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A New Model of Appeal Proceedings in Criminal Cases: Acceleration v. Fairness? A Few Remarks from the Perspective of the Standards of Protecting Human Rights*

Nowy model postępowania odwoławczego w sprawach karnych. Przyspieszenie v. rzetelność postępowania? Kilka uwag z perspektywy standardów ochrony praw człowieka

ABSTRACT

The purpose of this study is to present and evaluate the main changes to the appeal proceedings model introduced in the last few years to the Polish criminal proceedings in order to accelerate it and, thereby, satisfy the requirements of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The article presents arguments supporting the thesis whereby these have weakened the right of the defendant to appeal against the judgement. Under the currently applicable regulations, it is permissible that an appellate court may impose a penalty for the first time which cannot be subject to an effective appellate review. Such a solution may raise doubts as to its compliance with Article 14 (5) of the International Covenant on Civil and Political Rights. The article also formulates a thesis whereby the newly introduced measure – a complaint against the cassatory judgement of the appellate court – contrary to preliminary fears, has not in fact "blown up" the system of appeal measures in the Polish criminal proceedings. At the same time, despite the

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relatively small scope of its use, it may contribute to strengthening the appeal – as opposed to the revisory – model of appellate proceedings and thus accelerating the criminal proceedings. This thesis is based on the research of all complaints brought to the Supreme Court in 2016–2019.

Keywords: system of appeal measures in the Polish criminal proceedings; European Convention for the Protection of Human Rights and Fundamental Freedoms; complaint against the cassatory judgement of the appellate court; International Covenant on Civil and Political Rights

INTRODUCTION

The purpose of this study is to present and evaluate the main changes to the appeal proceedings model introduced in the last few years to the Polish criminal proceedings in order to accelerate it and, thereby, satisfy the requirements of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950.[1] New mechanisms for restricting the possibility of issuing cassatory judgements by appellate courts are presented, as well as the new measure of appeal – the complaint, introduced in order to secure reformatory adjudication in the appeal instance. An attempt to answer the following questions was made: may the new model of appeal proceedings actually contribute to accelerating criminal proceedings and have the model changes lowered the procedural guarantees of defendants, in particular their right to appeal against the judgement with reference to both guilt and imposition of a penalty. Furthermore, the assessment of the legitimacy of introducing a new measure of appeal – the complaint into criminal proceedings and the prospects of its impact on accelerating criminal proceedings – were made.

The article presents arguments supporting the thesis whereby the most recent changes in the model of appeal proceedings have weakened the right of the defendant to appeal against the judgement. Under the currently applicable regulations, it is permissible that an appellate court may impose a penalty for the first time which cannot be subject to an effective appellate review. Such a solution may raise doubts as to its compliance with the international obligations which are binding for Poland and stem from Article 14 (5) of the International Covenant on Civil and Political Rights.[2]

The article also formulates a thesis whereby the newly introduced measure – a complaint against the cassatory judgement of the appellate court – unknown to European legal systems, contrary to preliminary fears, has not in fact "blown up" the system of appeal measures in the Polish criminal proceedings. At the same time, despite the relatively small scope of its use, it may contribute to strengthen-

[1] Journal of Laws 1933, no. 61, item 284, as amended, hereinafter: ECHR.

[2] International Covenant on Civil and Political Rights, adopted by United Nations General Assembly on 16 December 1966 (Journal of Laws 1977, no. 38, item 167), hereinafter: ICCPR.

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ing the appeal – as opposed to the revisory – model of appellate proceedings and thus accelerating the criminal proceedings. These conclusions are drawn from the analysis of all complaints brought to the Supreme Court in 2016–2019.

THE "CASSATORY-REVISORY" MODEL OF APPEAL PROCEEDINGS AS A SOURCE OF EXCESSIVE LENGTH OF CRIMINAL PROCEEDINGS

The proceedings reviewing the judgement of a first instance court may be of appeal, cassatory or revisory character. In the appeal model, the appellate court is entitled to conduct a substantive review of the judgement within the scope of the appeal measure. It is entitled to conduct evidence and make factual findings on its own, as well as to issue a judgement as to the merit different from the one given by the first instance court. In turn, in the cassatory model, the appellate review is limited to legal issues, therefore, the appellate court is not, in principle, authorised to conduct evidentiary proceedings. After the examination of such an appeal, it may either dismiss it or – by granting it – quash the judgement and refer the case for re-examination to the first instance court. The revisory model envisages the review of the judgement in terms of both legal and factual issues. In this model, it is permissible not only to issue a cassatory judgement, but also a judgement changing the verdict of the first instance court, however, only on the basis of the factual circumstances determined in the first instance judgement.[3]

Until 30 June 2015, an appeal proceedings model, highly similar in its nature to the cassation and revisory model, was in force in Poland.[4] In the course of the constitutionally guaranteed two-instance proceedings, the function of appellate courts was implemented mainly through reviewing adjudication and not in its possible modification. The possibility of modifying the judgement of the first instance court was significantly limited on several levels, with two of them being of the greatest

[3] See C. Kulesza, *Conventional model of a fair appeal proceedings in the comparative perspective*, [in:] *Fairness of the New Model of Polish Criminal Appeal Proceedings in the Context of Delivered Research*, ed. C. Kulesza, Białystok 2019, pp. 24–25; M. Fingas, *Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym*, Warszawa 2016, pp. 27–29.

[4] In the doctrine, citing R. Kmiecik (*Trójinstancyjny system apelacyjno-kasacyjny czy dwuinstancyjna hybryda rewizyjno-kasacyjna?*, [in:] *Kierunki i stan reformy prawa karnego*, eds. T. Bojarski, E. Skrętowicz, Lublin 1995, p. 66 ff.), it has been adopted that this model is referred to as a "revisory-cassatory hybrid". Cf., among others, S. Zabłocki, *Priorytety Komisji w zakresie analizy rozwiązań dotyczących postępowania odwoławczego oraz postępowania w trybie nadzwyczajnych środków zaskarżenia*, "Biuletyn Komisji Kodyfikacyjnej Prawa Karnego" 2010, no. 2, p. 11. Other authors refer to it with the term "revisory-cassatory". See M. Klejnowska, *Model postępowania odwoławczego i nadzwyczajnoskargowego w sprawach karnych*, "Biuletyn Komisji Kodyfikacyjnej Prawa Karnego" 2010, no. 2, p. 34.

