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DEFENDANT'S RIGHT TO REFUSE TO TESTIFY AS A WITNESS IN CIVIL AND ADMINISTRATIVE PROCEEDINGS: OBSERVATIONS IN VIEW OF ARTICLE 182 §3 CPC

ŁUKASZ CHOJNIAK*

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The discussed problem of the witness's right to refuse to testify pursuant to Article 182 §3 of the Criminal Procedure Code (hereinafter: CPC) emerged in view of a specific case investigated by the Verification Commission for reprivatisation of Warsaw's real estate (hereinafter referred to as the Commission).[1] The actual case that occurred has not been resolved to date in judicial decisions issued by administrative courts.[2] The facts briefly described below, which are a point of departure for further analysis, are at the same time quite interesting in terms of theoretical considerations. This is because we are dealing with a situation which is not particularly rare when a witness who has been charged in criminal proceedings must now testify in civil or administrative proceedings to provide evidence that may be of relevance to his or her possible criminal liability. However, the extent of procedural guarantees vested in such a witness on the grounds of the latter two procedures is narrower than in the case of criminal proceedings. Accordingly, the problem in question, in addition to its theoretical aspect, is also strongly correlated with the everyday practice of the application of law.

* PhD, Assistant Professor, Institute for Social Prevention and Resocialisation, Faculty of Applied Social Sciences and Resocialisation of the University of Warsaw; e-mail: l.chojniak@uw.edu.pl

1 The Commission was set up pursuant to Article 3 para. 1 of the Act of 9 March 2017 on special rules for elimination of legal consequences of reprivatisation decisions issued in violation of law and concerning Warsaw's real estate (Journal of Laws [Dz.U.] of 2017, item 718), and the Commission's name was finally derived from the amendment to the act, which came into force on 14 March 2018 (Journal of Laws [Dz.U.] of 2018, item 431).

2 There are no relevant decisions of civil law courts, either, which would be helpful here in view of similar grounds for the witness's right to refuse to testify.

The defendant in criminal proceedings was summoned to testify before the Commission in a case the substantive scope of which, in the defendant's assessment, was identical or at least highly similar to the object of the criminal proceedings conducted against the defendant. The information that the Commission wanted to obtain from the defendant was important for finding whether the defendant was responsible in criminal proceedings.[3]

The defendant appeared before the Commission and did not leave the hearing before its end. At the hearing, the defendant appearing before the Commission as a witness stated her position by indicating that she had been presented with a charge in criminal proceedings and the nature of the presented charge and the object of the proceedings prevent her, in her opinion, from testifying before the Commission as her testimony could just be tantamount to providing information connected with the object of the criminal proceedings where she, as a defendant, took advantage of the right to refuse to provide explanations. Although, then, the witness in the proceedings in which she was to testify could not fear that she would be presented with charges (which obviously follows from the nature of those proceedings), what must be nevertheless stressed is that she had already been accused based on the facts which were, in her opinion, identical to or essentially identical to those of the case pending before the Commission. Therefore, what was meant was not a fear of being presented with a charge in the future but enforcement of the right to defence against a charge already presented.

The difference between these two situations was also noticed by the Constitutional Tribunal. This is because it recognised that the right to refuse to reply specific questions is vested in a witness, or a person to whom no charge of committing a crime has been presented. The Tribunal also emphasized the fact that the aforementioned procedural regulation does not mean that a person testifying in a trial as a witness is vested with the same scope of rights, rooted in the constitutional right to defence to which a defendant is entitled. Considering the above, not all the rights vested in a suspect because of the right to defence which is due to him or her should be vested on the same conditions in a person testifying in a trial as a witness, who may have committed a crime but one outside the scope of the pending proceedings.[4]

It should be stressed that the thesis presented by the Tribunal is correct, provided that the key issue is rightly emphasized: different scopes of proceedings in cases where the person testifies as a witness and those where he or she is presented with charges as a defendant. In the case which is the basis of further considerations, in the suspect's assessment, the factual findings made before the authority in the administrative proceedings were of key importance to her criminal liability assessed in the proceedings where as a suspect she took advantage of the right to silence. The substantive scope of both proceedings, defined by the factual findings made, was therefore congruent. It is irrelevant here whether the factual findings made are later used as the grounds for considering various types of legal, not only criminal,

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[3] Case R 1/17 conducted by the Commission.

