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PETRIFICATION OF A COURT BENCH COMPOSITION IN THE TRANSITIONAL PROVISIONS: COMMENTS IN THE LIGHT OF THE SUPREME COURT RULING OF 29 NOVEMBER 2016, I KZP 9/16

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The transitional issues of the law of criminal procedure have become the subject of two essential rulings of the Supreme Court recently,[1] one of which was given the power of a legal principle and generated vivid interest of jurisprudence.[2] The serious consideration given to these issues undoubtedly resulted from turbulences caused by the successive reforms of the Polish criminal procedure in the period 2013–2016. The foregoing article makes comments only on some transitional issues of the law of criminal procedure, namely the principle of petrification of the court bench composition in criminal proceedings. It is worth taking a closer look at it,

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1 Compare the Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW No. 12, item 85, 2016; the Supreme Court resolution of 29 November 2016, I KZP 10/16, OSNKW No. 12, item 79, 2016.

2 Compare especially, H. Paluszkiewicz, *Studia z zakresu problematyki intertemporalnej w prawie karnym procesowym* [Studies in transitional issues in the law on criminal procedure], Warsaw 2016; H. Paluszkiewicz, *Zagadnienia intertemporalne w polskim prawie karnym procesowym* [Transitional issues in the Polish law on criminal procedure], [in:] J. Mikołajewicz (ed.), *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza, funkcje, aksjologia* [Transitional issues in law. Key issues. Transitional solutions. Source, functions, axiology], Warsaw 2015, pp. 321–400; H. Paluszkiewicz, *Kilka uwag o gwarancyjnym charakterze przepisów przejściowych w ustawie z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw* [Several comments on guarantee nature of transitional provisions in the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts], [in:] M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga Jubileuszowa Profesora Piotra Kruszyńskiego* [On the guarantees of the contemporary criminal proceedings. Professor Piotr Kruszyński jubilee book], Warsaw 2015, pp. 339–355.

especially in the context of the opinions expressed by the Supreme Court in its ruling of 29 November 2016[3] since they inspire critical comments.

The above-mentioned ruling was issued as a result of a legal query submitted by the Appellate Court in K., in accordance with Article 441 §1 of the Criminal Procedure Code (CPC), concerning the legal issue requiring fundamental interpretation of statute as follows: "Does the phrase 'a court in its former composition' used in the provision of Article 30 of the Act of 27 September 2013 amending the Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.], item 1247, as amended) mean the composition determined by the provisions in force at the moment of the initiation of the proceedings before the court of a given instance or the court with a given bench composition determined in accordance with the provisions that were in force before the above-mentioned Act entered into force, which adjudicated in the main trial before 1 July 2015?"

The Supreme Court was asked to resolve the problem in connection with the appeal against the judgement of the District Court in B. being heard by the Appellate Court in K. concerning compensation for groundless detention applied against J.S., in which the Court ruled the compensation but dismissed other claims. The claim for compensation for groundless detention was filed to the District Court in B. on 27 May 2015. On 15 June 2015, a trial was scheduled for 16 September 2015 and a three-judge professional bench was appointed to hear the case. However, due to the successive adjournments of the hearing, the case was not examined until 8 and 21 April 2016. The judgement was issued on the latter day. However, earlier, on 15 March 2015, the President of the Criminal Chamber appointed the bench composed of one judge and two lay judges to hear the case. The judgement was appealed against by the representative of the petitioner and by the representative of the President of the District Court in B. as a body authorised to represent the State Treasury. The Appellate Court hearing the appeal, in the ruling issued on 12 August 2016, decided to ask the Supreme Court the legal query quoted above.

The legal query undoubtedly concerns an issue that is significant in practice. It is obvious that each amendment to regulations having impact on the composition of a court, as well as on its competence, must be accompanied by normative safeguards against negative consequences of the amendment for cases that were initiated before the change entered into force and pending after this date. It must be highlighted that the introduction of amendments to provisions regulating the bench composition without such safeguards would lead to situations in which, after the amending act entered into force, the composition of the bench formerly hearing the case would not be in compliance with the provisions in force and, in case the bench were to adjudicate, would result in absolute grounds for appeal based on inappropriate bench composition under Article 439 §1(2) CPC. In order to prevent this, it would be necessary to appoint a new adjudicating bench and hear the case from the beginning, regardless of the progress made in it. Similarly, negative consequences would be connected with a lack of relevant transitional provisions in case the amendment concerned the competence of criminal courts. In such a case, it is worth noting that not only the amendment

[3] I KZP 9/16, OSNKW No. 12, item 85, 2016.

