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Research Article

A NEW EXTRAORDINARY MEANS OF APPEAL IN THE POLISH CRIMINAL PROCEDURE: THE BASIC PRINCIPLES OF A FAIR TRIAL AND A COMPLAINT AGAINST A CASSATORY JUDGMENT

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Summary: 1. Introduction. – 2. Reasons for introducing the complaint into Polish criminal procedure. – 3. Principle of hearing the case within a reasonable time. – 4. The right to of defence. – 5. Principle of two-instance proceedings. – 6. Equality of arms in complaint proceedings. – 7. Conclusions.

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ABSTRACT

Background: *The main purpose of this study is to present and evaluate a new, extraordinary means of appeal in Polish criminal procedure – a complaint against cassatory judgment of the appellate court from the point of view of principles of criminal proceedings. This includes hearing the case within a reasonable time, the right of defence, two-instance proceedings, and equality of arms in complaint proceedings.*

Methods: *This study draws on comprehensive analyses of the provisions of the Polish Code of Criminal Procedure, partly based on case research, and comparing effects of these analyses with both the Polish constitutional standard and the jurisprudence of the European Court of Human Rights (ECHR).*

Results: *Complaint proceedings comply with the main requirements of a fair trial.*

Conclusions: *Certain limitations on the right of the accused in the discussed proceedings are fully justified by their special features and are proportionate. This conclusion applies to the time-limit for submitting the complaint, the requirement to bring it only through the assistance of a defence counsel, and also to the way of examination of the complaint by the Supreme Court in writing at the closed session. All these solutions constitute only permissible, proportionate restrictions of the indicated principles. This proportionality results primarily from weighing the benefits of the complaint proceedings: limitations of cassatory adjudication in genere, respect for the appeal model of appellate proceedings, and maintaining uniformity of interpretation of narrowly defined grounds for cassatory adjudication.*

1 INTRODUCTION

In 2016, a new extraordinary means of appeal was introduced into the Polish Code of Criminal Procedure (CCP)[1] – a complaint against an appellate court judgment quashing the judgment of the court of first instance and referring the case for re-examination (hereinafter, "complaint against a cassatory judgment" or "a complaint"). The aim of this study is to examine whether this new remedy satisfies the basic principles of criminal procedure sharing the general standard of a fair trial. To this end, the procedure provided for examination of a complaint was analysed in the context of the following principles of criminal proceedings:

1) the principle of hearing the case within a reasonable time;
2) the principle of the right of defence;
3) the principle of two-instance proceedings;
4) equality of arms in complaint proceedings.

The authors use a formal-dogmatic method, and the results of empirical research on the duration of proceedings were used as an aid. The compilation of views of the doctrine and jurisprudence, especially ECHR, was the theoretical basis for applying conclusions to the

1 Code of Criminal Procedure of the Republic of Poland 'Kodeks postępowania karnego' of 6 June 1997 (consolidated text) [2021] DzU 534.

new institution of complaint. The text attempts to relate the selected achievements of the doctrine and jurisprudence concerning other legal institutions to this new instrument in Polish criminal process. An attempt was made to answer the question on whether the new instrument of complaint fits into these established and developed standards.

The thesis of the article is that complaint proceedings compile with the main requirements of fair trial. Certain limitations on the right of the accused in the discussed proceedings are fully justified by their special features and proportionate because the complaint procedure does not result in a consideration of the case on the merits.

The authors argue that the complaint satisfies the right of the accused to have a criminal case examined within a reasonable time, despite the objective dedication of additional time necessary for its examination. Moreover, the legal framework provided for taking a decision on a complaint respects the accused's right to defence, even though a complaint is examined in closed session without the participation of the parties. In this respect, it also does not contradict the adversarial principle and the principle of equality of arms that forms part of it. The new legal remedy, although classified in the national legal order as an extraordinary appeal measure, does not demolish the two-instance model of criminal proceedings, although it results in its currently more formal than material nature. The indirect effect of the complaint is that appellate courts are more inclined to conduct evidence proceedings and new findings of fact at the appeal instance without being subject to the review of another higher court.

The structure of article is as follows. First, the reasons for introducing a new institution to the Polish legal order are briefly characterised, pointing to the characteristic features of the complaint. Then, this instrument is analysed in the context of four principles: the principle of hearing the case within a reasonable time; the principle of the right of defence; the principle of two-instance proceedings; and equality of arms in a complaint proceeding. Selected statements of the doctrine and jurisprudence in this regard have been taken into account.

2 REASONS FOR INTRODUCING THE COMPLAINT INTO POLISH CRIMINAL PROCEDURE

Before the key considerations, it is necessary to present the assumptions and process of systemic changes that led to the introduction of Chapter 55a of the CCP. On 1 July 2015, the model of appellate proceedings in the Polish criminal procedure changed.[2] One of its assumptions was to lead to a situation in which the courts of appeal, when reviewing the decision of the court of first instance, will adjudicate primarily on the merits. As a result, there was a shift from the revisory model to the appeal model of appellate proceedings.[3] In the new model, whenever there is a need to interfere with the content of the judgment of the court of first instance, the court of appeal should change the judgment instead of quashing one and referring the case back to the court of first instance. Instead of the previously applicable open catalogue of grounds for issuing a cassatory judgment by the appellate court, the legislator introduced a closed catalogue as of 1 July 2015. According to the new wording of Art. 437 § 2 of the CCP: "Quashing

2 On that day, the changes introduced by the large amendment Act of the Republic of Poland of 27 September 2013 'On amending the Act - Code of Criminal Procedure and certain other acts' [2013] DzU 1247.

3 Cezary Kulesza, 'Conventional Model of a Fair Appeal Proceedings in the Comparative Perspective' in C Kulesza (ed), *Fairness of the New Model of Polish Criminal Appeal Proceedings in the Context of Delivered Research* (Temida 2 2019) 13.

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of the decision and remitting the case for re-examination may take place only in the cases indicated in Art. 439 § 1, Art. 454, or if it is necessary to repeat the entire first instance trial."[4]

Secondly, Art. 452 § 1 of the CCP was revoked, which prevented the court examining an appeal from conducting evidence proceedings as to the merits of the case. Currently,[5] Art. 452 § 2 of the CCP allows the appellate court to dismiss the motion for evidence solely in two cases. Firstly, if the taking of evidence would be pointless due to the necessity of quashing the judgment for re-examination in the circumstances referred to in Art. 437 § 2 of the CCP. Secondly, if the evidence was not presented before the court of first instance, despite the fact that the applicant could have presented it at that time, or the circumstance to be proved relates to a new fact, which was not the subject of the proceedings before the court of first instance, and the applicant could have indicated it at that time. The evidence preclusion referred to in the second case will not be of great importance in practice, because in accordance with Art. 452 § 2 of the CCP, it shall not apply if the evidence taking is relevant, *inter alia*, for the assessment of whether the accused has committed a prohibited act and whether it is a crime.