[4] The judgement of the Constitutional Tribunal of 21 December 2007, Ts 62/07, Z.U. 2008/2B/69.

consequences. When a witness testifies in such a situation, this would give the authority conducting criminal proceedings against him or her knowledge of the facts about his or her participation in the criminal proceedings. It is irrelevant, either, that testimony reports could not be used as evidence in the criminal proceedings, if the authority conducting the criminal proceedings could easily familiarise itself with their content and thus obtain information needed to continue the proceedings against the suspect, which would be further verified by other evidence in the case.

As a result of the situation that occurred, the witness declared that she wanted to take advantage of the right vested in her pursuant to Article 182 §3 CPC and she refused to testify before the Commission.

The aforementioned regulation grants a witness the right to refuse to testify if he or she is accused of participation in a crime covered by proceedings in another pending case. Clearly, the indicated regulation is applicable only within criminal procedures and there is no corresponding regulation in civil law or administrative procedures. Also, the Act which established the Commission, in Article 38 para. 1, states that in cases not regulated by the Act, relevant provisions of the Code of Administrative Procedure (hereinafter: CAP) should be applicable. For the sake of completeness, it should be added that the CAP, in Article 83 §1 provides that no party may refuse to give evidence as a witness, except for the party's spouse, ascendants, descendants and siblings and the party's first-degree relatives, as well as persons remaining with the party in the relationship of adoption, custody or guardianship. The right to refuse to testify continues also after the termination of marriage, adoption, custody or guardianship. It is not, therefore, to any extent an equivalent of Article 182 §3 CPC but Article 182 §1 CPC, which allows the defendant's next of kin to refuse to testify in criminal proceedings; pursuant to Article 115 §11 of the Criminal Code (henceforth: CC), one's next of kin is defined as one's spouse, ascendant, descendant, sibling, relative in the same line or degree, a person remaining in the relationship of adoption as well as his or her spouse or a person living in actual co-habitation.[5]

On the other hand, Article 83 §2 CAP, which allows a witness to refuse to answer questions if an answer could expose him/her or his/her next of kin to criminal liability, disgrace or direct property loss or cause violation of the obligation to maintain in confidence a legally protected professional secret, corresponds both to Article 183 §1 CPC and, with regard to the obligation to maintain in confidence a legally protected secret, to Article 180 CPC. Obviously, the norms juxtaposed as above are not identically worded but are sufficiently similar in terms of content and adopted solutions to allow their comparison. But in the administrative (or civil law) proceedings, there is no provision corresponding to Article 182 §3 CPC.

The rights conferred on a witness in criminal proceedings pursuant to Articles 183 §1 CPC and 182 §3 CPC are essentially different and it is not accidental that the lawmaker put the two of them in two separate editorial units, wording them in a completely different manner. These are not, in any case, similar rights and the

[5] By the Resolution of 25 February 2016, I KZP 20/15, the Supreme Court specified in detail the list of persons classified as next of kin pursuant to Article 115 §11 CC.

rights under Article 182 §3 CPC, which are wider in scope and more advantageous for the accused, cannot effectively replace the rights granted on the basis of Article 183 §1 CPC.

Article 182 §3, introduced to the Criminal Procedure Code, grants a witness who has found him/herself in a special situation in a trial a far-reaching right having the nature and ensuring the enforcement of the actual right to defence. The right to refuse to testify is then granted also to a witness who is accused of complicity in a crime covered by proceedings in another pending case.

In the doctrine and jurisprudence, the commented norm has not been interpreted in detail, though the opinions expressed so far should be an important instruction for interpreting Article 182 §3 CPC.

W. Kręcisz points out that the lawmaker intended to include in the scope of the norm also situations identical to that regulated in Article 182 §3 CPC that may arise on the grounds of other regulations which are part of the criminal law system where the Criminal Procedure Code is applied directly or indirectly. The author continues to argue, correctly, that the provision of Article 182 §3 CPC functions as a kind of special guarantee which aims, as a manifestation of the constitutional right to defence, to spell out clearly the absence of any obligation on the part of anyone to provide evidence against oneself. Therefore, as indicated by W. Kręcisz, it is neither justified nor possible to restrict interpretation of Article 182 §3 CPC only to the linguistic interpretation, without taking into account or seeking another context – a systemic, functional one – for the interpreted rule of law, even though it is to be expected that such context should be established, all the more so since that would be in keeping with the principles of interpretation of the law. This is because it is not disputed that at present the principle of judicial independence cannot reduce courts (judges) to the role of "mouths of statutes", which would, to simplify greatly, limit their role in the process of law application to making findings concerning only the linguistic context of the interpreted rule of law.[6]

