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FORMAL DEFENCE IN DISCIPLINARY PROCEEDINGS AGAINST LEGAL COUNSELS

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1. INTRODUCTION

Numerous representatives of the doctrine are interested in the issue of disciplinary proceedings. And although specialists in constitutional, criminal and administrative law conduct their analyses from completely different perspectives, they all emphasise the consequences those proceedings may have for the rights of liable entities. The legislator who lays down a series of guarantee formulas within disciplinary proceedings also notices dangers connected with excessive interference into this sphere. Disciplinary proceedings against a legal counsel are part of such legislative practice. Although their structure is only based on partial regulation of the Act of 6 July 1982 on legal counsels[1] and a broad reference to application of the Criminal Code[2] and the Criminal Procedure Code[3] by analogy, there are no doubts that, what is based on those references, "(…) the adoption of instruments originating from criminal law and criminal procedure in disciplinary proceedings is to serve [exactly – note by K.D.] the purposes of protection".[4]

The legislator notices a specific "(…) connection between disciplinary liability and criminal liability – the aim of criminal penalty and disciplinary penalty is repression

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1 Journal of Laws [Dz.U.] of 2016, item 233, as amended; hereinafter: ALC.

2 Act of 6 June 1997: Criminal Code, Journal of Laws [Dz.U.] of 2016, item 1137, as amended; hereinafter: CC.

3 Act of 6 June 1997: Criminal Procedure Code, Journal of Laws [Dz.U.] of 2016, item 1749, as amended; hereinafter: CPC.

4 W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warsaw 2016, p. 29.

and not prevention".[5] That is why, a number of procedural guarantees may also be applied in disciplinary proceedings.[6] Although their form cannot be unreflectively copied,[7] experience gained throughout years of their operation in the area of criminal procedure makes it possible to include them in the framework of significant measures of protection of fundamental rights and freedoms. The right to defence is one of such procedural guarantees and not only does it "(…) constitute a fundamental principle of the criminal procedure but it is also an elementary standard of a democratic state of the rule of law. Thus, undoubtedly, it is one of those procedural guarantees for the accused that should be ensured within each disciplinary proceedings".[8]

The legislator seems to recognise the same and emphasises the suspected legal counsel's right to defence in Article 68 para. 4 ALC. Despite this declaration, many issues concerning the right to defence remain controversial and doubtful. Divergent justification for criminal and disciplinary liability[9] connected with the lack of commonly accepted rules of interpretation of the provisions referring to other regulations[10] causes a typical interpretational chaos. The legitimised, within application by analogy, broad possibility of modifying norms, or even refusing to apply them, causes that even such basic issues as the suspected legal counsel's right to a defence counsel appointed *ex officio* or a translator's assistance are points of disagreement.

This article, noticing the above-mentioned difficulties, aims to present a clear picture of the formal aspect of the suspected legal counsel's defence. It should be highlighted that the observed diversified frameworks of the instrument, developed *a casu ad casum*, raise doubts about its guarantee nature, especially in the context of maintaining an appropriate level of predictability of the procedural bodies' activities.[11] That is why, with respect to the aim of the present considerations, an analysis of the essence of the right to defence will be their necessary staring point. Next, noticing the significant dependence of the research subject matter on the accepted rules of interpreting provisions referring to other regulations, I present my own conception of interpreting the discussed structure. Then, using the rules of exegesis, I conduct a more detailed analysis of the formal aspects of the suspected legal counsel's defence. It must be highlighted that, due to the limited size of the article, I cannot thoroughly discuss international legal standards concerning the formal aspect of the suspected legal counsel's defence.

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[5] P. Przybysz, *Prawo do sądu w sprawach dyscyplinarnych*, Studia Iuridica Lublinensia No. 3, 2016, p. 68.

[6] See, P. Chlebowicz, *Odpowiedzialność dyscyplinarna radców prawnych*, Radca Prawny. Zeszyty naukowe No. 2, 2017, p. 125 ff.

[7] Compare, Ł. Chojniak, *Realizacja zasady trafnej reakcji dyscyplinarnej w postępowaniu dyscyplinarnym adwokatów – wybrane problemy,* Palestra No. 10, 2016, p. 74 ff.

[8] P. Czarnecki, *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warsaw 2011, p. 326; also see, Constitutional Tribunal judgement of 6 November 2012, K 21/11, OTK-A 2012, No. 10, item 119.

[9] See, W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, pp. 27–28; P. Skuczyński, *Niereprezyjne funkcje odpowiedzialności dyscyplinarnej a model postępowania w sprawach dyscyplinarnych,* Przegląd Legislacyjny No. 3, 2017, pp. 36–40.

[10] See, P. Czarnecki, *Stosowanie kodeksu karnego w postępowaniach dyscyplinarnych,* Państwo i Prawo No. 10, 2017 p. 104 ff.

[11] Compare, M. Wojciechowski, *Pewność prawa,* Gdańsk 2014, pp. 9–12.