As already mentioned, before 1 July 2015, there were no explicit limitations for issuing cassatory judgments by the appellate courts. Having established the procedural or substantive irregularities in a given case, the appellate courts could each time decide whether to issue a judgment changing the decision of the court of first instance or quash this judgment, no matter whether the irregularities at issue could be remedied at the appeal stage of the proceedings. Changes in Art. 452 § 1 of the Code of Criminal Procedure were extremely important, since this provision excluded the possibility of taking evidence on the merits of the case in appeal proceedings.[6] Prior to 1 July 2015, the appellate courts in principle could adjudicate differently in substance only on the basis of the material gathered in the first-instance proceedings. Furthermore, there was no explicit restriction on cassatory adjudication. The change made on 1 July 2015 should therefore be assessed as significant and far-reaching. However, the Polish legislator did not stop there.

In the classic, two-instance criminal proceedings, in which the final judgment of the court of appeal was subject only to a cassation to the Supreme Court, based on allegations of gross violation of the law, no review of cassatory judgments of the appellate courts was provided for. No means of appeal, neither ordinary nor extraordinary, was available to the parties against the decision of the court of appeal quashing the judgment of the court of first instance and referring the case back to this court for re-examination. The cassatory judgment is not a decision closing the case, thus the decision on this matter was not subject to any review. On 15 April 2016, an institution hitherto unknown[7] to Polish criminal procedure was introduced into the CCP, which is a complaint against the judgment of the court of appeal quashing the judgment of the court of first instance and remitting the case for re-examination (chapter 55a of the CCP). This instrument was intended to strengthen

4 These cases will be briefly explained later in the text.

5 The last amendment to this provision took place on 5 October 2019 under the Act of the Republic of Poland of 19 July 2019 'On amending the Act - Code of Criminal Procedure and certain other acts' [2019] DzU 1694.

6 Wojciech Jasinski and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) pt 2, ch 3; Maciej Fingas, Sławomir Steinborn and Krzysztof Woźniewski, 'Poland' in S Allegrezza and V Covolo (eds), *Effective Defence Rights in Criminal Proceedings: A European and Comparative Study on Judicial Remedies* (Wolters Kluwer 2018) 381.

7 Pursuant to the Act of the Republic of Poland of 11 March 2016 'On amending the Act - Code of Criminal Procedure and certain other acts' [2016] DzU 437.

the appeal model of appellate proceedings introduced on 1 July 2015.[8] It is worth mentioning that, according to the assumption of the legislator, the complaint is to be characterised by a limited scope of cognition and a simplified mode of its examination (at a session without the participation of the parties), while entrusting its examination to the Supreme Court is to favour the uniformity of jurisprudence in this regard.

While adjudicating upon the complaint, the Supreme Court may only examine whether the judgment of the court of first instance has been quashed and the case remitted for reconsideration to that court for reasons indicated by the legislator in the closed catalogue of grounds for issuing the cassatory judgment. In accordance with Art. 539a § 3 of the CCP, "The complaint may be filed only due to violation of Art. 437 or due to the irregularities specified in Art. 439 § 1." This means that the Supreme Court reviews whether the cassatory decision was actually issued in the event of any of the absolute grounds for appeal (Art. 439 § 1 of the CCP) or in the event of the need to repeat the entire first instance trial (Art. 437 § 2 of the CCP) or in the event of the *ne peius* rule (Art. 454 § 1 of the CCP).

As absolute grounds for appeal (Art. 439 § 1 of the CCP) are defined the most serious procedural irregularities, these can cause the necessity to quash the judgment. These are, for example, situations where an unauthorised entity or one incapable of adjudication participated in the issuance of the decision (Art. 439 § 1 point 1 of the CCP), when a court lower in rank has rendered a decision in a case falling under the jurisdiction of a court higher in rank (Art. 439 § 1 point 4 of the CCP) or when the accused in court proceedings did not have a defence counsel in cases of obligatory defence (Art. 439 § 1 point 10 of the CCP).

The necessity to repeat the entire first instance trial may occur in the event of (procedural) irregularities of a different nature than absolute grounds of appeal, however so grave, that their removal at the appeal instance is not possible and the trial must take place from the beginning. These may be errors in evidentiary proceedings but only those that affect the need to repeat all actions carried out so far, which is impossible in appeal proceedings. In fact, this would come down to conducting the entire proceedings anew at the appeal instance, depriving the parties of the right to appeal.[9]

As regards the *ne peius* rule, it means that a judgment of the court of first instance acquitting the accused or discontinuing the proceedings may be revoked if, in appeal proceedings, the court sees the possibility of issuing a judgment of conviction. In accordance with Art. 454 § 1 of the CCP, a court of second instance may not convict a defendant who was acquitted by the first instance court or whose case was discontinued at first instance. In Polish criminal procedure a court of second instance may never issue a judgment of conviction for the first time, thus changing the acquittal decision itself, although such conduct is explicitly permitted by Art. 2, section 2 of Protocol o. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, Protocol No. 7), ratified by Poland.[10]

8 A government project No 207 of the Act On amending the Act - Code of Criminal Procedure and certain other acts 'Rządowy projekt ustawy o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw' of 27 January 2016 <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=207> accessed 23 January 2023.
The justification for the draft of amending law indicates that "the appeal and reformatory model of appeal proceedings requires the introduction of an institutional mechanism to secure the reformatory nature of adjudication". The new instrument, in accordance with the will of the legislator, is intended to "eliminate unjustified cases of revoking", which will accelerate the proceedings. It will also perform "a preventive function, preventing courts of appeal from hasty cassation of judgments".

9 Dariusz Świecki (red), *Kodeks postępowania karnego: Komentarz*, t 2 (Wolters Kluwer 2021) art 437.

10 Protocol from 22.11.1984 ([2003] DzU 42/364), ratified by Poland under the Ratification Act of 21.06.2002 ([2002] DzU 127/1084), which entered into force on 25.08.2002.
Sławomir Steinborn, 'Ograniczenie zaskarżalności wyroku wydanego w I instancji jako środek uproszczenia procesu karnego w świetle prawa do dwuinstancyjnego postępowania (uwagi de lege lata i de lege ferenda)' (2005) 1 Gdańskie Studia Prawnicze 368; P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998).

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The Polish Supreme Court developed a standing case-law on the scope of the examination of the case in the complaint proceedings. When examining the complaint against the judgment of the appellate court, the Supreme Court may only assess whether the court of appeal was guided by the grounds for issuing the cassatory judgment indicated in Art. 539a § 3 of the Code of Criminal Procedure and whether such a decision was necessary in a specific case. Therefore, it does not carry out a typical instance review. The complaint is not a means of verifying the assessment of evidence carried out in the second instance. Neither is the complaint devoted to checking the quality of examination of the appeal by the second instance court. Hence, the Supreme Court cannot assess whether there are substantive grounds for issuing a specific type of judgment. It is entitled to assess only whether a decision to quash the first instance court was taken with due respect to a closed catalogue of grounds for issuing a cassatory judgment at the appeal stage of the proceedings.[11]

After outlining this issue, one should proceed to the basic considerations, namely, how the institution of complaint refers to selected, basic principles of the criminal procedure, indicated at the beginning.

