Jacek Kosonoga

REPROACH FOR EVIDENT CONTEMPT OF REGULATIONS IN THE CRIMINAL PROCEEDING

1. Introduction

Criminal proceeding is not limited to adjudication on the perpetrator's liability for a committed act. Apart from the main subject matter of the process, there is e.g. an organ's response to evident contempt of law by the participants of the proceeding. Its statutory prerogatives in that area are expanded. With regard to a solicitor or a plenipotentiary, it is possible to notify the District Bar Council or the District Chamber of Legal Counsel (Article 20 § 1 of the Criminal Procedure Code), and in the case of a public prosecutor involved in the preparatory proceeding or one conducting the preparatory proceeding – their direct superior (Article 20 § 2 of the Criminal Procedure Code). It is also possible to request a launch of a disciplinary proceeding within prosecution supervision (Article 326 § 2 of the Criminal Procedure Code) as well as supervision activities in connection with a complaint on the lengthiness of the proceeding[1]. A motion to launch a proceeding in connection with the professional liability of a translator is similar in nature[2].

Reproach for evident contempt of regulations belongs to the same category. An entity that may be subject to it is a proceeding organ itself, assessed by a superior organ independent of the supervision of the second instance. This institution serves the elimination of unprofessional performance of proceeding activities and to some extent has a disciplinary influence. This way, an organ's attention is drawn to evident errors in the proceeding. Reproach for evident contempt of regulations has its normative power in Article 40 of the Act on

[1] See: Article 13 item 1 of the Act of 17 June 2004 on complaint about the violation of a party's right to cognizance of the case in a preparatory proceeding conducted or supervised by a public prosecutor and juridical proceeding without a justifiable delay (Journal of Laws No. 179 item 1843 with amendments that followed).

[2] See: Article 24 of the Act of 25 November 2004 on the profession of a sworn translator (Journal of Laws No. 273 item 2702 with amendments that followed).

Common Courts[3], Article 65 of the Act on the Supreme Court[4] and Article 8 of the Act on Public Prosecution Service[5].

2. Reproach for default by an appellate court or a regional court

In accordance with Article 40 § 1 of the Act on Common Courts, an appellate court or a regional court acting as a court of appeal, in the case of confirmation of evident contempt of regulations during the proceeding, regardless of other powers, reproaches the offence to regulations to the court in question. Before the reproach for default, a judge or judges of the bench of the first instance are informed about a possibility to file written explanation within seven days. Then, the reproach for default is sent to the President of the particular court, and in the case of serious defaults – also to the Minister of Justice (Article 40§ 2 of the Act on Common Courts).

2.1. Legal character of the reproach

The legal character of the reproach is not unambiguously defined in the doctrine. On the one hand, it is said that the regulation provides for judicative supervision in contrast to official or administrative supervision[6]. On the other hand, it is said that it is not a proceeding related activity, but an official one addressed to a given judge or judges and reproach results are in a way disciplinary in character[7]. It is also assumed that reproach first of all plays a preventive role because its aim is not to correct a default in a particular proceeding but to prevent such defaults in the future. It also demonstrates semi-disciplinary features because reproach does not concern a court as a proceeding court but

[3] Act on the Law on the Common Courts Organisation (Journal of Laws of 2001 item 427 with amendments that followed, hereinafter referred to as the ACC).

[4] Act of 23 November 2002 (Journal of Laws of 2013 item 499, hereinafter referred to as the Act on the Supreme Court).

[5] Act of 20 June 1985 on the Public Prosecution Service (Journal of Laws of 2011, No. 270 item 1599 with amendments that followed, hereinafter referred to as the Act of the Prosecution).

[6] B. Godlewska-Michalak [in:] A. Górski (ed.), *Prawo o ustroju sądów powszechnych [Law on the Common Courts Organisation]*, Warszawa 2012, p. 168; H. Kempisty, *Ustrój sądów. Komentarz [Court Organisation – Commentary]*, Warszawa 1966, p. 120, differently: S. Resich, *Nauka o organach ochrony prawnej [Study of legal protection organs]*, Warszawa 1973, p. 37.