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importance. First, the provision of Article 452 of the Code of Criminal Procedure[5] in the then wording allowed the examination of evidence in appeal proceedings only in exceptional cases, which significantly hindered factfinding at this stage of the trial. It distinguished this means of recourse from the classic appeal, which provides for a full substantive review of the judgement and allows re-examination of evidence at the appeal instance.[6] Second, extensive *ne peius* prohibitions impeded reformatory adjudication. The provision of Article 454 § 1 CCP forbade the appellate court to convict a defendant against whom an acquittal was issued in the first instance, the proceedings were discontinued, or the proceedings were conditionally discontinued. Much greater restrictions resulted from Article 454 § 2 CCP, according to which an amendment of the judgement by an appellate court consisting in imposing a more severe penalty of imprisonment could only take place if the court did not change the factual findings adopted as the basis for the judgement under appeal. The third prohibition of *ne peius* indeed evolved significantly. Initially, it stated that imposing a harsher penalty, i.e., 25 years imprisonment penalty, was inadmissible in appeal proceedings. Subsequently, as a result of the 2003 amendment,[7] it was moderated in such a way that it ruled out aggravation of the penalty at this stage of the proceedings by imposing only the sentence of life imprisonment.

Undoubtedly, the outlined model of appeal proceedings contributed to the excessive length of criminal proceedings, which was identified as a "systemic problem" of the Polish judiciary by the European Court of Human Rights (ECtHR). Already in 2002, in the landmark judgement in the case of *Kudła v. Poland*,[8] the Court found that introducing an effective means of complaint about excessive length of proceedings into the domestic legal system is a necessary response to the wave of repeated individual complaints about the length of court proceedings in Poland, but also in other countries of the Council of Europe. The problem of excessive length of court proceedings in Poland was explicitly recognized as "systemic" in the pilot judgement issued in the case of *Rutkowski and Others v. Poland*.[9] As this judgement and subsequent case law show, the problem was not resolved by introducing the institution of the complaint about excessively long proceedings

[5] Act of 6 June 1997 – Code of Criminal Procedure (consolidated text, Journal of Laws 2020, item 30), hereinafter: CCP.

[6] Hence, the name of this means of challenge adopted in the Code ("appeal") did not reflect its true nature.

[7] Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness and the Act on the protection of classified information (Journal of Laws 2003, no. 17, item 155).

[8] Judgement of the ECtHR of 26 October 2000, *Kudła v. Poland*, application no. 30210/96.

[9] Judgement of the ECtHR [pilot judgement] of 7 July 2015, *Rutkowski and Others v. Poland*, application no. 72287/10, 13927/11 and 46187/11, §§ 203–206.

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in 2004, which implemented the judgement in the case *Kudla v. Poland*[10] into the Polish legal system.

In judgements concerning Poland, the ECtHR several times pointed to the fact that the repeated quashing of the judgements of the first instance courts reveals the dysfunction of the judiciary and causes excessive length of the proceedings. Admittedly, the Court made a reservation that it was not its task to assess the domestic model of proceedings or the legitimacy of individual procedural decisions, but at the same time stated: "since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower authorities, the repetition of such orders within one set of proceedings discloses a serious deficiency in the operation of the legal system".[11] The ECtHR also emphasized that "this deficiency is imputable to the authorities and not the applicants".[12]

The ease with which judgements could be revoked and the significantly limited possibilities for reformatory adjudication led to absolutely bizarre situations, where the first-instance court tried the case several times, and its consecutive judgements were revoked by the appellate court due to errors which, without detriment to the right to two-instance proceedings, could have been remedied by the appellate court itself.[13] The cassation-revisory model of appeal proceedings also contributed to the lengthiness of pre-trial detention under Article 5 (3) ECHR. The application of this preventive measure during the appeal proceedings is already treated as "detention after

[10] The so-called complaint against excessive length of proceedings (Act of 17 June 2004 on a complaint on the violation of the party's right to have a case examined in the pre-trial proceedings conducted or supervised by a public prosecutor and in the judicial proceedings without undue delay, consolidated text, Journal of Laws 2018, item 75, as amended) was modeled on an Italian act of law, known as the Pinto Act, introducing a general compensatory measure (cf., judgement of the ECtHR of 29 March 2006, *Scordino v. Italy (no. 1)*, application no. 36813/97, § 63). On the evolution of this remedy, see M. Wąsek-Wiaderek, *Sprawa Kudła v. Poland z 2000 r.: prawo do skutecznego środka odwoławczego (art. 13 of the Convention)*, [in:] *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.*, ed. E. Morawska, Warszawa 2019, pp. 168–174. On various national measures to redress excessive length of proceedings, see F. Edel, *The Length of Civil and Criminal Proceedings in the Case-law of the European Court of Human Rights, Strasbourg*, Strasbourg 2007, pp. 74–78.

[11] Judgement of the ECtHR of 4 March 2008, *Żelazko v. Poland*, application no. 9382/05, § 58; judgement of the ECtHR of 3 May 2011, *Chernyshov v. Poland*, application no. 35630/02, § 55. With reference to civil proceedings, see judgement of the ECtHR of 7 July 2015, *Rutkowski and Others v. Poland*, application no. 72287/10, 13927/11 and 46187/11, § 49. See also judgements concerning other states: judgement of the ECtHR of 27 July 2006, *Mamič v. Slovenia (no. 2)*, application no. 75778/01, § 35; judgement of the ECtHR of 19 November 2009, *Telegina v. Ukraine*, application no. 2035/03, § 33; ECtHR judgement of the ECtHR of 16 September 2010, *Beloga v. Ukraine*, application no. 620/05, § 28; judgement of the ECtHR of 21 July 2012, *Sizov v. Russia (No. 2)*, application no. 58104/08, § 63.