3 PRINCIPLE OF HEARING THE CASE WITHIN A REASONABLE TIME

The right to hear a case without undue delay is provided directly by the Constitution of the Republic of Poland (Art. 45 para. 1) and norms of international law – Art. 6 para. 1 of the ECHR and Art. 14 para. 3 (b) of the International Covenant on Civil and Political Rights of 19 December 1966.[12].This is also one of the four main objectives of criminal procedure indicated in Art. 2 § 1 of the CCP.

For the sake of clarity, it should be noted at the outset that the proceedings regarding the examination of the complaint shall remain under the protection of Art. 6 of the Convention, which provides for the guarantee of a fair trial by an independent and impartial tribunal established by law in determination of any criminal charge.[13]

11 Case I KZP 13/17 (Supreme Court of Poland, 25 January 2018) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20kzp%2013-17.docx.html> accessed 23 January 2023; Case I KS 8/20 (Supreme Court of Poland, 7 May 2020) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20ks%208-20.docx.html> accessed 23 January 2023; Case II KS 7/20 (Supreme Court of Poland, 30 July 2020) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20ks%207-20.docx.html> accessed 23 January 2023; Case III KS 5/21 (Supreme Court of Poland, 21 April 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/iii%20ks%205-21.docx.html> accessed 23 January 2023; Case IV KS 6/21 (Supreme Court of Poland, 31 March 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/iv%20ks%206-21.docx.html> accessed 23 January 2023; Case V KS 13/21 (Supreme Court of Poland, 31 May 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/v%20ks%2013-21.docx.html> accessed 23 January 2023; Case V KS 33/20 (Supreme Court of Poland, 29 January 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/v%20ks%2033-20.docx.html> accessed 23 January 2023; Arkadiusz Lach, 'Skarga na wyrok sądu odwoławczego' w A Lach (red), *Postępowanie karne po nowelizacji z dnia 11 marca 2016 roku* (Wolters Kluwer 2017) 259; Andrzej Sakowicz, 'Zakres kontroli dokonywanej przez Sąd Najwyższy przy rozpoznaniu skargi na wyrok kasatoryjny sądu odwoławczego' (2018) 23 (1) Białostockie Studia Prawnicze 155, doi: 10.15290/bsp.2018.23.01.10; Jan Kil, 'Skarga na wyrok sądu odwoławczego – uwagi de lege lata i de lege ferenda' (2019) 2 (19) Roczniki Administracji i Prawa 95, doi: 10.5604/01.3001.0014.0430; Adrian Zbiciak, 'Zakres kognicji Sądu Najwyższego przy rozpoznawaniu skargi' w M Wąsek-Wiaderek i inni (redz), *Skarga na wyrok kasatoryjny sądu odwoławczego w polskiej procedurze karnej: teoria i praktyka* (CH Beck 2021) 73.

12 Constitution of the Republic of Poland 'Konstytucja Rzeczypospolitej Polskiej' of 2 April 1997 [1997] DzU 78/483; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) [1977] DzU 38/167.
David Harris, *Cases and Materials on International Law* (Sweet & Maxwell 2004) ch 9.

13 Tymon Markiewicz, 'Skarga na wyrok sądu odwoławczego w świetle zasady rzetelnego procesu z art 6 EKPC' (2021) 31 (4) Roczniki Nauk Prawnych 39, doi: 10.18290/rnp21314-3.

It follows from the case-law of the ECHR that Art. 6 of the Convention shall apply throughout the criminal proceedings, from the indictment of a person to the final determination of his or her criminal liability. Consequently, the standard of a fair trial also applies to the stage of criminal proceedings at which a cassation is recognised as an extraordinary means of appeal.[14] Only the procedure of resuming criminal proceedings is not subject to the rules of Art. 6 of the Convention, although in the latest case law of the ECHR this thesis is also sometimes challenged in special circumstances.[15] These proceedings constitute the stage of resolving a criminal case within the meaning of Art. 6 of the Convention.[16] It is true that the purpose of the complaint proceedings is not to decide on the charges brought against the accused, but to assess the grounds for issuing the cassatory judgment. Nevertheless, these incidental proceedings directly concern the process of examining the main issue in the criminal case. The decision of the Supreme Court on the complaint determines whether the case should, as the court of appeal wanted, be referred for re-examination to the first instance court, or whether it can be terminated already at the appeal instance. The ECHR explicitly pointed out that when examining whether there was an infringement of the right to a hearing within a reasonable period of time, the final resolution of the case is important, and the introduction of additional instruments in national law to verify the correctness of the judgment does not relieve the state of the responsibility for guaranteeing the examination of the case within a reasonable time.[17] Based on the provision of Art. 6 para. 1 of the Convention, it is not possible to indicate the absolute duration of the proceedings.[18] The assessment of whether its duration is reasonable should be made in relation to the specific circumstances of each individual case.[19] In this situation, it is necessary to briefly analyse how the complaint proceedings may affect the duration of criminal proceedings, which is an important aspect of a fair trial.

The introduction of an additional extraordinary means of appeal *prima facie* appears to prolong the procedure by the time necessary for its examination. It is the time:

1) necessary to deliver a copy of the cassatory judgment, together with the statements of reasons (justification), which are drawn up *ex officio;*

2) to lodge the complaint itself, and this is a deadline of 7 days from the date of delivery of a copy of the judgment together with the statement of reasons (Art. 539 § 1 of the CCP);

3) to enable the parties to lodge a response to the complaint within 7 days of being served with a copy of the complaint;

14 Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) ch 4; Tom Barkhuysen and others, 'Right to a Fair Trial' in P van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) ch 9, 497; *JJ v Netherlands* App no 21351/93 (ECHR, 27 March 1998) <https://hudoc.echr.coe.int/eng?i=001-58147> accessed 23 January 2023; *San Leonard Band Club v Malta* App no 77562/01 (ECHR, 29 July 2004) <https://hudoc.echr.coe.int/eng?i=001-61962> accessed 23 January 2023; Bochan v Ukraine (no 2) App no 22251/08 (ECHR Grand Chamber, 5 February 2015) <https://hudoc.echr.coe.int/eng?i=001-152331> accessed 23 January 2023.

15 *Moreira Ferreira v Portugal* (no 2) App no 19867/12 (ECHR Grand Chamber, 11 July 2017) <https://hudoc.echr.coe.int/eng?i=001-175646> accessed 23 January 2023.