to the regulations of the criminal procedure but also to the criminal substantive law would have such a consequence. It results from the content of Article 25 §1 CPC, which uses a term "felony" when determining the cognition of a district court. Therefore, any changes within criminal statute shifting a given category of prohibited acts from the group of crimes into the group of felonies have an indirect influence on the competence of a court hearing the case concerning such an act.[4] Thus, in the light of the above, there is no doubt that it would be irrational to adopt a solution assuming that the change of norms concerning the competence or composition of a court should immediately apply to all pending criminal cases. In many of them, it would lead to the squandering of frequently considerable input into their examination so far. In jurisprudence, it is rightly indicated that petrification of the competence and composition of a court is a significant departure from a general rule that it is possible to establish, which is the application of new provisions. The arguments for it are important axiological reasons for the necessity to ensure effectiveness and economics of trials, which is not insignificant for ensuring legal standards of a fair criminal trial.[5] What must be determined, however, is the issue how long the petrification should be in terms of time. The solutions adopted should be relevant to the needs in relation to the above-mentioned necessity to ensure the effectiveness and economics of trials.

The principle of petrification of the competence and composition of a court is a solution adopted in the successive amendments to the Criminal Procedure Code of 1997. The Act of 1997: Regulations introducing the Criminal Procedure Code[6] already contained Article 7, which stipulated that if the competence of a court has been changed on the basis of the Criminal Procedure Code, the court adjudicating in a case so far is competent to continue in the event the indictment was lodged before the day when the Code entered into force. A similar regulation was laid down in Article 6 of the Act of 29 March 2007 amending the Act on the Public Prosecution, Act: Criminal Procedure

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[4] If we agree with the Supreme Court's stand presented in the ruling of 27 February 2013, I KZP 25/1, OSNKW No. 5, item 37, 2013, such a change in practice will not generate the necessity of referring a case to a court different from the one competent so far. As it was assumed in this ruling, "the provision of Article 25 §1(1) CPC determines the principle of competence *ratione materiae* in accordance with which a district court is competent to adjudicate on felonies as particular acts committed by particular perpetrators. Since the decision whether a particular act committed by a particular perpetrator is felony is based on Article 7 §2 CC in conjunction with the minimum penalty that this particular type of act carries in accordance with the legal state established with the use of rules laid down in Article 4 §1 CC, the provision of Article 25 §1(1) CPC within the scope of the district court competence *ratione materiae* covers only those prohibited acts that belonged to the felony category at the moment of their commission and did not lose their status at the moment of competence examination. Therefore, in the event, due to normative changes, the character of a prohibited act changes its classification from crime into felony, and the act at the moment of its commission was a crime subject to adjudication by a regional court, the determination of the regional court competence cannot be based on the content of Article 25 §1(1) but must result from a clear transitional provision". However, this opinion is at least debatable (for more, compare the justification for the Supreme Court ruling and literature and case law cited therein). Adoption of an opinion different from the Supreme Court's one would result in the necessity of referring cases in accordance with competence to higher level courts.

[5] Compare, H. Paluszkiewicz, *Studia…* [Studies…], pp. 29–33 and 73; H. Paluszkiewicz, *Kilka uwag…* [Several comments…], p. 353.

[6] Journal of Laws [Dz.U.] of 1997, No. 89, item 556.

Code and some other acts,[7] which stipulates that if the competence of a court has been changed based on the present statute, a court competent on the day when an indictment was lodged must adjudicate. In the context of changes concerning adjudicating benches' composition, first of all it is necessary to highlight Article 18(1) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts,[8] which stipulates that in cases in which the main trial started and was not concluded with a valid judgement before the Act entered into force and which, in accordance with the former regulations were heard in the presence of lay judges, the formerly binding regulations apply. However, in the event of a trial stay or adjournment, if the proceedings are not continued after the stay or adjournment, and also in the event of the case re-hearing, the proceedings are to be conducted in accordance with the existing Act. The provisions concerning petrification of the competence and composition of a court include also Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts[9] (hereinafter the September amendment), which stipulates that if on the basis of the present Act the competence or composition of a court changed, until the end of the proceedings in a court of a given instance, the court competent to adjudicate or in the composition to date adjudicates, and Article 22 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts[10] with identical content.

The Supreme Court ruling of 29 November 2016 focuses on the analysis of the content of the provision of Article 30 of the September amendment. The comments made by the Supreme Court are much more universal. They can also be referred to other transitional regulations, the content of which will be formulated in an identical or similar way. Thus, the issue is still up to date because Article 22 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts is an example of such a norm. This is why, the analysis of the Supreme Court deserves careful consideration.

The provision of Article 30 of the September amendment stipulates that, if based on the present Act the competence or composition of a court has changed, before the conclusion of the proceedings before a court of a given instance, the court competent so far or in its composition to date adjudicates. Thus, while the provision directly determines the final moment of petrification of a court competence or composition, it does not mention the issue of the starting point when it occurs. Before the Supreme Court issued the ruling, the question of the initial moment of petrification of a court composition raised doubts in both jurisprudence and the judicature. The background of the controversies lies within the normative changes concerning the composition of benches adjudicating in cases concerning compensation for groundless conviction, detention or arrest. To be precise, it is necessary to remind that until 1 July 2015, a three-judge professional bench adjudicated on such issues. The September amendment, which entered into force on 1 July 2015, introduced the norm in accordance with which the appropriate bench is composed of one judge and two lay judges. However,

7 Journal of Laws [Dz.U.] of 2007, No. 64, item 423, as amended.
8 Journal of Laws [Dz.U.] of 2007, No. 112, item 766.
9 Journal of Laws [Dz.U.] of 2013, item 1247.
10 Journal of Laws [Dz.U.] of 2016, item 437.

after the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts entered into force, a one-judge bench adjudicates on such issues.

