

## **ASSISTANT TO A JUDGE IN COMMON COURTS - STRUCTURAL POSITION AND RANGE OF ACTIVITIES**

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*The institution of the assistant to a judge originated relatively recently as it was introduced to the Polish legal system in 2001 by the Common Courts Organization Act. It was not included in previous legal regulations relating to common courts organization, i.e. the Regulation of 6 February 1928 and the Act of 20 June 1985, though the provision of the Article 265 § 2 of the Regulation of 1928 provided that judicial secretaries could independently perform certain judicial activities in cases stipulated by the law, and in the event of dissatisfaction with the secretary's decision, a judge or a court adjudicated. However, the aforementioned competences of the judicial secretary currently resemble more of a court referendary's powers than those of an assistant to a judge.*

*Keywords: Polish legal system, assistant to a judge, common courts organization.*

### **1. Origin of the institution and its structural position**

The institution of the assistant to a judge originated relatively recently as it was introduced to the Polish legal system in 2001 by the Common Courts Organization Act<sup>1</sup>. It was not included in previous legal regulations relating to common courts organization, i.e. the Regulation of 6 February 1928<sup>2</sup> and the Act of 20 June 1985<sup>3</sup>, though the provision of the Article 265 § 2 of the Regulation of 1928 provided that judicial secretaries could independently perform certain judicial activities in cases stipulated by the law, and in the event of dissatisfaction with the secretary's decision, a judge or a court adjudicated. However, the aforementioned competences of the judicial secretary currently resemble more of a court referendary's powers than those of an assistant to a judge.

Regulations regarding the structural position of the assistant to a judge are included in a separate chapter of the Common Courts Organization Act of 2001, located between chapters on court probation officers and on officials and other court employees. The location of the regulations concerning assistants to judges clearly indicates that the assistant is not an official or any other court employee, but rather a *paraprofessional*, i.e. a highly qualified judicial officer trained to assist professionals, but not licensed to practice in the profession.

According to the provision of the Article 155 § 1 of the Common Courts Organization Act of 2001, the assistant to a judge performs the court administrative acts and acts related to the preparation of judicial cases for hearing. The present wording of the

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<sup>1</sup> The Common Courts Organization Act of 27 July 2001 (JL of 2001, No. 98, item 1070 with subsequent changes).

<sup>2</sup> The Regulation of the President of the Republic of Poland of 6 February 1928 on Common Courts Organization (JL of 1928, No 12, item 93).

<sup>3</sup>The Common Courts Organization Act of 20 June 1985 (JL of 1985, No 31, item 137).

provision does not include the term “*on his/her own*”, which was used in the former wording<sup>4</sup> in reference to the activity of the assistant to a judge. The lack of the aforementioned term does not shatter the assistant’s to a judge ability to act in an independent manner, especially that it is explicitly used in the § 3 of the Regulation of 5 November 2002 on the detailed scope and manner of the performance of duties by assistants to judges<sup>5</sup>, issued on the basis of the authorization under the Article 155 § 5 of the Common Courts Organization Act of 2001. What is essential is that the assistant to a judge, unlike the court referendary, is not a judicial organ and thus is not endowed with attributes of independence and impartiality.

According to the classification of occupations and specializations<sup>6</sup> (i.e. a five leveled, hierarchical classification of occupations and specializations present in the labour market, comprising of five levels: major groups, sub-major groups, minor groups, unit groups and occupations and specializations), the assistant to a judge is located in the second major group, which includes professionals, together with e.g. legal assistant, assistant of public prosecutor, court probation officer, notary, attorney of the Treasury or court referendary. The second major group is characterized as a group of occupations and specializations which require a high level of occupational knowledge, skills and experience in the field of technical, natural, social, humanistic and related sciences. The major goal of the occupations and specializations classified in the second major group includes practical implementation of scientific or artistic theories and concepts, enlargement of the current state of knowledge by means of research, scientific and creative activity as well as systematic education.