16 Marek Antoni Nowicki, *Wokół Konwencji Europejskiej: Komentarz do Europejskiej Konwencji Praw Człowieka* (Wolter Kluwer 2017) pt 2.

17 *Foti and others v Italy* App nos 7604/76, 7719/76, 7781/77, 7913/77 (ECHR, 10 December 1982) <https://hudoc.echr.coe.int/eng?i=001-57489> accessed 23 January 2023.

18 David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) ch 6; Małgorzata Wąsek-Wiaderek, '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' (2021) 30 (4) Studia Iuridica Lublinensia 187, doi: 10.17951/sil.2021.30.4.187-207.

19 *Obermeier v Austria* App no 11761/85 (ECHR, 28 June 1990) <https://hudoc.echr.coe.int/eng?i=001-57631> accessed 23 January 2023; Santilli v Italy App no 11634/85 (ECHR, 19 February 1991) <https://hudoc.echr.coe.int/eng?i=001-57656> accessed 23 January 2023.

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4) to hand over the case files to the Supreme Court;

5) for the Supreme Court to examine the complaint.

However, in the case of retrial, which the instrument of the complaint is supposed to combat (if the decision on the necessity to carry it out was incorrect), the entire first-instance proceedings is carried out from the beginning, which in extreme cases may take years, especially if it is to be borne in mind that the judgment issued in the re-examined trial is then subject to the standard, full appeal procedure. At the same time, it is worth mentioning that the standard resulting from Art. 6 of the Convention requires special diligence with regard to the efficiency of proceedings in cases in which detention on remand is applied.[20] At the same time, the legislator explicitly provided that in cases in which a complaint was filed and in which detention on remand is applied, the Supreme Court adjudicates on the further use of this measure (Art. 539d of the CCP).

It seems that extending criminal proceedings by the few months needed to examine the complaint, while taking into account the potential benefits, constitutes an acceptable limitation of the principle of examining the case within a reasonable time. This assessment is not altered by the fact that in some cases this will be a waste of time – these are the situations in which the complaint will be dismissed. In the authors' opinion, there is a lower risk of "losing time" than if the first-instance proceedings were to take place again – which could be avoided. In the case-law of the ECHR in relation to the Polish legal system, it was explicitly pointed out that repeatedly revoking the judgment and referring the same case for reconsideration discloses a serious dysfunction of the Polish justice system.[21] As a result, the costs – both economic and social costs for the parties– that would be generated by the retrial will also be significantly lower. It is worth stressing that the instrument of the complaint, according to the legislator's assumption, is also a "preventive" element – in combination with a narrow catalogue of conditions for issuing a cassatory judgment, it is to have a "motivating effect" on the courts of the second instance and will strengthen the appeal model of appellate proceedings.

As transpires from our empirical research, the complaint proceedings do not significantly prolong the time of examination of a criminal case, and may ultimately contribute to speeding up the conclusion of the case as a result of avoiding the need for a retrial. Of the 692 cases examined,[22] in which a cassatory judgment was issued in the period from 15 April 2016 (introduction of the complaint into the Polish legal order) to 31 December 2018 (completion of the examination of cassatory judgments), 544 cases were re-trialled at first instance by the date of completion of empirical research. The average duration of the retrial in all 544 cases was approximately 216 days, with a median duration of 174 days. It is worth noting that the longest retrial has lasted 824 days. As part of the research, the cases that ended with the issuance of a decision without the hearing (consensual termination of the proceedings) and cases involving a cumulative judgment were analysed separately. In the former, the average duration of retrial was 106 days (median - 84), in the latter, the average was 101 days (median 83).[23]

20 Barkhuysen and others (n 16).

21 *Przemyk v Poland* App no 22426/11 (ECHR, 17 September 2013) <https://hudoc.echr.coe.int/eng?i=001-126357> accessed 23 January 2023.

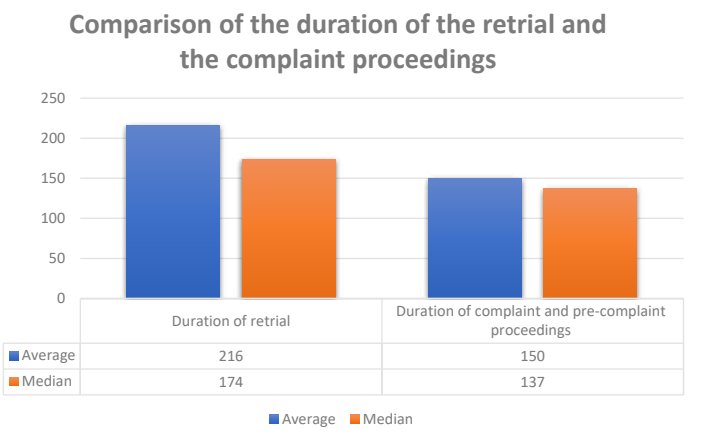
22 The research was limited to all courts of appeal of the Lublin appeal only, which of course cannot be considered representative for the whole country covering a total of 11 appeals, but still gave a noticeable research sample.

23 Tymon Markiewicz i Małgorzata Wąsek-Wiaderek, 'Porównanie czasu trwania postępowania skargowego oraz średniego czasu ponownego rozpoznania sprawy po wydaniu wyroku kasatoryjnego' w M Wąsek-Wiaderek (red), *Skarga na wyrok kasatoryjny sądu odwoławczego w polskiej procedurze karnej: teoria i praktyka* (CH Beck 2021) 307.

As part of the project, 340 cases that were brought to the Supreme Court with the complaint in 2016-2019, were then examined. The duration of the pre-complaint proceedings was analysed – from the issue of the cassatory judgment, to the date of receipt of the case by the Supreme Court.

The shortest duration of such proceedings was 24 days, the longest 268 days. The average duration of these proceedings is approximately 96 days, median 91 days. As for the time of examining the complaint before the Supreme Court in these 340 cases, it was approximately 53 days on average, median 46 days (maximum 419 days, minimum 3 days).[24]

The average duration of retrial was approximately 216 days (median 174), and complaint proceedings before the Supreme Court approximately 53 days (median 46 days). Adding to the duration of the proceedings before the Supreme Court (in order to consider the complaint) the duration of the pre-complaint proceedings (total 96 days, median 91), the total duration of the complaint and the pre-complaint proceedings was on average 150 days (median 137).



Presenting as briefly as possible the extensive conclusions that were made as a result of the research project, it should be pointed out that if the complaint is accepted (i.e., in the case of an incorrect cassatory judgment), the time saved is approximately 30% because the time of pre-complaint and complaint proceedings together is approximately 70% of the average time of retrial. However, it is worth bearing in mind that out of the 340 cases examined, the complaint was dismissed in 152 cases, while its substantive examination did not take place in 38 cases. Thus, in 190 cases in total, the time for examining the complaint was lost because the cassatory judgment turned out to be correct and the case was re-examined.

