

ON THE CONCEPT OF AN APPELLATE MEASURE IN A CRIMINAL PROCEEDING

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ABSTRACT

The aim of the paper is to analyse how the term ‘appellate measure’ is interpreted in the Polish doctrine of criminal procedure law and, in particular, to assess the accuracy of the assumption that the possibility of recognising a particular means of indictment of a decision as an appellate measure is determined by its normative features. Based on the analysis of the characteristic features of each means of indictment of a decision, an attempt is made to demonstrate that this assumption may be regarded as incorrect. It is suggested that the previous definition of an appellate measure be revised, and recognise that this concept is purely of a conventional (traditional) nature, which means that the possibility of classifying a particular means of indictment of a decision as an appellate measure should not depend on its nature or similarity to other legal measures considered as means of indictment of a decision.

Keywords: appellate measures, means of indictment of a decision, devolutionist nature, suspending nature, prohibition of *reformatio in peius*, appellate proceeding, criminal proceeding/trial

1. INTRODUCTION

The most fundamental concepts in the area of appellate proceedings in a criminal trial include the terms ‘means of indictment of a decision’ and ‘appellate measure’. The former does not raise significant doubts. Means of indictment of a decision are any legal measures stipulated by criminal procedure law that an involved party may use to challenge a procedural decision and subject it to review by another procedural

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body, deprive it of its legal force, or to demand a review of a procedural activity that is not a decision.¹ The term ‘appellate measure’ raises many more doubts.

According to the prevalent opinion among the representatives of the criminal procedure law doctrine, the following features distinguish appellate measures from the remaining means of indictment of a decision: (1) accusatorial nature; (2) devolutionist nature; (3) suspending nature; (4) reformist nature; and (5) prohibition of *reformatio in peius*.² Other authors argue that a means of indictment of a decision may be recognised as an appellate measure also if it only possesses some of the characteristic features mentioned above in points (1) to (4) (D. Drajewicz),³ (2) and (4) (S. Waltoś, P. Hofmański and J. Grajewski),⁴ (1) to (3) (P. Piszczek),⁵ or (2) and (3) (T. Grzegorzcyk, P. Wiliński, W. Jasiński and W. Daszkiewicz, T. Nowak and S. Stachowiak).⁶ Despite

¹ See Grzegorzcyk, T., in: Grzegorzcyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa, 2009, p. 768; similarly Skorupka, J., in: Skorupka, J. (ed.), *Proces karny*, Warszawa, 2020, p. 702; cf. Piszczek, P., in: Kruszyński, P. (ed.), *Wykład prawa karnego procesowego*, Białystok, 2012, p. 378, where he posits, “means of indictment of a decision encompass all methods stipulated in criminal procedure that an entitled party can use if they are unsatisfied with the settlement and seek to change or annul it”. This definition might be too narrow. Firstly, means of indictment of a decision are not confined to settlements but also pertain to other procedural activities or even omissions (see Article 467 § 1 Act of 6 June 1997: Code of Criminal Procedure, Journal of Laws of 2022, item 1375, hereinafter referred to as CCP). Secondly, since a means of indictment of a decision does not necessarily involve settlements, the entitled party does not need to strive to change or cancel anything. A decision by a second instance body sometimes involves recognising a particular procedural activity as unlawful or missing (see Article 467 § 2 CCP). Thirdly, a complainant, although usually dissatisfied with a particular settlement, does not need to be. Even a means dismissed due to a breach of the prohibition under Article 425 § 3 CCP continues to be a means of indictment of a decision. Indeed, the provision does not involve ‘lack of satisfaction’ and moreover, it does not apply to all complainants (see second sentence of Article 425 § 3 CCP). For these reasons, the definition proposed by K. Marszał and J. Zagrodnik also appears too narrow. According to them, “a means of indictment of a decision is a complaint addressed to a procedural body with a request for a review of a procedural decision” (Marszał, K., Zagrodnik, J., in: Zagrodnik, J. (ed.), *Proces karny*, Warszawa, 2021, p. 699; similarly Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2013, p. 320). As indicated, a means of indictment of a decision does not need to pertain to procedural decisions nor contain a request for review. Lodging some means of indictment of a decision (e.g. objection to an order) leads to the removal of a decision from legal transactions without the need for its review.

² Thus, inter alia, Skorupka, J., op. cit., p. 706; Świecki, D., in: Świecki, D. (ed.), *Meritum. Postępowanie karne*, Warszawa, 2019, p. 943; Paluszkiewicz, H., in: Dudka, K., Paluszkiewicz, H., *Postępowanie karne*, Warszawa, 2022, pp. 612–613; cf. Paluszkiewicz, H., *Metodyka sporządzania środków zaskarżenia w postępowaniu karnym i karnoskarbowym. Wzory pism procesowych*, Warszawa, 2022, p. 8, where the author expresses a somewhat different opinion, overlooking the reformist nature of appellate measures.