2. RIGHT TO DEFENCE: INTRODUCTORY REMARKS

The construct of the right to defence is a formula strictly connected with the present form of disciplinary proceedings. While the selection of a model or models of disciplinary proceedings remains disputable,[12] the doctrine and case law in the same way extend the scope of its application onto all forms of repressive liability.[13] That is why, remaining the guardian of the most valuable legal interests and a guarantee of the minimum level of just proceedings,[14] the construct of the right to defence constitutes one of the pillars of contemporary disciplinary proceedings. Despite the role it plays in the development of numerous procedural instruments, especially in the context of perceiving it as a typical value of the system, the doctrine has not worked out a uniform framework describing its essence. For some, "(…) it provides the accused with a possibility of conducting his own defence against charges and their legal consequences as well as using a defence counsel's assistance".[15] Others, emphasising the relative nature of the right, indicate that: "The right to defence, in its nature, contains the right to look for the most favourable solution to the issue of liability with the use of legally available measures".[16]

However, on the basis of the present article, I assume that the essence of the right to defence is best described as: "(…) undertaking activities aimed at defending the accused [the defendant – K.D.] against charges with the use of granted procedural rights".[17] The definition, thanks to the fact of being based on Article 42 para. 2 Constitution,[18] seems to be a typically constitutional one. Due to its abstract form obtained thanks to its separation from detailed regulations, it seems to realistically reflect the essence of the discussed construct. Maintaining its validity for analysing specific instruments of the criminal procedure as well as in case of abstract discourse on the models of repressive proceedings, the presented definition has a feature of broad universality. That is why, it seems fully rational to use it also in this article.

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[12] Compare, P. Czarnecki, *Model postępowania dyscyplinarnego w polskim systemie prawa*, [in:] P. Czarnecki (ed.), *Postępowanie karne a inne postępowania represyjne*, Warsaw 2016, p. 253; M. Zubik, M. Wiącek, *O spornych zagadnieniach z zakresu odpowiedzialności dyscyplinarnej sędziów Trybunału Konstytucyjnego – polemika*, Przegląd Sejmowy No. 3, 2007, p. 69 ff.

[13] Compare, W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, p. 26; compare, P. Czarnecki, *Postępowanie dyscyplinarne…*, p. 327; T. Sroka, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, Vol. I: *Komentarz do art. 1–86*, Warsaw 2016, p. 1019 ff; the Constitutional Tribunal judgement of 1 March 1994, U 7/93, OTK 1994, No. 1, item 5; the Constitutional Tribunal judgement of 26 November 2003, SK 22/02, OTK-A 2003, No. 9, item 97.

[14] Compare, J. Znamierowski, *Konstytucyjne i karnoprocesowe ujęcie prawa do obrony quasi-oskarżonych*, Państwo i Prawo No. 6, 2015, p. 83; P. Wiliński, *Dwa modele rzetelnego procesu karnego*, Państwo i Prawo No. 7, 2006, p. 43 ff.

[15] R.A. Stefański, *Obrona obowiązkowa – prawo czy konieczność*, [in:] J. Skorupka, I. Hajduk-Harwylak (ed.), *Współczesne tendencje w rozwoju procesu karnego z perspektywy dogmatyki oraz teorii i filozofii prawa*, Warsaw 2011, p. 108.

[16] P. Wiliński, *Prawo do obrony*, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. III: *Zasady procesu karnego*, Warsaw 2014, p. 1481.

[17] P. Wiliński, *Proces karny w świetle Konstytucji*, Warsaw 2011, p. 176; similarly: P. Sarnecki, *Komentarz do art. 42 Konstytucji*, [in:] L. Garlicki, *Konstytucja. Komentarz*, Warsaw 2003, p. 8.

[18] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended.

It should be indicated that sometimes: "The right to defence is defined in a broader way and the concept covers not only the entirety of the accused's rights serving the protection of his interests but also the entirety of the obligations of the justice administration bodies corresponding to those rights".[19] Nevertheless, it seems that the inclusion of the procedural bodies' obligations into this definition is unjustified. Extending the *definiens*, and as a result decreasing its readability, and increasing the potential area of disputes and doubts, the formulation does not introduce whatever new normative content. Every right occurs because of another entity's obligation.[20] That is why, it seems justifiable to assume that a liable entity's specified rights always accompany the above-mentioned procedural bodies' obligations. And although their detailed characteristics are differentiated, because some of them will be updated on the liable body's motion and some are specific *lex imperfecta* in nature, it is rational to treat them uniformly as the right of a liable person.

However, it should be noticed that the adopted formula of the right to defence is not uniform in nature. Both the doctrine and case law "(…) differentiate between substantive defence and formal defence. At the same time, there is no agreement on the uniform meaning of this division and justification for its existence".[21] Although rationality of the presented division will not be thoroughly discussed and its substantial substrate thoroughly characterised,[22] due to the tradition of its extensive occurrence, this division is *a priori* adopted in the present article. Nevertheless, because of the difference in the interpretation of the terms "formal defence" or "formal aspect of the right to defence",[23] it seems necessary to present the grounds for the mentioned differentiation.

The construct of the right to defence, co-formed by a number of procedural instruments, is in fact an original conglomerate of rights. Their detailed characteristics underline not only their diversity but also emphasise numerous links between them. This causes that, despite the distinction between formal and substantive aspects of defence, all elements permeate and supplement each other so that only their co-existence makes it possible "(…) to say that the right to defence (…) is something real and realistic". [24] Due to the interrelation of the two aspects, it is often difficult to classify a particular procedural right. The difficulties in this area correspond to the problems in defining the formal aspect of defence. While it is uniformly indicated that the substantive aspect of defence is manifested in all constructs serving to oppose prosecution charges,[25] there is a lack of broader approval of a particular

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[19] R.A. Stefański, *Obrona obowiązkowa…*, p. 109.

