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CONTENTS

ARTICLES

SPIS TREŚCI

ARTYKUŁY

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THREAT TO AN INDIVIDUAL'S PSYCHOSOCIAL IDENTITY IN THE CONTEMPORARY WORLD

BRUNON HOŁYST

1. ESSENCE OF PSYCHOSOCIAL IDENTITY

The issue of identity, its social origin and function are the subject for research in many sciences, including psychology and sociology. In sociologists' opinion, the concept of identity is connected with the process of 'giving' people social existence[1]. In contemporary societies and in attempts to explain or understand social phenomena of our times, it is a necessary conceptual tool in the analysis of contemporary man's real-life situations. It makes it possible to understand the behaviour connected both with his individuality and his position in the social structure[2]. The term 'sense of identity' or 'identification' is also used in colloquial speech. Using this term, one can mean the sense of belonging to a specific group as well as identification with some ideas, objectives or values adopted as one's own.

Determining the identity, i.e. who a man is, based on his or her individual features and personal background, we speak about personal identity. However, characterising it according to nationality, citizenship, religion or social functions, we speak about social identity. At the same time, personal identity ensures the sense of one's own uniqueness while thanks to social identity a man has a sense of belonging to other people, specific groups, organisations as well as the awareness of having one's position in the world.

In the time of globalisation, the issue of self-awareness, identity and a sense of common features with a group or organisation in which an individual functions, a sense of belonging to a group and also noticing diversity of the group is very up-to-date. An individual being a part of a group, in order to become its integral part, must at least partially internalise its values. He must also identify himself with its collective

[1] P.L. Callero, The Sociology of the Self, *Annual Review of Sociology* 2003, 29, pp. 115–133.
[2] H. Markus, S. Kitayama, Culture and the Self, *Psychological Review* 1991, 98, pp. 224–253.

aspirations and accept the group's objectives as one's own. It seems that it may be instituted by playing a social role in a group. Every man belongs to various social groups and plays various roles in them; in each, he or she shapes their unique individuality or uses a certain part of their social personality[3]. It is highlighted that a trend has been observed in social sciences recently to generalise the concept of identity and extend its range to a community. In this case, we speak about various forms of collective identity[4].

The sense of security lets the contemporary man play various social functions, and thus develop one's social identity. Moreover, every social group is striving for continuity, durability and distinctiveness, i.e. to maintain its own identity. The concept of identity refers to the basic need of individuals and groups, which is the need to belong. Functioning in a group shapes the sense of closeness and mutual bonds, the sense of roots, stability and homeliness. Maintaining identity also makes it possible to satisfy the need of security the lack of which causes damage both to an individual and to a group of people because it destabilises its functioning and lowers the efficiency that depends on the so-called group's collective will understood as the sum of its members' desires to achieve the collective objective. The share in the implementation of the group task should trigger its members' readiness to subordinate their own interests and objectives to the interests and objectives of the group.

In case of a lack of the sense of security, people demonstrate a tendency to change the existing state of things or even to oppose to unfavourable changes and the use of protective means that may restore their sense of security. This is a proof that security is not a certain state of things but a continuous social process within which entities strive to use mechanisms ensuring their sense of security. Therefore, one can state that the direction of individual desires of the group members depends on the condition of an organisation and its way of functioning as well as the degree of ensuring their members' sense of stability.

The concept of identity in such sciences as sociology and psychology, especially social psychology, often refers to the sphere of an individual's self-knowledge[5]. Thus, it can be defined as a set of ideas, opinions and beliefs a man has about his or her self. A man's subjectivity, self-knowledge and awareness of 'I' have been the subject of moralists', theologians', philosophers', artists' and psychologists' and sociologists' reflections. Since the beginning of sociology, the representatives of this science have also been interested in the concept of identity. Early interest in self-perception was in conjunction with the conviction that in the analysis of the man's actions, it is necessary to take into consideration the influence of the way of self-perception on the direction and the interactive forms of an individual's activeness. Ch.H. Cooley introduced a concept of the 'looking-glass self', which he used to describe the mechanism creating the social actor's opinions and imagination of one's self[6]. G.H. Mead, studying the issue

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[3] E. Goffman, *Człowiek w teatrze życia codziennego [The Presentation of Self in Everyday Life]*, PIW, Warszawa 1981.

[4] A. Melucci, *The Process of Collective Identity*, Temple University Press, Philadelphia, PA, 1995.

[5] Z. Bokszański, Tożsamość [Identity], [in:] *Encyklopedia socjologii [Encyclopaedia of sociology],* vol. 4, Oficyna Naukowa, Warszawa 2002, pp. 252–255.

[6] Ch.H. Cooley, Human Nature and the Social Order, [in:] Ch.H. Cooley (ed.), *The two major works of Ch. H. Cooley*, Glencoe, Ill., 1956.

of interaction and emphasising its dynamic character, used the concepts of 'getting the generalised other' and 'the distinct other' to describe the development of the self of an acting subject[7]. R.E. Park proposed a term 'self concept' linking it with a catalogue of social roles played by an individual[8].

A social psychologist and psychoanalyst, E. Erikson, is said to have played the most important role in introducing the concept of ego identity into social sciences[9]. He considered identity in a biographical dimension and analysed it with the use of a concept of a 'life cycle' and linking it with changes in social macrostructures. In his opinion, identity is a stable formula of self-knowledge that is formed in the meeting point of three basic dimensions of individuals' existence: their organisms' ability, their aspirations and opportunities, and social roles and prototype careers offered by the society. Failure to integrate these three dimensions leads to 'identity diffusion', the most visible manifestation of which was inability to manage oneself. Erikson's research programme, valorising an individual's self-image as an important area of psychosocial research, opened it to the analysis of macro-structural changes. It also contained an important thesis on the significance of identity in an individual's life.

2. IDENTITY MODELS

Erikson's ideas underwent far-reaching transformation in the thought development. New ways of understanding a social actor's identity were developed and they introduced new methodological proposals to the original concept, also new worldview and political contents. The double origin, sociological and psychological, of the concept of identity is sometimes emphasised when presenting basic differences between attitudes towards the theory of identity. These stands differ because of polymorphic ways of perceiving oneself by a social entity. Two main reasons for the use of the concept of identity in sociology are given[10]. Firstly, it is a necessity to supplement a set of concepts connected with the sociological description of an individual observed against the background of changing social structures and ways of an individual's social belonging. The second reason is the usefulness of the concept of identity in direct (face to face) analyses of interpersonal interactions. In the typology proposed by R. Robbins, three main theoretical models of the concept of identity are distinguished: the identity health model, the identity interaction model and the identity worldview model[11]. This typology may be supplemented with the identity ecological model. The source of the identity health model is the work of the above-mentioned E. Erikson. An individual's identity is treated as a typical area of mediation between the organism and the requirements of social life,

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[7] G.H. Mead, *Umysł, osobowość i społeczeństwa [Mind, Self and Society]*, PWN, Warszawa 1975.

[8] R.E. Park, Human Nature, Attitudes and the Mores, [in:] K. Young (ed.), *Social Attitudes*, New York 1931.

[9] E. Erikson, *Childhood and Society*, New York 1963.

[10] Z. Bokszański, Tożsamość [Identity], [in:] *Encyklopedia socjologii [Encyclopaedia of sociology]*, vol. 4, Oficyna Naukowa, Warszawa 2002, s. 253.

[11] R. Robbins: Identity, Culture and Behaviour, [in:] J.J. Honigman (ed.), *The Handbook of Social and Cultural Anthropology*, Chicago 1973.

an area in which a certain stable formula of an individual's existence is established which has its basis in the similarity between an individual's self-perception and his/her perception by their social surrounding.

The health model places an individual's identity in the context of inquiries about the reasons for mental disorders, especially those connected with various forms of social maladjustment and social pathology. As a result of the inspiration from the discussed model, e.g. the influence of changes in identity on the occurrence of disorders in nutrition was examined; there were attempts to support a thesis on a link between the incidence of cancer and a sudden change in or rejection of an individual's major identification. An approach was developed linking the analysis of an individual's psychological problems to general social problems, especially with identity-related results of cultural conflicts, migration and discrimination[12]. Erikson's term 'identity diffusion' holds the central position in this approach.