³ Drajewicz, D., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Tom II. Komentarz. Art. 425–682*, Warszawa, 2020, p. 5.

⁴ Waltoś, S., op. cit., p. 320; Grajewski, J., Steinborn, S., *Przebieg procesu karnego*, Warszawa, 2012, pp. 290–291.

⁵ Piszczek, P., in: Kruszyński, P. (ed.), *Wykład...*, op. cit., pp. 378–379.

⁶ Grzegorzcyk, T., in: Grzegorzcyk, T., Tylman, J., *Polskie...*, op. cit., p. 771; Wiliński, P., in: Wiliński, P. (ed.), *Polski proces karny*, Warszawa, 2020, p. 622; Jasiński, W., in: Boratyńska, K.T., Chojniak, Ł., Jasiński, W., *Postępowanie karne*, Warszawa, 2018, pp. 570–571; Daszkiewicz, W., Nowak, T., Stachowiak, S., *Proces karny. Część szczególna*, Poznań, 1996, p. 110; also note the somewhat ambiguous stance of K. Marszał and J. Zagrodnik, in: Marszał, K., Zagrodnik, J. (eds), *Proces...*, op. cit., p. 699, who indicate that “The devolutionist nature is the basic criterion distinguishing the first group [i.e. appellate measures] [...]. It is the most important feature setting

some differences in terminology, all these views are based on the assumption that the possibility of recognising a means of indictment of a decision as an appellate measure is not determined by the legislator's arbitrary decision (e.g. name of a particular legal measure or place of its regulation), but the nature (essence, features) of this measure.⁷ Based on the use of the above-presented criteria for distinguishing appellate measures from means of indictment of a decision, it is assumed that the latter category currently only includes an appeal and a complaint.⁸

The aim of the paper is to examine the accuracy of this assumption and determine whether one can speak about 'truly' (i.e. based on their essence) appellate measures or whether the term is in fact conventional, organisational, and technical in nature. This verification will be conducted through an analysis of some means of indictment of a decision functioning in the contemporary criminal trial, including in particular those commonly recognised as appellate measures. If at least one of them does not meet all the above-mentioned criteria, the definition of an appellate measure adopted in the literature will prove to be incorrect. Likewise, if it appears that at least one means of indictment of a decision commonly recognised as non-appellate measures meets the criteria. To streamline further discussions, whenever a challenged settlement, decision or judgement is mentioned, they should be understood as activities that are not procedural decisions and omissions that may also be challenged.

apart appellate measures from the entire group of means of indictment of a decision [explanation and underlining by B.Ł.]".

⁷ It is worth noting that only opinions of current representatives of the criminal procedure doctrine are referred to herein; cf. e.g. Kaftal, A., *System środków odwoławczych w polskim procesie karnym (rozważania modelowe)*, Warszawa, 1972, p. 7, in whose opinion, "appellate measures should [...] be understood as methods stipulated in the procedure that the entitled party can use to appeal against a judgement infringing his rights and request a review of the judgement challenged". This definition, formulated over 50 years ago, seems to align more closely with the concept of 'means of indictment of a decision'. An identical definition was proposed in the 1960s: Kalinowski, S., *Postępowanie karne. Zarys części szczególnej*, Warszawa, 1964, pp. 220–221. At the same time, unlike A. Kaftal, he provided more detail by adding: "an essential feature of appellate measures is their devolutionist nature, i.e. what results in transferring a case for review to a higher instance [...]. The other crucial feature of appellate measures is the fact that these are motions filed by the parties to a proceeding".

⁸ Contrarily Grajewski, J., Steinborn, S., *Przebieg...*, op. cit., p. 290; Marszał, K., Zagrodnik, J., in: Zagrodnik, J. (ed.), *Proces...*, op. cit., p. 701; Piszczek, P., in: Kruszyński, P. (ed.), *Wykład...*, pp. 380–381; Cichoński, M., *Względne podstawy odwoławcze w polskim procesie karnym. Studium z perspektywy dogmatyki oraz ogólnej refleksji nad prawem*, Warszawa, 2022, pp. 6–7, who differentiate between ordinary and extraordinary appellate measures, suggesting that, inter alia, cassation and motion to resume a proceeding are, in their opinion, appellate measures; critically about this division of means of indictment of a decision: Grzegorzczuk, T., in: Grzegorzczuk, T., Tylman, J., *Polskie...*, op. cit., pp. 768–769, who rightly point out that the legislator clearly distinguished appellate measures (Part IX CCP) from extraordinary means of indictment of a decision (Part XI CCP).