[7] S. Włodyka, *Nadzór nad orzecznictwem sądowym w sprawach cywilnych w świetle zasady niezawisłości sędziowskiej* [Supervision over court rulings in civil cases in the light of the principle of judges' independence], [in:] W. Osuchowski, M. Sośniak, B. Walaszek (ed.), *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego* [Legal Considerations – Professor Kazimierz Przybyłowski's Scientific Work Jubilee Book], Kraków–Warszawa 1964, p. 485; *ibid*., *Organizacja wymiaru sprawiedliwości PRL* [Organisation of the Administration of Justice in the People's Republic of Poland], Warszawa 1963, p. 66.

a particular bench, particular judges[8]. It is also noticed that supervision in this mode is not proceeding-like and is performed outside the course of instance, only in the interest of the administration of justice and not in the interest of particular parties[9]; thus, it constitutes a non-instance reproach for default made in the proceeding conducted by a lower instance[10].

As a result, there is no agreement whether reproach for evident contempt of regulations is an act within the judicative supervision or administrative one. The statutory placement of Article 40 of the Act on Common Courts means that the legislator links it with administrative supervision, which is clearly marked by the title of Chapter 5[11], and activities connected with reproach for default are initiated *ex officio*. However, there is a lack of official subordination typical of administrative supervision. In addition, a response to evident contempt of regulations is limited only to reproach for default and does not depend on dictatorial interference in the activities of the supervised entity. Moreover, administrative supervision tasks concentrate mainly on the administrative apparatus operation while reproach concerns a violation of regulations in connection with examining a case and so is indirectly connected with adjudicating. It is also rightly noticed in the doctrine that an entity entitled to supervise, its location among other organs and guarantees of independence and strong link between reproach implementation and the proceeding mode designed for jurisdiction are of great importance[12]. This decides that the discussed measure, although it has its own specific legal character that is a result of both elements: judicative and administrative supervision, shows a definitely stronger kinship with the former.

Thus, it is right to share an opinion that reproach based on Article 40 of the Act on Common Courts is a composite solution that links the features of judicative supervision because it is filed to an adjudicating organ in connection with a violation of regulations during the issue of a ruling by this organ with adminis-

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[8] S. Włodyka, *Funkcje Sądu Najwyższego* [Functions of the Supreme Court], Kraków 1965, p. 67; T. Ereciński, J. Gudowski, J. Iwulski, *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz* [Law on the Common Courts Organisation. Act on the National Council of the Judiciary of Poland. Commentary], Warszawa 2009, p. 138; K. Piasecki, *Organizacja wymiaru sprawiedliwości w Polsce* [Organisation of the Administration of Justice in Poland], Warszawa 1995, p. 159.

[9] H. Kempisty, *Ustrój sądów. Komentarz* [Court Organisation – Commentary], Warszawa 1966, pp. 119–120.

[10] Z. Resich, *Nauka o organach ochrony…* [Study of the organs of protection…], pp. 37–38.

[11] There is justification for raising doubts if Article 40 of the ACC should be included in the Chapter on the administrative supervision of courts because it concerns the application and interpretation of law issues. Moreover, what is important, issuing consequences by the court of higher instance is part of its formal supervision tasks, the role of an appellate court is purely signalling. T. Ereciński, J. Gudowski, J. Iwulski, *Prawo o ustroju…* [Law on the Common Courts Organisation…], p. 138.

[12] A. Bąk, *Wytknięcie obrazy przepisu w sprawie cywilnej* [Reproach of contempt of provisions in civil lawsuit], PS 2002, No. 7–8, pp. 137–138.

trative supervision over courts' operation because the consequences of reproach directly and personally concern judges who were the court bench members[13].

As the Supreme Court rightly notices, reproach for evident contempt of regulations mainly serves the development of proper rulings and is accommodated within the scope of supervision performed in the course of the same instance in an individual case at least indirectly connected with its concrete ruling. It is signalling in character, aimed at avoiding similar flagrant defaults in law administration by the court in the future. It does not result in direct disciplinary consequences, especially is not a penal–disciplinary ruling[14]. The measure of reproach for evident contempt of regulations is a specific instrument of law observance and at the same time a tool to strengthen its uniform administration[15].

The addressee of reproach is a court, which is an organ of public authority in accordance with Article 10 item 2 and Article 175 of the Constitution of the Republic of Poland[16]. The aim of judicative reproach is not to assess the professional competence of a judge but the good of justice administration by drawing a court's of lower instance attention to evident errors regarding interpretation and administration of law in order to avoid similar defaults in the future[17].