The theoretical assumptions of identity interaction model originate from the occurrence of the concept of an individual's identity in interactionism. The concept of a social actor's identity constituted a necessary supplement to one of the fundamental categories of interactionism, i.e. the idea of a 'perspective' determining a horizon of the actor's orientation in the surrounding, and consequently a direction of his/her action. The perspective adopted by an entity can be analysed in the context of such factors as 'the distinct other', the reference group, the course of the process of adopting social roles that finally are integrated in a form of a person's self concept[13]. Research was carried out into the attitudes towards one's self, the attitudes that were then called a concept of an individual's own self. According to the assumptions of this orientation, what is to be typical of a social actor is a relatively stable trans-situational concept of one's self, which he/she contributes to interaction as a variable explaining his/her action. There was also a proposal of a technique of studying the concept of self, the basic formula of which is used at present. Another parallel current developed and was then called the Chicago School. Its researchers exposed the processualism of the social self and its direct bonds with the interaction occurring here and now. They also questioned the grounds for a thesis on an individual's stable, trans-situational self-representation. They studied the polymorphic way of experiencing oneself in interaction, and E. Goffman looked for evidence for three fundamental, in his opinion, versions of identity manifestations: social identity, personal identity and ego-identity[14]. The current developed a basis for a biographic analysis of identity transformation, which uses the technique of a narrative interview[15].

The identity worldview model uses such concepts as value, cultural pattern or ethos. The concept of identity is understood as a set of stable premises of one's own image developed among the members of a given community. The premises originate from

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[12] Z. Bokszański, Tożsamość [Identity], [in:] *Encyklopedia socjologii [Encyclopaedia of sociology]*, vol. 4, Oficyna Naukowa, Warszawa 2002, p. 253.

[13] Z. Bokszański, *op. cit.*, p. 254.

[14] E. Goffman, *Stigma. Notes on the Management of Spoiled Identity*, Harmondsworth 1979.

[15] M.W. Bauer, G. Gaskell, *Qualitative Researching with Text, Image and Sound: A Practical Handbook*, Sage, London 2000.

the features of the social structure or entirely anthropologically understood culture of this community. The identity worldview model also refers to the thesis on the change in the psychosocial conditions of an individual's existence in the contemporary society and thus on the necessity to introduce a concept of identity to the language of the sociological theory. It is pointed out that in societies entering the post-industrial phase, there was a change in the principle organising individuals' self-perception, a transition from 'an institution' to 'an impulse' as a focus of the image of one's self[16]. The transition resulted from the loss of 'reality' by the institutional structure of the society caused by a general change in social bonds attitudes, which expose consumption more and more clearly and not production as a group-forming factor, as it was formerly. In the identity ecological model, developed in the contemporary social psychology, there is an attempt to distinguish the area of man's self-representation as an area of research allowing for quantitative analyses of the processes of the occurrence and transformation of various dimensions of an individual's identity. The research aims to reconstruct the structure and principles of functioning of the system generating various forms of a social actor's self-perception[17].

In social sciences, there is a tendency to generalise the concept of identity and extend its scope to a community. In such a case, we speak about various forms of collective identity. It sometimes meets with objections on the part of those theoreticians who believe that the use of the concept of identity to speak about a community may only be metaphorical in nature. In spite of that, there are works devoted to identities of ethnic groups, national identities or identities of social movements. There were attempts to formulate general descriptions of collective identities[18]. At the beginning of man's evolution, human beings were limited by their physical skills. Over dozens of thousands of years, people have developed other aspects of themselves and at the present stage of evolution, an individual may be analysed in six dimensions: volitional, spiritual, mental, social, emotional and physical. Volitional potential concerns the ability to make choices[19]. Adequately oriented and active, it is a determinant of freedom, implementation of most secret dreams and hopes. Directed at action in connection with will, it mobilizes experience, energy, knowledge and values – which is the product of other human potentials in order to use them to work for the benefit of the entirety. Healthy will means setting realistic objectives, making decisions, making subsequent attempts and not giving up in a difficult situation and prioritising until the objectives are achieved or changed[20]. Strong and healthy will is the closest ally of successful life. Healthy will is flexible, always open to new knowledge that comes from other personalities, ready to adapt and change in a new situation.

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16 R. Turner, *Struktura teorii socjologicznej [Structure od Sociological Theory]*, Wydawnictwo Naukowe PWN, Warszawa 2010.

17 H. Tajfel, *Social Identity and Intergroup Relations*, Cambridge University Press, Cambridge 1982.

18 L. Holy, Kulturowe tworzenie tożsamości etnicznej: Berti z Darfur [Cultural construction of ethnic identity: the Berti of Darfur], [in:] Z. Mach, A.K. Paluch (ed.), Sytuacja mniejszościowa i tożsamość, *Zeszyty Naukowe UJ* 1992, 15, pp. 21–22.

19 J. Bremer, *Czy wolna wola jest wolna? [Is free will free?]*, Wydawnictwo WAM, Kraków 2013.

20 R.F. Baumeister, T.F. Heatherton, D.M. Tice, *Utrata kontroli [Losing Control]*, Wydawnictwo PARPA, Warszawa 2000.

Substitute choices, undertakings and fulfilments by others, deprive an individual of a possibility of being a 'full' person because failing to include will into one's functioning, they do not let it develop fully. Substitute choices are usually made following fictitious principles, others' wishes, imposed standards; they are not objectives meeting which is beneficiary for an individual[21]. Choices, made under the influence of healthy will and for it, are aimed at an individual, are performed for the benefit of others and oneself. Avoiding responsibility for choices may be defined as an expression of will through omission (action without taking a decision). In some situations, it may be a good choice. Sometimes, events in life such as a war, a fatal disease or a loss of one's next of kin make people be really helpless and cannot act efficiently to achieve an expected result. In such a situation, one may complain about their fate and suppress feelings not to suffer, or simply give up and stop living – literally and figuratively. However, both ways of behaviour provide only the feeling of pain. The choice that can definitively solve the problem is acceptance of truth about the situation, taking a decision on acceptance, admission of one's own determination to do everything or acceptance of helplessness towards it.

3. FACTORS DEVELOPING THE SENSE OF IDENTITY

Spiritual potential is also of great importance to the maintenance of the sense of identity[22]. Over time, the meaning of the word 'spiritual' has become less clear and is now often used as a synonym of the word 'religious'. Every religion is connected with what is spiritual, however, not everything that is spiritual is connected with religion. Spirituality is deeply anchored in human timeless need to understand the sense of life. People have always asked questions: Where are we heading? Where do we come from? Why do we exist? What is happening after death? They were asked at the beginning of various cults and religions, inspired and still inspire poets and philosophers, raise creative anxiety that with increasing strength pushes science towards discoveries about the mysteries of the universe[23]. Spiritual potential of an individual who reached full development may give vent to various types of activeness aimed at meditation, humanitarian activities, prayer, religious organisations, discipline, development of higher 'I', devotion to support for justice, dignity, health and directed both outwards and inwards. In spite of pretence, potential does not mean generalities but also a real source of values. The system of values gives shape to every thought, everyday actions and experience, ennobles the most ordinary aspects of life making them important and beautiful.

An individual looking for happiness is very often occupied with common pleasures but does not find it. Disappointed, he or she starts feeling many symptoms from boredom

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[21] E. Fromm, *Ucieczka od wolności [Escape from Freedom]*, Czytelnik, Warszawa 1993.

[22] D. O'Leary, M. Beauregard, *Duchowy mózg [The Spiritual Brain]*, Wydawnictwo WAM, Kraków 2011.

[23] P. Socha, Psychologia rozwoju duchowego – zarys zagadnienia, [in:] P. Socha (ed.), *Duchowy rozwój człowieka [Spiritual development of man]*, Wydawnictwo UJ, Kraków 2000, pp. 15–44.

and indefinite tension, through irritability, psychosomatic disorders and depression[24]. Eventually, failing to find the sense in life, an individual may commit a suicide or becomes addicted to drugs, food or work. Constant increase in the spread of all these forms of self-destruction is a warning that spiritual helplessness has reached epidemic proportions in our times. People working with alcoholics and their families are aware of the problem. They believe that the state of spiritual helplessness is the reason or the result of the illness that accelerates the movement downward the spiral of addictions.

For ages, a man has had respect for human brains, which are often believed to be an extraordinary gift distinguishing us from animals. Even in societies in which declarations of equality are commonly expressed, individuals with outstanding mental potential are most highly appreciated. Many authors wondered whether ascribing so much value to mental skills is possible. Undoubtedly, however, human brains have an enormous influence on the course of the process of becoming a full person. Some authors write in this context about the strength of the brains because of many different skills taken into consideration[25]. The strength of the brains includes three aspects. The first aspect concerns the past, memory. Human memory has many hidden recesses, which are alive again in the light of new experiences evoking a series of flashbacks. Memory is useful not only because of so obvious reasons as being in the proper place in the proper time or not forgetting about important anniversaries and birthdays. Memories play the role of a teacher because, together with feelings, they compose experiences, and experiences, on the other hand, make the best teacher of life[26]. The strength of brains concerns also the ideas occurring at present. A man links them with past facts and creates new knowledge. Occurrence of an idea as the brains' function still remains a mystery unexplained in biological and physical terms. People are able to formulate ideas, plan, look for alternative solutions and prioritize, which is much more complicated than organisation of files in a computer.