[12] Judgement of the ECtHR of 26 March 2020, *Zborowski v. Poland*, application no. 72950/13, § 28.

[13] On the lack of constitutional obstacles to reformatory adjudication by appellate courts, see P. Wiliński, *Konstytucyjne uwarunkowania postępowania odwoławczego w procesie karnym*, [in:] *Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań*, ed. S. Steinborn, Warszawa 2016, pp. 102–113.

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conviction" under Article 5 (1) (a) ECHR. On the other hand, pre-trial detention applied after the revocation of a non-final conviction in the course of the re-examination of the case by the first-instance court again falls within the requirements of Article 5 (3) ECHR. Thus, in several Polish cases, it was the repeated revocation of judgements by the appellate courts and the continued use of detention during the re-examination that actually contributed to establishing the violation of Article 5 (3) ECHR.[14]

The dysfunctionality of the then model of appellate proceedings was also pointed out by the study of the causes underlying the excessive length of the trial in criminal cases.[15]

CHANGES TO THE MODEL OF APPEAL PROCEEDINGS AND THE RIGHT TO APPEAL AGAINST A JUDGEMENT ARISING FROM INTERNATIONAL OBLIGATIONS BINDING ON POLAND

In view of the phenomenon of protracted examination of criminal cases, one of the objectives of the comprehensive reform of criminal proceedings enacted in 2013, which came into force on 1 July 2015,[16] was to change the model of appeal proceedings. The essence of the changes consisted in the introduction of a closed catalogue of cases in which the appellate court may revoke the judgement of the first-instance court and refer the case back to the court of first instance for re-examination (new wording of Article 437 § 2 CCP).[17] This change was accompanied by a significant reduction in the scope of *ne peius* prohibitions and the extension of the possibility of conducting an evidence examination at an appeal hearing. In the intention of the legislator, the judgement may be revoked only in three situations:

[14] See, in particular, judgement of the ECtHR of 29 July 2008, *Choumakov v. Poland*, application no. 33868/05 and the second ECtHR judgement issued with reference to the same criminal proceedings: judgement of the ECtHR of 1 February 2011, *Choumakov v. Poland (no. 2)*, application no. 55777/08 – in this case the first instance judgement was twice quashed by the appellate court. Only third reconsideration of the case by the first instance court brought it to the end. The applicant was detained through the whole period of criminal proceedings. See also judgement of the ECtHR of 20 December 2011, *Zambrzycki v. Poland*, application no. 10949/10, §§ 13–23.

[15] See, P. Hofmański, D. Szumiło-Kulczycka, S. Waltoś, *Przewlekłość procesu karnego w Polsce i środki jej zwalczania*, [in:] *Zagubiona szybkość procesu karnego. Jak ją przywrócić?*, eds. S. Waltoś, J. Czapska, Warszawa 2005, p. 79.

[16] Act of 27 September 2013 amending the Code of Criminal Procedure (Journal of Laws 2013, item 1247).

[17] See M. Błoński, *Uchylenie orzeczenia i przekazanie sprawy do ponownego rozpoznania jako wyjątkowy rodzaj rozstrzygnięcia sądu odwoławczego*, [in:] *Artes serviunt vitae sapientia imperat. Proces karny sensu largo. Rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorczyka z okazji 70. urodzin*, eds. R. Olszewski, D. Świecki, J. Kasiński, P. Misztal, K. Rydz-Sybilak, A. Małolepszy, Warszawa–Łódź 2019, pp. 434–435.

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in the event of an absolute ground of appeal specified in Article 439 § 1 CCP, in the event of the fulfilment of the *ne peius* prohibition under Article 454 CCP and in the event when the entire judicial trial must be conducted anew.

From the point of view of international standards of human rights protection, the most important modification is the scope of the *ne peius* rule. Initially, the legislator limited the *ne peius* prohibitions to two, repealing Article 454 § 2 CCP. As a result, under the provisions being in force from 1 July 2015 to 4 October 2019, an appellate court could not convict a defendant who had been acquitted by a lower court or as to whom proceedings had been discontinued or conditionally discontinued. Moreover, it was unacceptable to aggravate the penalty at the appeal instance by imposing a sentence of life imprisonment. Both prohibitions underwent further restriction as a result of the amendments to the Code of Criminal Procedure, which entered into force on 5 October 2019.[18] Since that date, an appeal court has been allowed to convict a defendant against whom the court of first instance conditionally discontinued the proceedings.[19] Moreover, in view of repealing of Article 454 § 3 CCP, the penalty may be aggravated by imposing a penalty of life imprisonment at an appeal instance.

Summarising, under the current wording of Article 454 § 1 CCP, the appeal court may convict a defendant for the first time, if the proceedings against him were conditionally discontinued by the first instance court. In order to capture the real meaning of the recent change of this provision, on ought to conclude, that Article 454 § 1 CCP always (i.e., also prior to the amendments of 2015 and 2019) actually allowed for conditional discontinuance of proceedings by the appeal court in the situation when in the first instance a verdict of acquittal was passed.[20] However, before the amendments of the Code of Criminal Procedure of 2015, this legal opportunity has very limited (if any) practical impact since, as a rule, appellate courts were not allowed to conduct evidence proceedings and the new fact finding could take place at the appellate stage of the proceedings only exceptionally.

Such truncation of the *ne peius* prohibition translates directly into the scope of permissible attribution of criminal liability to the accused for the first time in the appellate instance in the two-instance model of criminal proceedings, in which the decision of the appellate court is only subject to extraordinary cassation appeal, the grounds for which are quite narrow and limited only to egregious infringements of law. Additionally, and importantly, the legislator explicitly states that a cassation appeal lodged by a party to proceedings cannot be brought solely on the grounds of the disproportionality of the penalty.

[18] Act of 19 July 2019 amending the Code of Criminal Procedure (Journal of Laws 2019, item 1694).