[20] S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa,* Poznań 2001, pp. 103–104.

[21] P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym,* Kraków 2006, p. 202.

[22] This, inter alia, concerns the assessment of the postulate for differentiation between the formal and substantial aspects of defence and not the right to defence (compare, P. Wiliński, *Zasada…*, p. 211).

[23] In the present article, they are synonymous.

[24] Compare, the Supreme Court judgement of 1 December 1997, III KKN 168/97 (unpublished).

[25] Compare, inter alia, M. Mazur (ed.), *Kodeks postępowania karnego – komentarz*, Warsaw 1976, p. 44; A. Sakowicz, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego – komentarz*, Warsaw

approach to formal defence. For some, it consists in the use of a defence counsel's assistance,[26] and some indicate that "(…) the formal right to defence means *sensu stricto* the accused person's right to appoint and have counsel for the defence, and *sensu largo* also any procedural activity of the counsel for the defence".[27] At the same time, also rightly, "(…) it is highlighted in the doctrine that the defence cannot be identified with the right to have a counsel for the defence".[28] It seems that, among the rights constituting the formal aspect of defence, one can also certainly distinguish the right to a translator's assistance or the right to claim a refund of costs incurred for defence.

Approval of the above seems to result in the assumption that the borderline between the substantive and formal aspects of defence is an element of directness between the procedural activity and refuting prosecution charges. In case of the manifestation of substantive defence, such as the right to initiate evidence taking proceedings, the right to silence or the right to appeal, they are all aimed at refuting prosecution charges, although it is necessary to admit that they are applied in a varied way. On the other hand, the instruments of the formal aspect of defence only indirectly strive to obtain such an objective. The right to appoint a counsel for the defence or the right to have a translator's assistance, although they constitute important procedural guarantees, first of all, seem to aim to provide the accused person with a real possibility of exercising all rights he is entitled to. At the same time, the differentiation between the substantive and formal defence described above seems to be relatively precise. That is why, its formula will be taken into account in the discussion below both as a determinant of the scope and typical standard of assessment. It seems that the whole construct of the right to defence would be considerably violated in case the accused did not have instruments making it possible to use it, regardless of the formal existence of a series of procedural rights.

3. APPLICATION BY ANALOGY: ORGANISING COMMENTS

Shaping disciplinary proceedings against a legal counsel, the legislator included a reference to the application of CPC by analogy in its formula. And although *prima facie* such a solution, thanks to the unification of the two procedures, is conducive to the clearness of the regulation, if the detailed perspective is considered, its application hampers considerably the reconstruction of a series of procedural instruments, including the adopted formula of the right to defence.[29] As the Constitutional Tribunal, considering the issue of constitutional guarantees in disciplinary proceedings,

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2015, pp. 34–35; For a different stand, compare the Constitutional Tribunal judgement of 9 July 2009, K 31/08, OTK-A 2009, No. 7, item 107.

[26] Thus, inter alia, B. Daniuk et al., *Prawo do obrony w postępowaniu przygotowawczym na tle dostępu do pomocy prawnej w postępowaniu karnym*, Warsaw 2006, p. 9.

[27] A. Demenko, *Prawo do obrony formalnej w transgranicznym postępowaniu karnym w Unii Europejskiej,* Warsaw 2013, p. 65.

[28] R.A. Stefański, *Obrona obowiązkowa…*, p. 115.

[29] Compare, P. Czarnecki, *Stosowanie kodeksu karnego…*, p. 104.

rightly noted: "One cannot (…) ignore the fact that their main role is to create particular guarantees for the accused in the course of a trial".[30] That is why, "(…) one cannot transfer all guarantee norms created for the needs of criminal liability onto the ground of disciplinary proceedings".[31] As the Constitutional Tribunal indicates, the distinction between disciplinary proceedings and criminal proceedings only inspires application of the normative framework of procedural guarantees by analogy, on the same grounds.[32] It is necessary to remember about the doctrinal "(…) self-government function of disciplinary law where excessive right to defence, adopted directly under the Criminal Procedure Code, would paralyse its course (…)".[33] As a result, not only the shape of particular procedural instruments but also the rules of exegesis of the provisions referring to the application by analogy, which directly determine them, remain the central category of the discourse on the formal aspect of a legal counsel's right to defence.

However, the construct of the application by analogy is still not uniformly understood. For some, "(…) the formula of application by analogy is a legislative solution that, because of a given interpretational problem, serves to find an adequate legal norm in a given factual state by comparing two or more provisions in a particular normative act or acts".[34] Others indicate that: "The obligation to apply the provisions of the Criminal Procedure Code by analogy means the obligation to use the analogy from statute as a way of applying law in cases indicated in a provision referring to another regulation".[35] At the same time, the conception seems to be one of the oldest because, in the context of reference to application by analogy, already J. Wróblewski wrote that: "Such reference may be interpreted as an obligation to use the analogy of statute as a way of applying law in cases indicated in a provision referring to another regulation".[36]

Still, without discussing the theoretical essence of the mechanism of application by analogy, it is necessary to admit that "(…) a closer examination shows that application of the provisions referred to 'by analogy' is not a uniform activity. Generally speaking, three groups of cases can be distinguished because of a different effect or result when some provisions are applied 'by analogy'. As a result, even the

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[30] The Constitutional Tribunal judgement of 4 July 2002, P 12/01, OTK-A 2002, No. 4, item 50.