2.2. Subject to reproach

The subject to reproach can only be evident contempt of regulations, which, as it is often emphasised in the doctrine, means such a violation that is obvious for an average lawyer[18]. It concerns defaults that are doubtless, unquestionable, certain[19]. The Act does not limit the types of violated regulations. These are mainly substantial provisions, but also those regarding proceeding and the legal system. However, one cannot exclude a possible occurrence of contempt of a court's rules and regulations and a court's instruction[20]. In a criminal case, it can concern e.g. a court's failure to take into account legal opinions and directives for further proceeding expressed by the court of appeal, which remanded

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[13] Ruling of the Constitutional tribunal of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3, T. Ereciński, J. Gudowski, J. Iwulski, *Prawo o ustroju…* [Law on the Common Courts Organisation…], p. 138.

[14] Decision of the Supreme Court of 17 March 2005, SNO 7/05, Lex 569060.

[15] Ruling of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3.

[16] Decision of the Constitutional Tribunal of 8 January 2008, TS 181/07, OTK-B 2009, No. 2 item 113, decision of the Constitutional Tribunal of 4 October 2006, TS 94/05, OTK-B 2006, No. 5, item 183, also see: decision of the Constitutional Tribunal of 13 March 2012, TS 222/11, OTK-B 2012, No. 2, item 232.

[17] Ruling of the Supreme Court of 2 December 2010, I CSK 111/10, Lex No. 1001270.

[18] S. Włodyka, *Funkcje Sądu Najwyższego* [Supreme Court Functions], Kraków 1965, p. 69; S. Resich, *Nauka o organach ochrony…* [Study of the protection organs…], p. 38, some adopt a narrower criterion as a criterion for an average judge, A. Bąk, *Wytknięcie obrazy…* [Reproach of contempt…], p. 154.

[19] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego* [Universal Dictionary of the Polish Language], Warszawa 2003, vol. III, p. 76.

[20] Ł. Korózs, M. Sztorc, *Ustrój sądów powszechnych. Komentarz* [Common Courts Organisation – Commentary], Warszawa 2002, p. 63.

the case for re-examination (Article 442 § 3 of the CPC); ignoring the Supreme Court resolution on a legal issue requiring the substantial interpretation of an Act by the court referring the question (Article 441 § 3 of the CPC); not considering all the motions and charges indicated in the appellate measure unless the Act makes an exemption from this obligation (Article 433 § 2 of the CPC). Evident contempt of regulations may also occur in the case of delayed referral of case files to a court of the second instance, delayed issue of arrest warrant that results in the wanted man' escape[21], or a failure to withdraw a decision on the use of a pre-trial supervision measure regardless of the proceeding discontinuation[22].

However, it is difficult to speak about evident defaults in cases, in which a new regulation or one that has not been used so far has been analysed and used in accordance with the accepted rules of interpretation even if the court of appeal assessed the process critically[23]. It is also absolutely convincing to state that, in accordance with Article 40 § 1 of the ACC, a default that raised or raises controversies in the doctrine or discrepancies in rulings obviously cannot be treated as evident ones. In such a situation, taking a stand demonstrating one group of opinions is the responsibility of the adjudicating court of the first instance and the fact that a court of appeal does not agree with that standpoint does not mean the case should be treated as evident default even if the standpoint of the court of the first instance demonstrates the opinion of the minority[24]. Reproach of default cannot concern an error made in establishing facts or inadequacy of the ruled penalty[25].

Law on Common Courts introduces a gradation of default because in a situation when it is serious, not only the president of a relevant court is notified but also the Minister of Justice (Article 40 § 2 of the ACC).

Reproach of obvious contempt of provisions does not concern an individually distinguished particular person's act or omission but is addressed to a court. The Constitutional Tribunal rightly states that it concerns judges being members of a particular bench, regardless of the duties assigned to them. In this mode, it is not possible to take into account a violation of law by particular members of the bench and reproach only those of them who violated law on their own or charge a court with its member's default. Negative consequences of reproach are for the bench members independent of their involvement in the commission of contempt of provisions[26]. However, there are some doubts whether *votum*

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[21] Ł. Korózs, M. Sztorc, *Ustrój sądów powszechnych…* [Common Courts Organisation…], p. 63.

[22] Por. J. Kosonoga, *Dozór Policji jako środek zapobiegawczy* [Police monitoring as a pre-trial supervision measure], Warszawa 2008, p. 331.

[23] A. Bąk, *Wytknięcie obrazy przepisu…* [Reproach of contempt of provisions…], p. 144.

[24] Decision of the Supreme Court of 6 May 2010, OSNwSK 2010, item 974.