2. POSSIBLE FEATURES OF MEANS OF INDICTMENT OF A DECISION

Determining whether a given means of indictment of a decision possesses a given feature requires a prior, at least brief, explanation of each feature.

2.1. ACCUSATORIAL NATURE

The accusatorial nature means that a review proceeding can only be conducted after an entitled party lodges a given means of indictment of a decision, thus it cannot be initiated *ex officio* by a proceeding body (by the way, it is worth pointing out that this feature characterises a given review proceeding rather than a means of indictment of a decision itself).

2.2. DEVOLUTIONIST NATURE

The devolutionist nature means that a means of indictment of a decision may be substantively recognised only by a body superior to the one that issued the challenged decision. It is sometimes assumed that the devolutionist nature is also maintained when a second instance body is on the same level as the first instance body (the so-called horizontal or flattened devolutionist nature).⁹ However, this view should be strongly disapproved. There should be no doubt that the feature analysed does not merely depend on the transference of a case to whatever body. The point is that a body that is assumed to be more competent and experienced than the first instance body should re-examine the supposedly incorrect settlement of a case. If a reviewing body is not hierarchically superior to a reviewed body, the idea of devolution and its guarantees are negated. Therefore, horizontal devolution simply implies a lack of devolutionist nature.

2.3. SUSPENDING NATURE

The suspending nature of a means of indictment of a decision lies in the fact that its lodging suspends execution of the challenged settlement. In the criminal procedure law doctrine, two forms of suspending nature are recognised: absolute and relative. Absolute suspending nature implies that execution of the challenged settlement is suspended *ex lege* by lodging a means of indictment of a decision, eliminating the need for any separate decision on the matter. Conversely, relative suspending nature implies that even though lodging a given means of indictment of a decision does not suspend the execution of the challenged settlement, a relevant body

⁹ Thus, inter alia Skorupka, J., in: Skorupka, J. (ed.), *Proces...*, op. cit., p. 706; Paluszkiwicz, H., in: Dudka, K., Paluszkiwicz, H., *Postępowanie...*, op. cit., p. 613; Świecki, D., in: Świecki, D. (ed.), *Meritum...*, op. cit., p. 943.

(either reviewing or reviewed) can still decide on its suspension. The concept of relative suspending nature shares as much in common with the suspending nature as the horizontal devolutionist nature with the devolutionist nature. If a decision on suspension of the execution of the challenged settlement depends on the body, it does not directly relate to lodging a means of indictment of a decision and is unknown at the moment of its lodging; hence the mere possibility of applying a means cannot be treated as its feature. All means of indictment of a decision, the lodging of which does not automatically suspend the execution of a challenged settlement, should be recognised as non-suspending measures. Approving of the concept of relative suspending nature would be absurd because, as a result, it would be necessary to assume that a conviction by the court of first instance has a relatively acquittal nature, because the court of second instance may alter the settlement.

2.4. REFORMIST NATURE

Reformist nature means that a body reviewing the challenged settlement may issue a substantive decision, i.e. settle the essence of a case independently. The opposite of this feature is cassation, which indicates that the body of second instance, recognising the decision of the body of first instance as incorrect, may only cancel it, and either discontinue the case or refer it for re-hearing to the body of first instance, which will exclusively settle the case substantively.

2.5. PROHIBITION OF *REFORMATIO IN PEIUS*

The prohibition of *reformatio in peius* signifies that the body of second instance cannot adjudicate to the detriment of the complainant if the means of indictment of a decision has been lodged by (more precisely: in favour of) this complainant (direct prohibition of *reformatio in peius*). Moreover, a decision worsening the legal situation of the sole complainant cannot also be issued by the body of first instance to which the reviewing body referred the case for re-examination (indirect prohibition of *reformatio in peius*). In the literature, it is assumed that the prohibition applies only to the accused, but it should be acknowledged that in reality, as a theoretical construction found not only in a criminal trial,¹⁰ it applies to every complainant. The fact that the prohibition of *reformatio in peius* in a specific legal system (or in a specific type of proceedings) may have a different scope in relation to various