Summarising, the research proved that a complaint contributed to limiting the number of cassatory judgments, as the courts of appeal are aware that cassatory judgments can be subject to review.[25] Thus, the positive effect of introducing the complaint into the Polish legal system in terms of the duration of criminal proceedings can ultimately be recognised.[26]

24 ibid.

25 In the courts of the Lublin appeal in 2015, 916 cassatory judgments were issued, in 2016 – 705, in 2017 – 623, in 2018 – 579.

26 Małgorzata Wąsek-Wiaderek, 'Podsumowanie i wnioski' w M Wąsek-Wiaderek (red), *Skarga na wyrok kasatoryjny sądu odwoławczego w polskiej procedurze karnej: teoria i praktyka* (CH Beck 2021) 331

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4 THE RIGHT TO DEFENCE

It should be pointed out once again that the essence of complaint proceedings is not a substantive settling on the subject of the procedure, i.e., adjudicating directly on the accused's liability for the act as charged, but only checking the correctness of the cassatory decision of the court of appeal. The scope of the examination of the case in the complaint proceedings is thus very limited.

With reference to the right to defence, it is important to note that the complaint is examined at the session without the participation of the parties (Art. 539 § 1 of the CCP).[27] This has an impact on the accused's legal position and the accused's ability to take defensive actions. Additional issues which should be analysed from the angle of the right to defence are a time-limit of 7 days for submitting a complaint to the Supreme Court and access to a defence counsel in the complaint proceedings. While the precise scope of the right of the defence clearly must be governed by provisions of national law, those provisions cannot be incompatible with the system of guarantees of the rights of the defence resulting from international law.[28]

At the European level, the accused's right to defence is regulated primarily in Art. 6 para. 3 (b) and (c) of the Convention. However, the enumeration of the accused's rights contained therein is only a non-exhaustive clarification of the general standard of a fair trial provided in Art. 6 para. 1 of the Convention. It is indicated that the standard resulting from Art. 6 section 3 letter c of the Convention specifies only the minimum scope of the accused's rights, it is not their closed catalogue,[29] which leads to the conclusion that the provision in question is also an expression of the distinction between this standard in criminal matters and civil matters.[30]

As mentioned above, the standard of Art. 6 of the Convention applies also to the examination of a complaint by the Supreme Court. Thus, a defendant shall have adequate time and opportunity to prepare the defence in these proceedings.[31] The implementation of this guarantee at this stage must differ from what is required at the pre-trial stage of the proceedings or during examination of the case in the first instance.[32] Since the complaint cannot be submitted by the defendant without the assistance of a defence counsel (mandatory representation of a defendant by a defence lawyer is required), the standard of Art. 6 para. 3 (b) ECHR shall be applied to both the accused and his/her defence counsel. However, the right of the defence counsel to have adequate time and opportunity to prepare the defence is of a different nature than the corresponding right of the accused and serves only to respect the guarantee of the accused.[33] Undoubtedly, when assessing whether the accused has adequate time to prepare his/her defence, the time-limit for submitting a complaint, which

27 The adjudication at the session without the participation of the parties rests more broadly on the adversarial principle.

28 Hans-Jürgen Steiner, 'International Protection of Human Rights' in MD Evans (ed), *International Law* (OUP 2003) 757.

29 Peter Kempees, *A systematic Guide to the Case Law of the European Court of Human Rights, vol 1 1960-1994* (Brill Academic Publ 1996).

30 *Deweer v Belgium* App no 6903/75 (ECHR, 27 February 1980) <https://hudoc.echr.coe.int/eng?i=001-57469> accessed 23 January 2023; *Goddi v Italy* App no 8966/80 (ECHR, 9 April 1984) <https://hudoc.echr.coe.int/eng?i=001-57495> accessed 23 January 2023.

31 *Melin v France* App no 12914/87 (ECHR, 22 June 1993) <https://hudoc.echr.coe.int/eng?i=001-57833> accessed 23 January 2023.

32 Andrzej Wróbel i Piotr Hofmański, 'Komentarz do art 6' w L Garlicki (red), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t 1 Komentarz do artykułów* 1-18 (CH Beck 2010) 241.

33 *Makhfi v France* App no 59335/00 (ECHR, 19 October 2004) <https://hudoc.echr.coe.int/eng?i=001-67120> accessed 23 January 2023.

is 7 days, is of crucial importance. As is underlined by the ECHR, the introduction of time-limits for initiating legal remedies does not constitute a violation of Art. 6 of the Convention, provided, however, that they have been formulated in national legislation in such a way that it is possible to use these legal remedies.[34] In the last of the mentioned judgments it was indicated that the 5-day deadline for lodging an appeal was too short and violated the right to a court. The time-limit of 7 days for submitting a complaint to the Supreme Court against a cassatory judgment of an appellate court, although relatively short, shall be assessed as compatible with the requirements of the Convention. The subject-matter of a complaint is strictly limited, the scope of the possible pleas is objectively narrow and it relates, in principle, not to the whole proceedings, but only to the settlement of the court of appeal. Under such assumptions, even the fact that this time-limit is objectively short in comparison to the time-limit for bringing a cassation to the Supreme Court (which is 30 days from serving on a party a judgment with written reasons - Art. 524 § 1 of the CCP), it does not allow for a conclusion that a defendant is not granted adequate time for preparation of his/her defence.

Under Art. 6 para. 3 (c) ECHR every accused shall have a right to a defence counsel. This right applies at every stage of the proceedings.[35] As transpires from the well-established case-law of the ECHR, the obligation to be represented by a defence counsel in certain procedural activities (in relation to the complaint such obligation is stemming from Art. 539f of the CCP in conjunction with Art. 526 § 2 of the CCP) is not contrary to the right to a fair trial. Despite the fact that in cases of mandatory defence the accused is prevented from exercising his/her right to choose whether or not to be represented by a defence counsel, the ECHR considered that in the proceedings before the Supreme Court, the obligation to use the assistance of a defence counsel is, due to the specificity of these proceedings, something natural.[36] In the last of the mentioned judgments, the Court, by 9 votes to 8, found no violation of Art. 6 of the Convention in proceedings in which the applicant, who was himself a lawyer (although suspended in the right to practice this profession), was "forced" to have the assistance of a lawyer appointed for him ex officio, due to the requirement of mandatory defence – see, paras. 154-157, 162, and 167-168 of the judgment.