The third aspect of the strength of the brains concerns the future – fantasy and imagination. Imagination, external world inhabited by creatures from dreams, allows for looking for possibilities that are most extraordinary and trying new types of behaviour. Imagination provides new ways of acting and allows for analysing their possible results. Mental potential creates a bridge between the past and the future making them real for the present time[27]. Memories are voices from the past and fantasies speak from the future but we can experience them here and now. Thanks to that, our brains let the past and the future contribute to the present life. The brains all the time remain in interaction with other elements of the system of psyche receiving signals from the body and transmitting their own information to the external world, supervising social interaction and making contact with the world possible.

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[24] C. Hammen, *Depresja. Modele kliniczne i techniki terapeutyczne [Depression: Clinical models and therapy methods]*, Wydawnictwo GWP, Gdańsk 2006.

[25] D. Wegscheider, *If Only My Family Understood Me: A family can find new balance through stress*, Compcare Publishers, New York 1989.

[26] D.B. Pillemer, *Momentous Events, Vivid Memories*, Harvard University Press, Cambridge, MA, 1998.

[27] C.W. Mills, *Wyobraźnia socjologiczna [The Sociological Imagination]*, Wydawnictwo Naukowe PWN, Warszawa 2007.

Contacts with other people may be a source of the biggest happiness as well as a problem for everybody. Social potential provides benefits even in the least significant contacts: with a bank clerk, colleagues, a lecturer, i.e. with various people in the course of the roles they play when meeting in everyday life. Such contacts are more pleasant and efficient if social potential is properly used. In contemporary societies, much importance is attached to learning skills that make people more attractive to others, making it possible to manage life situations in a way that is beneficial for an individual. It is also important how much one can get and not the quality of the exchange, which, unfortunately, is connected with a failure to develop such features as straightforwardness, openness, honesty, closeness and cooperation and causes even their weakening. At the same time, these aspects of social potential are fundamental for the creation of and deepening important relations in life: with children, parents, spouses and friends. Inability to establish and maintain relations is reflected in the development of addictions, divorces, violence and psychosomatic disorders[28]. The more often social potential is used, the faster its positive effects occur. Every relation and every contact concerns two persons, each of which has social potential. Neglected social potential is weakened, e.g. in case of addicts' families. Potential once lost is being re-established for a long time and among all things people depend on it depends on other people most.

Emotional potential has a specific significance in developing the sense of security. Emotions develop in a natural way, giving taste to life, providing joy. One should let them occur in the full light of awareness and use them in a good way regardless of their content. Emotions are often described as feelings, internal responses to internal or external events. Unable to manage emotions, people pretend they do not exist. For the long term, such behaviour is not a good solution as the cost is very high. Truly experienced feelings give colour to life, allow for establishing and maintaining contacts with other people and the surrounding world. Contact with one's own feelings opens a person to intuitive insight. If an individual expresses his or her emotions in a sensible way, others feel safe. Appropriately managed emotional potential creates a constant stream of energy strengthening actions aimed at achieving objectives. A person who suppresses emotions incurs big losses. People who feel fear cannot sometimes understand that all emotions are good and what may be inappropriate or 'bad' is the way in which they are interpreted[29].

In the face of very strong feelings, there is always a choice of response. For example, in a situation when somebody insults another person publicly, the insulted person may feel embarrassment, anger or shame; it may make their flesh creep, they may clench their teeth or fists or go red. But an individual may make a choice and respond in different ways. He or she may hit the other person expressing anger, but this will not provide relief and will increase the feeling of embarrassment; a person's response may take the form of insult, too; they may do nothing and say nothing but remain angry, nurture it and, having an opportunity, take revenge; they may get rid of

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[28] I. Pospiszyl, *Patologie społeczne [Social pathologies]*, Wydawnictwo Naukowe PWN, Warszawa 2008.

[29] P.N. Johnson-Laird, K. Oatley, Poznawcza i społeczna konstrukcja w emocjach [Cognitive and social construction in emotions], [in:] M. Lewis and J. M. Haviland-Jones (eds.), *Psychologia emocji [Psychology of emotions]*, Wydawnictwo GWP, Gdańsk 2005.

all unpleasant feelings and pretend nothing happened. All these choices are improper because they prevent a free flow of emptions in the aggrieved person. More efficient reactions include: waiting for a more appropriate moment and communicating one's feelings; telling the person about one's feelings without accusations and without insult; refraining from speaking and acting and attempting to find another way of managing the accumulated energy. Each of the reactions is an attempt to find the best solution. When people discover they do not have to be helpless victims of their feelings, they start using their emotional potential, limit wrong choices and increase those that are right.

Every man's body is exceptional, unique, contains one of its kind set of possibilities that no other human being has[30]. It depends on the body what a person is able to do in the physical sphere. It is the basis for health, strength, good communication, conscious senses, sexuality, beauty, charm, dexterity, fitness and speed. Physical potential determines all other skills, which find practical expression in it. Properly developed physical potential is a key to many successes in life although finding pleasure is not the only physical function of the body. It can also cause pain as it occurs in case of drug addicts. Internal satisfaction and efficient action constitute a prize for fully developed potentials. If all the potentials are developed, an individual becomes an entirety, which is accompanied by the sense of one's own value. It is a very important element of the personal wellbeing. When an individual's development is complete, they are able to accept all information flowing from others, do not block it and openly react to it. A stable sense of one's own value frees an individual from being preoccupied with one's self and awakes an ability to open oneself to the whole universe. A person whose potentials are disturbed or not fully developed is unable to notice positive features of their own personality. In order to protect their dignity, they do not accept any critical information about themselves. It is very difficult for such people to experience sincere contact with others.

4. ISSUE OF SELF-ASSESSMENT

Many authors dealing with the issue of self-assessment, self-perception, often use a term 'I', which is ambiguous. Two ways of understanding 'I' are usually distinguished. Firstly, 'I' means an individual, organism, subject, being and it is very often connected with the term 'ego'. Secondly, 'I' means a certain way of self-knowledge[31]. In the first aspect, 'I' is a subject who acts and can be determined in terms of actions expressed in a man's active attitude towards the surrounding, the perception, adaptation and thinking. In the second aspect, 'I' as an object of self-knowledge is a set of bases, evaluating opinions that an individual follows in his or her conduct and which refer to their external look, attitude to other people and behaviour.

According to E. Hilgard, 'I' in the first meaning is the so-called deduced 'I' that is analogous to the term 'ego'[32]. It constitutes a construction developed based on external

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[30] O. Sakson-Obada, *Pamięć ciała [Body memory]*, Wydawnictwo Difin, Warszawa 2009.

[31] A. Reber, *Słownik Psychologii [Dictionary of psychology]*, Wydawnictwo Scholar, Warszawa 2000, p. 283.

[32] E. Hilgard, *Wprowadzenie do psychologii [Introduction to psychology]*, PWN, Warszawa 1968.

symptoms of the subject's behaviour, created as a result of deduction made by competent observers. 'Ego' is a structure representing a centre of decision-making, planning and defence, thus determines an acting individual. An external observer may draw conclusions based on external symptoms of mechanisms and objectives of 'ego', even such ones that an individual is not aware of. In such an approach, directing awareness to one's self is minimal because when a man performs activities he usually pays attention to their implementation and does not focus on perception or thoughts at all or does it on a smaller scale. In the second meaning, 'I' refers to a person who is aware of himself/herself, is a set of features perceived by him/her consciously. Thus, a man may think about behaviour in various situations, the process of perception, thinking. Naturally, a man only partially realises what kind of psychological processes and behaviour occur. According to other authors, the term 'I' means a specific person, on the one hand a subject got to know by oneself, and on the other hand an agent of a psychological action[33]. Thus, the same term refers to two different phenomena occurring in two different aspects: an objective one where 'I' constitutes an object of behaviour, skills, feelings, self-knowledge to be realised and understood, and a subjective 'I' as an acting individual.

It is pointed out that only a fragment of the system of 'I' that is integrated and organised develops self-perception. Self-perception is only an element of a coherent system of 'I', the one that is highly integrated and organised, really coherent and probably in some sense one that an individual realises most. Experiences creating 'I' are 'raw material' that is the origin of an image of oneself. An image of oneself concerns very important and central beliefs for a man. Self-perception includes only those experiences of 'I' that are permanently coded in memory, highly organised, generalised and integrated, creating a coherent whole. If self-perception were not such an entirety with a cohesive structure, its role in an individual's behaviour regulation would be limited. With the development of an individual, as a result of generalisation of experiences regarding an individual's direct sensations, a series of more or less cohesive knowledge of oneself is created. It is a relatively stable system of views, beliefs and opinions regarding one's self. According to some authors, the structure of self-perception is not uniform, is 'multi-layer' in character and incorporating many varied elements. W. James separated 'ideal I', i.e. a set of images including all the features that an individual would like to have and pointing out what a man should be like, from 'empiric I' that concerns what a man imagines he is[34].