¹⁰ See Article 384 Act of 17 November 1964: Code of Civil Procedure (Journal of Laws of 2021, item 1805, as amended); Article 139 Act of 14 June 1960: Code of Administrative Procedure (Journal of Laws of 2022, items 2000 and 2185); Article 234 Act of 29 August 1997: Tax Law (Journal of Laws of 2021, item 1540, as amended); Article 134 § 2 Act of 30 August 2002: Law on the proceedings before administrative courts (Journal of Laws of 2022, items 329, 655 and 1457); Article 146 par. 1 Act of 17 December 2004 on liability for a breach of public finance discipline (Journal of Laws of 2021, item 289).

parties to the proceeding (e.g. to protect the interests of the accused in the broadest way) is a separate issue.¹¹

Having defined the individual features of a means of indictment of a decision, one should now verify whether they are characteristic of the most typical means of indictment of a decision applicable in a criminal trial, i.e. an appeal, a complaint, a cassation, a complaint against the judgement of an appellate court, a motion to resume a court proceeding, an extraordinary complaint, motions to cancel a valid judgement pursuant to Article 96 Act of 8 December 2017 on the Supreme Court,¹² or pursuant to Act of 23 February 1991 on the recognition of convictions of persons who were subject to suppression for their activities for the independent existence of the Polish State as invalid,¹³ and an objection to an order.

3. ANALYSIS OF THE FEATURES OF INDIVIDUAL MEANS OF INDICTMENT OF A DECISION

3.1. APPEAL

Appellate proceedings cannot be conducted if an appeal has not been lodged (accusatorial nature). A trial arrangement in which the court that issued a challenged judgement hears an appeal is not possible (devolutionist nature). A situation in which a judgement challenged in an appeal is subject to execution before it becomes final and valid is also not possible (suspending nature). When hearing an appeal in accordance with Article 437 CCP, the court of second instance may alter the challenged judgement, as well as revoke it and subsequently discontinue the proceeding or refer it for re-hearing to the court of first instance (reformist nature). Generally, the court to which the appeal has been lodged is not entitled to rule to the detriment of the complainant, but the criminal procedure law also provides for a situation in which the court may change the judgement adversely even though the appeal has been lodged to act in favour of the complainant (Article 434 § 4 CCP), as well as a contrasting situation in which the court may change the judgement in favour of the accused although the appeal has been lodged to act adversely (Article 434 § 2 CCP) (prohibition of *reformatio in peius*).

¹¹ For more on individual features of means of decision indictment, see Skorupka, J., in: Skorupka, J. (ed.), *Proces...*, op. cit., pp. 706–707; Marszał, K., Zagrodnik, J., in: Zagrodnik, J. (ed.), *Proces...*, op. cit., pp. 700–701; Piszczek, P., in: Kruszyński, P. (ed.), *Wykład...*, op. cit., pp. 379–380; Waltoś, S., Hofmański, P., *Proces...*, op. cit., p. 320; Grzegorzczuk, T., in: Grzegorzczuk, T., Tylman, J., *Polskie...*, op. cit., p. 771.

¹² Journal of Laws of 2021, item 1904 and of 2022, items 480 and 1259, hereinafter referred to as ASC.

¹³ Journal of Laws of 2021, item 1693, hereinafter referred to as ARCL.

3.2. COMPLAINT

Depending on the situation, the complaint can be handled by a higher-level body, same-level body, or even the body that issued the challenged decision (devolutionist nature). Under Article 462 § 1 CCP, lodging a complaint does not suspend the execution of the reviewed decision, unless specifically stated otherwise by law (e.g. Article 290 § 3 CCP) or decided by a competent authority (suspending nature). Regarding accusatorial nature, reformist nature, and the prohibition of *reformatio in peius*, a complaint bears similarities to an appeal.

3.3. CASSATION

Depending on procedural arrangements, cassation can be heard by a superior body or a body of the same hierarchically level. The former is, of course, a rule, while the latter may take place only exceptionally when the Supreme Court acts as the reviewing body. This is possible when a case is taken over for examination pursuant to Article 441 § 5 CCP (while answering a specific legal question) or when the first instance court hearing a case is a military district court the appeals against whose judgements can be heard, pursuant to Article 655 § 1 (1) CCP, by the Supreme Court (devolutionist nature). The mere filing of a cassation does not suspend the execution of the challenged judgement; however, under Article 532 § 1 CCP, the cassation court may decide to suspend it (suspending nature). As per Article 537 § 1 CCP, when a cassation is upheld, the Supreme Court may only revoke the challenged judgement, which *prima facie* indicates a strictly cassation-like nature of this means of indictment of a decision (in accordance with its name). At the same time, however, should the conviction be deemed unjust, the highest judicial body may acquit the accused without needing to refer the case for re-hearing to the competent court (Article 537 § 2 *in fine* CCP), essentially changing the challenged judgement¹⁴ (reformist nature). With regard to the accusatorial nature and prohibition of *reformatio in peius*, a cassation demonstrates features similar to an appeal.