[19] In accordance with Article 66 § 1 of the Polish Criminal Code, the proceedings may be conditionally discontinued if the guilt and social consequences of the act are not significant.

[20] See, in particular, judgement of the Supreme Court of 29 January 2020, II KS 27/19, LEX no. 2775312; judgement of the Supreme Court of 18 July 2019, IV KS 25/19, LEX no. 2714724.

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In the European system of human rights protection, the right of appeal against a judgement is understood relatively narrowly. It is not derived from the general right to a fair trial guaranteed by Article 6 ECHR.[21] The case law of the ECtHR is shaping the standards of fair appellate proceedings in criminal cases, including those relating to access to the appellate or cassation stage of proceedings. However, the ECtHR emphasizes that no obligation to guarantee an appellate review of the judgement stems from this provision. However, if the national legislation provides so, it should respect the basic requirements of fairness. Within the context of the *ne peius* rules, it must be emphasized that the standard of fair appellate proceedings includes the personal hearing of the accused and the direct examination of evidence by the appellate court if that court alters the acquittal of the court of the first instance and passes a judgement of conviction in appeal proceedings. Such a procedure is necessary if that court "had not simply given a different legal interpretation or another application of the law to facts already established at first instance, but had carried out a fresh evaluation of facts beyond purely legal considerations".[22] However, if the issues under consideration by the appellate court "have a predominantly legal character and the court does not carry out a fresh evaluation of the evidence but rather makes a different legal interpretation from that of the lower court", then the hearing of the accused, as well as direct hearing of witnesses is not necessary in appeal proceedings.[23] Within the context of these requirements, one must consider the current wording of Article 451 CCP to be compliant with the standard stipulating that the accused be heard by the appellate court. The accused has the right to participate in the appeal hearing and, if incarcerated, he/she may request to be brought to that hearing. Any desistance from such appearance (if requested by the accused within the prescribed time limit) must result in ensuring the participation of the defence counsel in the hearing and may take place only in situations indicated in the case law of the ECtHR, which has been fully reflected in the Supreme Court's rulings.[24]

The right of appeal against a criminal conviction is guaranteed by Article 2 of Protocol no. 7 to ECHR.[25] It follows from the second paragraph of this provision that a conviction judgement may be passed on the basis of an appeal against an

[21] E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Antwerp–Oxford–Portland 2010, pp. 52–53.

[22] Judgement of the ECtHR of 10 March 2009, *Igual Coll v. Spain*, application no. 37496/04, § 36.

[23] Judgement of the ECtHR of 16 July 2019, *Júlíus Þór Sigurþórsson v. Iceland*, application no. 38797/17, § 37. See also judgement of the ECtHR of 1 December 2020, *Lamatic v. Romania*, application no. 55859/15, § 42.

[24] See judgements of the Supreme Court of Poland referring to the case-law of the ECtHR on this issue: judgement of the Supreme Court of 2 March 2009, IV KK 334/08, LEX no. 495314; judgement of the Supreme Court of 31 August 2005, V KK 58/05, OSNKW 2005, no. 11, item 113.

[25] Protocol no. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 22 November 1984 (Journal of Laws 2003, no. 42, item 364).

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acquittal by a first-instance court, and that such a conviction need not be subject to further appeal. It is indeed emphasized that this provision guarantees the right to a single appeal.[26] The cited provision introduces an exception to the general right of each person convicted of a criminal offence to have their case heard by a higher court, regarding both the verdict on guilt and the penalty, expressed in Article 2 (1) of Protocol no. 7. A different interpretation of the right of appeal against a judgement has no support in the relatively modest judicial decisions of the ECtHR.[27]

A more definite standard in this respect is expressed in Article14 (5) ICCPR. It provides for the right of each person convicted of a criminal offence to appeal to a higher court for a reconsideration of the judgement of guilt and penalty in accordance with the law. This provision does not specify the legal form of the means of challenge, since, as can be seen from the history of the preparation of its final content, the intention was to guarantee "a more general right of review".[28] Contrary to Article 2 of Protocol no. 7, in Article 14 ICCPR no exception to this right is provided for.[29] Although the understanding of the right of appeal in Article 14 (5) ICCPR gives the States parties to the Covenant quite considerable flexibility in regulating the manner in which the right of appeal is guaranteed, they are nonetheless obliged to ensure the possibility of a substantive review of the judgement of guilt and sentence, as well as real access to a means of challenge.[30] This leads to the conclusion that a decision assigning criminal responsibility in the form of finding the accused guilty and imposing a sentence for the first time in appeal proceedings should be subject to appeal. Moreover, it should be examined by a higher court, and both the attribution of guilt and the imposed sentence should be reconsidered.[31] This is precisely the interpretation given to this provision

[26] S. Trechsel, *Human Rights in Criminal Proceedings*, with the assistance of S.J. Summers, Oxford 2006, p. 371. See also P. Hofmański, [in:] *Protokół nr 7 do Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz*, ed. L. Garlicki, Legalis 2011, commentary on Article 2 of the Protocol.

[27] See decision of the European Commission on Human Rights of 17 January 1994, *Botten v. Norway*, application no. 16206/90. See also K. Flinterman, *Right to Appeal in Criminal Matters*, [in:] *Theory and Practice of the European Convention on Human Rights*, eds. P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, Cambridge–Antwerp–Portland 2017, p. 975; D. Djukić, *The Right to Appeal in International Criminal Law: Human Rights Benchmarks, Practice and Appraisal*, Leiden–Boston 2019, pp. 67–68.

[28] S. Trechsel, *op. cit.*, p. 361.

[29] See W. Jasiński, *Redukcja postępowania przed sądem pierwszej instancji a konstytucyjny i konwencyjny standard prawa do odwołania się w sprawach karnych*, [in:] *Postępowanie odwoławcze w procesie karnym…*, p. 120.

