law and the overall expeditiousness of proceedings in employment-related matters. This inconsistence reflects and emphasizes incoherence of the extraordinary complaint with general standards of legal certainty, protection of trust and predictability including finality of valid judgment.

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