3.4. COMPLAINT AGAINST A JUDGEMENT OF AN APPELLATE COURT

Under Article 539b § 2 CCP, lodging a complaint against a judgement of an appellate court suspends the execution of the second instance court's judgement on the revocation of the judgement of the court of first instance and referring the case for rehearing to it (suspending nature). If this means of indictment of a decision is upheld, the Supreme Court may, pursuant to Article 539e § 2 CCP, revoke

¹⁴ See Hofmański, P., 'Orzeczenie sądu kasacyjnego', in: Płachta, M. (ed.), *Aktualne problemy prawa i procesu karnego. Księga ofiarowana Profesorowi Janowi Grajewskiemu*, Gdańskie Studia Prawnicze, No. 11, Gdańsk, 2003, p. 346; approvingly: Koziulewicz, W., in: Drązewicz, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz. Art. 425–682*, Warszawa, 2020, p. 394; similarly: Świecki, D., in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2021, p. 1416.

the challenged judgement and refer the case for rehearing to the appellate court (reformist nature). With regard to the accusatorial nature, devolutionist nature and prohibition of *reformatio in peius*, this measure is similar to a cassation.

3.5. MOTION TO RESUME A PROCEEDING

Pursuant to Article 542 § 1 CCP, a proceeding may be resumed based on a motion or, in the event of serious breaches, *ex officio* (accusatorial nature). Under Article 544 §§ 1 and 2 CCP, a decision on the resumption of proceedings is made by a higher instance court where a lower instance court has issued a judgement, or by a court of the same instance if the proceedings concluded with a Supreme Court judgement (devolutionist nature). With respect to the suspending nature, reformist nature and prohibition of *reformatio in peius*, the motion to resume a proceeding resembles a cassation.

3.6. EXTRAORDINARY COMPLAINT

In accordance with Article 89 § 1 *in principio* ASC, an extraordinary complaint may be lodged only against judgements of common and military courts. The Supreme Court, which is the only court authorised to hear such appellate measures, is neither a common court nor a military one (*argument ex Article 175(1) of the Constitution of the Republic of Poland*),¹⁵ therefore it should be assumed that this measure is not subject to judgements issued directly by the Supreme Court¹⁶ (cf. Article 94 § 2 ASC). This means that a higher-level body, i.e. superior to the body that issued the challenged judgement, shall always hear an extraordinary complaint (devolutionist nature). Pursuant to first sentence of Article 91 § 1 ASC, if an extraordinary complaint is upheld, the Supreme Court revokes the challenged judgement and, depending on the proceeding's outcome, decides on the merits of the case, discontinues the proceeding or refers the case for rehearing to the competent body (reformist nature). With regard to the accusatorial nature, suspending nature and prohibition of *reformatio in peius*, an extraordinary complaint demonstrates the features similar to a cassation.

¹⁵ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, of 2001 No. 28, item 319, of 2006 No. 200, item 1471 and of 2009 No. 114, item 946).

¹⁶ Thus, also Dziga, K., 'Czy możliwe jest merytoryczne rozpoznanie skargi nadzwyczajnej w sprawach karnych', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 2, p. 146; Szczepaniec, M., 'Skarga nadzwyczajna w praktyce – wybrane zagadnienia', *Prokuratura i Prawo*, 2021, No. 9, p. 15; Szczucki, K., *Ustawa o Sądzie Najwyższym. Komentarz*, Warszawa, 2020, theses 39–40 to Article 89; differently, after the adoption of Act of 10 May 2018 amending Act: Law on the system of common courts, Act on the Supreme Court and some other acts (Journal of Laws, item 1045), amending the original wording of Article 94 § 2 ASC; Gruszecka, D., 'Podstawy skargi nadzwyczajnej w sprawach karnych – uwagi w kontekście »wypełniania luk w systemie środków zaskarżenia«', *Palestra*, 2018, No. 9, p. 28; thus, as it seems, also Świecki, D., in: Świecki, D. (ed.), *Meritum...*, op. cit., pp. 952–953.