S. Ossowski, using the terms 'image of oneself' and 'self-characteristics' interchangeably, distinguished two types of the 'image of oneself': 'for others' and 'for oneself'[35]. Among the images of 'I for myself', he distinguished precise and real images of oneself and images of 'ideal I'. According to J. Reykowski, an image of the world includes two parts: what refers to the external world ('not-I') and what refers to the person ('I'). Next, in the part referring to the person's 'I', he distinguishes three sub-

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[33] J. Nuttin, *Struktura osobowości [The structure of personality]*, PWN, Warszawa 1968.

[34] W. James, *Psychologia [Psychology]*, Wydawnictwo Naukowe PWN, Warszawa 2002.

[35] S. Ossowski, *Z zagadnień psychologii społecznej [Issues of social psychology]*, PWN, Warszawa 1967.

structures: 'ideal I', 'conscious I' and 'the sense of one's I'[36]. Undoubtedly, particular elements may be more or less uniform and consistent. Inconsistency very often occurs inside the 'ideal I', which is connected with the fact that there is usually antagonism between a person's wishful thinking and representations and their egoistic desires.

A 'real I' and an 'ideal I' are very important elements of the image of 'oneself'. In the structure of self-awareness, a 'real I' makes all that constitutes an individual's life experience formed under the influence of time. It says what a subject is like at the moment, what his possibilities are, what he has achieved etc. An 'ideal I', on the other hand, includes all the features that it would like to have and also has all that one should be in the light of one's representations, ideals, beliefs, moral norms and desires. An 'ideal I' includes the system of information about what an individual would like to be (a desire-related element) and a collection of information on what an individual should be (a postulative element). The ideal of oneself constitutes a typical moral model, departure from which results in an individual's decreased self-assessment. It develops during the development of the subject. In the first part of a man's life, a postulative element of one's own ideal develops. From the very beginning of a child's life, parents tell them what they should be like and how they should behave highlighting 'good' and 'bad' behaviour. This influence makes a child mix the features that are adequate to others' expectations, usually important people's ones, but it is 'somebody else's' and not 'one's own' ideal. With an individual's development, the ideal becomes more and more desire-related in character and a person adopts some requirements as one's own and tries to act in accordance with them.

What is decisive in the development of an 'ideal I' during adolescence is the peer group, comparison to other members of the group and group influence mechanisms, a system of penalties and prizes for having some features of lacking them. These mechanisms cause that an individual wants to have the features that are appreciated and desired[37]. In the initial stages of development, the people from the closest circles form a child's ideal, then these are book and film characters. The ideas are manifested in behaviour and feelings and determine a man's conduct. In some cases, the 'ideal I' model does not have to influence an individual's conduct, often so when it is beyond its possibilities. A 'real I' plays a dominant role in the structure of self-concept. It is a basis for comparisons and references, is a foundation for the 'ideal I' development. A 'real I' and an 'ideal I' of different people may be in various relations with each other, from full analogy to complete discrepancy. The bigger the discrepancy, i.e. the less an individual meets the requirements, the bigger the threat for the sense of one's own value, the higher self-dissatisfaction.

A man's self-state representation is composed of many specific features, which are material that developed as a result of collection, generalization and organisation of experiences concerning one's self-state. Information on one's self-state is important for an individual, it allows for and determines identification. The information determining a man's identification includes all personal identification data, i.e. first name and

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[36] J. Reykowski, *Procesy emocjonalne, motywacja, osobowość [Emotional processes, motivation, personality]*, PWN, Warszawa 1992.

[37] W. Bąk, E. Higginsa teoria rozbieżności ja [E. Higgins' theory of self-discrepancy], *Przegląd Psychologiczny* 2002, 45, pp. 39–55.

surname, sex, age and profession. Thanks to the perception of one's features, a person develops opinion on his or her body, realises what his/her skills and interests or likes and dislikes are; people start thinking about themselves as introverts or extroverts, they learn about their influence on other people. The scope of phenomena included in self-state representation is really broad. Self-state representation includes many categories of features such as look and physical qualities; skills and abilities; moral features; position among other people; features of emotional reactions and temperament.

The features composing self-state representation are closely connected with an individual's age. With age, the importance and frequency of some features occurrence increase and the significance of some other features decreases at the same time. For example, in adolescence, values connected with one's own personality and character become especially important while matters connected with school, learning and home become less important. The content of self-state representation may be described in terms of three categories of features: physical features that include the organism construction (build, height, health, look and fitness); psychological features among which one can distinguish: intellectual features (thinking, imagination, intelligence, skills), emotional and motivational features (emotional stability, anxiety, energy); social features (friendliness, truthfulness, sociability, jealousy) [38]. Features building self-state representation do not constitute a simple collection of information that an individual acquired in the course of experience. Both quantity and quality of this information is different for different people. It depends on the way in which an individual was raised, the features of their educational environment, age, intelligence, the number of social roles performed, and the scope of interests. If parents influence children in the way that limits their activeness, the attitudes contribute to the development of a narrow and one-sided collection of information about their abilities.

Self-state representation is not just getting to know oneself but also self-assessment consisting in the development of an emotional attitude towards the features and their evaluation. Thus, self-assessment constitutes an assessment-evaluation element of self-representation. Information about oneself and the features providing this information are premises of the assessment of one's possibilities in various situations and different fields of life. Psychologists describe the concept of self-assessment in different ways. It is mainly described as a set of opinions and judgements that an individual refers to one's self. These judgements and opinions concern psychological, physical and social features[38].

BIBLIOGRAPHY

Baumeister R.F., Heatherton T.F., Tice D.M., *Utrata kontroli [Losing Control]*, Wydawnictwo PARPA, Warszawa 2000.

Bokszański Z., Tożsamość [Identity], [in:] *Encyklopedia socjologii [Encyclopaedia of sociology]*, T. 4, Oficyna Naukowa, Warszawa 2002.

Callero P.L., The sociology of the Self, *Annual Review of Sociology* 2003.

[38] For more detailed information see B. Hołyst, *Bezpieczeństwo [Security]*, vol. 2, *Bezpieczeństwo jednostki [Individual's security]*, Warszawa 2014, pp. 243–250.

Fromm E., *Ucieczka od wolności [Escape from Freedom]*, Czytelnik, Warszawa 1993.
Goffman E., *Człowiek w teatrze życia codziennego [The Presentation of Self in Everyday Life]*, Warszawa 1981.
Hammen C., *Depresja. Modele kliniczne i techniki terapeutyczne [Depression: Clinical models and therapy methods]*, Wydawnictwo GWP, Gdańsk 2006.
James W., *Psychologia [Psychology]*, Wydawnictwo Naukowe PWN, Warszawa 2002.
Mead G.H., *Umysł, osobowość i społeczeństwa [Mind, Self and Society]*, PWN, Warszawa 1975.
Mills C.W., *Wyobraźnia socjologiczna [The Sociological Imagination]*, Wydawnictwo Naukowe PWN, Warszawa 2007.
O'Leary D., Beauregard M., *Duchowy mózg [The Spiritual Brain]*, Wydawnictwo WAM, Kraków 2011.
Park R.E., Human Nature, Attitudes and the Mores, [in:] K.Young (ed.), *Social Attitudes*, New York 1931
Pospiszyl I., *Patologie społeczne [Social pathologies]*, Wydawnictwo Naukowe PWN, Warszawa, 2008. P.N. Johnson-Laird, K. Oatley, Poznawcza i społeczna konstrukcja w emocjach [Cognitive and social construction in emotions], [in:] M. Lewis, Haviland-Jones J.M. (eds.), *Psychologia emocji [Psychology of emotions]*, Wydawnictwo GWP, Gdańsk 2005.
Reykowski J., *Procesy emocjonalne, motywacja, osobowość [Emotional processes, motivation, personality]*, PWN, Warszawa 1992.
Robbins R., Identity, Culture and Behaviour, [in:] J.J. Honigman (red.), *The Handbook of Social and Cultural Anthropology*, Chicago 1973.
Sakson-Obada O., *Pamięć ciała [Body memory]*, Wydawnictwo Difin, Warszawa 2009.
Turner R., *Struktura teorii socjologicznej [Structure of Sociological Theory]*, Wydawnictwo Naukowe PWN, Warszawa 2010.