[31] The Constitutional Tribunal judgement of 11 September 2001, SK 17/00, OTK 2001, No. 6, item 165.

[32] Compare, the Constitutional Tribunal judgement of 11 September 2001, SK 17/00, OTK 2001, No. 6, item 165; the Constitutional Tribunal judgement of 6 November 2012, K 21/11, OTK-A 2012, No. 10, item 119; the Constitutional Tribunal judgement of 29 January 2013, SK 28/11, OTK-A 2013, No. 1, item 5.

[33] Ł. Chojniak, *Prawo do obrony w dochodzeniu dyscyplinarnym adwokatów – wybrane zagadnienia z uwzględnieniem ostatniej nowelizacji prawa o adwokaturze,* Palestra No. 3–4, 2015, p. 96.

[34] P. Czarnecki, *Odpowiednie…*, p. 16.

[35] K. Dudka, *Odpowiedzialność dyscyplinarna oraz zakres stosowania przepisów k.p.k. w postępowaniu dyscyplinarnym wobec nauczycieli akademickich,* Studia Iuridica Lublinensia No. 9, 2007, p. 14; also see, M. Hauser, *Przepisy odsyłające. Zagadnienia ogólne,* Przegląd Legislacyjny No. 4, 2003, pp. 88–89.

[36] J. Wróblewski, *Przepisy odsyłające,* ZNUŁ Nauki Humanistyczne, Seria I No. 35, 1964, p. 9.

phrase 'application by analogy' is not unambiguous".[37] That is why, it also seems erroneous to look for a general essence of the formula without referring to particular consequences of it being in force.

From this perspective, the construct of application by analogy may result in normative consequences that may be classified in one of three groups. "The first group contains cases where the legal provisions referred to are to be applied and, in fact, often are applied to another scope of reference without any changes. (…) The second group contains those cases where the provisions referred to that are to be applied by analogy are used with some changes. (…) The third group contains all the legal provisions that cannot and are not applied to another scope of reference at all because of their irrelevance or their absolute conflict with the provisions enacted for the relations to which they were to be applied by analogy (…)".[38] At the same time, the group seems to be enlarged by cases in which a norm applied by analogy is in conflict with superior norms, including especially those shaping the rules of the legislator's interference into the sphere of human rights and freedoms, or flagrantly in conflict with the values of its "secondary" normative environment.

It is necessary to draw attention to the fact that sometimes it is also stated that "(…) the nature of legal norms decides on inadmissibility of their application. This especially concerns those provisions that interfere into human rights and freedoms, for example, the provisions concerning a search or interception of correspondence as well as the provisions regulating the use of coercive measures. Their application would undoubtedly be an infringement of an appropriate proportion".[39] However, it seems that the point in the described case is not the nature of the norm but its conflict with the norms of higher rank, especially the principle of proportionality. That is why, the above-presented extension of justification for non-application of particular norms does not seem to be necessary.

Although the above-presented approach to the application by analogy is very general, it clearly emphasises that "(…) the application of the provisions referring to other regulations by analogy concerns not only the stage of the application of the legal norm of the basic provision but also the preceding stage of constructing that legal norm".[40] Despite that, the doctrine has not yet worked out the rules of reconstructing the norm applied by analogy. Frankly, one can find two conceptions of pragmatic exegesis of this type of constructs but their shape seems to be insufficient. The model of interpretation worked out by M. Hauser[41] seems to be too general and not formulating the rules of obtaining

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[37] J. Nowacki, *„Odpowiednie" stosowanie przepisów prawa*, Państwo i Prawo No. 3, 1964, pp. 370–371.

[38] *Ibid*.

[39] K. Dudka, *Odpowiedzialność…*, p. 15.

[40] M. Hauser, *Odesłania w postępowaniu przed Trybunałem Konstytucyjnym*, Warsaw 2008, p. 67.

[41] The author distinguishes seven stages of interpreting the provisions referring to application of other regulations by analogy, i.e.: "(1) identification of a provision referring to other regulations with the reservation of application by analogy; (2) assessment of the state of regulation of the examined relations in accordance with the legal provisions regulating them and assessment to what extent there are no regulations for given cases; (3) establishment of the scope of reference made and the scope of what is referred to; (4) identification of a provision (or provisions) of reference; (5) assessment of the usefulness of the provision of reference for the examined relations and whether and to what extent it is necessary to make some changes in the

the norm applied by analogy. On the other hand, P. Czarnecki's conception assuming the existence of two specific directives on the interpretation of provisions referring to other regulations,[42] although very interesting, is too fragmentary because it does not present the relations between the directives and general conceptions of law interpretation[43] or particular stages of interpretation proceedings.[44] Also looking for a clear and coherent conception of the exegesis of the discussed legislative construct is to no avail.[45]