[25] Ł. Korózs, M. Sztorc, *Ustrój sądów powszechnych…* [Common Courts Organisation…], p. 63.

[26] Ruling of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3, also see: ruling of the Supreme Court of 5 November 2008, I CSK 189/08, Legalis.

separatum can have influence on the application of Article 40 of the ACC. In the doctrine, such an attitude is rightly accepted as it is assumed that a dissenting opinion in an erroneous issue makes its author exempt from responsibility for the majority opinion that results in contempt of provisions[27].

Reproach for obvious contempt of provisions is not self-contained in character, i.e. it functions only "at the time of case examination". While Article 40 § 1 of the ACC speaks about the composition of the adjudicating bench of a court of the first instance, it concerns only cases examined by an appellate court or a regional court acting as a court of appeal. It is not possible then to agree with the opinion that the establishment of default and reproach for it based on Article 40 § 1 can take place during the appointment of a competent court based on Article 44 of the Civil Procedure Code (compare Article 36 of the Criminal Procedure Code and Article 43 of the Criminal Procedure Code) and Article 45 of he Civil Procedure Code (compare Article 37 of the Criminal Procedure Code)[28]. In the former case, a court to which a motion to appoint another court was filed does not adjudicate on an appellate measure but rules on the subject matter of the motion[29]; in the latter case, however, it is a matter of the Supreme Court jurisdiction, to which not Article 40 § 1 of the ACC, but Article 65 § 1 of the Act on the Supreme Court applies.

2.3. Reproach addressee's juridical guarantees

A very important issue connected with reproach for obvious contempt of provisions is the juridical proceedings guarantees for judges adjudicating in a court of the first instance. This issue raised doubts in the former legal state in which an appellate court or a regional court could, before reproach, demand explanation from the presiding judge in the court of the first instance. At present, after the Amendment of 18 August 2011[30], which resulted from the ruling of the Constitutional Tribunal[31], these powers are much broader. In accordance with Article 40 § 2, second sentence, before reproach for default, a judge or judges being members of an adjudicating bench of a court of the first instance are informed about the possibility to file a written explanation within the time of seven days. It is the duty of the appellate court or a regional court acting as a court of appeal before they reproach. Thus an explanation does not depend on the will of the court that considers reproach but on the court that may be subject to reproach.

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[27] A. Bąk, *Wytknięcie obrazy przepisu…* [Reproach of contempt of provisions…], p. 140.

[28] J. Bodio, Gloss on the decision of the Supreme Court of 21 July 2011 V CZ 35/11, Gdańskie Studia Prawnicze Przegląd Orzecznictwa 2012, No. 3, p. 49 and next.

[29] See: resolution of the Supreme Court of 21 February 1972, III CZP 76/71, OSNC 1972, No. 9, item 152.

[30] Act of 18 August 2011 amending the Act on the Law on Common Courts Organisation and some other acts (Journal of Laws No. 203 item 1192).

[31] Ruling of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3.

This way a real guarantee was provided that potential contempt of provisions can be explained.

Apart from giving explanation, there are no other possibilities of questioning charges concerning the reproach subject matter. In particular, there is no right of appeal against reproach[32]. The right of appeal against such a decision cannot be assumed[33], nor drawn from the Criminal Procedure Code[34] or the Civil Procedure Code[35]. Article 40 § 3 of the Act on Common Courts unambiguously says that reproach for default is adjudicated in a separate decision. It should not be included in a ruling or its justification[36].

There is a right opinion that, in the case of negative assessment of the interpretation and application of law by a court of the first instance in accordance with Article 40 § 1 of the ACC, there is no defamation of a judge in the form of depriving him/her of "the right to have a reputation of a competent one applying the provisions of law properly" due to the fact that he/she was a member of the criticised bench[37]. It is rightly highlighted that the adjudication on reproach for obvious contempt of provisions is not addressed to the sphere of individual rights and freedoms of a judge who issued a decision repealed by the court of the second instance.

2.4. Consequences of reproach

It is obvious that reproach for default has no influence on the final ruling; however, it is not so unambiguous whether it binds the addressee and, in this sense, limits the principle of judicial discretion. It is an important issue because – as it is rightly noticed in the doctrine – the preventive character of reproach makes sense only if it is a binding directive for the future[38]. But, as far as cases of obvious contempt of provisions are concerned, there should be no doubts

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[32] Decision of the Supreme Court of 21 July 2011, V CZ 35/11, Legalis, decision of the Supreme Court of 17 March 2005, SNO 7/05, OSNSD 2005, No. 1, item 35.