Due to the change of an adjudicating bench composition introduced by the September amendment, there are two different attitudes in case law towards the meaning of the provision on petrification of a court composition. On the one hand, it was assumed that "in cases concerning compensation for groundless conviction and unjustified use of coercive measures that were initiated before court before 1 July 2015 and were not concluded in a court of a given instance, the application of Article 554 §2 CPC in the wording of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.] of 2013, item 1247) is excluded pursuant to Article 30 of that Act, i.e. those cases are subject to hearing by three-judge benches."[11] The Appellate Court in Wrocław discussed the above stand and held that "due to the fact that the provisions of Articles 27 and 30 of the amendment discussed use clear and readable time criteria for a case initiation and conclusion in a court of a given instance, they do not refer, however, to the stage of the trial, they do not make reference to the trial initiation or its adjournment, in the Appellate Court's opinion, for the assessment whether a court had an appropriate bench, it is not important that the present case was heard at the sessions on 9 December 2015 and 22 January 2016, thus, that the adjudication took place after 1 July 2015."[12] The content of Article 30 of the September amendment was also analysed in the Supreme Court rulings, where it was emphasised that "the concept of 'former composition' should (…) not be referred to the bench that heard the case at a given instance but the bench appropriate pursuant to the provision binding to date, i.e. the provisions that were in force until 30 June 2015. Therefore, it concerns a court composition in abstract and not definite meaning. The necessity of such an interpretation of Article 30 of the September amendment is indicated in the wording *in principio*, which reads: "if, on the basis of statute, the change of a court competence or composition took place". It is obvious, however, that no other act may change the composition of a court in a definite sense.[13]

The appellate Court in Katowice expressed a different opinion and held that "in cases concerning compensation for groundless conviction, detention or arrest initiated before 1 July 2015, in which in accordance with the former wording of Article 554 §2 CPC, a district court in a bench of three judges adjudicated, the requirement for maintenance of the same court composition appointed in accordance with former rules is the initiation of a trial before that date. There is no doubt that all adjudication-related activities of a court taking place after calling a case before court should be undertaken by a court in the appropriate composition."[14]

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[11] Judgement of the Appellate Court in Lublin of 26 January 2016, II AKa 295/15, Lex No. 1994424.

[12] Judgement of the Appellate Court in Wrocław of 5 May 2016, II AKa 95/16, Lex No. 2052587; similarly: judgement of the Appellate Court in Wrocław of 7 April 2016, II AKa 93/16, OSAW 2016, No. 2, item 340.

[13] Supreme Court judgement of 23 September 2016, III KK 41/16, Lex No. 2122061; similarly: Supreme Court ruling of 15 June 2016, V KK 114/16, LEX No. 2080107; Supreme Court ruling of 29 June 2016, II KK 180/16, Lex No. 2062819.

[14] Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, LEX No. 2023111.

The Appellate Court in Katowice, presenting arguments for its stand, indicated the following issues. Firstly, the linguistic interpretation supports it. Article 30 of the September amendment refers to a former composition, which indicates the composition appointed to hear a case and not the provisions regulating the appointment of a bench. If it were to concern the application of former provisions, the legislator would have stipulated the application of the provisions of the Act repealed in the transitional provisions, as in Article 18(1) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts, and would not have stipulated adjudicating in *verba legis* the same composition.

Secondly, the Appellate Court in Katowice drew attention to the fact that the September amendment emphasised very strongly the principle of using the new law (Articles 27 and 29 of the September amendment), which differentiates it from other amendments to the Criminal Procedure Code throughout the period 2003–2009. Thus, as a rule, the principle concerns the composition of a court. In this light, the provision of Article 30 of the September amendment constitutes an exception and should be precisely interpreted. Making such an assumption, the adjudicating bench stated that: "in the context of this principle [of applying the new law – note by W.J.], the only rational reason for the introduction of special norms concerning the competence and composition of a court in proceedings conducted earlier was to avoid the necessity of referring cases form court to court and re-hearing adjourned or interrupted trials from the beginning."[15] The above means that the application of Article 30 of the September amendment seems to be admissible only in situations in which there are the above-mentioned reasons for that. However, in the opinion of the Appellate Court in Katowice, in the case it heard, the reasons were not updated. It is worth mentioning that, in the case in which the Court adjudicated, a motion under Article 552 CPC was referred to an incompetent court before 1 July 2015 and submitted to a competent court after the date. According to the Appellate Court in Katowice, the reasons of purposefulness justifying the existence and sense of Article 30 of the September amendment in such circumstances cannot support its application. The adjudicating bench also highlighted that the procedural configuration indicated above resembles, in its essence, other situations that should be recognised as not included in the scope of application of Article 30 of the September amendment, i.e. the situations when e.g. because of the necessity of changing the composition of a court after 1 July 2015, there will be a need to rehear the case from the beginning. Such a stand was expressed in the literature and it was indicated that rehearing a case from the beginning should result in the appointment of a new adjudicating bench in accordance with the new regulations.[16]