That is why, in the face of the indicated lack of uniformity, in this article, I adopt my own new conception of interpreting the provisions referring to other regulations by analogy. At the same time, I assume that there are two stages of this interpretation; the first one constitutes the interpretation of the provision referring to another regulation, the second one is a direct reconstruction of the norm applied by analogy. Building this pattern of the exegesis based on the assumption of the derivative conception of interpretation, I recognise that the first stage, putting it in a simplified way, aims to interpret the norm of the structure: in case Y, an interpreter is obliged to apply/apply by analogy norm N within the scope of X, where X and Y are substitutes. At the same time, I admit that, although it is necessary to consider the rules of interpreting such a norm, due to the limited scope of this article, it must be omitted. However, I highlight that, in connection with the disciplinary proceedings against a legal counsel, inter alia, the terms of the accused and suspected remain substitutes. On the other hand, the second stage assumes interpretation of the norm coded in the provision referred to and, successively, application of substitutes and interpretation *sensu stricto*, i.e. the use of the directives on linguistic, functional and systemic interpretation.

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provision referred to; checking whether the possibly modified and "adjusted" provision really matches the examined relations; (6) reconstruction of the legal norm regulating the considered cases taking into account the basic provisions regulating those relations and the provisions of reference, possibly appropriately modified; and finally (7) application of the norm established this way". (M. Hauser, *Odesłania…*, pp. 75–76).

[42] The author indicates that the interpretation of the discussed structure is subject to two directives: the directive on optimum adaptation and the directive on firmness. The first one "(…) prescribes taking maximum account of the specificity of the legal act containing the provision referred to and, at the same time, taking into consideration the functions of the provisions that should be applied by analogy. The second one, on the other hand, (…) is subsidiary (auxiliary) in nature because it is applicable only when the results of the use of the directive on optimum application are hard to approve of. The directive prescribes application of provisions directly in case of doubts". (P. Czarnecki, *Odpowiednie…*, pp. 20–21).

[43] This concerns, inter alia, the issues whether the idea is based on the derivative conception of interpretation and the principle of *omnia sunt interpretanda*, or there are different bases.

[44] This concerns, inter alia, the issue of relations between the above-mentioned directives and the stages of linguistic, functional and systemic interpretation, i.e. whether the indicated directives exclude their application or only supplement them, and if so, what their sequence is.

[45] See, inter alia, the Supreme Court ruling of 21 April 2017, VI KS 1/17, LEX No. 2281284; the Supreme Court judgement of 25 July 2013, SDI 12/13, LEX No. 1363207, in which the Supreme Court totally ignored the issue of adopted directives on the interpretation of the provisions referring to other regulations; and also, the Supreme Court ruling of 15 November 2012, VI KZ 14/12, LEX No. 1228526, and the Supreme Court judgement of 13 January 2017, SDI 42/16, Biul. SN 2017/4/15–16, in which the Supreme Court, based on the similar legal state because of the almost completely different directives on the interpretation of the provisions referring to other regulations, drew diverse conclusions concerning admissibility of resumption of disciplinary proceedings.

4. FORMAL ASPECTS OF A SUSPECTED LEGAL COUNSEL'S DEFENCE

Having in mind the assumptions presented above and willing to create a picture of the formal aspect of a suspected legal counsel's defence, one should consider at least such issues as the right to have a counsel for the defence, the right to have a translator's assistance or the right to claim a refund of costs incurred for the defence. The shape of all these rights, due to the conciseness of ALC, seems to be built based on the provisions of CPC applied by analogy.[46]

From this perspective, the right to choose one's own counsel for the defence remains unquestionable, which results from the provisions of Article 83 CPC applied by analogy. It is hard to look for values or regulations inspiring different conclusions. There are also many strong arguments for this interpretation. Firstly, in Article 42 para. 2 second sentence Constitution, the legislator stipulated an absolute right to choose a defence counsel, which in the context of Article 8 para. 2 Constitution laying down an obligation to possibly broadest co-application of the Polish basic law,[47] undoubtedly builds the appropriateness of the proposed interpretation.[48] And although it is necessary to clearly admit that, determining the scope of the above-mentioned procedural guarantee, the legislator distinctly linked it to criminal liability, one cannot forget that "(…) the constitutional concept of 'criminal liability' is (…) understood autonomously and may concern various forms of liability not only connected with formal administration of a penalty but also repressive measures (…)",[49] which certainly includes measures of legal response to legal counsel's prohibited act subject to disciplinary proceedings. This is the classification of the legislator who, suggesting the application of CPC by analogy and not a civil law or administrative regulation, assumes that the formula subordinated to repressive aims constitutes more appropriate provisions referred to. Moreover, also Article 68 para. 3 ALC, which uses a term a "counsel for the defence" (and not a "representative") and suggests the penal nature of liability, supports such classification. Secondly, it should be taken into account that, in accordance with the assumptions of the legislator's rationality, the axiology of the Constitution seems to be the same as that in force based on statutory regulations. Thus, if in Article 42 para. 2 Constitution the legislator recognises the right to choose a defence counsel as the core of the right to have a counsel for the defence, it seems that other cases of declaring the right to have a defence counsel should also be recognised. Finding this declaration in Article 68 para. 3 ALC, one should assume that at its directive level supplemented by Article 83 CPC applied by analogy, the legislator certainly coded the right to choose a counsel for the defence because, in accordance with its

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46 Compare, W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, p. 320.