THREAT TO AN INDIVIDUAL'S PSYCHOSOCIAL IDENTITY IN THE CONTEMPORARY WORLD

Summary

The issue of identity is the subject for research in many sciences, especially psychology and sociology. Two types of identity are distinguished: personal and social ones. Personal identity provides an individual with a sense of one's own uniqueness while social identity indicates that a man has a sense of belonging to other people, given groups or organisations and is aware of one's own place in the world. The identity worldview model uses such concepts as 'value', 'cultural pattern' or 'ethos'. The concept of identity is, in this case, understood as a set of permanent features of one's self developed among the members of a given group. The premises originate from the features of the social structure or entirely, anthropologically understood culture of the given community. The identity worldview model also refers to a thesis on a change in the conditions of an individual's psychosocial existence in the contemporary society.

Key words: *identity*, *sense of security*, *self-consciousness*, *sense of closeness*, *identity interaction and worldview model*

ZAGROŻENIE TOŻSAMOŚCI PSYCHOSPOŁECZNEJ CZŁOWIEKA WE WSPÓŁCZESNYM ŚWIECIE

Streszczenie

Problem tożsamości jest przedmiotem badań wielu dziedzin nauki, szczególnie psychologii i socjologii. Odróżnia się tożsamość osobistą od tożsamości społecznej. Tożsamość osobista zapewnia poczucie własnej niepowtarzalności, natomiast tożsamość społeczna wskazuje, iż człowiek ma poczucie przynależności do innych ludzi, do określonych grup, organizacji, a także ma świadomość posiadania swojego miejsca w świecie. Światopoglądowy model tożsamości posługuje się takimi pojęciami, jak wartość, wzór kulturowy lub etos. Koncepcja tożsamości pojmowana jest w tym przypadku jako zbiór trwałych przesłanek obrazu własnej osoby, ukształtowanych wśród członków danej zbiorowości. Przesłanki te wywodzą się z cech struktury społecznej lub całościowo, antropologicznie pojmowanej kultury tejże zbiorowości. Światopoglądowy model tożsamości odwołuje się również do tezy o zmianie warunków psychospołecznej egzystencji jednostki we współczesnym społeczeństwie.

Słowa kluczowe: *tożsamość*, *poczucie bezpieczeństwa*, *samoświadomość*, *poczucie bliskości*, *interakcyjny i światopoglądowy model tożsamości*

ON THE UNDERLYING ASSUMPTIONS FOR THE 2015 CRIMINAL LAW REFORM AND THE MOST IMPORTANT CHANGES IN THE PENAL SYSTEM

MIROSŁAWA MELEZINI

The Act of 20 February 2015 amending the Criminal Code and some other laws[1] has been the biggest amendment to the Criminal Code since it was passed in 1997. Due to the scope and type of changes introduced as well as some expectations, it is especially important for the penal policy that aims at rationalisation and flexible treatment of the so-called petty and 'small' scale crimes. The main motive behind the Criminal Code amendment, presented in the statement of reasons for the bill, was "a defective structure of penalties ruled by courts in relation to the level and characteristic features of criminality"[2].

It must be reminded that the basic criminal and political underlying assumption for the Criminal Code of 1997 was to create such a system of penal response measures in which a penalty of imprisonment would be treated as a category *ultima ratio* in relation to petty and 'small' scale criminality. The main means of penal response to that category of crimes was to be first of all a fine and imprisonment, and possibly a penalty of conditionally suspended imprisonment. At the same time, the Criminal Code established a directive on the primacy of non-custodial penalties and measures over imprisonment in case of crimes that are subject to the alternative non-custodial penalties and imprisonment (Article 58 § 1 of the CC) and created a possibility of ruling non-custodial penalties even in case of crime that is subject to the penalty of imprisonment not exceeding five years (Article 58 § 3 of the CC). With the new approach to imprisonment, the Code also modified the legal shape of, inter alia, a fine and community sentencing and extended the use of conditional discontinuance of the

[1] Journal of Laws of 2015, item 396.

[2] Statement of reasons for the government bill of 15 May 2014 to amend the Act on the Criminal Code and some other laws and the projects of secondary legislation to these acts, paper no. 2393, p. 1.

proceeding as well as conditional suspension of the punishment execution, including a fine and imprisonment[3]. Undoubtedly, the Criminal Code of 1997 with its new philosophy of punishment created opportunities to rationalise penal policy and get closer to the standards of penal policy of most European countries. Moreover, promoting moderation in punishment, it was justified to assume that the solutions adopted in the Criminal Code would lead to the limitation of prison population.

However, the assumption that the penal system should be rational has not been fully implemented. A defectively implemented penal policy has been the source of the continuous high level of the prison population. In 2013 the rate exceeded 221 per 100,000 citizens and the Polish incarceration rate is one of the highest in the European Union. What is even worse, due to highly populated prisons, the number of imprisonment penalties awaiting execution is continually rising (from 28,761 in 2001 to 52,846 in 2014), and the number of people sentenced increased from 26,963 in 2001 to 42,709 in 2014. At the same time, in comparison to the European Union countries, criminality in Poland is at the moderate level having shown a clear tendency to decline since 2005[4].

Thus, the need to modify the system of responding to crime and to implement the formerly adopted assumptions became the main reason for amending the Criminal Code.

The main aim of the Criminal Code amendment was the substantial limitation of the use of conditional suspension of the execution of imprisonment, which was the basic measure of penal response to petty and medium impact crime. The justification of the bill highlights the overuse of a suspended imprisonment sentence in court judgements (applied to almost 60% of all the convicted perpetrators in a year), a measure that is most often ruled in the form of pure probation. Attention was drawn to inappropriate practice of sentencing suspended imprisonment penalty in case of a period longer than

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[3] To read more on the topic see A. Zoll, Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności [Political and criminal assumptions for the Criminal Code in the light of contemporary challenges], *Państwo i Prawo* 1998, no. 9–10, pp. 40–50; A. Marek, Nowy kodeks karny – zasady odpowiedzialności, nowa polityka karna [New Criminal Code: liability rules, new penal policy], *Monitor Prawniczy* 1997, no. 12, pp. 474–475; T. Kaczmarek, Kryminalnopolityczne założenia nowego kodeksu karnego [Criminal and political assumptions for the new Criminal Code], [in:] L. Bogunia (ed.) *Nowa kodyfikacja prawa karnego [New criminal codification]*, Wrocław 1997, pp. 11–30; New Criminal Codes of 1997 with justification, Warszawa 1998, pp. 135–143, 150–165. (Also see M. Melezini, *Punitywność wymiaru sprawiedliwości karnej w Polsce w XX wieku [Criminal justice punitivity in the 20th century Poland]*, Białystok 2003, pp.166–167).

[4] To read more on the topic see T. Szymanowski, *Przestępczość i polityka karna w Polsce w świetle faktów i opinii społeczeństwa w okresie transformacji [Crime and penal policy in Poland in the light of facts and public opinion in the transformation period]*, Warszawa 2012, pp. 47–178; *ibid*., Skazania na bezwzględne kary pozbawienia wolności jako następstwo nieefektywnej polityki karnej [Definitive imprisonment sentencing as a result of inefficient penal policy], *Państwo i Prawo* 2014, no. 4, pp. 79–92; K. Krajewski, Rozmiary i dynamika populacji więziennej w Polsce na tle tendencji europejskich. Uwagi na tle dwóch kwestii spornych [Size and dynamics of prison population in Poland against the background of European tendencies], *PWP* 2008, no. 59, pp. 37–54; M. Melezini, Aktualne problemy polityki karnej, [in:] J. Majewski (ed.), *Nadzwyczajny wymiar kary*, Toruń 2009, s. 27–47; Justification of the bill to amend the Act on the Criminal Code (developed by the Criminal Code Codification Committee, edited on 5 November 2013), CzPKiNP [Czasopismo Prawa Karnego i Nauk Penalnych] 2013, vol. 4, pp. 43–47.

in the case of sentencing this penalty without conditional suspension of its execution. At the same time, it was established that almost half of the imprisoned served a sentence based on the order to execute the penalty of imprisonment that had been conditionally suspended. This kind of sentencing practice resulted in relatively low rate of non-custodial sentences, i.e. fines (21.3% sentences) and community service (12.3%). Definitive imprisonment sentences constituted 9.6% of all the convictions[5].

The diagnosis of the causes of the defectively implemented penal policy and the indication of "the necessity of fast sentencing of really severe penalties" induces, as it was emphasised in the statement of reasons, "complete substitution of fine and non-custodial penalties for suspended imprisonment penalties"[6]. Thus, the legislator made another attempt to make non-custodial penalties (a fine and community service) the basic measure of penal response to petty and medium impact crime[7]. This direction in criminal law reform undoubtedly deserves approval.

Therefore, the amendments limiting sentencing suspended imprisonment penalties, on the one hand, and broadening grounds for sentencing non-custodial penalties, on the other hand, are of key importance to meeting the main aim of the criminal law reform.