In the doctrine, the right opinion is also invoked that Article 182 §3 CPC should be considered not only in the linguistic context but also in the systemic and functional contexts. If this is so, then the right to refuse to testify should be also granted to a witness who is actually, strictly speaking, not accused from the point of view of the Criminal Procedure Code but because of his or her young age appears in a case conducted before a family court under the Act on procedure in juvenile cases (henceforth: Juvenile Act). There are no reasonable arguments to differentiate the situation of two accomplices testifying in the trial. If the interpretation is limited to the literal wording of the provision, then a juvenile accomplice who is to testify before a criminal court would be deprived of the right to refuse to testify, while his or her adult partner, testifying before a family court, would be instructed about his or her right to refuse to testify under the procedure of Article 191 §2 CPC in connection with Article 20 Juvenile Act.[7]

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[6] W. Kręcisz, *O wykładni ustaw w sposób zgodny z Konstytucją na tle stosowania art. 182 §3 k.p.k.*, Prokuratura i Prawo No. 4, 2000, pp. 7–27.

[7] See P.K. Sowiński, *Prawo świadka do odmowy zeznań w procesie karnym*, Warsaw 2004, p. 75, and the opinions referred to therein.

On the other hand, K. Łojewski classified the right to refuse to testify vested in a witness as an institution of evidence prohibitions, which include any rules of criminal proceedings that forbid taking evidence for a certain circumstance or with the use of particular pieces of evidence. Evidence prohibitions, however, do not represent rights that are in conflict with the interest of judicial authorities but only rights whose protection exerts an adverse influence on the principle of aiming to find the objective truth in criminal proceedings. The prohibitions actually make it difficult or impossible to find the truth but the fact that they have such effects, which is correctly emphasized by the author, is completely consistent with the intentions of judicial authorities. The interest of the judicial authority and the principle of the objective truth are not unambiguous concepts and the protection of one does not necessarily mean the protection of the other.[8]

In the jurisprudence, although individual, a view has been presented that on the basis of Article 182 §3 CPC, the essence of which is to prevent an accused person from actually having to testify against him/herself as a result of a change in his or her procedural situation (under the threat of criminal liability for giving false evidence), the statutory concept of participation in a criminal offence should be understood more broadly and should include, in addition to complicity, aiding and abetting, cases which are similar, where the factual connection between the acts in question is also strong and where their perpetrators, if the connection is found, face similar criminal consequences.[9]

The judgement of the Appellate Court in Katowice referred to above has been criticised in a gloss, where the presented argument was claimed to be fallacious in that assuming that Article 182 §3 CPC is an exception from the duty to testify following from Article 177 §1 CPC, then such an exception cannot be given an extended interpretation, therefore complicity in a criminal offence for the purposes of the discussed provision should be understood exclusively as the forms of complicity described in Article 18 §1–3 CC.[10]

The argument advanced by M. Siwek is isolated, not supported in the doctrine or in the jurisprudence. The view is based on a certain misunderstanding because the author seems to oppose the prohibition against extended interpretation of Article 182 §3 CPC to the guarantee role of the provision; both these values, though, are possible to reconcile and certainly neither of them excludes the other.

The aim of the regulation of Article 182 §3 CPC is undoubtedly to guarantee a suspect the right to fair treatment in given criminal proceedings. As Polish law grants such a person the right to silence and to refuse to provide explanations, then it is necessary to ensure that the procedural authorities respect the right effectively. The point then is to make it impossible to exclude cases identical with regard to the substance or to initiate such proceedings apart from already pending ones, where a suspect as a witness would be made to testify, and even in a situation where

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[8] K. Łojewski, *Instytucja odmowy zeznań w polskim procesie karnym*, Warsaw 1970, pp. 14–15.

[9] Judgement of the Appellate Court in Katowice of 28 November 2002, II AKa 398/02, OSAKiSO 2003, No. 1.

[10] M. Siwek, *A gloss to the judgement of the Appellate Court in Katowice of 28 November 2002, II Aka 398/02*, Palestra No. 11–12 2005, p. 280.

he or she would give false testimony to defend him/herself, he or she would be exposed to criminal liability by imprisonment up to five years (Article 233 §1a CC). Exactly, in the light of the new regulation of Article 233 §1a CC, the interpretation of Article 182 §3 CPC in terms of guarantee takes on importance. What is interesting, in the justification of the bill amending the CPC, stipulating criminal liability for a witness who gives false testimony in fear of threatening criminal liability, it was emphasized that the Polish criminal procedure provides for sufficient guarantees of the right to defence referred to in Article 6 of the European Convention on Human Rights and Article 42 para. 2 of the Constitution of the Republic of Poland. In particular, as indicated in the justification for the bill, the guarantee is provided by, among others, just the right to refuse to testify and the right to refuse to answer a question referred to in Articles 182 and 183 CPC.[11] Therefore, the right defined in Article 182 §3 CPC is undoubtedly important as it fulfils the role of a guarantee.