[30] P.D. Marshall, *A Comparative Analysis of the Right to Appeal*, "Duke Journal of Comparative and International Law" 2011, vol. 22(1), p. 18; A. Gliszczyńska-Grabias, K. Sękowska-Kozłowska, *Komentarz do art. 14 Międzynarodowego paktu praw obywatelskich i politycznych*, ed. R. Wieruszewski, LEX/el. 2012, thesis no. 18.10.

[31] See HRC views adopted on 22 July 2005, Communication no. 1095/2002, *Bernardino Gomaríz Valera v. Spain*, U.N. Doc. A/60/40, vol. II, at 134 (HRC 2005), § 7. See also M. Wasek-Wiaderek,

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by the Human Rights Committee (HRC) in general comments to Article 14 ICCPR. It explicitly states that "Article 14 (5) is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court".[32] Additionally, the HRC further states there that the right to appeal "imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant".[33]

From the Polish perspective, the key question is whether a cassation appeal brought by a party to the proceedings may be considered an "appeal" under Article 14 (5) ICCPR. Because only if this question was answered positively would the current wording of Article 454 § 1 CCP, which allows for passing a conviction at the appeal instance as a result of changing the first-instance decision on conditional discontinuation of proceedings, be regarded as compliant with Article 14 (5) ICCPR. In the *Uclés v. Spain* case, while assessing the possibility of considering a cassation as "a review" within the meaning of this provision, the HRC stressed that the right to review does not include the right to a retrial or a new hearing. "However, the court conducting the review must be able to examine the facts of the case, including the incriminating evidence". Given the fact that, according to the case law of the Supreme Court of Spain, when examining a cassation it could not reassess the evidence evaluated by the trial court, the HRC concluded that "the review conducted by the Supreme Court was limited to a verification of whether the evidence, as assessed by the first instance judge, was lawful, without assessing the sufficiency of the evidence in relation to the facts that would justify the conviction and sentence imposed. It did not, therefore, constitute a review of the conviction as required by Article 14 (5), of the Covenant".[34] The scope of review required under this provision was confirmed by the HRC in other individual cases.[35]

Wybrane aspekty postępowania odwoławczego w procesie karnym po 1 lipca 2015 r. w świetle standardów międzynarodowych, [in:] *Postępowanie odwoławcze w procesie karnym…*, p. 156.

[32] HRC, General Comment no. 32, 23 August 2007, CCPR/C/GC/32, part VII.

[33] *Ibidem*.

[34] HRC views adopted on 22 July 2009, Communication no. 1364/2005, CCPR/C/96/D/1364/2005, § 11.3. The views of the HRC adopted in this case and other Spanish cases had impact on interpretation of the scope of its jurisdiction in cassation proceeding by the Spanish Supreme Court. See P.D. Marshall, *op. cit.*, p. 20. The Spanish model of appeal proceedings was subsequently amended in 2015, i.a., under the influence of the case-law of the ECtHR concerning appeal proceedings. See *Impact of the European Convention on Human Rights in States Parties: Selected Examples*, Council of Europe, November 2016, pp. 69–70.

[35] See HRC views adopted on 28 March 2006, Communication no. 1100/2002, *Bandajevsky v. Belarus*, CCPR/C/86/1100/2002, § 10.13; HRC views adopted on 6 April 1998, Communications

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Referring these standards to the current model of the criminal procedure in Poland, specifically to the new wording of Article 454 § 1 CCP, leads to the conclusion that to a certain narrow extent it remains in conflict with Poland's obligations under the International Covenant on Civil and Political Rights. For the sake of clearing the foreground, it should be noted that the change of judgement from conditional discontinuation to conviction at the appellate instance does not pertain to the issue of ascribing guilt. Since the application of this probatory measure may only take place when the degree of the accused person's guilt is not significant (Article 66 § 1 of the Criminal Code), this guilt must already be established in the first instance judgement conditionally discontinuing the proceedings. On the other hand, there is no doubt that the change of the judgement from conditionally discontinuing the proceedings to conviction is connected with imposition of a sentence for the first time at the appeal instance. The convicted person should therefore be entitled to appeal against this judgement, as referred to in the case law of the HRC under Article 14 (5) ICCPR. However, Polish law does not provide for such an appeal. For several reasons, one cannot consider a cassation appeal to be such. First, a cassation appeal in favour of a person sentenced to a penalty other than imprisonment without its conditional suspension may be brought in a very narrow scope. Pursuant to Article 523 §§ 2 and 4 CCP, its only basis may be the absolute ground of appeal under Article 439 § 1 CCP.[36] Certainly, such a scope of examination by the Supreme Court of the judgement of an appellate court, limited to a narrow catalogue of errors listed in this provision, cannot be considered as the implementation of the "right to review" under Article 14 (5) ICCPR. This catalogue, apart from imposing a penalty or another means of penal reaction unknown to the Act (Article 439 § 1 (5) CCP) does not include errors regarding the severity of the sentence. Secondly, even if at the appeal instance a penalty of imprisonment is issued without conditional suspension of its execution, which denotes the possibility of lodging a cassation appeal in favour of the accused also with reference to a "gross violation of the law", it is still impossible to question directly the severity of the sentence in this means of challenge. This is prevented by the contents of Article 523 § 1 *in fine* CCP, according to which a cassation appeal cannot be brought purely on the grounds of the penalty being disproportionate.

In conclusion, the latest amendment to Article 454 § 1 CCP, which has been in force since 5 October 2019, in connection with the scope of the cassation re-

no. 623/1995, 624/1995, 626/1995, 627/1995, *Domukovsky and others v. Georgia*, CCPR/C/OP/6/2005, § 18.11.

[36] Article 523 § 1 CCP indicates two categories of grounds for cassation appeal: absolute grounds of appeal indicated in Article 439 § 1 CCP (closed catalogue) and "other gross violation of the law if it might have a material impact on the contents of a judgement".