## **2. Qualification requirements for the position of the assistant to a judge**

According to the Article 155 § 2 of the Common Courts Organization Act of 2001, the assistant to a judge may be a person who:

1) is a Polish citizen and enjoys full civil and full public rights,

Citizenship is defined as a relatively permanent legal node that connects an individual with the state - an entity of international law<sup>7</sup>. The requirement of the Polish citizenship does not violate the provision of the Article 39 para. 2 of the Treaty on European Union, which introduces prohibition of all forms of discrimination on grounds of nationality, in respect of employment, in relation to all employees of the EU Member States. The principle of non-discrimination does not include employees of public power sector, who are required a unique public trust<sup>8</sup>. The ability to fully exercise civil rights is equivalent with full legal capacity and capacity to perform legal acts in the meaning of the provisions of the Civil Code<sup>9</sup> (Book I - General Part, Title II, Section I – Natural Persons, Chapter I - The legal capacity and the capacity to perform legal acts). The ability to fully exercise public rights includes: the right to vote and stand for election to a public authority,

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<sup>4</sup> Amendment to the Article 155 § 1 was introduced by the Act of 18 August 2011 (JL of 2011, No 203, item 1192).

<sup>5</sup> Regulation of the Minister of Justice of 5 November 2002 on the detailed scope and manner of the performance of duties by assistants to judges (JL of 2002, No 192, item 1613 with subsequent changes).

<sup>6</sup> Regulation of Ministry of Economy and Labour of 27 April 2010 on Classification of Occupations and Specializations for Labour Market Needs (JL of 2010, No 82, item 537).

<sup>7</sup> J. Jagielski, *Obywatelstwo polskie. Zagadnienia podstawowe*, Warszawa 1998, p. 19.

<sup>8</sup> European Commission Communication 88/C 72/02: Freedom of movement of workers and access to employment in the public service of the Member States - Commission’s action in respect of the application of article 48 paragraph 4 of the EEC Treaty" (OJ 88/C 72/02), and Judgment of the Court of 2 July 1996 in case C-473/93, *Commission v. Luxembourg*, [1996] ECR I-03207.

<sup>9</sup> The Civil Code Act of 23 April 1964 (JL of 1964, No 16, item 93 with subsequent changes).

professional self-government or business self-government, the right to participate in the administration of justice and to perform functions in the organs and institutions of the state, territorial self-government or professional self-government.

2) is a person of integrity,

Explanation of the abovementioned term, used also in other structural and corporate acts<sup>10</sup>, is not easy, as it is of abstract and idealistic nature, though there have been attempts in the literature to describe the concept<sup>11</sup>. It is assumed that a person of integrity should be: honest, hardworking, impeccable, stable, scrupulous, courageous, patient, with high personal culture, smart, polite, self-critical, intellectually open and endowed with an inner sense of independence. Such a person should also clearly express his/her thoughts, reason discursively, write well, be sensitive, but also strict and rigorous in the application of procedural provisions, and have a high sense of justice and equity, with a simultaneous tendency to a reasonable compromise.

3) has completed higher education in law in Poland and has obtained the title of master (graduate), or has completed higher education in law abroad recognized in Poland,

4) has attained 24 years of age,

The legislator set the age limit at 24, considering that this age, given the education and practical experience to date, is sufficient.

5) has completed the post-graduate legal training in the Polish National School of Judiciary and Public Prosecutor's Office or passed judicial or prosecutor examination or completed notarial apprenticeship, attorney at law apprenticeship or legal counsel apprenticeship and passed a relevant examination.

The recruitment of candidates is conducted in the form of a contest, which aims to select the candidate with the most knowledge and the highest qualifications, predispositions and general abilities necessary to perform the duties of an assistant to a judge (Article 155 § 2 of the Common Courts Organization Act).

It may be noted that, apart from the requirements concerning age, citizenship and those of a moral nature, the road to become the assistant to a judge consists of three stages.

The first stage includes graduation from Master legal studies in the Republic of Poland or foreign legal studies recognized in the Republic of Poland. The discussed stage requires a candidate for the assistant to a judge to either graduate in law together with obtaining a Master of laws degree in Poland (the right to confer the Master of laws degree is regulated by the Higher Education Act of 27 May 2005<sup>12</sup>) or to hold a foreign law degree, provided that it is recognized in Poland.