47 Compare, W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2013, p. 22.

48 See, M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warsaw 2017, p. 660 ff; P.K. Skowiński, *Uprawnienia składające się na prawo oskarżonego do obrony*, Rzeszów 2012, p. 19 ff.

49 Compare, the Constitutional Tribunal judgement of 8 January 2008, P 35/06, OTK-A 2008, No. 1, item 1.

axiology, it constitutes the essence of the discussed construct. The Supreme Court also inspires similar conclusions as it admits the participation of a suspected legal counsel's counsel for the defence in disciplinary proceedings.[50]

The lack of a suspected legal counsel's right to have a translator's assistance is also unquestionable.[51] Undoubtedly, the application of Article 72 CPC by analogy, due to a specific form of irrelevance, consists in refusal of its application. The analysis of ALC results in a conclusion that a legal counsel must know the Polish language. Otherwise no one can guarantee appropriate performance of this job. In accordance with Article 6 para. 1 in conjunction with Article 27 para. 1 ALC, the performance of the job of a legal counsel mainly consists in acting before the bodies of the Republic of Poland, which requires the legal counsel's linguistic proficiency. Also Article 22 para. 1(2) Act of 5 July 2002 on providing legal services by foreign lawyers in the Republic of Poland suggests such a requirement[52] as it requires that the foreign lawyers registered by the OIRP (Bar Association) have speaking and writing skills in the Polish language. Therefore, if the situation in which a legal counsel cannot use the Polish language fluently is legally inadmissible, the right to have a translator's assistance as a result of the application of Article 72 CPC by analogy cannot be considered.

The assessment of the right to have a defence counsel appointed within what is called the right of the poor in cases of obligatory representation by a counsel for the defence is not so unambiguous. The arguments derived from the legal system are relative here because the legislator, emphasising the discretion to shape this right in Article 42 para. 2 Constitution,[53] only indicates that one may exercise the right in accordance with the principles specified in statute. Thus, as ALC does not refer to this issue, it is possible to assume that this legislative omission was purposeful and was aimed at depriving a legal counsel of the right to have a counsel for the defence appointed. Indeed, the axiology of the discussed instrument, inspired by the will to ensure the equal arms,[54] loses its strong grounds in the discussed proceedings because in each case the accused is a legal counsel, "(…) i.e. a professional who knows his rights and obligations as well as the consequences of the infringement of procedural duties".[55]

Despite that, however, the unquestionable conclusion that there is a lack of the above right seems to be premature. There may be a different *ratio* for the participation of a defence counsel in proceedings. As R.A. Stefański rightly notes, although he

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[50] Compare, the Supreme Court judgement of 27 March 2008, SDI 3/08, LEX No. 1615356.

[51] It seems that P. Czarnecki argues differently and states that, due to reference to the application of CPC by analogy, the defendant has "(…) all the rights implementing his right to defence in the substantive meaning (the right aimed at annihilating or freeing one from the consequences of accusation) or in the formal one (the right to use assistance of a counsel for the defence)". (P. Czarnecki, *Status obwinionego w postępowaniach dyscyplinarnych w polskim systemie prawnym*, Przegląd Prawa Publicznego No. 4, 2017, p. 88).

[52] Journal of Laws [Dz.U.] 2016, item 1874, as amended.

[53] Compare, P. Wiliński, *Proces karny…*, p. 181.

[54] Compare, B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 279; C. Kulesza, *Europejski standard efektywnej obrony z urzędu w orzecznictwie SN*, Państwo i Prawo No. 8, 2007, p. 62; ECtHR judgement of 31.05.2012 in case *Diriöz v. Turkey*, no. 38560/04.

[55] Ł. Chojniak, *Prawo do obrony…*, p. 97.

writes about criminal proceedings *sensu stricto*, "(…) the admissibility of participation of a counsel for the defence results from the following: professionalism – thanks to education and experience, a counsel for the defence defends better; a mental attitude – the defence counsel is involved in the defence of his legal interest, which enables him to choose appropriate defence tactics; the ability to act *in lieu of* others – the accused cannot always perform all procedural activities within the defence; psychical assistance – the counsel for the defence is a person trusted by the accused, who can have an impact on awakening activity in one's own defence".[56] Thus, the protection of equal arms requires not only professionalism of the parties to proceedings but also assumes the maintenance of an appropriate intellectual and mental relation. As a result, just the fact of ensuring adequate level of professional protection of the accused, connected with a professional's participation in proceedings, does not match all the elements of the grounds for the participation of a defence counsel in disciplinary proceedings and makes the issue of the right to have a counsel for the defence appointed open to discussion.

The construct of the right of the poor, resulting from Article 78 §1 CPC, in particular remains in this controversial scope. Assuming that the provision lays down a norm that, with a certain simplification, obliges given bodies to appoint a counsel for the defence in a situation when the accused has not chosen a defence counsel and demands that one is appointed because he cannot cover the cost of defence without harm to his and his family's livelihood, one needs to conduct a further interpretational analysis. Substituting "suspected" for "accused", we get the statement: "If the suspected who has not chosen a counsel for the defence demands that one should be appointed and properly proves that he cannot incur defence costs without harm to his and his family's livelihood, the competent bodies shall appoint a counsel for the defence". However, I have to point out that the interpretation of the construct should also cover the term "the competent bodies", which is omitted due to the limited scope of the article.