[33] Decision of the Supreme Court of 24 April 2012, VI KZ 1/12, Legalis, compare: decision of the Supreme Court of 27 January 2010, WZ 56/09, OSNKW 2010, No. 7, item 60, with a gloss by M. Siwek, Lex/el. 2010, in which a specific provisional solution was adopted and it was stated that since Article 40 § 1 of the ACC was deemed not to be in compliance with Article 2 of the Constitution, it is necessary to assume that until the legislator regulates the form and mode of proceeding enabling a judge to execute the rights to file explanation, in criminal cases, by analogy, the regulations on appellate proceeding of the CPC should be used in a supplementary way. The standpoint was rightly challenged in the decision of the Supreme Court of 3 February 2011, V KK 229/10, OSNKW 2011, No. 2, item 19, and in the doctrine, criticizing the legislative character of the ruling - M. Siwek, Gloss in the decision of the Supreme Court of 27 January 2010, WZ56/09, Lex/el. 2010, thesis 12.

[34] Decision of the Supreme Court of 3 February 2011, V KK 229/10, OSNKW 2011, No. 2, item 19.

[35] Decision of the Supreme Court of 21 July 2011, V CZ 35/11, LEX No. 898280 with a gloss by J. Bodio, Gdańskie Studia Prawnicze Przegląd Orzecznictwa 2012, No. 3, p. 49 and next, Decision of the Supreme Court of 9 October 2009, I CNP 59/09, Lex No. 599736.

[36] Ruling of the Supreme Court of 4 April 1962, V K 654/61, OSNKW 1963, No. 6, item 112.

[37] Ruling of the Supreme Court of 2 December 2010, I CSK 111/10, Lex 1001270.

[38] See: S. Włodyka, *Funkcje Sądu Najwyższego* [Supreme Court Functions], Kraków 1965, p. 69.

that a bench involved will respect the opinion presented by a competent court in the future. Moreover, before reproach, its addressee can present its arguments in the form of a written explanation. If, despite this presentation of arguments, a court of the second instance decides to use the discussed measure, its obviousness seems to be evident. Thus, although there is no normative ground for it, it should be assumed that reproach is binding in character. In addition, failure to apply the conclusions resulting from it creates a new risk of application of Article 40 § 1 of the Act on Common Courts.

Reproach for obvious contempt of provisions, apart from the fact that it demonstrates disapproval of a judge's work, has serious consequences on his/her personal income because, in accordance with Article 91a § 6 of the ACC, it stretches their tenure required for promotion to a position with higher remuneration by three years. In addition, a copy of the decision on reproach issued by an appellate court or a regional court acting as a court of appeal as well as the explanation filed by a judge are kept in the judge's personal files (Article 49 § 3 of the ACC). After five years from reproach for default, on a judge's motion, the President of the court orders to dispose of all such documents from the files. However, in the event of another occurrence of obvious contempt of provisions reported by an appellate court in that period that resulted in reproach for default or caution in accordance with Article 37 § 4 of the ACC, only a simultaneous disposal of all such documents and data would be admissible.

Signalling based on Article 37 § 4 of the ACC is totally different from reproach for obvious contempt of provisions. In accordance with the regulation, in the event of finding a violation of the court proceeding efficiency, the Minister of Justice and court Presidents can caution a judge in writing and demand that the results of the violation are removed. A cautioned judge can file written explanation to an organ that issued a caution but this does not free them of the obligation to remove the effects of default. While Article 37 of the ACC indicates the instruments of administrative supervision, the regulation in Article 40 § 1 of the ACC is clearly juridical in character. Reproach takes place in the course of instance, in connection with the pending proceeding, and the competent organ is an appellate court or a regional court acting as a court of appeal. Reproach is addressed to a court, and not to its particular members. While administrative caution must be connected with an individual activity, a particular person's omission, reproach for default is addressed to an adjudicating bench[39].

[39] Ruling of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3.