The second stage requires a candidate to complete a general post-graduate legal training at the National School of the Judiciary and Public Prosecution, or pass the judge, prosecutor, notary, lawyer or solicitor examination. The post-graduate legal training and the examination are fundamental requirements for the position of the assistant to a judge, as such assistants should have specific practical skills necessary for the performance of the given duties, which cannot be replaced by even the best theoretical background<sup>13</sup>. Therefore any person with an academic title of professor or assistant professor in law

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<sup>10</sup> Article 65 of the Bar Act of 26 May (JL of 2002, No 123, item 1058); Article 11 of the Notary Public Act of 14 February 1991 (JL of 2002, No 42, item 369); Article 24 of the Legal Advisers Act of 6 July 1982 (JL of 2002, No. 123, item 1059).

<sup>11</sup> T. Ereciński, J. Gudowski, J. Iwulski, *Komentarz do prawa o ustroju sądów powszechnych*, Warszawa 2002, p.167.

<sup>12</sup> The Higher Education Act of 27 May 2005 (JL of 2005, No. 164, item 1365).

<sup>13</sup> T. Ereciński, J. Gudowski, J. Iwulski, *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, Warszawa 2009, Lex Polonica, commentary on the Article 155.

cannot become the assistant to a judge without having completed the necessary post-graduate legal training or pass appropriate examinations.

The third and the last stage of the road to become the assistant to a judge in Poland is to pass a specific examination, taken as a part of a recruitment contest, organized by a president of a competent court. Details regarding the recruitment contest are stipulated in the Regulation of the Minister of Justice of 3 September 2008<sup>14</sup>.

President of the court fixes a date and a place of the contest, and informs about the contest at least 60 days before its commencement. A candidate for the assistant to a judge is required to submit: an application for employment as the assistant to a judge; curriculum vitae and information about professional career development; original or an officially authenticated copy of a graduate diploma from Master legal studies in the Republic of Poland or foreign legal studies recognized in the Republic of Poland, or a Master's examination certificate; declaration that no legal proceedings for an indictable offence nor for a fiscal offence are conducted against them; statement of consent to the processing of personal data for the purposes of the contest; three photographs compatible with requirements in force at the issue of identification documents. Moreover, candidates may attach documents certifying their additional qualifications and achievements. All the documents should be submitted directly to the seat of the court or by mail.

Applications from candidates are accepted by the president of the court within time specified in the contest notice. After all submitted applications have been checked in terms of formal requirements, the president of the court establishes a list of candidates admitted to the contest and announces it in a publicly accessible place in the seat of the court as well as in the Public Information Bulletin, no later than 14 days before the commencement of the contest.

The President of the court appoints a committee consisting of three judges, including his representative, who chairs the committee, no later than 21 days before the commencement of the contest.

The contest is conducted in the form of a written examination, which consists of two parts:

- 1) test of 36 questions concerning criminal and civil law,
- 2) 2 case studies, concerning criminal and civil law, which require preparing grounds for the court's decision.

Only candidates who achieve at least 28 points in the test and at least 8 points in the case studies may be qualified to take the position of the assistant to a judge. After completion of the contest the committee immediately calculates the number of points obtained by each candidate and indicates the candidate who achieved the highest number. If none of the candidates received the required number of points, the president of the court orders another contest. Information on results of the contest is announced by the President of the court in a publicly accessible place in the seat of the court as well as in the Public Information Bulletin.

### **3. Professional status of the assistant to a judge**

The basis of the assistant's to a judge employment relationship is a contract concluded between the employee, i.e. the assistant to a judge and the employer, i.e. a common court - district, regional or appeal, represented by the president of the court.

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<sup>14</sup> Regulation of the Minister of Justice of 3 September 2008 on assistant to a judge contest procedures (JL of 2008, No. 167, item 1037).

The Minister of Justice assigns new positions to particular courts, with particular consideration of the rational use of personnel as well as the needs which result from the workload of individual courts. In the event of termination of assistant's to a judge employment in courts operating in the area of a particular appeal, the president of the appeal court shall immediately notify the Minister of Justice, who assigns the vacant position to this or to any other court or abolishes it (Article 155d of the Common Courts Organization Act).