The linguistic interpretation of the above statement, explaining inter alia the scope of the phrases "without harm to his and his family's livelihood" or "chosen defence counsel", has no impact on the resolution of the analysed subject matter. The interpretation based on the legal system also seems not to change the adopted construct because there are no regulations in conflict with or opposite to the above formula. On the other hand, the functional interpretation emphasises a certain collision of values existing between the postulation concerning the speed of proceedings perceived as a condition for disciplinary proceeding reality and the axiological basis of the construct of the right to defence. Indeed, it may seem that the participation of an appointed counsel for the defence will only lengthen proceedings, which in the face of short periods of limitation will exclude the suspected legal counsel's liability. Nevertheless, this contradiction shocks with its seeming appearance. The participation in disciplinary proceedings of a professional, who is not emotionally involved directly, may only speed up the proceedings. Limiting the signs of excessive procedural activity, he will contribute to coherent

[56] R.A. Stefański, *Obrona obowiązkowa…*, p. 113 with the literature referred to therein.

and real presentation of the defendant's stand to a disciplinary court. Concurrently, the principles of professional ethics binding the defence counsel, forcing the maintenance of appropriate loyalty to procedural bodies, exclude his activity aimed at prolonging the proceedings. At the same time, the fact that the defence counsel substitutes for the defendant and excludes the necessity of the defendant's direct participation in the whole proceedings undoubtedly ensures appropriate protection of his interests and eliminates the effectiveness of a potential plea of breach of the right to defence. A professional's participation in the disciplinary proceedings also forces the clear formulation of grounds for an appeal; Article 427 §2 CPC applicable by analogy requires that professional entities articulate them. As a result, also the second instance proceedings are accelerated. All these conclusions illustrate the seeming appearance of the potential conflict of values.

In the face of the above arguments, admissibility of the suspected legal counsel's use of the benefits of the right of the poor should not raise doubts. Even if someone does not share the assumption of seeming appearance of the above-mentioned axiological conflict, it is necessary to notice that the legislator, taking a decision on the right to have an appointed defence counsel, encountered the same controversy. Thus, if the decision is in favour of the right to defence, acting in accordance with the assumption of the legislator's rationality, one should recognise that the legislator decided the same in case of the right to have an appointed counsel for the defence. Indeed, the legislator cannot create the shape of procedural standards depending on whether the defendant can afford to hire a counsel for the defence or does not have sufficient financial resources to do that.

The right to have an appointed counsel for the defence looks equally seeming in case of the obligatory participation of a defence counsel in proceedings. The discussed right, having grounds in Article 81 §1 in conjunction with Article 79 §1 CPC applied by analogy, is based on the same axiology as in case of the right of the poor. There are also other arguments for this interpretation. Indeed, one cannot forget that the construct of obligatory participation of a defence counsel "(…) is not established only in the interest of the accused but also in the interest of the administration of justice because it is in the interest of society to enable the accused to perform the role of the party defending against charges".[57] Thus, this social interest determines the protection of equal arms in a situation when a legal counsel is deaf, dumb, blind or insane at the moment of committing an act or the pronouncement of judgement. It is hard to speak about keeping any standards of the right to defence in situations when the suspected legal counsel, due to his physical or mental impairment, would not have real possibilities of exercising his procedural rights. There is no doubt that it would be absurd to ask questions to a deaf or dumb defendant and expect him to answer them. Thus, *argumentum ad absurdum* is also for the presented interpretation. At the same time, it should be indicated that the functioning of obligatory participation of a defence counsel in disciplinary proceedings against a legal counsel also seems to be connected with the need to establish guarantees for keeping the standard of the defendant's right

[57] R.A. Stefański, *Obrona obowiązkowa…*, p. 125.

to a fair trial. As the Constitutional Tribunal indicates, "(…) the implementation of the constitutional right to a fair trial, especially in its subjective aspect, is possible only when a court does not act arbitrarily and the parties to proceedings are not treated as objects".[58] Moreover, the construct of obligatory participation of a defence counsel interpreted as an obligation to have a defence counsel even against the will of the accused also suggests the above-presented conclusion.[59] If a defendant is obliged to have a defence counsel, the role of the proceeding bodies is to ensure its implementation. And the formula of appointing a counsel for the defence *ex officio* is the only form that can constitute a real mechanism of coercion to implement it. While one can raise a series of additional arguments or outline a full process of interpreting appropriate norms applied by analogy, it seems that the above consideration unambiguously indicates a defendant's right to have a counsel for the defence appointed *ex officio*.

The right to claim a refund of incurred defence costs also remains an indispensable element of the formal aspect of defence. As the Constitutional Tribunal noticed, "The right to defence is infringed when exercising it, even to the smallest extent of a single counsel for the defence, must be subject to economic calculation".[60] As far as this is concerned, however, it seems that the regulation of CPC applied by analogy will not be applicable because Article 70^6 ALC regulates the issue autonomously. As a result, the obligation to apply CPC by analogy expressed in Article 74^1 ALC will not be updated in the face of the lack of grounds for classifying the issue as "not regulated". However, it should be indicated that, in accordance with ALC, in case of acquittal, the defendant is only entitled to a lump sum as a refund of costs.