3. Reproach for default and disciplinary proceeding

A disciplinary procedure can constitute another plane for the assessment of obvious contempt of provisions. Because it is not out of the question that a violation reproached for in accordance with Article 40 § 1 of the ACC will also exhaust the features of a disciplinary delict. There is, however, a major difference between behaviour that is subject to reproach and premises of disciplinary liability. Although in both cases contempt of provisions must be obvious, in the case of disciplinary liability it is necessary to find that the contempt was "flagrant" in character. The term "flagrant", however, is used in relation to consequences of the contempt of provisions. An occurrence of an obvious error made by a well-educated lawyer is not sufficient to recognize a judge's action to be a disciplinary delict. The error must expose law to loss of confidence and put at risk essential interests of parties to the proceeding or other persons involved, or cause damage; also endangering the administration of justice can be an important element[40]. That is why the default discussed in Article 40 § 1 of the ACC does not automatically decide on a commission of a disciplinary delict due to obvious and flagrant contempt of provisions. On the other hand – as it is rightly pointed out in rulings – refraining from reproaching a court for default despite a flagrant violation of law should not influence a decision on the launch of disciplinary proceeding or the assessment of a judge's behaviour[41]. The relationship between the institution of Article 40 § 1 of the ACC and a judge's disciplinary liability is rightly expressed in the statement that – what is obvious – reproach for default neither is a disciplinary penalty, nor substitutes it, however, it can influence an application of a disciplinary penalty because it constitutes a specific trouble for the judge involved[42].

4. Reproach for default by the Supreme Court

Also the Supreme Court is entitled to reproach for obvious contempt of provisions. In accordance with Article 65 § 1 of the Act on the Supreme Court, in the event of recognition of obvious contempt of provisions – regardless of other powers – the organ reproaches a given court for default. Before reproach for default, the Supreme Court can demand adequate explanation. Recognition and reproach for default does not influence the adjudication in the case. The Supreme Court notifies the President of the given court about reproach (Article 65 § 2 of the Act on the Supreme Court).

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40 Ruling of the Supreme Court of 4 September 2003, SNO 51/03, OSNSD 2003, No. 2, item 54.
41 Ruling of the Supreme Court of 26 September 2006, SNO 49/06, OSNSD 2006, No.1, item 60.
42 Ruling of the Supreme Court of 25 February 2009, SNO 4/09, Lex No. 725086.

As there is no statutory limitation, the concept of "case" used in Article 65 § 1 of the Act on the Supreme Court should be understood broadly and treated as any case within the cognition of the Supreme Court. This means that it can be not only adjudication on cassation but also e.g. remanding a case for re-examination by another court of the same level if it better serves the administration of justice (Article 37 of the CPC); adjudicating on the re-opening of the proceeding concluded with a ruling rendered an appellate court or the Supreme Court (Article 544 § 2 of the CPC); adjudicating, on the request of an appellate court, on juridical questions requiring a substantial interpretation of law (Article 441 § 3 of the CPC); adjudicating on discrepancies between law interpretation occurring in the decisions of common courts, military courts and the Supreme Court (Article 60 of the Act on the Supreme Court); annulment, upon the motion of the Public Prosecutor General, of a valid decision rendered in the case which at the moment of deciding did not fall under the jurisdiction of Polish courts on the account of the person, or in which in the moment of deciding the suit was inadmissible, if such a decision cannot be challenged in accordance with the procedure provided for in the laws on the juridical proceedings (Article 64 of the Act on the Supreme Court)[43].

Like in the case of reproach decided by an appellate or regional court (Article 40 § 1 of the ACC), it is possible in the event of recognition of obvious contempt of provisions. Some doubts may be raised in connection with the interdependence of grounds for cassation and prerequisites of reproach as filing this extraordinary measure of appeal is possible in the case of a flagrant breach of law that is mentioned in Article 523 § 1 of the CPC and Article 439 of the CPC. In other words, it is interesting what the relationship between flagrant violation of law as a ground for cassation and flagrant contempt of provisions as a ground for reproach is. The Supreme Court noticed that interdependence and rightly stated that, although there is a consideration of cassation in every case a reflection of an agreement with an opinion that an appellate court committed a "flagrant violation of law" and in accordance with the regulation of reproach the condition of reproach is a "flagrant contempt of provisions", which seems (because of the connotation of the word "flagrant") to be a diagnosis of a more lenient default, it is obvious that only a small proportion of cases where the grounds for cassation were right required reproach. As the Supreme Court emphasised, in the long history of juristic practice, it has been accepted that the so-called reproach, because of the consequences for the adjudicating bench judges, should be used only in extraordinarily difficult to accept cases of violation of the provisions of law[44].

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[43] See: S. Włodyka, *Funkcje Sądu Najwyższego* [Supreme Court Functions], Kraków 1965, p. 66.
[44] Ruling of the Supreme Court of 3 October 2013, II KK 118/13, LEX No. 1383272.