3.7. MOTION TO REVOKE A FINAL AND VALID JUDGEMENT PURSUANT TO ARTICLE 96 ASC

According to Article 96 § 1 ASC, the Supreme Court may revoke a final and valid judgement issued in a criminal case that, at the time of adjudication, was not subject to Polish courts' jurisdiction due to the person involved, or in which a court proceeding was inadmissible at the time of adjudication. Unlike in the case of an extraordinary complaint, the challenged judgement does not have to be issued by a common or a military court, which means, conversely, that the means of indictment of a decision under analysis may also concern the judgements of the Supreme Court itself (devolutionist nature). Another difference between the institutions is that if the motion to revoke a final and valid judgement is upheld, the Supreme Court cannot change the challenged judgement, which also results from the very conditions for upholding this means of indictment of a decision, not to mention its name (reformist nature). Taking into account the conditions and possible consequences of upholding the measure analysed, one should assume that a judgement to the detriment of the complainant cannot be issued as a result of the hearing of the motion to revoke a final and valid judgement (prohibition of *reformatio in peius*). With regard to the accusatorial nature and suspending nature, this measure resembles a cassation.

3.8. MOTION TO REVOKE A FINAL AND VALID JUDGEMENT PURSUANT TO ARCI

Under Article 3(1) ARCI, revocation of a final and valid judgement in the analysed mode may take place solely based on a motion (accusatorial nature). In accordance with the first sentence of Article 2(1) ARCI, a district court (or a military district court) determines the invalidity in every case, irrespective of the body issuing the challenged settlement. If a regional court or a non-judicial body's judgement is in question, a higher-level body superior to a reviewed one will handle the means. However, if a district court, an appellate court or the Supreme Court (or their historical counterparts, such as the Supreme Military Court) issued the judgement that was then challenged, a court of the same instance or even a lower instance court would hear the motion to revoke a judgement (devolutionist nature). Article 3(4) ARCI states that provisions regulating an ordinary criminal proceeding should apply in the proceeding concerning the revocation of a final and valid judgement. Although Article 96 § 7 ASC clearly indicates that provisions on a cassation should apply by analogy in relation to the proceeding concerning the revocation of a judgement in the above-discussed mode, Article 3(4) ARCI does not specify which specific provisions should apply. Case law assumes that the motion in question should be treated "by analogy, as an entitled accuser's complaint"¹⁷ (and therefore e.g. as an indictment of a decision or a motion to grant a compensation

¹⁷ Ruling of the Appellate Court in Katowice of 27 July 2001, II AKz 526/01, OSA 2002, No. 1, item 2.

for wrongful conviction). This suggests that the district court examining it, formally a court of first instance, cannot make use of the possibility of withholding the execution of the challenged judgement, as laid down in Article 462 § 1 or Article 532 § 1 CCP. This remark, of course, is purely theoretical, as decisions challenged in this undoubtedly specific mode have already been fully implemented due to their essence (suspending nature). If the motion is upheld, a court can only declare the challenged judgement as invalid. Pursuant to the first sentence of Article 2(1) ARCI, recognising a judgement's invalidity is deemed 'equivalent to an acquittal'. This implies that upholding the motion essentially settles the case (i.e. the issue of liability of a person subject to suppression for a given act) (reformist nature). Given the narrow scope of a court's cognition examining a motion to revoke a judgement, as well as the possibility of lodging it solely in favour of a person subject to suppression, it should be assumed that no judgement to the complainant's detriment can be issued in its course, regardless of the assessment on the possibility of properly applying provisions concerning prohibition of *reformatio in peius* in the analysed mode of proceedings (prohibition of *reformatio in peius*).

3.9. OBJECTION TO A COURT ORDER

Due to the nature of an objection to a court order, the measure cannot be unambiguously classified through the prism of the features distinguished previously. Since lodging an objection to a court order causes that the judgement challenged loses its legal effect without the need to be reviewed, the measure is not 'recognised' within the traditional sense of the word (i.e. assessed in terms of merits) at all, and the judgement challenged is neither enforceable nor unenforceable. It is not certain whether the assessment of the means of indictment of a decision in question with regard to devolutionist nature or suspending nature makes sense at all. Therefore, only for the purpose of further research, it can be pointed out that lodging an objection to a court order does not result in referring a case to a higher instance court. The loss of legal force by the challenged order means that the court that issued the judgement will continue dealing with case (devolutionist nature). The measure in question also does not result in the suspension of the execution of the judgement challenged. As it was earlier aptly pointed out in the literature, objections have only a superficial suspending nature. A classic suspending nature consists in the fact that a judgement challenged is not executed although, in the legal sense, it exists¹⁸ (suspending nature). Since the use of the measure in question always leads to the elimination of the judgement challenged from legal transactions, it never results in a change of the judgement challenged (reformist nature). In accordance with Article 506 § 6 CCP, a court hearing a case after an objection has been lodged

¹⁸ See Nowikowski, I., 'Sprzeciw wobec decyzji referendarza sądowego w Kodeksie postępowania karnego (kwestie wybrane)', in: Świecki, D., Kasiński, J., Misztal, P., Rydz-Sybilak, K., Małolepszy, A. (eds), *Artes serviunt vitae, sapientia imperat. Proces karny sensu largo – rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorzczaka z okazji 70. urodzin*, Warszawa–Łódź, 2019, p. 475 and the literature cited therein.

is not bound by the content of the order that lost force. It is assumed that this regulation means that a judgement issued in the further proceeding may worsen the situation of the person who lodged an objection to a court order in comparison to a situation resulting from the judgement (prohibition of *reformatio in peius*).¹⁹ With regard to the accusatorial nature, the means of indictment of a decision analysed above resembles an appeal.