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[15] Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, LEX No. 2023111; moreover, the Appellate Court in Katowice drew attention to the fact that reference to the reason of a trial effectiveness and economics was also made in the justification for the September amendment bill in the part concerning transitional provisions.

[16] [Sic:] M. Kurowski, *Znowelizowany Kodeks postępowania karnego w pracy prokuratora i sędziego. Zagadnienia ogólne i postępowanie przygotowawcze* [Amended Criminal Procedure Code in the practice of a prosecutor and a judge. General issues and preparatory proceedings], KSSiP, Kraków 2015, p. 110.

Thirdly, the Appellate Court in Katowice emphasised that there is a lack of grounds for the assumption that, regardless of the legislator's silence on the issue, the initiation of the proceedings is an obvious moment of petrification of a court composition. It must be noted that the legislator indicates various moments, which mark time limits for the application of provisions repealed or the new ones (compare Articles 33 to 36, 38 and 42 of the September amendment).

Fourthly, failure to indicate a moment important for petrification of a court composition results in the assumption that "it should be related to the moment when the issue of the competence and composition of a court is updated in a trial".[17] While in case of a court competence there is no doubt that the moment is the initiation of the juridical proceedings, as the Appellate Court in Katowice states, "the issue of a court composition is different because the legislator associates it only with adjudication and sessions (Articles 28 to 30 CPC, and in the event of cases from Chapter 58 CPC – the provision of Article 554 §2 CPC)."[18]

The Appellate Court in Wrocław expressed a similar opinion. In one of the rulings, it held that "the term: proceedings 'in a given instance' used in Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.] 203.1247, as amended) should be related to the main trial in the proceedings before a court of first instance or appeal proceedings before a court of second instance and not to the date of a case registration."[19] In the justification of the stand, the adjudicating bench indicated that petrification of a court composition "aims to avoid the change of the composition or competence of a court that hears a given case at the right forum, which would have to lengthen the proceedings. The aim that is the basis of rules laid down in the provision must be taken into consideration in the interpretation of the term 'in a given instance' used (…). That is why, the term proceedings 'in a given instance' must be related to a trial, the proceedings before a court of first instance or appeal proceedings before a court of second instance, and to the date of a case registration."[20]

The issue of petrification of a court bench composition has also become the subject of different opinions in jurisprudence. On the one hand, it is assumed in the literature that the moment important for the petrification of a court composition is the initiation of proceedings in a given instance court.[21] On the other hand, it is

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[17] Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, LEX No. 2023111.

[18] *Ibid*.

[19] Ruling of the Appellate Court in Wrocław of 25 January 2016, II AKo 200/15, LEX No. 2204496.

[20] *Ibid*.

[21] [Sic:] in the context of appellate proceedings: D. Świecki, [in:] B. Augustyniak, D. Świecki, M. Wąsek-Wiaderek, *Znowelizowany Kodeks postępowania karnego w pracy prokuratora i sędziego. Postępowanie odwoławcze, nadzwyczajne środki zaskarżenia, postępowanie po uprawomocnieniu się wyroku i postępowanie w sprawach karnych ze stosunków międzynarodowych* [Amended Criminal Procedure Code in the practice of a prosecutor and a judge. Appeal proceedings, extraordinary complaint measures, proceedings after the judgement enters into force and proceedings in international criminal cases], KSSiP 2015, p. 16; by the same author, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz do zmian 2016* [Criminal Procedure Code. Commentary on the 2016 amendments], Warsaw 2016, pp. 656–657.

indicated that: "adjudication by the court competent so far, in its composition to date, is an 'exception' to the principle of the directly binding new act laid down in Article 27 in the event of changes introduced with respect to this issue after the amendment. This provision [Article 30 of the September amendment – note by W.J.] applies only to judicial proceedings in cases in which a trial before a court of first instance or appeal proceedings before a court of second instance were initiated before 1 July 2015. Judicial proceedings mean the main trial and the issue of a final ruling in compliance with all statutory requirements, i.e. the course of procedural activities from the moment laid down in Article 381 CPC until the moment laid down in Article 418 CPC."[22] None of the above-mentioned stands was substantiated.