The functional and pro-guarantee rather than only literal interpretation of Article 182 §3 CPC does not lead at all to an extension of the subjective and objective scope of Article 182 §3 CPC. This is because it is not challenged that the right to refuse to testify on the grounds of Article 182 §3 CPC is granted only to a witness "accused of complicity in a criminal offence coved by the proceedings". The point is, however, that while decoding the objective scope of the term "criminal offence" one cannot restrict or narrow down the interpretation of the possibility of taking advantage of the right resulting from Article 182 §3 CPC only to such situations where in proceedings a witness is to testify, the subjective and objective configuration is an ideally symmetrical reflection of the factual circumstances in the proceedings, where the witness is presented with charges, and the only exceptions from such an ideal similarity are provided by Article 18 §1–3 CC. What is of fundamental importance then is the objective scope of the proceedings in which the witness is to testify. If the scope is essentially similar to the proceedings where the witness is presented with charges, then he or she has the right to refuse to testify.

It should be emphasized that such an interpretation of Article 182 §3 CPC is supported by the judgement of the Supreme Court of 28 November 2003, IV KK 14/03, where it was clearly stressed that to assess the possibility of taking advantage of the right following from Article 182 §3 CPC, the nature of the action covered by the given proceedings must be considered. This follows from the fact that the Supreme Court assumed that the provision of Article 182 §3 CPC establishes an exception to the obligation to testify in a case. The right to refuse to testify is then granted to a witness who is accused of complicity in a crime covered by proceedings in another pending case, and the court must instruct the witness about his or her right to refuse to testify. Comparing, on the grounds of the same system of law, the terms of "accused" and "juvenile" leads to the conclusion that they refer to persons against whom proceedings have been initiated and are conducted to determine the legal liability for a committed offence.

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[11] Justification for the bill, the Sejm print no. 207, p. 19 – Sejm of the 8th term. Even though the nature and the aim of the regulation found in the provision of Article 182 §3 CPC is described correctly, Article 233 §1a CC remains nevertheless in conflict with the function of Article 182 §3 CPC.

Pursuant to Article 189(3) CPC, a witness is not obligated to make a vow if he or she is suspected of an offence which is the object of the proceedings or remains in a close connection with an action being the object of the proceedings or when he or she has been sentenced for the offence. The lawmaker uses here a different description of the relationship between the content of the witness's testimony and the object of criminal proceedings in which he or she is accused. The expression used, after all, is a "close connection" rather than "complicity" as in Article 182 §3 CPC. However, referring to the wording of Article 189(3) CPC does not solve the problem, either. A witness indicated in Article 189(3) CPC may be only a suspected person, therefore a person against whom no charges of committing an offence have been brought, but it is a court on its own that decides whether a witness is to be identified as a "suspected person" based on the evidence held in the case.[12] Therefore, Articles 182 §3 and 189(3) CPC refer to different subjects, so it is unfortunate to compare the two where a witness who is at the same time a "suspect" rather than merely a "suspected person" is forced to defend him/herself against criminal charges already presented to him or her, due to which the accusation is actual and not only hypothetical. By the same token, it is Article 182 §3 CPC to which the pro-guarantee and functional interpretation of the provision applies.

It would be possible, though unfortunate, to invoke the right granted to any witness based on Article 183 §1 CPC, therefore the right granted even to a witness against whom no criminal charges have been brought. It is beyond any doubt that the scope of guarantee in Article 183 §1 CPC is much narrower than that provided for in Article 182 §3 CPC. As already indicated, the right to silence, guaranteed in Article 182 §3 CPC is a different thing from the necessity to indicate to the interrogator where a witness sees the possibility of being exposed to criminal liability (Article 183 §1 CPC), which by itself is an important piece of information for the authority conducting the proceedings and is not consistent in any way with guaranteeing the right to silence to a suspect. If a witness, having been presented with criminal charges, is interrogated, having no choice in the matter, in other proceedings as a witness but about circumstances identical to those presented to him or her in the criminal charge, then the procedural authorities are obligated to behave in a loyal manner to the witness and respect the right to silence vested in him or her. M. Cieślak, then, rightly assumed that if a witness invokes the right to refuse to answer questions, this is some kind of admission of guilt on the part of the witness. Therefore, invoking the right requires of the witness a great moral courage and perhaps, in the author's opinion, not only moral courage.[13]