In the context of the legislator's striving for radical limitation of the use of suspended imprisonment penalties, it must be straightaway noted, that the Criminal Code amendment eliminated the possibility of conditional suspension of the execution of non-custodial and fine penalties completely. The argument for the decision regarding non-custodial penalties provided in the statement of reasons for the bill was mainly that in the current legal state a non-custodial penalty is saturated with probation elements, which will even strengthen its content after the amendment enters into force, and therefore, "there is no justification for sentencing this penalty with conditional suspension of its execution". Moreover, the decision was substantiated by the scarce amount of penalties in that form applied in practice. Sentencing conditionally suspended fines is also very seldom and this kind of penalty is commonly believed to be useless, which was an argument for giving it up[8].

The amendment introduced substantial changes to the premises of the conditional suspension of the execution of imprisonment. The amended Article 69 § 1 CC limited the possibility of using this measure only to the case of up to one year's imprisonment sentence (formerly it was up to two years' imprisonment) if the perpetrator of crime had not been sentenced to imprisonment (definitive or conditionally suspended one), and it is sufficient to achieve the punishment aim, especially the prevention of their commission of a crime again. It must be added that in accordance with the new wording of Article 69 § 4 of the CC, with regard to perpetrators of hooliganism and perpetrators of crime under Article 178a § 4 CC, the application of conditional suspension of execution of the penalty of imprisonment was limited to really well substantiated cases.

Despite the introduction of such radically stricter conditions for suspension of execution of imprisonment penalty, the amending Act repealed the provision of Article 69

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5 See the justification of the government bill, pp. 2–4.

6 Justification of the government bill, pp. 4–5.

7 J. Majewski, *Kodeks karny. Komentarz do zmian 2015 [Criminal Code: Commentary on the 2015 amendments]*, Warszawa 2015, p. 49.

8 Statement of reasons for the government bill, p. 13.

§ 3 CC, annulling all limitations to the use of this measure towards perpetrators specified in Article 64 § 2 CC and as a result towards perpetrators specified in Article 65 CC, i.e. those for whom crime is the source of income or who committed a crime as members of an organised criminal group or union, towards a criminal committing a crime of a terrorist nature and a perpetrator of a crime specified in Article 258 CC. Seemingly, giving up formal limitations to the use of conditional suspension of penalty execution (formerly laid down in Article 69 § 3 CC) results from the change of premises of the admissibility of that measure that have been limited to such an extent that it does not really seem to be possible to make conditional suspension of penalty execution applicable to multi-recidivists.

The amendment also introduced a shorter probation period. The decision is undoubtedly connected with the decrease in the imprisonment penalty the execution of which can be suspended. Under the new wording of Article 70 § 1 CC, a probation period ranges from one to three years (in the former legal state it was from two to five years). The exception is a different probation period from two to five years applicable to the conditional suspension of penalty execution in case of juveniles and, what is new, a perpetrator who committed a violent crime against a co-resident (Article 70 § 2 CC).

Another modification is the fine amount that can be ruled in connection with conditional suspension of imprisonment penalty execution. The Act amending the Criminal Code lifted the maximum limit (270 daily rates) and decided that a fine shall be applied in compliance with general rules. This means that the fine amount shall be established in compliance with Article 33 § 1 CC, which lays down that the maximum fine limit is 540 daily rates.

It is necessary to mention a substantial change introduced within the modified wording of Article 72 CC regarding obligations of the probation period. Namely, the legislator introduced a compulsion to impose at least one probationary obligation from the list of duties laid down in Article 72 § 1 CC in case no penal measure has been ruled. Therefore, in the current legal state it is not possible to apply the so-called simple conditional suspension of the imprisonment penalty execution because since the sentence becomes valid, some kind of hardship for the perpetrator will always be applied.

Discussing the modifications that are of key importance in order to achieve the main aim of the reform, i.e. the limitation of the number of people imprisoned, it is necessary to mention two new solutions laid down in Article 7 § 3a and Article 75a CC. The provision added to Article 75 § 3a CC introduces a measure of shortening the period of imprisonment in case of its execution resulting from negative assessment of the probation period. The statement of reasons for the bill highlights two circumstances that constitute grounds for the introduction of "a possibility of reducing a penalty in relation to a penalty ruled with suspension of its execution". Firstly, it was decided that, when taking the decision to reduce imprisonment, a court should take into account the fulfilment of obligations by a convict before the reasons for ruling a penalty execution appeared because the convict would not have been obliged to fulfil them if the penalty had not been ruled as conditionally suspended. Secondly, It must be taken into account that "ruling a penalty, a court treats the decision on its conditional suspension as an integral element of the penalty, which results in its higher amount than in case of

a definitive penalty"[9]. The provision of Article 75 § 3a CC stipulates that the convict's performance during the probation period, especially the completion of assigned duties, is to be the ground for reduction of a penalty in connection with a ruling to execute it in cases specified in Article 75 § 2 and § 3 CC. It must be added that a court may mitigate a penalty maximum by half (Article 75 § 3a *in fine* CC).

The institution of a penalty change laid down in Article 75a CC is an important novelty in the context of the implementation of criminal law reform. Its essence consists in the fact that if there are grounds for ruling the execution of a conditionally suspended imprisonment penalty, a court may rule its execution or change it into supervised community service not exceeding two years, or a fine not exceeding 810 daily rates. Such a change of imprisonment to non-custodial penalty or a fine may contribute to the achievement of the main aim of the reform, i.e. reduction of the number of imprisoned convicts. The bill justification indicates that the introduction of this amendment "aims at increasing flexibility of judicial decisions in particular cases and preferring non-custodial penalties, especially towards perpetrators sentenced based on the current regulations, i.e. in cases where the conditionally suspended penalty is overused"[10]. It is worth adding that in compliance with Article 75a § 4 CC, the change of a suspended imprisonment penalty into a non-custodial penalty or a fine does not exempt the convict from the execution of other penal measures ruled: forfeiture, compensation, preventive measures, even if a concurrent sentence is issued later. If a convict evades imprisonment, paying a fine, fulfilling assigned obligations or the ruled penal measures, forfeiture or compensation, a court is obliged to annul the change and rule the execution of the imprisonment penalty (Article 75a § 5 CC)[11].

The legislator linked the deep changes in the area of conditional suspension of the imprisonment penalty execution with a range of changes making penal response to petty and medium impact crime more flexible.

Among various changes, it is first of all necessary to highlight a solution introduced in Article 37a CC, which created a possibility of ruling non-custodial penalties (a fine or community service with the exception of the form laid down in Article 34 § 1a (3) CC) in all cases that are subject to an imprisonment penalty not exceeding eight years. Modifying the statutory penalty of maximum eight years, the provision of article 37a CC added two statutory non-custodial penalties that could not be ruled in the past, i.e. a fine and community service, which resulted in substantial extension of basis for non-custodial penalties sentencing. This makes it practically possible to answer the calls for making non-custodial penalties (a fine and community service) basic penal measures of response to petty and medium impact crime. It must be taken into account, however, that due to the addition of Article 37a CC, the legislator modified not only

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[9] Statement of reasons for the government bill, p. 14.

[10] Statement of reasons for the government bill, pp. 14–15.

[11] For more on interpretational doubts regarding provisions of Article 75 a CC see A. Zoll, Środki związane z poddaniem sprawcy próbie i zamiana kary [Measures connected with probation and a change of penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Criminal law amendment of 2015: Commentary]*, Kraków 2015, pp. 443–447; J. Majewski, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 266–278.

Code-incorporated statutory imprisonment penalties not exceeding eight years but also non-Code-incorporated statutory penalties[12].

The legislative motives include the fact that the provision of Article 37a CC is to play two roles. The first of them "is connected with non-Code-incorporated penal law within which there are great discrepancies in how a penal sanction is tailored (…). Because of that, the provision changes uniform sanctions existing in non-Code-incorporated regulations into alternative ones and provides a possibility of ruling a fine or a non-custodial penalty if the non-Code-incorporated penal law does not provide this possibility. On the other hand, the provision constitutes a directive on a judicial punishment, which prompts courts to rule non-custodial penalties instead of imprisonment"[13]. It is necessary to mention here that the wording of the content of the Article 37a CC and its justification in the bill evoked different doctrinal opinions on the character of the norm expressed in Article 37a CC. One can sometimes notice expressions of a directive on judicial penalty sentencing.