4. CRITERIA FOR ASSESSING CHARACTERISTIC FEATURES TYPICAL OF A MEANS OF INDICTMENT OF A DECISION

The answer to the question whether a given appellate measure is characterised by a given feature depends on the adopted research perspective. In this context, at least two approaches are possible: a positive approach, which asserts that a means of indictment of a decision has a given feature when it is possible to imagine at least one procedural arrangement in which a specific means meets the requirements for being recognised as accusatorial, devolutionist, suspending, reformist or subject to the prohibition of *reformatio in peius*. For example, in the positive approach, a cassation is recognised as a devolutionist means of indictment of a decision, even if the body that issued the challenged judgement re-examines it in specific situations. In accordance with this stance, the key factor is that in other situations, the court of cassation is of a higher instance than the court that issued the judgement under review. The features of individual appellate measures in the positive approach are presented in Table 1.²⁰

In accordance with the second possible approach – negative approach – a means of indictment of a decision cannot be recognised as one having a given characteristic feature when it is possible to imagine at least one procedural arrangement in which the specific measure does not meet the requirements for being recognised as accusatorial, devolutionist, suspending, reformist or subject to the prohibition of *reformatio in peius*. For example, in the negative approach, an appeal is not a means of indictment of a decision that is reformist in nature since there are situations in which the approval of the measure cannot entail a direct change of the challenged settlement by a court of second instance. The features of individual means of indictment of a decision in the negative approach are presented in Table 2.

¹⁹ For more on the scope of the prohibition of *reformatio in peius* when objecting to a court order, including in particular whether the effect of the order depends on circumstances revealed during a proceeding that argue for adjudicating a stricter penalty than the one initially passed in the order, see Łukowiak, B., 'Sprzeciw od wyroku nakazowego a zakres obowiązywania zakazu reformationis in peius', *Studia Prawnicze*, 2020, Vol. 221, No. 1, pp. 143–162.

²⁰ Although the concept of relative suspending nature was previously abandoned, for the purpose of developing Table 1, it was acknowledged that in a specific case, if a competent body suspends the execution of a challenged judgement due to a lodged means of indictment of a decision, it could be deemed as having a suspending nature.

Table 1. Features of means of indictment of a decision in the positive approach

Means name	Means features				
	accusa- torial nature	devolu- tionist nature	suspen- ding nature	reformist nature	prohibition of <i>reformatio in peius</i>
Appeal	+	+	+	+	+
Complaint	+	+	+	+	+
Cassation	+	+	+	+	+
Complaint against a judgement of an appellate court	+	+	+	-	+
Motion to resume a proceeding	+	+	+	+	+
Extraordinary complaint	+	+	+	+	+
Motion to revoke a final and valid judgement pursuant to Article 96 ASC	+	+	+	-	+
Motion to revoke a final and valid judgement pursuant to ARCI	+	+	-	+	+
Objection to a court order	+	-	-	-	-

Source: own development.

The conclusions drawn from the application of both approaches will be identical in those situations where a given means of indictment of a decision absolutely (i.e. in every procedural arrangement that can be imagined) matches or does not match a specific feature. For example, an appeal is a means that is suspending in nature in both the positive and the negative approach, because lodging it always suspends the execution of a challenged judgement. At the same time, in a specific procedural arrangement, lodging an appeal may be connected with the fact that the court of second instance cannot change or revoke a judgement challenged to the complainant's detriment (e.g. in the event the appeal is lodged only in favour of the accused who has not been convicted with the application of the so-called small crown witness arrangement), while in another procedural arrangement, lodging

Table 2. Features of means of indictment of a decision in the negative approach

Means name	Means features				
	accusa- torial nature	devolu- tionist nature	suspen- ding nature	reformist nature	prohibition of <i>reformatio in peius</i>
Appeal	+	+	+	-	-
Complaint	+	-	-	-	-
Cassation	+	-	-	-	-
Complaint against a judgement of an appellate court	+	-	+	-	-
Motion to resume a proceeding	-	-	-	-	-
Extraordinary complaint	+	+	-	-	-
Motion to revoke a final and valid judgement pursuant to Article 96 ASC	+	-	-	-	+
Motion to revoke a final and valid judgement pursuant to ARCI	+	-	-	+	+
Objection to a court order	+	-	-	-	-