Moving on, on the other hand, to the possibility of refusing to testify on the part of a witness in circumstances described in Article 182 §3 CPC but giving evidence in different proceedings from criminal ones (not conducted pursuant to the Code of Criminal Procedure), it should be recognised that objecting to such a right may

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[12] See: D. Gruszecka, *Komentarz do art. 189 k.p.k.*, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Legalis, 2017; and D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2013, p. 616.

[13] M. Cieślak, *Przesłuchanie osoby podejrzanej o udział w przestępstwie, która nie występuje w charakterze oskarżonego*, Państwo i Prawo No. 5–6, 1964, p. 865.

violate the standard defined in Article 42 para. 2 first sentence of the Constitution. This is because anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. The views that the Constitution guarantees the right to defence, among others, in a material sense, are correct and this entails the possibility of using any measures aimed at defence that are acceptable in criminal proceedings. This guarantee subsumes the right to shape and influence the conducted evidence proceedings and the procedural activities taken during the proceedings by, among others, providing explanations (or refusing to provide them), access to the files, and submission of motions concerning evidence. The right to defence construed in this way entails imposing on the procedural authorities obligations to create conditions allowing the entitlements following from the right to become actual.[14] On the other hand, other authors think that an inherent part of the right to defence, in constitutional terms, is the right to freedom of expression, where a special element may be distinguished, namely the right to provide explanations and possibly the right to refuse to testify (the right to silence). In addition, no adverse consequences can be drawn from the fact of the individual's taking advantage of the right to silence. The above follows, as it is stressed, from the principle of *nemo se ipsum accusare tenetur*, which is applicable in the Polish legal order.[15]

An extremely complex problem, however – which I am fully aware of – is the possibility of appealing to the right to refuse to testify in such circumstances of the case as described in Article 182 §3 CPC, in spite of there being no positive statutory standard in the given (civil law, administrative procedure) regulating such a right.

Recently, the problem of the "dispersed constitutional review" has been discussed broadly and, it must be admitted, correctly. Specifically, it is pointed out in the doctrine that an individual is entitled to claim a right to be justified when it is rooted in the Constitution. Common courts, then, are authorised to analyse law against constitutional rules in various cases and different factual circumstances, which extends significantly the scope of constitutionality. A mixed model of constitutionality of law emphasizes the role and function of courts whose basic task is to issue fair and just decisions in compliance with axiological principles and constitutional values to resolve individual cases. A court has the right to refuse to apply a rule of law in a specific case when the rule is clearly inconsistent with the Constitution but a court has the right to apply the Constitution only in that scope. A court's refusal to apply the rule of law inconsistent with the Constitution in a specific case does not relieve the court from seeking other grounds for its decision. In some cases, such grounds may be provided simply by the provisions of the Constitution, applied directly and independently. In individual acts of applying laws, courts may treat the Constitution as the grounds for protecting personal rights and freedoms, not as the grounds for limiting them.[16]

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[14] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 278, and the references contained therein.

[15] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, Vol. 1: *Komentarz do art. 1–86*, Warsaw 2016.

[16] P. Kardas, M. Gutowski, *Konstytucja z 1997 r. a model kontroli konstytucyjności prawa*, Palestra No. 4, 2017, pp. 11–29.

The above consideration of dispersed constitutional review of rules of law solves only partially the problem of the absence of the normative basis at the ordinary statutory level for a witness to take advantage of the right to refuse to testify in a different procedure from the criminal one when the circumstances described in Article 182 §3 CPC arise.

Consequently, attention should be drawn to the fact that the doctrine applies the model to the possibility of refusing to follow a given statutory law or seeking a relevant pro-constitutional interpretation rather than a situation when a given provision is missing from the legal order. It is beyond any doubt, then, that the problem of constitutionality of a law may be analysed by a common court that is to issue a decision in a given case, but the question remains open whether the same court is allowed, similarly, to seek the right legal grounds for resolving the case in a situation closer to a legislative omission (*zaniechanie prawodawcze*).