The assistant to a judge is entitled to a basic remuneration as well as to: additional allowance for years of service, jubilee awards, one-time redundancy payment or disability severance payment. The assistant to a judge may also receive a special additional remuneration for periodic increase of duties or assignment of additional tasks as well as a reward for outstanding achievements in the course of professional work, accordingly to the provisions regarding the employees of the courts and the prosecutor's office.

The assistant to judge may take the judge examination after working four years at the post of the assistant to judge. Taking the examination requires: submission of a request for admittance to the examination to the Head of the Polish National School of Judiciary and Public Prosecutor's Office a month before the examination and payment of an applicable fee, determined by the Regulation of the Minister of Justice on the fee for taking the judge or prosecutor examination by non-trainees of the National School of the Judiciary and Public Prosecution<sup>15</sup>.

What is new is the ability to delegate the assistant to a judge to perform duties in another court. The power to delegate the assistant to a judge to a different court in the area of the appeal is a privilege of the President of the appeal court and always requires the assistant's consent. The president may delegate the assistant for a specified period not exceeding two years, or for an indefinite time. The power to delegate has also been entrusted to the Minister of Justice, though in a broader spectrum, as it includes the possibility to refer the assistant to a different court not only within but also outside the area of the appeal, as well as to delegate them to perform administrative tasks in the Ministry of Justice or other organizational entity subordinate to the Minister of Justice or supervised by him - for a specified period not exceeding two years, or for an indefinite time. Moreover, the Minister of Justice may also delegate assistants to judges, upon their consent and in accordance with their qualifications, to perform duties or functions outside the Republic of Poland, within the activities undertaken by international or transnational organizations as well as international teams working under international agreements, including agreements constituting international organizations, ratified by the Republic of Poland, for a specified period not exceeding four years. Initial delegation may be repeated for a further period of time no longer than four years.

Exceptionally, if required by the interests of justice, the assistant to a judge may be delegated to a different court even without his/her consent, for a period not exceeding six months. Such a delegation may be repeated no earlier than after three years. In the time of delegation, the assistant to a judge is entitled to a basic remuneration as well as to additional allowance for years of service. In cases of delegation without the assistant's consent or delegations exceeding six months, the assistant to a judge is entitled to an additional remuneration of 10% of basic salary. In cases of delegation to the Ministry of

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<sup>15</sup> The Regulation of the Minister of Justice of 15 May 2009 on the fee for taking the judge or prosecutor examination by non-trainees of the National School of the Judiciary and Public Prosecution (JL of 2009, No. 89, item 736).

Justice or other organizational unit subordinate to the Minister of Justice or supervised by the Minister, the assistant to a judge is entitled to a functional allowance.

In matters concerning assistants to judges not covered by the Common Courts Organization Act, the provisions regarding the employees of the courts and the prosecutor's office, i.e. the Act of 18 December 1998<sup>16</sup>, shall apply (Article 155 § 9 of the Common Courts Organization Act).

In accordance with the Article 6 of the Act of 18 December 1998, the assistant to a judge is obliged to: obey the Constitution and other provisions of law; perform assigned tasks fairly, impartially, efficiently and on time; maintain state and official secrets; behave with dignity and broaden professional knowledge. At the same time, the legislator directly in the Common Courts Organization Act, by means of reference to the appropriate application of the Article 82a, imposed another obligation, i.e. to a constant professional development, including participation in training. The organization of training and other forms of professional development in respect to assistants to judges is regulated by the Act of 23 January 2009 on the National School of the Judiciary and Public Prosecution<sup>17</sup>. Under the Article 2 of the aforementioned Act, the National School is in charge of, among others, training and professional development aimed to improve specialist knowledge and professional skills, which shall be realized through: outlining curricula and organizing training and other periodical forms of professional development; coordinating training schemes organized by courts and prosecutor's offices; preparing and organizing conferences, symposiums and seminars; international cooperation and joint-action with basic organizational units of colleges which conduct training in the legal faculty, research and development units and academic units of the Polish Academy of Sciences, with regards to training activities and other forms of professional development; conducting publishing operations; acquiring and utilizing aid funds intended for financing tasks as well as performing other duties related with professional development, as indicated by the Minister of Justice.