Art. 6 para. 3 (c) of the Convention guarantees the accused the right to use the assistance of a defence counsel of his/her choice or the right to have a defence counsel appointed *ex officio*. Legal aid shall be granted to the accused if he/she has insufficient means to pay for legal assistance and the interests of justice so require. The fulfilment of the economic prerequisite for the appointment of an *ex officio* defence counsel should be proved by the accused. However, if there are doubts as to whether the accused can afford the costs of defence, they should be decided in favour of the accused.[37] The need to appoint an *ex officio* defence counsel may arise not only in *ad quem* proceedings, but also in appeal or cassation proceedings. If access to a court at a certain stage of the proceedings may be exercised by a defendant only with assistance of a defence counsel, as is the case with complaint proceedings, it is obvious that the prerequisite of the "interest of justice", mentioned in Art. 6 para. 3 (c) of the ECHR,

34 *Pérez de Rada Cavanilles v Spain* App no 28090/95 (ECHR, 28 October 1998) <https://hudoc.echr.coe.int/eng?i=001-58260> accessed 23 January 2023; Tricard v France App no 40472/98 (ECHR, 10 July 2001) <https://hudoc.echr.coe.int/eng?i=001-64140> accessed 23 January 2023.

35 Wróbel i Hofmański (n 34).

36 *Antonicelli v Poland* App no 2815/05 (ECHR, 19 May 2009) <https://hudoc.echr.coe.int/eng?i=001-92615> accessed 23 January 2023; *Kulikowski v Poland* App no 18353/03 (ECHR, 19 May 2009) <https://hudoc.echr.coe.int/eng?i=001-92611> accessed 23 January 2023; *Correia de Matos v Portugal* App no 56402/12 (ECHR Grand Chamber, 4 April 2018) <https://hudoc.echr.coe.int/eng?i=001-182243> accessed 23 January 2023.

37 Trechsel (n 16); Małgorzata Mańczuk, 'The Right to Defence in an Appeal Proceedings in the Context of Research Findings' in C Kulesza (ed), *Fairness of the New Model of Polish Criminal Appeal Proceedings in the Context of Delivered Research* (Temida 2 2019) 185; *Pakelli v Germany* App no 8398/78 (ECHR, 25 April 1983) <https://hudoc.echr.coe.int/eng?i=001-57554> accessed 23 January 2023.

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is fulfilled.[38] It is worth noting that in the Polish legal system, the accused, demanding the appointment of a legal counsel (except in situations of compulsory defence), must only prove that he/she cannot afford a defence counsel of his/her choice. A defendant does not have to prove that access to legal aid is required in the interest of justice. Thus, the CCP provides for a higher standard of access to an *ex officio* defence counsel than that stemming from the ECHR or from EU law.[39]

The above-described rules apply also to the appointment of an *ex officio* defence counsel for the purpose of bringing a complaint against a cassatory judgment to the Supreme Court. An accused wishing to submit a complaint shall apply for the appointment of an *ex officio* defence counsel paid by the state (Art. 78 § 1a of the CCP). However, the accused must duly demonstrate that he/she is not able to bear the costs of appointing a defence counsel of choice without prejudice to the necessary maintenance of himself/herself and the family (Art. 78 § 1 and § 1a of the CCP). Such a limitation of access to the complaint is justified, the same rule applies to other extraordinary means of appeal (cassation – Art. 526 § 2 of the CCP and the motion for reopening of proceedings - Art. 545 § 2 of the CCP). At the same time, this limitation forces the actual participation of the defence counsel in the complaint proceedings in the form of a fair preparation of the complaint. The right to active defence in criminal proceedings is treated as an important element of the Convention's right of defence.[40] This is due to the fact that a complaint shall not only be signed by a lawyer but also prepared by him. So, the complaint elaborated by a party and only signed by a defence counsel cannot be admitted for examination by the Supreme Court.[41] Important from the point of view of the principle of the right of defence is the position of the Supreme Court expressed in case II KS 13/20, according to which "in the event of the court of appeal issuing a cassatory judgment, which – although it is formally final (binding) – is not a judgment terminating the proceedings, a court appointed defence counsel is obliged to act further in criminal proceedings, but is not obliged to lodge a complaint against such a judgment – arg. from Art. 84 § 3 CCP.[42] also It is also our view that this limitation of access to the complaint proceedings is justified by their special features. While refusing to elaborate a complaint, an *ex-officio* defence lawyer is obliged to inform the court that in his/her opinion there are no grounds for filing a complaint. Such opinion with written reasons is also available to the accused (Art. 84 § 3 CCP).

The second issue which should be discussed from the angle of the right to defence is the fact that the Supreme Court examines the complaint at a closed session without the participation of the parties. Although the cassatory decision reviewed in the complaint proceedings does not end the case, we cannot lose sight of the fact that the accused will definitely have a legal interest in combating the decision annulling the acquitting judgment or judgment discontinuing the proceedings issued by the first instance court. The complaint proceedings are conducted fully in writing since no evidence is taken by the Supreme Court, which adjudicates only after reviewing the material from the case file. This in itself limits the right to

38 Barkhuysen and others (n 16); G*ranger v United Kingdom* App no 11932/86 (ECHR, 28 March 1990) <https://hudoc.echr.coe.int/eng?i=001-57624> accessed 23 January 2023; *Pham Hoang v France* App no 13191/87 (ECHR, 25 September 1992) <https://hudoc.echr.coe.int/eng?i=001-57791> accessed 23 January 2023.

39 Adrian Marek Zbiciak, 'Effective Access to Defence Counsel in the Judicial Stage of Polish Criminal Proceedings in the Scope of Directives 2013/48/EU and 2016/1919/EU' (2020) 41 (2) Review of European and Comparative Law 153, doi: 10.31743/recl.6429.

40 Stephanos Stavros, *The Guarantees for Accused Person Under* Art. 6 of the European Convention on Human Rights (Brill Nijhof 1993) ch 2.

41 Dariusz Świecki (red), *Kodeks postępowania karnego: Komentarz*, t 2 (Wolters Kluwer 2021) art 539a.

42 Case II KS 13/20 (Supreme Court of Poland, 3 December 2020) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20ks%2013-20.docx.html> accessed 23 January 2023.

defence. The doctrine indicates that an important element of the right of defence are all rights serving the procedural protection of the accused and which enable him/her to participate in criminal proceedings.[43] However, taking into account the limited scope of these proceedings, the solution adopted by the Polish legislator regarding the participation of the accused in the complaint proceedings shall be assessed as compatible with the standard of fair trial. As already mentioned, the examination of the complaint by the Supreme Court does not lead to the launch of another procedure, a "subsequent instance", where evidence is taken, and the parties have the opportunity to prove their case, as in the main proceedings – meaning first or even second instance proceedings. The Supreme Court in the complaint proceedings is not entitled to review the assessment of individual evidence in the aspect of liability of the accused in the judgment of the court of appeal, and the complaint against the judgment of the court of appeal reversing the judgment of the court of first instance is not a means of verifying the assessment of evidence made in the second instance.[44] The limitation of the rights of the defence in the material sense, expressed primarily in the above-mentioned elements, does not exclude the possibility of the accused's personal action at this stage of the procedure. He has the possibility of submitting pleadings other than the complaint itself. Due to the scope of the these proceedings and the possible consequences of the decision of the Supreme Court made after examining the complaint (which in turn leads to a substantive examination of the case – either again in the first or second instance), the restriction of the rights of defence in the material sense is in accordance with the standard resulting directly from both Art. 6 of the ECHR and Art. 42 para. 2 of the Constitution of the Republic of Poland.