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view of the appellate court judgement, raises serious doubts as to its compliance with the provisions of the International Covenant on Civil and Political Rights.[37] Admittedly, the doctrine indicates that the term "convicted person" in Article 14 (5) ICCPR has an autonomous meaning and covers also the person found guilty but not sentenced, i.e. a person subject to a judgement conditionally discontinuing the proceedings.[38] However, even with the acceptance of such a view, which is not shared by the author of this article, only in case of conviction by the appeal court (but not in case of conditional discontinuation of proceedings) the penalty is imposed for the first time at the appeal instance and at least in this respect the accused should be entitled to a full appeal.

The issue considered here was taken into account by the legislator but justifying the amendment to Article 454 § 1 CCP was limited to stating that "the provision of Article 14 (5) ICCPR prevents only the first-time attribution of a forbidden act at the appeal instance".[39]

As was mentioned above, since the outset of the applicability of the current Code of Criminal Procedure, i.e., since 1998, Article 454 § 1 CCP has provided the appellate court with the possibility to alter the acquittal issued in the first-instance proceedings into a judgement conditionally discontinuing the proceedings. Until the amendment, which entered into force on 1 July 2015, in practice, however, there occurred no such reformatory adjudication by courts of appeal, but for different reasons. According to the Supreme Court ruling,[40] if the court of first instance acquitted the accused or discontinued the proceedings, the appellate court may discontinue the proceedings unconditionally (in the event of prior acquittal) or conditionally discontinue them only exceptionally – only if it does not make its own findings and when commission of an offence is obvious. In other cases, the appellate court should quash the judgement under appeal and refer the case to the court of first instance for re-examination. The change in the normative environment in this respect, as of 1 July 2015, by allowing the appellate court to conduct evidence, and above all by closing the catalogue of situations in which it is permissible to issue a cassatory judgement, put the courts of appeal in a completely new situation. Currently, an acquittal may only be revoked for three reasons specified in Article 437 § 2 *in fine* CCP and Article 454 § 1 CCP listed as the basis for such revocation does not cover situations where the appellate court deems the

[37] See decision of the Supreme Court of 7 October 2020 r., IV KS 24/20, Supremus.

[38] D. Świecki, [in:] *Komentarz aktualizowany do art. 454 Kodeksu postępowania karnego*, LEX/el. 2020, thesis no. 4.

[39] Justification of the Draft Act no. 3251 of the Parliament of the Republic of Poland of the 8th term, www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3251 [access: 12.12.2020].

[40] Judgement of the Supreme Court of 7 December 1994, II KRN 234/94, "Wokanda" 1995, no. 5, p. 13 (delivered under the provisions of the Code of Criminal Procedure of 1969, which also provided for similar *ne peius* prohibitions).

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conditional discontinuation of proceedings against a person acquitted in the first instance justified. Therefore, the Supreme Court has repeatedly indicated that if there are grounds for conditional discontinuation of proceedings, the appellate court should not revoke the judgement of the court of first instance pursuant to Article 454 § 1 CCP.[41]

As a result, on statutory grounds, it is permissible that criminal liability is ascribed to the accused for the first time by the appellate court, but only in the form of a probation measure of – conditional discontinuation of the proceedings, which, as already mentioned above, is associated with the imputation of guilt. However, this is not a conviction. Since Article 14 (5) ICCPR refers to a person convicted of a crime, it can be assumed that it does not include a person who was subject to a probation measure in the form of conditional discontinuation of the proceedings. Taking a different position and recognizing that the term "convicted person" should also be understood as the person to whom guilt was ascribed and whose trial was conditionally discontinued,[42] would mean that also in this respect, i.e., in the event of altering an acquittal judgement at an appeal instance to conditional discontinuation of the proceedings, the accused person's right to appeal against the judgement, as guaranteed in Article 14 (5) ICCPR, would be violated.

A cassation appeal against the judgement conditionally discontinuing the proceedings may be brought by the party only because of the emergence of absolute grounds of appeal (Article 439 § 1 CCP). In those circumstances, it could not, by any means, be considered "a review" meeting the requirements of Article 14 (5) ICCPR. As already indicated above, due to the contents of this provision, which refers to the convicted person and also uses the category of "guilt and punishment", it should be concluded that the possibility of changing the acquittal judgement issued by the first instance court into the conditional discontinuation of the proceedings by the appellate court, permitted by the Polish law, is not inconsistent with the International Covenant on Civil and Political Rights. On the other hand, such a contradiction should be seen in the situation authorising an appellate court to issue a conviction, permissible since 5 October 2019, if the criminal proceedings were conditionally discontinued in the first instance.

[41] Decision of the Supreme Court of 20 October 2020, V KS 23/20, Supremus; judgement of the Supreme Court of 29 January 2020, II KS 27/19, LEX no. 2775312; judgement of the Supreme Court of 4 July 2019, V KS 20/19, Supremus.

[42] D. Świecki, [in:] *Komentarz aktualizowany*...

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THE COMPLAINT ON THE CASSATORY JUDGEMENT OF THE APPELLATE COURT – A SPECIAL REMEDY AIMED AT ACCELERATION OF CRIMINAL PROCEEDINGS?

Shortly after the new model of appeal proceedings entered into force, on 15 April 2016, another amendment to the Code of Criminal Procedure entered into force,[43] introducing a new means of challenge into the Polish criminal procedure. In principle, it was intended to be an extraordinary appeal examined by the Supreme Court and brought against cassatory judgements issued by the appellate courts in breach of Article 437 § 2 CCP. As a result, since 1 July 2015, a closed catalogue of grounds for the revocation of the judgement has been in force, and since the 15 April 2016, a special legal procedure for complaining against cassatory judgements issued despite the lack of grounds expressed in Article 437 § 2 *in fine* CCP.[44]

Against the background of recognized European models of appellate measures in criminal cases, such complaint should be considered as innovative or even experimental. In addition to the complaint about the excessive length of proceedings, applicable to all court proceedings,[45] the legislator decided to introduce the complaint which neither examines the validity of the decision on guilt, nor the decision on penalty. Its purpose is only to examine whether the appellate court quashed the judgement despite the lack of statutory grounds for doing so.[46] Therefore, the complaint does not directly contribute to eradication of the excessive length of proceedings. It is intended to strengthen the appellate model of criminal proceedings, the side effect of which was to shorten the time needed for the examination of criminal cases.[47]

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[43] Act of 11 March 2016 amending the Code of Criminal Procedure (Journal of Laws 2016, item 437).