The Supreme Court, in its ruling of 29 November 2016, in the starting point of its analysis, agrees that the interpretational dilemma connected with Article 30 of the September amendment results from the lack of clear indication of the initial moment of petrification of a bench composition. Therefore, two ways of interpreting the content of this provision presented above are possible. Firstly, it can be assumed that it concerns a bench determined by the statutory provisions in force at the moment of proceeding initiation in a given court instance. Secondly, it is possible to assume that it concerns a particular bench adjudicating in the case. The Supreme Court supported the former of the two ways of interpreting the principle of petrification of a court composition and indicates the following arguments for it.

Firstly, referring to Article 30 of the September amendment, the Supreme Court agrees that in the course of establishing the initial moment of petrification of a court composition that is not directly defined in statute, it is necessary to carefully do this by analogy to transitional provisions laid down in other acts amending the Criminal Procedure Code. To tell the truth, there are a few general rules of transitional regulations (including petrification), however, "detailed analysis of the way of laying them down in transitional provisions leads to a conclusion that there is a lack of uniformity in the field of defining the initial and final moment when the rules are in force".[23]

Secondly, the initial moment of petrification of a court bench composition may be established by *argumentum a contrario* to the phrase "conclusion of the proceedings in a given instance" used by the legislator in Article 30 of the September amendment. This prompts a conclusion that it concerns the initiation of the proceedings in a given instance.

Thirdly, assuming the above, it is necessary to draw a conclusion that the change of a court composition referred to in Article 30 of the September amendment does not concern a specific bench appointed to adjudicate in a given case but the statutory provisions creating the bench composition. It is obvious that if the initiation of the proceedings before a court of a given instance is a point of time important for determining petrification, it takes place before the appointment of an adjudicating bench. As the Supreme Court stated, statute cannot modify a court composition in the

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[22] M. Świetlicka, *Komentarz do przepisów przejściowych ustawy z dnia 27 września 2013 roku o zmianie ustawy Kodeks postępowania karnego i niektórych innych ustaw (Dz.U. 2013.1247)* **[**Commentary on the transitional provisions of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws, Dz.U. 2013.1247)**]**, Lex/el 2015.

[23] Supreme Curt ruling of 29 November 2016, I KZP 9/16, OSNKW No. 12, item 85, 2016.

definite meaning. Moreover, in the context of the discussed argument, once again it was emphasised that there is a lack of sufficient grounds for basing the interpretation of Article 30 of the September amendment on the comparison of the wording of the transitional provisions of various amendments to the Criminal Procedure Code. In the provision of Article 18(2) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts, the legislator included a phrase about the use of the provisions regulating the composition of a court to date and not about adjudication by the bench to date. Therefore, it cannot be a convincing argument against the stand adopted by the Supreme Court.

Therefore, the Supreme Court unambiguously states that: "the wording of the provision of Article 30 of the above-mentioned Act [the September amendment – note by W.J.] confirms that the regulation refers to petrification of the composition of a court resulting from the provisions in force to date."[24]

The above arguments presented by supporters and opponents of the stand that petrification of the composition of a court takes place at the moment of proceeding initiation in a given instance provoke the following comments.

Firstly, the opinion shared by the two parties to the debate that the legislator did not determine the initial moment of petrification of the composition of a court is an obvious starting point to solve the problem in question. Therefore, it is necessary to establish the interpretation of Article 30 of the September amendment. Since it is not possible to determine it based on a linguistic analysis because the legislator does not mention the issue, it is necessary to use other methods of interpretation. In this context, first of all, it is required to consider the Supreme Court argument indicating that as Article 30 of the September amendment uses the phrase "until the conclusion of the proceedings in a given instance", *a contrario* it should be understood that the initiation of the proceedings in a given instance should be an initial moment. Making comments on this argument, it must be stated that, although this seems to be very intuitive, it is hard to recognise it as decisive as the Supreme Court did. To keep the discussion in order, it is worth mentioning that *argumentum a contrario* was not used in this reasoning. In fact, an appeal from the contrary follows an assumption that if a legal norm binds some consequences and a specified fact together, another different fact shall not result in such consequences.[25] Thus, it is obvious that it is not this course of reasoning in the context discussed. What we deal with is an assumption that since the legislator indicates the moment of concluding the proceedings in a given instance, it must be silently assumed that it concerns the whole proceedings before a given court instance. However, the problem with this reasoning consists in the fact that it is difficult to indicate arguments for it. First, it is not a rule generally applied in transitional provisions. For example, Article 18(1) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts adopted other initial and final moments than those indicated above. Those were the beginning of the main trial

[24] *Ibid*.