5 PRINCIPLE OF TWO-INSTANCE PROCEEDINGS

The principle of two-instance judicial proceedings is provided in Art. 176 para. 1 of the Constitution of the Republic of Poland. This provision complements the right to appeal granted in Art. 78 of the Constitution.[45] The application of these provisions in the context of the complaint proceedings may give rise to some doubts. Art. 78 of the Constitution provides literally for the right to appeal against decisions issued "in the first instance". Reading this provision literally, it does not imply a constitutional right of complaint against the cassatory judgment as a means of appeal against a judgment of the court of second instance. However, although the Constitution does not explicitly provide for the need to establish more than two instances before which it would be possible to challenge the decision, there is no obstacle to the legislator providing for such a solution, although it is not required to do so by constitutional provisions.[46] At the same time, the firm provision of Art. 176 para. 1 of the Constitution contains an order for "at least" two-instance proceedings. Adding that the complaint proceedings are not a "third instance" (which is not prohibited by constitutional provisions), enabling an additional assessment of issues that have already been the subject of the court of appeal's consideration, does not in any way violate the constitutional principle of two instance procedure.

43 Paweł Wiliński, 'Zasada prawa do obrony w polskim procesie karnym' w P Hofmański i P Wiliński (redz), *System prawa karnego procesowego*, t 3 Zasady procesu karnego (Wolters Kluwer 2014) pt 2.

44 Case V KS 33/20 (n 13).

45 Leszek Garlicki i Krzysztof Wojtyczek, 'Komentarz do art 78' w L Garlicki i M Zubik (redz), *Konstytucja Rzeczypospolitej Polskiej: Komentarz*, t 2 (2 wyd, Sejmowe 2016).

46 Tadeusz Wiśniewski, 'Problematyka instancyjności postępowania sądowego w sprawach cywilnych' w T Ereciński i J Gudowski (redz), *Ars et usus: Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* (LexisNexis 2005); Adam Zieliński, 'Konstytucyjny standard instancyjności postępowania sądowego' (2005) 11 Państwo i Prawo 3.

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The complaint proceedings shall also be analysed from the angle of the right of appeal provided in Art. 2 of Protocol 7 to the Convention. It regulates the right of appeal of any person found by a court to have committed a criminal offence. Art. 2 of Protocol 7 to the ECHR supplements the general standard of a fair trial provided in Art. 6 Convention, which does not explicitly provide for the right of appeal.[47]

Art. 2 of Protocol 7 provides for the right to appeal against the judgment of the criminal court by which a person was found guilty.[48] Therefore, the decision to discontinue the proceedings, among others, remains outside the protection of this provision.[49] Since Art. 2 of Protocol No. 7 was literally limited only to the above-mentioned judgment, it does not apply to the complaint against a cassatory judgment, which is a means against a judgment that does not adjudicate either on guilt nor the punishment. However, this provision does not preclude the national system of the means of appeal from being developed more broadly, as long as it does not occasionally contradict the substance of the means in question.[50]

Since the new model of appeal proceedings, supplemented by a complaint against a cassatory judgment, indirectly forces substantive adjudication in the appeal instance, it should also be analysed through the prism of the right to appeal as guaranteed in Art. 2 of Protocol 7. The question is whether the substantive amendment of a judgment by the appellate court, including one made to the detriment of the accused, is compatible with the requirements of the right of appeal under Protocol 7 to the ECHR if such a judgment becomes final and is not subject to further appeal measures. With regard to this issue it should be noted that Art. 2 para. 2 of Protocol 7 explicitly allows for limitation of the right to appeal when the person concerned has been found guilty and convicted as a result of an appeal against the acquittal judgment of the court of first instance. Thus, this exception allows for conclusion that other changes of the first instance judgment made at the appeal instance are also permissible, in particular when they are less detrimental for the accused than the conviction by the appellate court of a defendant who was acquitted by the first instance court. This is especially so in that due to Art. 454 § 1 of the CCP regulating the *ne peius* rule, this situation in a Polish criminal case, referred to directly in the provision of the Protocol, cannot take place.[51]

6 EQUALITY OF ARMS IN COMPLAINT PROCEEDINGS

The adversarial trial presupposes the existence of two equal parties to the proceedings with opposite interests, presenting their arguments before an impartial and independent court.[52] The parties shall have a right to present their arguments based on evidence submitted in the course of the proceedings. The doctrine indicates that the essence of its contradictory nature

47 Ed Cape and others, *Effective Criminal Defence in Europe: Executive Summary and Recommendations* (Intersentia 2010) ch 2; *Rybka v Ukraine* App no 10544/03 (ECHR, 17 November 2009) <https://hudoc.echr.coe.int/eng?i=001-95995> accessed 23 January 2023.

48 Stephen C Thaman, 'Appeal and Cassation in Continental European Criminal Justice Systems: Guarantees of Factual Accuracy, or Vehicles for Administrative Control?' in DK Brown, JI Turner and B Weisser (eds), *The Oxford Haandbook of Criminal Process* (OUP 2019).

49 Piotr Hofmański, 'Komentarz do art 2 Protokołu 7' w L Garlicki (red), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, t 2 *Komentarz do artykułów 19–59 oraz Protokołów dodatkowych* (CH Beck 2011).

50 *Krombach v France* App no 29731/96 (ECHR, 13 February 2001) <https://hudoc.echr.coe.int/eng?i=001-59211> accessed 23 January 2023.

51 Clare Ovey and Robin CA White, *European Convention of Human Rights* (3rd edn, OUP 2002) ch 12; Wąsek-Wiaderek (n 20).

52 Marian Cieślak, *Polska procedura karna: podstawowe założenia teoretyczne* (PWN 1984).

is inherent in the right to conduct a dispute using instruments specified by law.[53] Thus, the conditions necessary to guarantee the adversarial principle include:

1) precise indication of the subject of the procedure;
2) the existence of the opposite parties before the body appointed to settle the dispute;
3) equality of the parties to dispute;
4) the necessary minimum of availability – the right of the parties to influence the course and outcome of the procedure with their actions.