In M. Grzybowski's opinion, a legislative omission refers to a situation where contrary to an order following from prevailing laws – normative obligation – the legislator has failed to pass the required regulations or regulated a matter in an incomplete and insufficient manner. In the first of the described situations, we can see omission proper (absolute omission); in the second – relative (partial) omission. Following the above line of thought, M. Grzybowski referred to the Constitutional Tribunal's judgement of 3 December 1996, where in the justification, the Tribunal stated that it had no competence to assess the lawmaker's omissions involving failures to issue a legislative act, even if the obligation to issue it followed from constitutional norms. On the other hand, in the case of a legislative act which has been issued and is in force, the Constitutional Tribunal is authorised to assess its constitutionality also with regard to pointing out missing regulations without which, because of the regulatory nature of the act, it may raise doubts about its compliance with the Constitution. The charge of unconstitutionality may, therefore, apply both to what the legislator included in the given act of law and area omitted from the act, even though that area should have been regulated if the Constitution had been followed.[17]

Answering then the question whether a court is allowed to seek the right legal grounds for resolving the case in a situation closer to a legislative omission, it is possible to give a partially positive answer based on two assumptions, which are crucial, in my opinion. First, a court or authority which does not operate on the basis of the criminal procedure may accept a witness's right to refuse to testify as described in Article 182 §3 CPC as long as the court decides that there are reasonable grounds to assume that the legislator could and should have introduced the given solution to the civil law or administrative procedure but failed to do so. The fact that a rule defining an appropriate right of an individual is not indicated in procedural provisions directly does not mean that the person is deprived of the right when – by interpreting the provisions, using most frequently systemic

[17] M. Grzybowski, *Zaniechanie prawodawcze w praktyce polskiego Trybunału Konstytucyjnego*, published on http://www.confeuconstco.org/reports/rep-xiv/report_Poland_po.pdf [accessed on 8/07/2018], and the judgement of the Constitutional Tribunal, as referred to therein, of 3 December 1996, K 25/95, OTK ZU 1996, No. 6, item 52.

interpretation – it is possible to derive the right from the existing regulations, even if those are not included in the procedural laws applied by the given authority. Such an interpretation, however, cannot lead to creating completely new solutions, unknown in the Polish legal order, because then the interpretation would acquire a law-making role.

Furthermore, it is possible to conclude, by making an interpretation, that Article 182 §3 CPC should be applied to other proceedings than criminal ones as long as we assume that the failure to repair such a "legislative omission" by a court or authority will lead to the application of law with unconstitutional consequences affecting the individual. Such a consequence, which is inconsistent with the Constitution, could be forcing someone to testify in spite of the right to silence guaranteed in the Constitution as a component of the right to defence.

On the other hand, on the grounds of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (henceforth: ECHR),[18] W. Jasiński observes that in the decisions of the European Court of Human Rights, apart from the right not to incriminate oneself, another term is also used, namely the right to silence. As the author convincingly argues, the two terms: the right not to incriminate oneself and the right to silence cannot be regarded as equivalent. Their meanings overlap. On the one hand, as the author notes, the right to silence is an element of the right not to incriminate oneself. This is because the latter includes not only refusal to provide statements which may incriminate one but also refusal to provide incriminating factual evidence. On the other hand, the right to silence involves not only statements that are incriminating in nature.[19] It is beyond doubt, however, that an effective right to silence, at least from the moment of presenting charges to a suspect, is part of the right to fair trial following from the Convention.

With regard to the right to silence, the decision-making of the European Court of Human Rights is quite extensive but its deeper analysis would not be possible in this paper. A representative example, which is worth discussing, though, is the Grand Chamber's case of *Ibrahim and Others v. the United Kingdom*.[20] The Court's discussion in the relevant scope shows the difficulty of unambiguous delineation of limits of the right to silence.

The Court indicates that the right not to incriminate oneself focuses mainly on respecting the accused person's will to remain silent and assumes that the prosecutor in a criminal case makes an effort to prove his argument without resorting to evidence obtained by threat or coercion, against the accused person. The right to silence during an interrogation by the police and the privilege of not incriminating oneself are commonly recognised international standards, forming the basis of the

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[18] Journal of Laws [Dz.U.] of 1993, No. 61, item 284.

[19] W. Jasiński, *Prawo do nieobciążania się w procesie karnym w świetle standardów strasburskich*, Prokuratura i Prawo No. 7–8, 2015, p. 11.