[25] Compare, e.g. L. Morawski, *Wstęp do prawoznawstwa* [Introduction to jurisprudence], Toruń 2005, p. 194.

and the issuing of a valid judgement in a case, respectively, unless it is determined otherwise in statute. Then, a question arises what conclusion concerning the initial moment of petrification of a court composition should be drawn in a situation in which the final moment of the principle of petrification were determined unlike in Article 30 of the September amendment, i.e. "before the conclusion of the proceedings in a given instance". Again, we can use as an example Article 18(1) Act of 15 March 2007 amending the Act: CCP, Act: CPC and some other acts. The Act *in fine* made a reservation that in case of a stay of proceedings or a trial adjournment, provided that after the stay or adjournment the proceedings are not continued, and in the event of rehearing, the proceedings shall be conducted in accordance with the new regulations. What is typical, the Supreme Court in the ruling of 29 November 2016, in the context of the rules of petrification of the composition and competence of a court and proceeding stages, emphasises that "there is a lack of uniformity in the field of determining the initial and final moments for the rules to bind".[26] At the same time, the Court assumes that since the provision refers to the conclusion of the proceedings in a given instance, this must *implicite* mean reference to the initiation of the proceedings in a given instance. In the light of the above, there are no grounds for acknowledging that the intuitive interpretation of Article 30 of the September amendment does not raise any doubts and silently expresses something that was to be obvious on the basis of transitional provisions.

Secondly, one should agree with the Supreme Court that systemic reference to transitional provisions introduced by earlier acts amending the Criminal Procedure Code should be made carefully. Taking into consideration legislative inflation and the insufficient quality of law enactment in Poland, the conclusion seems to be fully justified. Obviously, it would be desirable to adopt a uniform method of creating transitional provisions[27] and use a standard template to develop them, but if we look realistically at the practical conditions, the assumption has no chance to be always implemented. However, the above cannot lead to a conclusion that a comparative analysis of transitional provisions does not make sense. One cannot exclude that some kind of general regularities will be established and they will serve as arguments in the process of transitional provisions interpretation. In the circumstances discussed, however, a comparative analysis does not lead to unambiguous conclusions. The analysis of the transitional provisions quoted at the beginning of the article, enacted in the period when the Criminal Procedure Code of 1997 was in force, does not allow us to draw unambiguous conclusions concerning the issue in what way the rule of petrification of a court composition should function in principle.

Thirdly, it is necessary to make comments on the Supreme Court's argument indicating that the phrase "if the change of a court composition resulted from statute" obviously cannot concern the bench appointed because there in no legal act that can change the composition of an actually appointed bench. One must agree with the Supreme Court that the phrase used by the legislator is actually

[26] Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW No. 12, item 85, 2016.

[27] Obviously, in accordance with the general recommendations in the Regulation of the President of the Council of Ministers of 20 June 2002 concerning the legislative technique rules (Journal of Laws [Dz.U.] of 2016, item 283).

an ellipsis. In fact, it does not refer to the actual composition of a bench but to the provisions regulating the matter. This statement, however, in no way exacts interpretation that the initiation of the proceedings is a moment significant for the assessment of the consequences of the change of regulations. Even after an adequate reformulation of the provision in question, the problem of establishing the initial moment of petrification of a court composition remains and the provision in such wording can continue to be diversely interpreted.

In the light of the above findings, it must be assumed that the arguments presented by the Supreme Court cannot be recognised as convincing to such an extent that they would make it possible to acknowledge that Article 30 of the September amendment should be understood as petrification the composition of a court from the moment of the initiation of the proceedings in a given instance. Thus, in this state of facts, it is necessary to use the purposefulness-based arguments, which the Supreme Court completely ignored in its ruling. However, it is hard to overlook the fact that the consideration of purpose-related reasons is, as it seems, critical for the reasoning presented by the opponents of the opinion supported by the highest court instance. There is no doubt that petrification of an adjudicating bench composition in cases that the amendment "deals with on the fly" is to prevent rehearing them from the beginning and wasting the input of labour and resources invested before the regulations amending the provisions concerning a bench composition came into force. This assumption has two important implications. First, it provokes a conclusion that such input occurs when a bench has already been appointed. Only in such a situation, its change may result in wasting the attempts to examine a given case. Then, the interpretation of a relevant transitional norm assuming petrification of the composition of a court cannot lead to adopting interpretation that will not fulfil its aim. However, determining the initiation of the proceedings as the moment of petrification of a bench composition, the Supreme Court does it in a way that results in petrification of a bench also in situations in which there was no input into a case examination justifying such steps. The circumstances of the case adjudicated by the Appellate Court in Katowice can be the most flagrant example of this. The Court issued a ruling on 17 February 2016 concerning a claim for compensation under Article 552 CPC filed to an incompetent court before the Act amending CPC came into force and referred the case to a competent court after the Act entered into force. In such a situation, there are no grounds whatsoever for appointing a bench under non-binding provisions. The aim of such a possibility, dictated by the economics of trials, cannot be achieved in the presented situation. There are other examples confirming that the initiation of the proceedings is not the optimum moment of petrification of a bench composition. In the context of criminal cases initiated by an indictment, a situation in which an indictment filed before the amending act comes into force is returned to the prosecutor because of formal shortages that must be eliminated and filed again in the period when the amending act is already in force can be an example.