The amendment of Article 58 § 1 CC, which originally stipulated a directive on *ultima ratio* definitive imprisonment, corresponds to the modification of the system of statutory penalties. In the current legal state, the provision lays down that, if an act provides a possibility of choosing the type of punishment and a crime is subject to maximum five years' imprisonment, a court rules an imprisonment penalty only if another penalty or penal measure cannot achieve the aim of punishment. Thus, the amendment changed a directive on *ultima ratio* definitive imprisonment into a directive on *ultima ratio* imprisonment in general, thus also conditionally suspended penalty of imprisonment. At the same time, it extended the range of the directive application to all crimes that are subject to imprisonment not exceeding five years'. In the former legal state, the directive referred to crimes that were subject to alternative non-custodial penalties, which were generally applied instead of penalties not exceeding one or two years' imprisonment, and exceptionally (in the special part of the Criminal Code) not exceeding three or five years' imprisonment. Comparing the new directive of Article 58 § 1 CC with the modification of statutory punishment in case of crimes that are subject to a penalty not exceeding eight years' imprisonment expressed in Article 37a CC, it is necessary to conclude that the directive on definitive imprisonment penalty may be broadly applied, however, only to crimes that are subject to a penalty not exceeding five years' imprisonment. In case of a crime that is subject to a statutory penalty of a higher maximum limit, the imprisonment penalty loses its *ultima ratio* character. Moreover, it must be emphasised that (definitive or suspended) imprisonment penalty sentencing under Article 58 § 1 CC is connected with a belief that another non-custodial penalty or penal measure cannot achieve the aims of punishment.

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[12] See J. Giezek, O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzanej kary [On alternative sanctions and a possibility of choosing a type of punishment], *Palestra* 2015, no. 7–8, pp. 25–36; J. Majewski, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 49–51 and 85–101; M. Małecki, Ustawowe zagrożenie karą i sądowy wymiar kary [Statutory penalty and punishment imposed by a court], [in]: W. Wróbel (ed.), *Nowelizacja prawa karnego 2015[Criminal law amendment of 2015]*, pp. 284–295.

[13] Statement of reasons for the government bill, p. 13.

The legislator's striving to radical limitation of suspended imprisonment penalty application for the benefit of non-custodial penalties sentencing, inter alia a fine in particular, which should account for 60% of all penalties[14], was also expressed by repealing a directive of Article 58 § 2 CC, which banned sentencing a fine in case a perpetrator's income, property or financial possibilities constitute grounds for a belief that the convict will not pay a fine and it will not be possible to enforce it. In Part IX of the statement of reasons for the amending bill entitled "Assessment of the regulation effects", it was pointed out that the main source of "problems and pathologies connected with sentencing a fine" is the directive that bans sentencing a fine in case it is established that a perpetrator cannot pay it and it cannot be enforced. It was assumed that the provision that "was to tame simple change of a fine into a substitute imprisonment as well as was to prevent a convict's family from being burdened with that fine (…), in fact contributed to substantial limitation of the role of a statutory fine in the penal policy"[15]. It seems that the conclusion is intuitive because the results of research into files conducted by W. Dadak with respect to statutory fines prove that in majority of cases courts rule fines irrespective of the ban on sentencing an unenforceable fine. According to that author, "the dysfunctionality of the solution does not consist in a binding ban on sentencing an unenforceable fine but in the fact that a court does not establish circumstances necessary to impose a fine, i.e. data on a perpetrator's status"[16]. He rightly concludes that repeal of the ban would be groundless because it functions as a guarantee that prevents sentencing penalties that cannot be enforced in their basic form.

It is necessary to raise one more argument against the decision on repeal of Article 58 § 2 CC, which W. Górowski points out. Namely, it is not possible to impose a fine following the system of daily rates regardless of a perpetrator's financial status, because at the second stage of the fining procedure establishing a daily rate, a court is obliged to take into account a perpetrator's income, living and family circumstances, property relationships and opportunities to earn money. If, as a result of the process, a court establishes that the accused has no property, and the directive on a penalty is to impose a fine, the circumstance will only influence the amount of a daily rate, which should be at the lowest level, and not the decision of sentencing a fine[17].

The amended regulations on a non-custodial penalty constitute very important changes. Apart from extended grounds for this penalty based on a solution laid down in Article 37a CC, the amendment totally reformed the legal shape of a non-custodial penalty. The statement of reasons for the bill highlighted that "The planned amendments to Article 34 and 35 are aimed at intensifying burdens connected with a non-custodial penalty. A non-custodial penalty should become the main punishment imposed for misdemeanours of not especially high social impact" [18]. In the attempts to make it more

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[14] *Ibidem*, p. 126.

[15] *Ibidem*, p. 125.

[16] See W. Dadak, *Grzywna samoistna w stawkach dziennych [Statutory fine in daily rates]*, Warszawa 2011, pp. 492–493.

[17] See W. Górowski, Orzekanie kary grzywny po 1 lipca 2015 r. [Sentencing a fine penalty after 1 July 2015], *Palestra* 2015, no. 7–8, pp. 67–68; *ibid*., [in:] W. Wróbel (ed.) *Nowelizacja prawa [Criminal law amendment]*, pp. 71–73.

[18] Statement of reasons for the government bill, p. 8.

flexible and attractive, a non-custodial penalty was constructed based on numerous elements that make it possible to differentiate its burden depending on the needs of a particular case. At the same time, the length of time for which a non-custodial penalty can be imposed was increased from one to two years. The amended Article 34 § 1 CC stipulates that a non-custodial penalty shall be served for the minimum of one month and the maximum of two years, and shall be imposed for a specified number of months and years.

After the amendment, a non-custodial penalty[19] consists of three groups of elements that form a possible combination of specified burdens of the penalty. These are: (1) constant elements, which affect every convict sentenced to a non-custodial penalty, (2) changeable (mobile) elements, which are freely chosen by a court and can be imposed separately or cumulatively, but at least one of them must be applied, (3) additional elements, which may be imposed on a convict as an additional burden.

The constant elements of a non-custodial penalty that are applied in any form of this penalty were not amended. There is still a ban to change the place of residence without a court's consent and an obligation to provide information about the course of serving the penalty (Article 34 § 2 (1) and (3) CC).

The main changes were introduced in the area of changeable (mobile) elements that form the contents of a non-custodial penalty and make it possible to freely establish the level of its burden. Apart from former two forms of a non-custodial penalty (unpaid supervised community service, deduction of 10–25% of remuneration for charity purposes), the legislator introduced new forms, i.e. the so far unknown electronic monitoring (tagging) and made the duties laid down in Article 72 § 1 (4) CC be the elements of a non-custodial penalty and not, as it was earlier, additional measures applied towards a convict sentenced to a non-custodial penalty.

As a result, in the present legal state, non-custodial penalties include:

1) Obligatory supervised unpaid community service for 20–40 hours monthly;
2) Obligatory stay in the place of permanent residence or another assigned place with the use of an electronic monitoring system (tagging) for a maximum of 12 months and not longer than 70 hours weekly and 12 hours daily taking into account convict's working hours and other obligations imposed;
3) Obligatory probation laid down in Article 72 § 1 (4)–(7a) CC, however, some of the obligations can be ruled individually or cumulatively; they include:
   A) Employment, education, vocational training,
   B) Refraining from abuse of alcohol or use of other intoxicating substances;
   C) Undergoing drug rehabilitation;
   D) Undergoing therapy, especially psychotherapy and psycho-education,
   E) Participation in correctional-educational programmes;

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[19] For more see T. Sroka, Kara ograniczenia wolności [Non-custodial penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego [Amendment to criminal law]*, pp. 85–153; *ibid*., Koncepcje jedności kary ograniczenia wolności w nowym modelu tej kary po nowelizacji z 20 lutego 2015 r. [Uniformity conception of non-custodial penalty in the new model of this penalty after the amendment of 20 February 2015], *Palestra* 2015, no. 7–8, pp. 47–56; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 291–314; J. Majewski, *Kodeks karny. Komentarz [Criminal code: Commentary]*, pp. 54–82.

F) Refraining from spending time in specified circles and places,
G) Complying with a restraining order instructing to refraining from getting in touch with the victim or other people in a specified way or to stay a certain distance away from the victim or other people.

4) Deduction of 10–25% of monthly remuneration for a charity recommended by a court, which is applicable only towards an employed person. However, without a court's consent, the person cannot resign from the job in the period covered by the sentence.

Moreover, the content of the non-custodial penalty may include additional elements that are optional. Under Article 39 (7) CC, they include:

1) Monetary contribution, laid down in Article 39 (7) CC, of maximum PLN 60,000 to Fundusz Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej [Victims and Post-penitentiary Aid Fund],
2) Obligations laid down in Article 72 § 1 (2) and (3) CC. i.e.:
   a) Making an apology,
   b) Obligatory maintenance payment.