[44] This measure may be brought against cassatory judgements issued in the course of the proceedings initiated by an indictment lodged with the court after 30 June 2015.

[45] On different models of addressing the problem of excessive length of criminal proceedings in Europe, see F. Calvez, N. Regis, *Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights*, Report CEPEJ(2018)26, Council of Europe 2018, p. 66. In Germany, it may take the form of stating in the operative part of the judgement that a specified part of the penalty imposed was to be considered as having been served (so-called "execution approach", *Vollstreckungslösung*). See judgement of the ECtHR of 20 June 2019, *Chiarello v. Germany*, application no. 497/17, §§ 29–30.

[46] See D. Świecki, *Nadzór judykacyjny Sądu Najwyższego sprawowany w trybie skargi na wyrok kasatoryjny*, [in:] *Ewolucja polskiego wymiaru sprawiedliwości w latach 2013–2018 w świetle standardów rzetelnego procesu*, eds. C. Kulesza, A. Sakowicz, Białystok 2019, pp. 426–427.

[47] See Justification of the draft Act of 11 March 2016 amending the Act – Code of Criminal Procedure and some other acts, Legislative issue no. 207 of the Parliament of the 8th term, www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=207 [access: 12.12.2020].

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The introduction of the complaint into the legal system has generally been criticized by the doctrine.[48] It has been pointed out that there was a risk that the new measure would act counterproductively in the already extensive system of appeal measures – instead of speeding up the proceedings, it would prolong them, additionally significantly increasing the backlog of cases at the Supreme Court. Lodging a complaint and its examination automatically delayed sending the case files along with the cassatory judgement to the court of first instance for its re-examination. These concerns have been expressed despite the introduction of a relatively short, 7-day deadline for lodging a complaint from the date of serving the judgement with the justification, as well as a complaint fee equal to the cassatory fee.

Unfortunately, it is impossible to answer the question of whether, without the institution of the complaint, the new model of appeal proceedings would become established enough to lead to a significant reduction in the number of cassatory judgements issued by appellate courts. As already indicated, only nine months after the change of this model, the institution of complaint was introduced into the Code of Criminal Procedure. As a result, the significant decrease in the total number of cassatory judgements observed in recent years[49] cannot be attributed solely to the change in the model of adjudication in the appeal instance.

The conducted research of all complaints lodged with the Supreme Court from the beginning of the existence of this measure until the end of 2019 allows for a preliminary assessment of its effectiveness and legitimacy of its introduction into the legal system. It ought to be concluded that the fears that the number of submitted complaints will paralyse the work of the Criminal Chamber of the Supreme Court have not been proved. The significant extension of the time for examining a case by the Supreme Court is mainly due to factors other than the extension of the jurisdiction of this court with the competences for consideration of complaints. In the entire period covered by the study, i.e., during the years 2016–2019, 340 complaints

[48] See J. Zagrodnik, *Instytucja skargi na wyrok sądu odwoławczego (rozdział 55a k.p.k.) – zarys problematyki*, [in:] *Verba volant scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, eds. T. Grzegorczyk, R. Olszewski, Warszawa 2017, pp. 520–521; S. Steinborn, *Skarga na wyrok kasatoryjny sądu odwoławczego na tle systemu środków zasakrżenia w polskim procesie karnym*, [in:] *Verba volant scripta manent…*, pp. 416–417; A. Sakowicz, *Zakres kontroli dokonywanej przez Sąd Najwyższy przy rozpoznaniu skargi na wyrok kasatoryjny sądu odwoławczego*, "Białostockie Studia Prawnicze" 2018, vol. 23(1), pp. 156–158, 171–172. Introduction of this new remedy was considered as "justified" by A. Lach (*Skarga na wyrok sądu odwoławczego*, [in:] *Postępowanie karne po nowelizacji z dnia 11 marca 2016 r.*, ed. A. Lach, Warszawa 2017, pp. 259–260).

[49] As transpires from the data collected from appellate courts of Lublin Appeal Region (i.e., Lublin Court of Appeal, and Regional Courts in: Lublin, Zamość, Siedlce and Radom), cassatory judgements were issued with reference to respectively: 22.95% defendants in 2013, 21.10% defendants in 2014, 16.46% defendants in 2015, 11.90% defendants in 2016, 10.68% defendants in 2017, and 9.95% defendants in 2018.

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against cassatory judgements of common courts were lodged with the Supreme Court,[50] 302 of which were examined substantively. The inflow of complaints in the following years was as follows: 10 complaints in 2016, 41 complaints in 2017, 111 complaints in 2019, and 178 complaints in 2019. The detailed study did not cover the complaints filed in 2020, but the obtained general data show that this year a total of 129 complaints have been lodged with the Supreme Court. This data allow us to predict that the inflow of complaints, after its significant increase over the years 2017–2019, will stabilize at the level of approximately 150 complaints per year. Due to the fact that the annual inflow of a cassatory appeals in criminal cases to the Supreme Court amounts to about 2,000 cases (e.g., in 2020 it was 2,213 cassation appeals), it must be stated that the introduction of the complaint did not significantly increase the judicial burden of the Supreme Court. The research also shows that complaints are brought in only about 3% of cases where it is admissible.

Over the years 2016–2019, the Supreme Court dismissed 50.33% of the lodged complaints, and granted 49.67%. As a result, nearly half of the complaints are effective. Such a percentage of granted complaints should be assessed as high. The main reason for granting the complaints was too hasty revocation of judgements by appellate courts with erroneous indication whereby it was necessary to repeat the entire judicial trial (50.67% of all granted complaints). The second main reason for granting the complaints was the lack of indication of the clear ground for quashing the first instance judgement (26.67%). This means that appellate courts continue to issue cassatory judgements without a proper indication of statutory grounds, which in turn is corrected through a complaint.