Therefore, in this light, it is hard to agree with the Supreme Court that the lack of explicit determination of the initial moment of petrification of a bench composition in the relevant provision, in the course of its interpretation, leads to the assumption

that it is the moment of the initiation of the proceedings in a given instance. What should be decisive in establishing it are purpose-related reasons, which make it possible to resolve doubts resulting from the linguistic interpretation of Article 30 of the September amendment. Moreover, the Appellate Court in Katowice, in its ruling of 17 February 2016, indicates that the Supreme Court provided too extensive interpretation of the provision in question, which is in fact an exception to the general rules of new law application.

Approval of the above-presented stand makes it necessary to indicate another moment than the initiation of the court proceedings in a given instance when petrification of a bench composition occurs. In the ruling of 17 February 2016, the Appellate Court in Katowice assumes that the moment when an adjudicating bench starts the main trial is one. It argues this results from the fact that the legislator relates the bench composition "only to adjudicating in a trial or a session (Articles 28 to 30 CPC, and in the event of cases from Chapter 58 CPC – the provision of Article 554 §2 CPC)". However, this opinion is not convincing. First, there are no grounds for adopting it on the basis of systemic interpretation. Not all the CPC provisions directly bind adjudication in the trial and a session and the bench composition together. The legal norm concerning the composition of a bench is given a different wording in Article 29 §2 CPC or Article 534 §1 CPC. Such examples can also be found in other acts applicable to criminal cases.[28] Then, an adjudicating bench and its members are assigned entitlements to perform specific procedural activities before a trial or a session in particular CPC provisions (e.g. Articles 349 §7, 350 §§2 to 4 and 352 CPC) or outside those forums of adjudicating (Article 396 CPC). Therefore, there are no grounds for binding only a court composition and adjudicating in a trial or a session together. The opinion does not find grounds in the Supreme Court ruling of 27 February 2007,[29] which is indicated in jurisprudence as one justifying the stand discussed. The ruling assumes that "court proceedings (Article 439 §1(10) CPC) means the conducting of a main trial and issuing a final ruling, in compliance with all statutory conditions from the moment laid down in Article 381 CPC until the moment laid down in Article 418 CPC". It is necessary to note that it was issued in a special context of the interpretation of absolute grounds for appeal consisting in the absence of obligatory defence counsel in court proceedings or such counsel's failure to take part in the activities in which participation is obligatory. In the circumstances that are connected with the obligation to ensure the right to defence, it does not raise objections. However, there are no grounds for its generalisation for other contexts. By the way, the Supreme Court rightly criticises the opinion and states "not taking part in academic discussions concerning the stages of the court proceedings, only in order to provide an example, it is necessary to indicate that the first stage of the jurisdictional proceedings before a court of first instance is the initial review of the indictment, and the first stage of the proceedings before a court of second instance is a review of admissibility of an appellate measure and case files to check their

[28] Compare, Article 8(1) of the Act of 17 June 2004 on complaints against the infringement of a party's right to be heard in the preparatory proceedings conducted by a prosecutor or supervised by a prosecutor and court proceedings without unjustified delay.

[29] I KZP 38/06, OSNKW No. 3, item 23, 2007.

appropriate organisation and the activities performed after the issue of a ruling".[30] Summing up, it cannot be assumed that that the beginning of adjudicating in a trial or a session constitutes the moment of a bench composition petrification.

The exclusion of the possibility of recognising the beginning of adjudicating in a trial or a session as the moment of petrification of a bench composition causes a necessity of indicating another point in time. Since the provision of Article 30 of the September amendment refers to a court bench, it seems that its appointment is the appropriate moment. There are no linguistic or systemic obstacles to such a solution. As it was highlighted above, both the analysis of the wording of Article 30 of the September amendment and consideration of transitional provisions adopted in the acts amending the Criminal Procedure Code in the past do not lead to unambiguous conclusions. In this light, the purposefulness-related reasons should be decisive. Those, however, are unequivocal arguments for the solution proposed. It should be noted that the appointment of an adjudicating bench is a moment when the bench (or its members) may undertake activities aimed to prepare the case for hearing. Therefore, from this moment the change of the adjudicating bench would have a negative impact on the economics of trials.

Finally, it should be emphasised that the above-mentioned solution is not in opposition to the fact that Article 30 of the September amendment jointly regulates the issues concerning the change of a court competence and composition, and in case of the former it is unquestionable that petrification starts with the initiation of the court proceedings. The indicated construction of the provision of Article 30 does not result in the necessity of assuming that the moments of petrification should be identical for both issues. The lack of their unambiguous indication makes such interpretation possible and purposefulness-related reasons, as it has been highlighted earlier, are unambiguous arguments for that.