Source: own development.

the same means of indictment of a decision will not be connected with absolute inability to worsen the complainant's situation (e.g. in the event an appeal is lodged only to the detriment of the accused but the court of second instance notices the need to change the legal classification of the act in favour of the accused). This means that an appeal may be recognised as a means of indictment of a decision that is subject to the prohibition of *reformatio in peius* (positive approach) as well as a means that is not subject to this prohibition (negative approach). Of all the above-analysed means of indictment of a decision, only an objection to a court order demonstrates the same features regardless of the research perspective adopted (cf. Table 1 and Table 2).

5. CONCLUSIONS

Assuming that an appellate measure is a means of indictment of a decision that is accusatorial, devolutionist, suspending and reformist in nature and is subject to the prohibition of *reformatio in peius*, one should approve of the stance that in the current legal state, an appeal and a complaint are appellate measures. Through positive approach application, other means of indictment of a decision, i.e. a cassation, a motion to resume a proceeding and an extraordinary complaint, should also be acknowledged as appellate measures (see Table 1). Conversely, with the negative approach, neither an appeal nor a complaint is indeed an appellate measure. In fact, no current means of indictment of a decision can be recognised as an appellate measure (see Table 2). As a side note, even if a means of indictment of a decision that meets only some of the above-mentioned requirements were considered an appellate measure, conclusions would remain the same.

Discrepancies between the appellate measures definition adopted in case law and literature, and the analysis results of normative features of specific decision indictment means can be resolved in three ways. Firstly, one could abandon the term 'appellate measure' completely, resorting to the broader term 'means of indictment of a decision'. Secondly, using the described positive approach, the term 'appellate measure' could refer to a larger group of means of indictment of a decision, including some extraordinary ones. Thirdly, the prior interpretation of the term 'appellate measure' could be disregarded.

Means of indictment of a decision seem to form a group too heterogeneous to suffice as a collective concept for adjudication practice or a scientific debate on basic forms of the appellate procedure. On the other hand, extending the appellate measure concept to include a cassation, a motion to resume a proceeding and an extraordinary complaint, would likely reduce their practical value. Often, the term is used not to describe an appellate measure meeting certain requirements, but avoid repeating the term 'an appeal and a complaint' when discussing provisions concerning both legal means (see e.g. Articles 26, 428 or 655 § 1 (1) CCP). Expanding the term 'appellate measure' might require another term to describe only the two most typical and frequently lodged means of indictment of a decision, leading to unnecessary multiplication of entities, conflicting with the economy of thought principle. Therefore, redefining the term in question seems the most appropriate solution.

No 'genuinely' appellate measures exist, let alone their essence. The term should serve conventionally to organise the system of decision indictment means for scientific, educational and practical purposes, allowing, inter alia, more synthetic editing of legal provisions, judgements justifications, and scientific and educational texts. The term 'appellate measures' should denote legal instruments explicitly recognised as such by the legislator, regardless of their normative features or whether other legal instruments might share these features.

Due to the long-standing tradition and civil procedure models, only an appeal and a complaint should be recognised as appellate measures in a criminal trial.

However, it seems that, *de lege lata*, all means of indictment of a decision laid down in Part IX CCP, thus also an objection, should be recognised as appellate measures. This solution, albeit not aligned with the afore-mentioned patterns and linguistic tradition, implies that when an appellate measure is referred to in Chapter 48 CCP, in general, guided by the systemic interpretation directives, including in particular *a rubrica* reasoning, one should presume that *lege non distinguente* is about an appeal (Chapter 49 CCP), as well as a jointly regulated complaint and objection (Chapter 50 CCP).²¹ Thus, *de lege ferenda*, it is necessary to relocate the regulation concerning an objection from Part IX CCP to another place in the act on criminal procedure, and possibly, in the course of regulating individual types of objection, to refer (e.g. in Articles 93a and 506 CCP) to the application of the provisions on the appellate procedure or a complaint by analogy.

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²¹ Differently: Nowikowski, I., *Sprzeciw...*, op. cit., pp. 479, 485 and 488, and the literature cited therein. However, it is noteworthy that authors who oppose considering systemic interpretation directives in this context accept that recognising a means of indictment of a decision as an appellate measure is only reflected in its normative nature, therefore, challenging the significance of *argumentum a rubrica* was seemingly obvious to them.

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