The average time of examination of the complaint by the Supreme Court is approximately 50 days. However, if cumulated with the time needed for examination of its formal requirements by the appellate court before sending a complaint to the Supreme Court, the whole complaint proceedings amount to approximately 140–150 days. With reference to all complaints which were dismissed, this time extends the overall length of criminal proceedings. On the other hand, undeniably the complaint, if granted, may accelerate the final adjudication of the case by avoiding its re-examination by the first instance court. The case is back at the appellate stage of the proceedings, which, however, does not prevent the appellate court from delivering the cassatory judgement for the second time. With reference to all 340 examined complaints, this measure was brought for the second time within the framework of the same criminal proceedings only in a few cases. Indeed, all the above circumstances significantly impede the unambiguous assessment of the complaint.

However, the above data allow formulating a thesis whereby currently the institution of complaint, due to the very limited number of cases in which it is

[50] This number excludes complaints against the judgements of corporation and military courts.

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brought, is not a key instrument directly influencing the overall length of proceedings. This does not mean, however, that it has no "galvanising" effect on the courts examining appeals. For obvious reasons, however, this impact cannot be measured in a quantifiable way. However, one can risk a thesis whereby the very fact of the existing possibility of subjecting a cassatory judgement to the review of the Supreme Court – a judgement which previously remained beyond any judicial review – causes appellate courts to examine with more diligence the prerequisites which need to be met to revoke a judgement and refer the case to the court of first instance for reconsideration. It should also be noted that the complaint significantly contributed to the unification of the judicial decisions of the Supreme Court in terms of understanding the grounds for issuing cassatory judgements.

CONCLUSIONS

Due to the fact that the excessive length of criminal proceedings identified by the ECtHR was also generated by its structure, including the appeal proceedings model, a change of this model was introduced in 2015 as one of the elements of structural changes aimed at reducing the lengthy examination of criminal cases. In the following years, further legislative steps were taken to this end. One of them was to significantly reduce the scope of *ne peius* prohibitions. The current wording of Article 454 § 1 CCP, which allows the issuance of a first-time conviction judgement by an appellate court examining an appeal against a judgement conditionally discontinuing criminal proceedings, raises significant doubts as to its compliance with Article 14 (5) ICCPR. Indeed, it cannot be accepted that an extraordinary measure, in the form of cassation against the judgement of the appellate court, fulfils the requirements of a "review" resulting from this provision. As a result, the latest amendments to the Code of Criminal Procedure adopted in 2019 and aimed at accelerating proceedings, weaken the procedural guarantees of the accused, including their right to appeal against the judgement. At the same time, it cannot be regarded that this further reduction of the *ne peius* prohibition could significantly contribute to the acceleration of criminal proceedings. The conducted research shows that the most common reason for issuing unfair cassatory judgements is the erroneous determination that there is a need to repeat the trial in its entirety, mainly the complete re-examination of evidence in the case. The judgements are also often quashed because an appellate court sees the need to alter the judgement of acquittal into a conviction, and it cannot do this on its own due to the *ne peius* prohibition. On the other hand, relatively rarely, the reason for quashing a judgement (prior to the changes introduced in 2019) was the appellate court's determination that there was a need to issue a judgement of conviction in a situation, where a judgement conditionally discontinuing criminal proceedings was passed in the first instance.

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This allows formulating a thesis whereby the further restriction of the scope of the *ne peius* prohibitions, made in 2019, will not translate into acceleration of criminal proceedings.

Although for various reasons it is difficult to unequivocally assess the introduction of a complaint against a cassatory judgement of the appellate court in 2016, there is no confirmation of the initial concerns whereby the complaint would slow down criminal proceedings, instead of accelerating them. The study conducted as part of the research grant leads to the conclusion that this extraordinary measure may contribute to reducing the number of cassatory judgements issued, which should translate into accelerating criminal proceedings.

At the same time, it should be emphasized that various factors influence the duration of examining a criminal case. Therefore, the potential outcome in the form of shortening proceedings as a result of model changes in the examination of appeals may not be finally noticeable, if there are other factors extending them, such as, e.g., legislative changes introducing new regulations which raise interpretation doubts.

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ABSTRAKT

Celem niniejszego opracowania jest przedstawienie i ocena głównych zmian modelu postępowania odwoławczego wprowadzonych w ciągu ostatnich kilku lat do polskiego procesu karnego w celu jego przyspieszenia i uczynienia w ten sposób zadość wymogom art. 6 ust. 1 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności. W artykule przedstawiono argumenty na rzecz tezy, że zmiany te osłabiły prawo oskarżonego do odwołania się od wyroku. W rezultacie w świetle obecnie obowiązujących przepisów dopuszczalne jest wymierzenie kary po raz pierwszy przez sąd odwoławczy i rozstrzygnięcie to nie może być poddane efektywnej kontroli odwoławczej. Takie rozwiązanie może budzić wątpliwości co do jego zgodności z art. 14 ust. 5 Międzynarodowego Paktu Praw Obywatelskich i Politycznych. W opracowaniu sformułowano też tezę, że nowo wprowadzony środek zaskarżenia – skarga na wyrok kasatoryjny sądu odwoławczego – wbrew początkowym obawom nie spowodował w praktyce „rozsadzenia" systemu środków zaskarżenia w polskim procesie karnym. Jednocześnie, pomimo stosunkowo niewielkiego zakresu jego wykorzystania, może przyczynić się on do wzmocnienia apelacyjnego – w przeciwieństwie do kasacyjnego – modelu postępowania odwoławczego i tym samym do przyspieszenia postępowania karnego. Teza ta znajduje oparcie w badaniach wszystkich skarg wniesionych do Sądu Najwyższego w latach 2016–2019.

Słowa kluczowe: system środków zaskarżenia w polskim w procesie karnym; Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności; skarga na wyrok kasatoryjny sądu odwoławczego; Międzynarodowy Pakt Praw Obywatelskich i Politycznych