[20] The judgement issued by the Grand Chamber of the ECtHR of 13 September 2016 in the case *Ibrahim and Others v. the United Kingdom*, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, as well as the body of court decisions referred therein, discussing in detail the comments presented by the Court – paras. 266–269.

concept of fair procedure pursuant to Article 6 ECHR. As assessed by the Court, the justifiability of the rights follows also from the protection of the accused against inappropriate use of force by the authorities, which contributes to the avoidance of court errors and achievement of the aims of Article 6 ECHR.

It should be noted that recognising the privilege of not incriminating oneself does not protect against submission of an incriminating statement by itself but against obtaining evidence by threat or force. The existence of coercion raises doubts whether the right not to incriminate oneself has been respected. For these reasons, the Court must always consider first the nature and extent of coercion used to obtain evidence. As the Court shows, it identified in its decision-making body at least three types of situations which raise doubts about inappropriate use of coercion, violating Article 6 ECHR.

The first occurs if a suspect is obligated to testify under a threat of sanctions and because of that decides to testify or suffers consequences for refusing to testify.

The second concerns physical or psychological pressure, often assuming the form of treatment in breach of Article 3 ECHR, used to obtain actual evidence or statement.

Finally, the third refers to a situation where the authorities use a stratagem to extract information that has been impossible to obtain during the interrogation.

Testimony obtained under duress which does not seem to be incriminatory in nature, such as revealing remarks or information taken only from replies to questions about facts, may be used in criminal proceedings to support the indictment, for example to deny or dismiss other statements made or evidence provided by the accused person or to undermine their reliability in some other way. In connection with the above, the right not to incriminate oneself cannot be justifiably limited to directly incriminating statements.

The right to freedom from self-incrimination is not absolute, though. In the Court's assessment, the extent of applied coercion is inconsistent with Article 6 ECHR if the coercion contradicts the privilege of not having to incriminate oneself. Not every form of direct coercion denies the sense of the privilege of not having to incriminate oneself and leads to violation of Article 6 and the ECHR standards. In the Court's assessment, what is important here is the use of evidence obtained under duress during a criminal trial.

Applying the above comments to considerations about the possibility of refusal to testify by a witness in civil law or administrative proceedings, if the witness has been presented with charges in criminal proceedings and the established facts are identical or essentially similar to the facts relevant to the criminal proceedings, then forcing the witness to testify under threat of criminal liability, combined with the witness's fear of being sentenced for giving false evidence, could lead to the conclusion that Article 6 ECHR has been violated.

It seems similar to the situation when a witness can use the right to refuse to answer particular questions, if it is noted every time that the witness refuses to answer a question because he or she is afraid of threatening criminal liability, which is a form of forcing the witness to incriminate him/herself. This is a kind of stratagem, because even though the witness may not be threatened with criminal

liability for giving false evidence, he or she is nevertheless forced to use the right to refuse to answer particular questions aiming to incriminate him or her and in connection with this he or she may effectively and unintentionally point to factual issues that can lead to his or her criminal liability. It is not accidental that the accused person has the right to give evidence and also to refuse to do so without stating a reason, which is not identified by the legislator with the possibility of refusing to answer each particular question.

On the other hand, the Court in its decisions emphasizes the actual use of evidence obtained under duress in criminal proceedings. Undoubtedly, evidence from a suspect's testimony given in other proceedings when he or she appears as witness cannot form the basis for establishing facts in a case, interestingly, not even to the suspect's benefit. In this sense, effective use of evidence obtained in such a manner is limited. The content of the minutes from the hearing of the witness cannot be overlooked, though, as it may help the prosecutor to seek further evidence against the suspect. From this perspective, the scope of actual use of such evidence is broadened. This is emphasized by M. Kurowski, who states that the idea of Article 182 §3 CPC is to use information taken from given testimony because the testimony itself cannot be used directly against an accused person.[21]

If the principle of *nemo se ipsum accusare tenetur* is applicable not only to a suspect and an accused person but also to a "suspected person" and "potentially suspected person",[22] then it seems that a witness who defends him/herself in criminal proceedings against presented charges should not be forced to testify in different proceedings from the criminal ones where the content of the testimony could incriminate him or her. It is sometimes stressed that the right to defence entails the possibility of selecting a strategy of defending oneself, in particular, an accused person may choose an active or passive defence. One of the aspects of the right to defence in criminal proceedings is the right to passive defence, expressed in the aforementioned procedural rule of *nemo se ipsum accusare tenetur*, which prohibits self-incrimination and providing evidence against oneself.