5. CONCLUSIONS

The presented considerations, illustrating the construct of the formal aspect of the suspected legal counsel's defence, emphasise the controversy over a series of issues. Despite that, there is no doubt that the application of CPC by analogy results in the occurrence of formulas providing a suspected legal counsel with rights, inter alia, to use the assistance of a counsel for the defence (either chosen or appointed *ex officio*) or to claim a refund of defence costs in the form of a lump sum. This way, the constitutional standard of the right to defence seems to be met. Indeed, the present regulation undoubtedly ensures appropriate maintenance of equal arms for all the parties to proceedings.

Nevertheless, somehow regardless of the above-mentioned relatively favourable assessment, it is hard to approve of the present shape of ALC. Placing a series of detailed issues of the right to defence in an imprecise mechanism of application by analogy, the legislator considerably limited the certainty of their application.

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[58] The Constitutional Tribunal judgement of 16 January 2006, SK 30/05, OTK-A 2006, No. 1, item 2.

[59] Compare, R.A. Stefański, *Obrona obowiązkowa…*, p. 123.

[60] The Constitutional Tribunal judgement of 26 June 2006, SK 21/04, OTK-A 2006, No. 7, item 88.

A complicated process of interpretation, requiring that a series of evaluative arguments should be taken into account, or the lack of uniform rules of interpreting the structure of reference may *in concreto* inspire the proceeding bodies to draw conclusions different from those indicated in the present article. That is why, approving of the fact that there are no grounds for the creation of a separate complex procedure regulation, one should assume that it is right to postulate *de lege ferenda* that the legislator clearly determine the basic procedural guarantees binding in disciplinary proceedings against a legal counsel. It can take the form of separate provisions, such as e.g. "A defendant has the right to use assistance of a counsel for the defence appointed *ex officio*", as well as consist in re-edition of the existing formulas. The interpretational doubts would be solved even thanks to such a simple step as an indication in Article 74[1] ALC that "the provisions of CPC, especially Articles 78 to 81 CPC, are applied by analogy" or, in case of the lack of the right to have an appointed counsel for the defence, an indication that "the provisions of CPC, except for Articles 78 to 81 CPC, are applied by analogy". At the same time, it seems right to postulate that the legislator, willing to amend the signalled legislative defects, should possibly avoid describing the fragments of reference with the use of classification terms, including those referring to a specific system of a legal act.[61] However, it seems that the use of such a legislative measure will still leave too broad decision-making freedom, undoubtedly hampering the appropriate exegesis of the complicated structure of provisions referring to other regulations.

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[61] Differently in K. Dudka, *Stosowanie przepisów kodeksu postępowania karnego w postępowaniach dyscyplinarnych uregulowanych w prawie o adwokaturze oraz ustawie o radcach prawnych,* Prawo w Działaniu No. 18, 2014, p. 59.

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FORMAL DEFENCE IN DISCIPLINARY PROCEEDINGS AGAINST LEGAL COUNSELS

Summary

The article discusses formal aspects of a suspected legal counsel's right to defence and pinpoints the great vagueness of this issue. That is why, the author begins his discussion with the analysis of the essence of formal aspects of the right to defence and accepted rules of interpretation of provisions referring to other regulations. Next, using theoretical instruments created earlier, the author describes a suspected legal counsel's basic rights, in particular, the right to have his own counsel for the defence, a translator's assistance, and the right to claim a refund of incurred costs of defence. As a result, the author proves that current regulations, although they meet the requirements of the Constitution, should be changed. In his opinion, describing the substantial elements of the basic procedural guarantees with the use of the phrase "should be applied by analogy" makes those guarantees doubtful.

Keywords: right to defence, disciplinary proceedings

OBRONA FORMALNA W POSTĘPOWANIU DYSCYPLINARNYM RADCÓW PRAWNYCH

Streszczenie

Niniejsza praca – poddając analizie formalne oblicze obrony obwinionego radcy prawnego – dostrzega szeroką niedookreśloność przedmiotowego zagadnienia. Z tego powodu zawarte w niej rozważania rozpoczyna przedstawienie istoty formalnego aspektu obrony oraz przyjętych zasad wykładni przepisów odsyłających. Korzystając z wytworzonych w ten sposób instrumentów teoretycznoprawnych, autor obejmuje dalszą refleksją kwestie uprawnień obwinionego do pomocy obrońcy, tłumacza czy żądania zwrotu kosztów obrony. Poczynione z tej perspektywy przemyślenia prowadzą go zaś do przekonania, iż – mimo zachowania przez obecną regulację wymogów konstytucyjnych – konieczne są określone zmiany legislacyjne. Zdaniem autora pozostawienie istotnych zagadnień kształtu podstawowych gwarancji procesowych nieostrej formule odpowiedniego stosowania wzbudza uzasadnione wątpliwości.

Słowa kluczowe: prawo do obrony, postępowanie dyscyplinarne

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