According to the Article 7 of the Act on the Employees of the Courts and the Prosecutor's Office, the assistant to a judge is obliged to carry out service instructions of superior officials (a judge, to which the assistant was assigned; the President of the department of his/her employment). In cases of illegal or mistaken service instructions, the assistant to a judge is obliged to notify the superior officer in writing. However, if the instruction has been confirmed in writing, the assistant to a judge is required to execute it. The assistant to a judge may not execute the instruction only if it would lead to the commission of an offense or would threaten with irretrievable losses.

The assistant to a judge cannot be guided by his/her political or religious opinions as well as by individual or group interests in the performance of official duties (Article 9). The assistant to a judge cannot take additional employment without the consent of the president of the court of his/her employment. They also cannot perform activities which are contrary to the duties of an assistant or undermine confidence in the court (Article 11).

In matters concerning officials and other employees of the courts and the prosecutor's office not covered by the Act of 18 December 1998, the provisions of the

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<sup>16</sup> The Employees of the Courts and the Prosecutor's Office Act of 18 December 1998 (JL of 1998, No. 162, item 1125).

<sup>17</sup> The National School of the Judiciary and Public Prosecution Act of 23 January 2009 (JL of 2009, No. 26, item 157).

Employees of State Offices Act of 16 September 1982<sup>18</sup> shall apply (Article 18 of the Act on the Employees of the Courts and the Prosecutor's Office). The mostly applied provisions of the Act on Employees of State Offices include articles 29 and 30, both regarding the working time of civil servants. According to these regulations, working time may not exceed 8 hours per day and an average of 40 hours a week in the adopted accounting period of no longer than 8 weeks. In cases justified with the organization of work, work schedules which enable prolonging working time up to 12 hours per day can be used. However, working time may not exceed an average of 40 hours per week, in the adopted accounting period of no longer than 12 weeks. If required by the needs of the court, the assistant to a judge may be employed outside of normal working hours, even at night as well as on Sundays and holidays. In case of duties performed outside normal working hours at the instruction of a superior official, the assistant to a judge, according to his/her choice, is entitled to either remuneration, or free time, provided that the free time that may be granted in the period immediately preceding the leave or after its completion. However, as argued by D. Wajda, the specific nature of assistant's work to a large extent consists in the performance of tasks assigned by the coordinating judge. The assistant to a judge is entitled but at the same time obliged to organize his/her work independently in a way that allows to perform his/her duties in the time specified by the judge, whom they assist. Therefore, the work of the assistant to a judge is a kind of a derivative of the judge's work, and since working time of judges is specified by the dimension of their tasks, so should be the working time of the assistant to a judge.<sup>19</sup>

#### **4. Range of activities and professional obligations of the assistant to a judge**

The range of activities and professional obligations is governed by the Regulation of 5 November 2002 on the detailed scope and manner of the performance of duties by assistants to judges.

Assistants to judges carry out activities in the departments of district, regional and appeal courts, while in the commercial departments maintaining the National Court Register or the register of pledges as well as in the land and mortgage register departments only in special cases, recognized as such by the president of the court.

A person employed as the assistant to a judge may act as an assistant to no more than two judges. The President of the court assigns assistants who perform activities aimed at preparing judicial cases for hearing. The term "assignment" is to be understood as an indication of the judge who maintains substantive supervision.

The assistant to a judge independently performs the court administrative acts and acts related to the preparation of judicial cases for hearing, except for activities restricted to the competence of the heads of departments on the basis of separate provisions. Independent activities include: preparing draft judgments; preparing draft grounds for judgments; preparing draft orders organizing a case to be resolved at a trial or a session; preparing draft orders concerning formal requirements of indictment; controlling the efficiency, timeliness and accuracy of execution of judicial orders by the secretariat of the department; applying to individuals and institutions for the information necessary to resolve a civil case; controlling the timeliness of preparation of opinions by experts; preliminary analysis of case files assigned to the judge's department; preliminary analysis of charges contained in the appeals; performing verification activities in suspended cases and informing the judge in the state of suspended and unrecognized cases; fulfillment of

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<sup>18</sup> The Employees of State Offices Act of 16 September 1982 (JL of 2001, No 86, item 953, with subsequent changes).