The main condition of an adversarial proceeding is the equality of the parties, known in the Strasbourg jurisprudence as "the equality of arms principle".[54] In our opinion all requirements of equality of arms are preserved in the complaint proceedings. First of all, Art. 539e § 1 of the CCP provides that a complaint is examined without hearing of any parties, at a closed session of the Supreme Court. So, both parties are "heard" by the Supreme Court enabling them to submit written pleadings to the court. It is pointed out that the fundamental element of a fair trial is the right to be heard by the court, and proceedings without the participation of the accused should be accepted only in a situation where the accused has the opportunity to conduct an adversarial hearing.[55] Furthermore, Art. 539c § 1 and 2 of the CCP clearly states that a complaint shall be accompanied by an appropriate number of copies for other parties. The president of the court (the court of appeal to which the complaint is submitted) delivers copies of the complaint to the other parties and instructs them about the right to submit a written response to the complaint within 7 days from the date of delivery of the copy. It is only after this period that the president of the court sends the files to the Supreme Court. Thirdly, all parties to the complaint proceedings are granted the same opportunity to present their case in conditions that do not put them in a worse situation than the one in which the opponent finds himself.[56] The opposite party has a right to submit a response to the complaint (Art. 539c § 2 of the CCP).

Summarising, all the above circumstances allow for drawing the conclusion that both parties in the proceedings are granted equal opportunity to express their views on the matter.[57] Therefore, it seems that this solution is sufficient to guarantee the possibility of influencing the course of the procedure, i.e., the last of the above four conditions for ensuring the adversarial nature of the complaint proceedings. As already mentioned, in the complaint proceedings the Supreme Court does not examine evidence and its decision is fully based on the case-file. Moreover, the complaint proceedings concern exclusively issues of law and not of fact. Having regard to these special features of the discussed proceedings, we are of the opinion that the mere examination of a complaint by the Supreme Court at a session without the participation of the parties, based on written pleadings, fully complies with the principle of equality of arms and adversarial proceedings.

53 Piotr Hofmański, 'Zasada kontradyktoryjności' w P Hofmański i P Wiliński (redz), *System prawa karnego procesowego*, t 3 *Zasady procesu karnego* (Wolters Kluwer 2014) pt 1.

54 *Kartvelishvili v Georgia* App no 17716/08 (ECHR, 7 June 2018) <https://hudoc.echr.coe.int/eng?i=001-183376> accessed 12 October 2022; *Kress v France* App no 39594/98 (ECHR, 7 June 2001) <https://hudoc.echr.coe.int/eng?i=001-59511> accessed 23 January 2023.

55 Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell 2001).

56 Trechsel (n 16); Drazan Djukić, *The Right to Appeal in International Criminal Law: Human Rights Benchmarks, Practice and Appraisal* (BRILL NIJHOFF 2019).

57 *Parol v Poland* App no 65379/13 (ECHR, 11 October 2018) <https://hudoc.echr.coe.int/eng?i=001-189805> accessed 23 January 2023; *Adamkowski v Poland* App no 57814/12 (ECHR, 28 March 2019) <https://hudoc.echr.coe.int/eng?i=001-191911> accessed 23 January 2023.

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Moreover, it seems that the introduction of the possibility of challenging the cassatory judgment (not subject to any further appeal review) directly fulfils the fourth condition of the adversarial principle – the postulate of availability. The parties were given the opportunity to contest a judgment issued in contravention of the procedural requirements (including those burdened with the existence of an absolute ground of appeal), which they were previously deprived of. It is particularly important in cases when the second instance court is revoking the judgment of acquittal and transmitting the case for re-examination to the first instance court.

As transpires from the case-law of the ECHR, it is possible to depart from a public and oral hearing if the scope of court's examination at the appeal stage of the proceedings is limited to the questions of law and does not cover evidence taking and factfinding.[58] The Strasbourg Court explicitly stated that the lack of an open cassation hearing does not infringe Art. 6, para. 1 of the Convention because it is a hearing concerning only the law.[59] Furthermore, at the cassation stage the additional lack of public and open announcement of the decision does not infringe Art. 6, para. 1 of the Convention.[60] The possible need to perform this action depends on the circumstances of the specific case.[61] Since the complaint proceedings concern only questions of law, lack of oral hearing before the Supreme Court examining the complaint cannot be assessed as contrary to Art. 6 of the Convention.[62]

7 CONCLUSIONS

The analyses conducted in this paper allow for drawing the conclusion that the complaint proceedings comply with the main requirements of a fair trial, namely the principle of the examination of the case within a reasonable time, the right to defence, the principle of two-instance procedure, and the principle of adversarial procedure. Certain limitations on the rights of the accused in the discussed proceedings are both proportionate and fully justified by their special features. This conclusion applies to the time-limit for submitting the complaint, the requirement to bring it only through the assistance of a defence counsel, and also to the way of examination of the complaint by the Supreme Court in writing at a closed session.

All these solutions constitute only permissible, proportionate restrictions of the indicated principles. This proportionality results primarily from the benefits of the complaint proceedings: limitations of cassatory adjudication *in genere*, respect for the appeal model of appellate proceedings, maintaining uniformity of interpretation of narrowly defined grounds for cassatory adjudication. Sometimes there is even a specific coincidence between these limitations – the examination of a complaint in camera, without the participation of the parties, favours the

58 *Axen v Germany* App no 8273/78 (ECHR, 8 December 1983) <https://hudoc.echr.coe.int/eng?i=001-57426> accessed 23 January 2023.

59 *Tierce and others v San Marino* App nos 24954/94, 24971/94, 24972/94 (ECHR, 25 July 2000) <https://hudoc.echr.coe.int/eng?i=001-58765> accessed 23 January 2023; *Dondarini v San Marino* App no 50545/99 (ECHR, 6 July 2004) <https://hudoc.echr.coe.int/eng?i=001-66424> accessed 23 January 2023; *Valovà, Slezàk and Slezàk v Slovak Republic* App no 44925/98 (ECHR, 15 February 2005) <https://hudoc.echr.coe.int/eng?i=001-93462> accessed 23 January 2023; *Saccocia v Austria* App no 69917/01 (ECHR, 18 December 2008) <https://hudoc.echr.coe.int/eng?i=001-90342> accessed 23 January 2023.

60 *Nikolova and Vandova v Bulgaria* App no 20688/04 (ECHR, 17 December 2013) <https://hudoc.echr.coe.int/eng?i=001-139773> accessed 23 January 2023.

61 Małgorzata Wąsek-Wiaderek, 'Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka' w P Hofmański i C Kulesza (redz), *System prawa karnego procesowego*, t 6 *Strony i inni uczestnicy postępowania karnego* (Wolters Kluwer 2016) 524.

62 Axen v Germany (n 60); *Sutter v Switzerland* App no 8209/78 (ECHR, 22 February 1984) <https://hudoc.echr.coe.int/eng?i=001-57585> accessed 23 January 2023.

acceleration of the complaint proceedings, which would have to last longer if it was connected with the obligation to organise a public session or hearing. The imposition of an obligation to have a complaint prepared and signed by a lawyer also has a positive effect on the time of examining the complaint, as it forces a certain level of professionalism of the preparation of this legal remedy, which prevents formal actions aimed at meeting the formal and substantive conditions of the complaint – they are supposed to be guaranteed by the entity submitting it.

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