Apart from the fact that reproach should be *ultima ratio*, it seems that to assess both premises it is necessary to use different criteria. Grounds for cassation were in general defined as circumstances having essential influence on the content of a ruling. At the same time, in the case of reproach, it should be important what the role of the court in the default was; the level of legal ignorance that the court demonstrated. The obvious contempt of law is relative to the manner in which the given adjudicating bench acted, and not to the content of the ruling. This, however, does not change the fact that one juristic action or its lack will at the same time be a premise of cassation and a ground for reproach.

As Article 65 of the ACC says, the normative construction of the discussed measure is in general similar to the solution adopted in Article 40 of the ACC. The difference lies in the scope of powers of a judge or judges of the adjudicating court to which reproach is addressed. The Act does not specify the obligation to inform them about the possibility to file explanation and only entitles the Supreme Court to demand such.

Thus, the right of the adjudicating bench to explain the issues that are subject to reproach and present their standpoint was evidently limited. There are no convincing arguments for such an important differentiation of the procedure in connection with reproach for default in accordance with the Act on Common Courts and the Act on the Supreme Court. These are the same legal solutions resulting in the analogous consequences in the field of the powers of a judge, who is reproached. That is why they should be analogously regulated, in accordance with the principle *ubi eadem legis ratio, ibi eadem legis disposition*.

The comments made by the Constitutional Tribunal on Article 40 § 1 of the ACC in connection with its wording before the amendment are in this case fully up-to-date. It was raised that, in the field of the reproach procedure, the legislator missed the principle *audiatur et altera pars*. Since the results of reproach relate to certain rights and have substantive consequences, the opening of a specific explanatory route for the members of the bench was recognised as a necessity. The Tribunal questioned the lack of possibility of responding to reproach by the judges of the adjudicating court to which reproach is addressed. In the Tribunal's opinion, the possibility of demanding explanation from the adjudicating bench that a reproaching court can use as a facultative measure on its own discretion is not such a guarantee either. As a result, the tribunal ruled that the challenged regulation is not in compliance with the principle of a democratic rule of law state expressed in Article 2 of the Constitution and recognised it as a violation of the principle of proper legislation[45]. The discussed constitutional model should be referred to the regulation of Article 65 § 1 of the Act on the Supreme Court.

It seems right to postulate *de lege ferenda* uniformity of Article 65 § 1 of the Act on the Supreme Court and Article 40 § 1 of the Act on Common Courts and

[45] Ruling of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009, No. 1, item 3.

the introduction of an obligation to inform about the possibility of filing written explanation also in the event of reproach from the Supreme Court. *De lege lata*, on the other hand, such practice should be suggested so that reproach would always be preceded by the demand that the bench responsible for contempt of provisions should file explanation.

5. Reproach for default by a superior prosecutor

Reproach for default is also administered in connection with the operation of the Public Prosecution Service. It has, however, a different normative construction from Article 40 of the Act on Common Courts. In the event of recognition of an obvious contempt of law while investigating a given case, regardless of other powers, a superior prosecutor reproaches a prosecutor investigating the case for default, after a prior demand – if necessary – of explanation. The recognition and reproach for default does not influence the resolution of the case (Article 8 item 7 of the Prosecution Act). It refers to every type of case that a prosecutor investigates: a civil, administrative or criminal one, at the preparatory or juridical proceeding stage.

Like in the case of Article 65 § 1 of the Act on the Supreme Court, the demand of adequate explanation is facultative. This drawback is, however, compensated by Article 8 item 7 of the Prosecution Act, in accordance with which a reproached prosecutor, within seven days, can file a written reservation to his/her superior prosecutor who reproached them for default. In the event of a filed reservation, the superior prosecutor either annuls reproach for default or refers the case for examination by a disciplinary commission. In such a case, the disciplinary commission adjudicates the case after having listened to the disciplinary spokesman and the reproached prosecutor except when it is not possible. The decision rejecting the reservation can be appealed against. It is examined by the same disciplinary commission but with a changed composition (Article 8 item 7b of the Prosecution Act). Thus, the Prosecution Act provides a specific supervision of reproach at different instances, which – in comparison with the Law on Common Courts – is a regulation that creates a higher level of guarantees for the reproach addressee.

Analogously, like in the case of judges, a copy of valid reproach for default, as well as a prosecutor's reservation are included in the prosecutor's personal files (Article 8 item 7d of the Prosecution Act). Reproach influences a prosecutor's income (Article 62 item 1 point 1 ee of the Prosecution Act in connection with Article 61 item 1 point eb of the Prosecution Act).