<sup>19</sup> D. Wajda, *Status prawny asystenta sędziego*, PS 2006/3, p. 61 – 62.

statistical cards; gathering case law and literature useful to resolve civil cases and to perform other activities related to the judicial activity of judges, who they work with, resulting from the specific nature of the department of the particular court; preparing draft replies to writs, except for formal motions; performing activities regarding the enforcement of judgments in criminal and family cases.

Apart from the activities included in the above-mentioned wide catalogue, the judicial assistant may also perform other activities that affect the efficiency and rationality of the proceedings, provided that acting on the instructions of the supervising judge

Until recently, it was debatable whether the assistant to a judge could record at a criminal trial. This issue has been resolved in the Supreme Court resolution of 24 February 2010<sup>20</sup>, which stipulates that the assistant to a judge is entitled to record a trial, referred to in the Article 144 § 1 of the Criminal Procedure Code. As adopted by the Supreme Court, in the light of the requirements and obligations that the assistant to a judge is subject to, one cannot effectively challenge the idea that vocational preparation and qualifications of the assistants to judges significantly exceed qualifications of secretarial staff, and sometimes even the knowledge and skills of the legal trainees. The Supreme Court held that the new model of the judge's and prosecutor's post-graduate legal training to a large extent includes performance of the function of the assistant to a judge - Article 31 of the Act on the National School of the Judiciary and Public Prosecution not only provides that a part of the judge's post-graduate legal training includes serving an internship on the positions of the assistant to a judge but also states that during the internship, the trainee judge is employed on the position of the assistant to a judge under a contract of employment for a specified period of time. The Supreme Court stated that the enumeration of entities entitled to record a trial, included in the Article 144 § 1 of the Criminal Procedure Code, is a reflection of the substantive (credibility, responsibility, appropriate skills) and formal criteria (organizational relationship with a particular court) required to be admitted to record. All of the abovementioned expectations are also associated with the position of the assistant to a judge. Therefore, the admission of the assistant to a judge to perform recording at the trial in a criminal case is fully acceptable, although it is not explicitly mentioned in the Article. 144 § 1. The absence of a provision explicitly providing assistants to judges with the power to record trials, as pointed out by the Supreme Court, is connected with the fact that, at the time of adoption of the Criminal Procedure Code of 1997, the institution of the assistant to a judge has not yet been introduced, and therefore it was not mentioned in the content of the Article 144 § 1. The lack of subsequent modification of the provision cannot be interpreted as a negative indication.

Provisions of the Civil Procedure Code do not define the circle of individuals with the power to become a clerk, so this function can be performed by assistants to judges, which seems fully justified due to their qualifications and the structural position.

### **5. Other legal regulations on assistants to judges**

Finally, it is worth signaling that the institution of the assistant to a judge is known not only in the common judiciary, but is also present in the particular judiciary and in the Supreme Court.

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<sup>20</sup> The Supreme Court resolution of 24 February 2010 (I KZP 28/09), <http://www.edukacjaprawnicza.pl/nc/aktualnosci/a/pokaz/c/aktualnosc/art/asystent-sedziego-uprawnienia-dospisania-protokolu-rozprawy/login/przypomnij.html?cHash=c079ddbc8f071577d8a7f513d8eb9cff&print=1>

The Article 27a of the Administrative Courts Organization Act of 25 July 2002<sup>21</sup> provides for the function of the assistant to a judge and the senior assistant to a judge. The institution of the assistant to a judge has also been introduced by the Article 64a of the Military Courts Organization Act of 21 August 1997<sup>22</sup> and the Article 51 of the Supreme Court Act of 23 November 2002<sup>23</sup>.

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<sup>21</sup> The Administrative Courts Organization Act of 25 July 2002 (JL of 2002, No. 153, item 1269).

<sup>22</sup> The Military Courts Organization Act of 21 August 1997 (JL of 1997, No. 2012, item 952).

<sup>23</sup> The Supreme Court Act of 23 November 2002 (JL of 2002, No. 240, item 2052).