The essence of the discussed rule amounts to giving an accused person freedom to decide whether to participate actively in proceedings against him or her. Protection against self-incrimination refers in the first place to the person accused in criminal proceedings but the scope of the *nemo se ipsum accusare tenetur* principle is not limited by the criminal proceedings defined by presenting a charge on the one hand, and issuance of a legally valid decision on the other. In particular, we should completely agree with the following: that the scope of the protection resulting from the principle allows a witness, in certain situations, to refuse to testify as well as it allows a person obligated to provide information in proceedings to refuse to comply with the procedural obligation.[23] Lastly, taking into consideration all the foregoing considerations, it seems reasonable to assert that the essence of the right

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[21] M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania…*, Vol. 1, Warsaw 2013, p. 592.

[22] Cz. Kłak, *„Osoba podejrzana" oraz „potencjalnie podejrzana" w polskim procesie karnym a zasada nemo se ipsum accusare tenetur*, Ius Novum No. 4, 2012, p. 74.

[23] P. Nowak, *Definicja podejrzanego i oskarżonego a konstytucyjne prawo do obrony*, Czasopismo Prawa Karnego i Nauk Penalnych Vol. 4, 2016, p. 70.

of defence, as defined by both the Constitution and the Criminal Procedure Code, must not be adversely affected in civil or administrative proceedings if the subject matter of such proceedings is relevant from the perspective of a possible criminal liability of a person who has been charged in criminal proceedings and who is subsequently required to testify as a witness in civil or administrative proceedings to provide certain significant evidence that might be relevant to the criminal proceedings. Obviously, a solution postulated within a certain time horizon would be to amend the Code of Administrative Procedure and the Code of Civil Procedure by introducing solutions corresponding to the one adopted in Article 182 §3 CPC, whereby the right to refuse to testify as a witness would be vested in a person who in other pending proceedings is accused of a crime the essential facts of which are covered by the civil or administrative proceedings in question and with regard to which this person would be subpoenaed as a witness.

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DEFENDANT'S RIGHT TO REFUSE TO TESTIFY AS A WITNESS IN CIVIL AND ADMINISTRATIVE PROCEEDINGS: OBSERVATIONS IN VIEW OF ARTICLE 182 §3 CPC

Summary

The article addresses issues related to the right of a witness in civil or administrative proceedings to refuse to testify in a situation where the witness has been charged in criminal proceedings. In criminal proceedings, it is beyond doubt that a witness may refuse to testify altogether if he or she is accused of complicity in a crime dealt with in the proceedings pending in another case. Regardless of the construction of the contents of Article 182 §3 CPC, a corresponding

right has not been formulated with respect to civil or administrative proceedings, even though a witness may be required to testify in such proceedings with regard to facts of relevance to his or her criminal liability. In practice, this may generate a situation which is in breach of the right to defence of the accused and, at the same time, a witness in other pending proceedings. It does not seem a sufficient guarantee for such a witness would consist only of the right to refuse to answer specific questions asked of him or her during the hearing.

Keywords: witness, suspect, testimony, refusal, silence, question, charges

PRAWO OSKARŻONEGO DO ODMOWY ZŁOŻENIA ZEZNAŃ W POSTĘPOWANIU CYWILNYM I ADMINISTRACYJNYM – SPOSTRZEŻENIA NA TLE ART. 182 §3 K.P.K.

Streszczenie

Artykuł porusza problematykę związaną z prawem świadka w postępowaniu cywilnym lub administracyjnym do odmowy złożenia zeznań w sytuacji, gdy temu świadkowi zostały przedstawione zarzuty w postępowaniu karnym. W postępowaniu karnym nie ulega wątpliwości, że świadek może w całości odmówić złożenia zeznań, o ile w innej toczącej się sprawie jest oskarżony o współudział w przestępstwie objętym postępowaniem. Niezależnie od rozumienia treści art. 182 § 3 k.p.k., analogiczne uprawnienie gwarancyjne nie zostało sformułowane w postępowaniu cywilnym i administracyjnym, mimo że świadek może być przesłuchiwany w tych postępowaniach na okoliczności istotne dla jego odpowiedzialności karnej. W praktyce może to prowadzić do sytuacji naruszającej prawo oskarżonego, a zarazem świadka w innym postępowaniu, do jego obrony. Nie wydaje się, aby wystarczającą gwarancją dla takiego świadka było wyłącznie prawo do odmowy odpowiedzi na poszczególne pytania zadawane mu w toku przesłuchania.

Słowa kluczowe: świadek, podejrzany, zeznania, odmowa, milczenie, pytanie, zarzuty

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