Summing up, it can be stated that although in the sphere of transitional provisions of the law of criminal procedure it is possible to identify specific rules governing their creation and functioning, it cannot be forgotten that those provisions should be developed and interpreted so that they fulfil their aim, namely safeguard fluent and undisturbed transition from the old to the new legal state. Thus, the identification of values behind their particular form and interpretation is extremely important.[31] Looking through the prism of the above assumption, it is hard to agree with the Supreme Court's stand that the lack of clear indication of the initial moment of a court bench petrification in Article 30 of the September amendment provokes a conclusion that the initiation of court proceedings is such a moment. The analysis conducted leads to a conclusion that it should be the moment of the appointment of an adjudicating bench. There are no linguistic and systemic reasons against such a solution and purposefulness-related reasons unambiguously support it. With respect to the role of transitional provisions, it seems justified to give the latest factor primacy within the issue discussed. However, generalising the issue and going

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[30] Supreme Court judgement of 23 September 2016, III KK 41/16, Lex No. 2122061.

[31] H. Paluszkiewicz exposes this issue not without reasons in: *ibid.*, *Studia…* [Studies…], *passim*.

beyond the interpretation of Article 30 of the September amendment, it is necessary to propose that the moment of petrification of an adjudicating bench be related to the appointment of the bench and not to the initiation of the proceedings in a given instance. The aim can be achieved either by the above-proposed interpretation of transitional provisions, which the legislator would give the form respective to Article 30 of the September amendment,[32] or by eliminating doubts occurring in this matter, thanks to clear determination of the initial moment of a court composition petrification in the transitional provisions enacted in the future.

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[32] For instance, Article 22 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts.

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PETRIFICATION OF A COURT BENCH COMPOSITION IN THE TRANSITIONAL PROVISIONS: COMMENTS IN THE LIGHT OF THE SUPREME COURT RULING OF 29 NOVEMBER 2016, I KZP 9/16

Summary

The article discusses the temporal aspect of a court bench petrification regulated in the transitional provisions of the Act of 27 September 2013 amending the Criminal Procedure Code and some other acts. The direct reason for discussing the issue is the Supreme Court's stand presented in its judgement of 29 November 2016 (I KZP 9/16, OSNKW 2016, No. 12, item 85). It assumes that petrification of a court bench takes place at the moment of initiating the proceedings of a given instance. It is necessary to note, however, that the issue solved by the Supreme Court raises doubts in judicial decisions as well as jurisprudence. The author draws attention to them and reconstructs arguments for and against the Supreme Court's opinion. In conclusion, he states that the linguistic and systemic interpretation of the provision of Article 30 of the Act of 27 September 2013 amending the Criminal Procedure Code and some other acts does not unanimously support the opinion on petrification of a court bench at the

moment of initiating the proceedings of a given instance, and the results of the purpose-related interpretation are quite the contrary. Thus, it should be assumed that the moment appropriate for petrification of a court bench is its establishment in accordance with the provisions of the Criminal Procedure Code. The analysis and conclusions presented are not applicable only to the context indicated by the above-mentioned amending act but also, due to the way in which a court bench petrification is constructed in the amending acts, including the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, have universal significance for the discussed issue.

Keywords: petrification of a court bench, transitional provisions, amendments to the Criminal Procedure Code

PETRYFIKACJA SKŁADU SĄDU W PRZEPISACH INTERTEMPORALNYCH – UWAGI NA TLE POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 29 LISTOPADA 2016 R., I KZP 9/16

Streszczenie

W artykule omówiono aspekt temporalny petryfikacji składu sądu uregulowanej w przepisach intertemporalnych ustawy z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw. Bezpośrednim powodem poruszenia tej kwestii jest stanowisko zajęte przez Sąd Najwyższy w postanowieniu z dnia 29 listopada 2016 r. (I KZP 9/16, OSNKW 2016, nr 12, poz. 85). Przyjęto w nim, że petryfikacja składu sądu następuje w chwili wszczęcia postępowania w danej instancji. Należy jednak zauważyć, że rozstrzygana przez Sąd Najwyższy problematyka budzi w orzecznictwie i doktrynie wątpliwości. Autor wskazuje na nie oraz rekonstruuje argumenty przemawiające za i przeciwko stanowisku Sądu Najwyższego. W konkluzji stwierdza, że za poglądem o petryfikacji składu sądu od chwili wszczęcia postępowania w danej instancji nie przemawiają jednoznacznie wyniki wykładni językowej oraz systemowej przepisu art. 30 ustawy z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, natomiast sprzeciwiają się jej wyniki wykładni celowościowej. Tym samym należy przyjąć, że momentem początkowym utrwalenia składu sądu jest jego wyznaczenie zgodnie z przepisami Kodeksu postępowania karnego. Przeprowadzona analiza oraz sformułowane wnioski nie dotyczą wyłącznie kontekstu wskazanej powyżej ustawy nowelizującej, ale, ze względu na sposób konstruowania petryfikacji składu sądu w ustawach nowelizujących, w tym ustawie z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, mają uniwersalne znaczenie dla poruszanej problematyki.

Słowa kluczowe: petryfikacja składu sądu, przepisy intertemporalne, nowelizacja kodeksu postępowania karnego