6. Conclusions

The juridical proceeding organ cannot remain indifferent to obvious contempt of law. This applies to default committed by the participants of the proceeding it conducts as well as that in an organ of the lower instance. In the latter, reproach for obvious contempt of provisions is possible.

The measure use is in the interest of the administration of justice because it does not only strengthens the uniformity of rulings but also helps a juridical proceeding organ to avoid flagrant default in the application of law in the future.

Despite generally parallel *ratio legis* solutions for reproach of default and analogous consequences resulting from it, the legislator regulated the issues of an addressee's rights in a different way each time. The biggest guarantees are provided by the Prosecution Act, which apart from the right to a written explanation introduces a possibility of filing a written reservation to reproach and a procedure of its verification by a disciplinary commission. The least favourable to a reproached court is the solution adopted in Article 65 of the Supreme Court. The Supreme Court is not obliged to inform a common court about a possibility of filing explanation and this means it can adjudicate on its own discretion.

The privileged position of the Supreme Court does not raise doubts and is justified by legal acts. However, in the analysed case, there are no convincing arguments that would exclude the necessity to check the reproach addressee's standpoint. Thus, as it was mentioned, it seems that Article 65 of the Act on the Supreme Court needs to be amended. The Supreme Court should be made obliged to instruct, before reproach, a judge or judges being members of the adjudicating bench that they could file written explanation.

REPROACH FOR EVIDENT CONTEMPT OF REGULATIONS IN THE CRIMINAL PROCEEDING

Summary

The article characterises reproach for obvious default of provisions in the criminal proceeding. Article 65 of the Act on the Supreme Court, Article 40 of the Act on Common Courts and Article 8 item 7 of the Prosecution Act are analysed. The article shows similarities and differences between them, in particular those regarding juridical proceeding guarantees for an addressee of reproach. The author postulates amending Article 65 of the Act on the Supreme Court in order to oblige the Supreme Court to request the court that is to be reproached to present its standpoint explanation.

WYTKNIĘCIE OCZYWISTEJ OBRAZY PRZEPISÓW W POSTĘPOWANIU KARNYM

Streszczenie

W opracowaniu scharakteryzowano instytucję wytknięcia oczywistej obrazy przepisów prawa w postępowaniu karnym. Analizie poddano art. 65 u. SN i art. 40 u.s.p. oraz art. 8 ust. 7 u. prok. Wskazano wzajemne podobieństwa i różnice zachodzące pomiędzy nimi, ze szczególnym uwzględnieniem gwarancji procesowych przysługujących adresatowi wytknięcia. Zgłoszono postulat nowelizacji art. 65 u. SN polegający na wprowadzeniu obowiązku zwrócenia się przez Sąd Najwyższy z wnioskiem o zajęcie stanowiska przez sąd, w stosunku do którego ma zostać sformułowane wytknięcie.

DES REPROCHES DE L'OFFENSE ÉVIDENTE DU RÈGLEMENT DANS LA PROCÉDURE PÉNALE

Résumé

Dans l'article on caractérise l'institution de reproche de l'offense évidente des règlements dans la procédure pénale. On analyse minutieusement l'art. 65 du droit de la Cour Suprême et art. 40 du droit des cours universelles ainsi que l'art. 8 du droit 7 du droit des accusateurs. On indique des analogies parallèles et des différences qui se forment entre eux surtout en soulignant des garantis de procès dont le destinataire de ce reproche a le droit. On postule aussi la novélisation de l'art. 65 du droit de la Cour Suprême qui parle de l'introduction du devoir de se diriger à la Cour Suprême avec la demande de présenter le point de vue de la cour à laquelle est formulé ce reproche.

УКАЗАНИЕ НА ОЧЕВИДНУЮ КАРТИНУ ПОЛОЖЕНИЙ В УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ

Резюме

В исследовании дана характеристика института указаний на процессуальные упущения и настоящую картину положений закона в уголовном судопроизводстве. Анализу подвержены ст. 65 п. ВС и ст. 40 п. ОС, а также ст. 8 п. 7. Указывается на сходства и различия между ними, с особенным учётом процессуальных гарантий, причитающихся адресату указания. Заявлен постулат поправки к ст. 65 п. ВС, суть которого состоит в обязательности обращения через Верховный суд с ходатайством о выражение судом своей позиции, в отношении которой может быть сформулировано указание.