Undoubtedly, a present non-custodial penalty is a very flexible type of punishment and it makes its contents be composed in such a way that it may be very lenient, but it may also be very severe. Obviously, it will allow for more individualised penal response, however, it is rightly pointed out in literature that Code approach to a non-custodial penalty, which constitutes a "mixture of many differentiated rigours, which may be applied in various options, does not comply with the principle of a fixed penalty and "provides a judge with too much room for discretion in tailoring it in particular situations". It is highlighted that "each penal measure, especially if it is called a penalty, should be to some extent uniform and be called what it really is"[20]. However, based on the established model of a non-custodial penalty, it must be said that the character of a penalty is to large extent non-uniform. Moreover, reservations about the use of an electronic monitoring system within a non-custodial penalty are expressed. It is especially pointed out that there is "a lack (…) of specifically determined factual premises in the use of this penal system" in case of its application under Article 37a CC in connection with Article 34 § 1a (1), (2) and (3) CC and within the so-called mixed (combined) penalty[21].

In this context, it is necessary to mention an important change proposed in the bill on amending the Act–Criminal Code and the Act–Penalty Execution Code of 22 December 2015. Namely, having taken into account the multiplicity of forms of a non-custodial penalty, it is proposed that the electronic monitoring system should not be treated as a form of a non-custodial penalty execution. The statement of reasons for

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[20] J. Skupiński, Kolejny projekt nowelizacji Kodeksu karnego. Kilka uwag szczegółowych na tle ogólniejszych refleksji [Subsequent bill to amend the Criminal Code: Some detailed comments against the background of general reflections], [in:] Z. Jędrzejewski, M. Królikowski, Z. Wiernikowski, S. Żółtek (ed.), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego [Between science and criminal law practice. Professor Lech Gardocki jubilee book]*, Warszawa 2014, p. 301. Also see A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 294.

[21] See T. Szymanowski, Nowelizacja prawa karnego wykonawczego – przegląd ważniejszych zagadnień [Penalty execution law amendment – review of key issues], *Palestra* 2015, no. 7–8, pp. 186–187.

the bill highlights that "the attractiveness of the electronic monitoring system as a form of influencing a convict, joining repressive and correctional advantages, causes that the system may constitute a more effective tool of developing penal policy if it can be a form of imprisonment execution"[22]. Thus, there is a proposal to amend Article 34 § 1a CC by repealing point (2) as well as Article 35 CC by repealing § 3.

The so-called mixed penalty (Article 37b CC) introduced by the 2015 amendment Act is a novelty that increases the flexibility of legal and penal response to more serious misdemeanour. It allows for sentencing a misdemeanour perpetrator to two penalties at the same time: a short-term imprisonment and a non-custodial penalty. The statement of reasons for the bill indicates that an addition of a new Article 37b CC was connected with the radical limitation of sentencing suspended imprisonment in the amended Code. However, as a result, it might lead to excessive sentencing of the substitute for this form of penal response in the form of definitive imprisonment. Taking this into account, the bill proposes a solution that allows for inclusion of non-custodial penalties for illegal acts subject to 1–10 years' or 2–12 years' imprisonment. It is then emphasised that "In many situations, a short-term imprisonment sentence for a misdemeanour perpetrator will be sufficient to achieve a special preventive aim connected with the sanction. A non-custodial penalty would supplement penal influence in this case, would be aimed at establishing socially desired behaviour of a convict but would not contain the strong stigma effect. (…) Due to the necessity of keeping certain gradation of penal sanctions influence, there is a stipulation that imprisonment is to be served first[23].

According to Article 37b CC, in case of misdemeanour subject to imprisonment irrespective of the minimum statutory penalty, a court may rule at the same time:

1) One to three months' imprisonment, if the maximum statutory imprisonment penalty is less than ten years, and a non-custodial penalty from one month to two years;
2) One to six months' imprisonment, if the maximum statutory imprisonment penalty is over ten years, and a non custodial penalty from one month to two years.

In case of a mixed penalty, imprisonment is executed first unless a statute stipulates otherwise.

It is worth mentioning that there is a difference in opinion in jurisprudence whether it is possible to suspend the mixed penalty. The dominating opinion is that there are no formal reasons why a penalty under Article 37b CC should not be suspended[24]. At the same time, attention is drawn to special problems that arise in connection with the lack of a statutory ban on conditional suspension of imprisonment. Inter alia, it is raised

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[22] Statement of reasons for the government bill to amend the Act on the Criminal Code and the Act on the Penalties Execution Code of 22 December 2015, pp. 15–16.

[23] Statement of reasons for the government bill, pp. 10–11.

[24] See J. Majewski, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 100; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 331. M. Małecki presents a contrary opinion, showing a lack of possibilities of conditional suspension of execution of a consecutive imprisonment penalty. See M. Małecki, Ustawowe zagrożenie karą i sądowy wymiar kary [Statutory penalty and punishment imposed by a court], [in:] W. Wróbel (ed.), *Nowelizacja [Criminal law amendment of 2015: Commentary]*, pp. 298–299; *ibid*., Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37 b k.k.) – zagadnienia podstawowe [Sequence of short-term imprisonment and a non-custodial penalty (Article 37 b CC) – basic issues], *Palestra* 2015, no. 7–8, pp. 45–6.

that there is a possibility of doubling obligations that are contents of changeable or additional elements of a non-custodial penalty (if a court included them in the contents of a non-custodial penalty) with the probation obligations laid down in Article 72 § 1 CC. It is pointed out that in case of the so-called simple suspension of imprisonment penalty execution, the total burden of a mixed penalty would decrease so much that there would be an impression of impunity[25].

The Criminal Code amendment bill of 22 December 2015 presents a solution to this problem. It proposes the amendment to Article 37b CC consisting in the introduction of a ban on applying Article 69 § 1 CC.

Finally, it is necessary to emphasise that the presented changes are of key importance for the implementation of the legislator's penal policy ideas. They create opportunities to limit the role of imprisonment, especially the suspended one, in the penal policy and make a fine and a penalty of limitation of liberty basic penal measures of response to petty and medium impact crimes. Undoubtedly, they go in the right direction. But only time will tell whether they will result in overcoming the deadlock in the penal policy, because the success of the criminal law reform depends not only on the change of regulations but also on its support by the justice system practitioners.

BIBLIOGRAPHY

Dadak W., *Grzywna samoistna w stawkach dziennych [Statutory fine in daily rates]*, Warszawa: Wydawnictwo LexisNexis, 2011.

Journal of Laws of 2015, item 396.

Giezek J., O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzanej kary [On alternative sanctions and a possibility of choosing a type of punishment], *Palestra* 2015, no. 7–8.

Górowski W., [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Criminal law amendment: Commentary]*, Kraków: Wydawnictwo KIPKF, 2015.

Górowski W., Orzekanie kary grzywny po 1 lipca 2015 r. [Sentencing a fine penalty after 1 July 2015], *Palestra* 2015, no. 7–8.

Grześkowiak A., [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Wydawnictwo C. H. Beck, 2015.

Kaczmarek T., Kryminalnopolityczne założenia nowego kodeksu karnego [Criminal and political assumptions for the new Criminal Code], [in:] L. Bogunia (ed.), *Nowa kodyfikacja prawa karnego [New criminal codification]*, Wrocław 1997.

Krajewski K., Rozmiary i dynamika populacji więziennej w Polsce na tle tendencji europejskich. Uwagi na tle dwóch kwestii spornych [Size and dynamics of prison population in Poland against the background of European tendencies], *PWP* 2008, no. 59.

Majewski J., *Kodeks karny. Komentarz do zmian 2015 [Criminal Code: Commentary on the 2015 amendments]*, Warszawa: Wydawnictwo Wolters Kluwer SA, 2015.

Małecki M., Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37 b k.k.) – zagadnienia podstawowe [Sequence of short-term imprisonment and a non-custodial penalty (Article 37b CC) – basic issues], *Palestra* 2015, no. 7–8.

[25] See A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 331.

Małecki M., Ustawowe zagrożenie karą i sądowy wymiar kary [Statutory penalty and punishment imposed by a court], [in]: W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Criminal law amendment of 2015: Commentary]*, Kraków: Wydawnictwo KIPKF, 2015.

Marek A., Nowy kodeks karny – zasady odpowiedzialności, nowa polityka karna [New Criminal Code: liability rules, new penal policy], *Monitor Prawniczy* 1997, no 12.

Melezini M., Aktualne problemy polityki karnej [Current issues of penal policy] [in:] J. Majewski (ed.) *Nadzwyczajny wymiar kary [Extraordinary penalty]*, Toruń: Wydawnictwo TNOiK „Dom Organizatora", 2009.

Melezini M., *Punitywność wymiaru sprawiedliwości karnej w Polsce w XX wieku [Criminal justice punitivity in the 20th century Poland]*, Białystok: Wydawnictwo Temida 2 2003.

Nowe kodeksy karne z 1997 r. z uzasadnieniami [New Criminal Codes of 1997 with justification], Warszawa: Wydawnictwo Prawnicze, 1998.

Skupiński J., Kolejny projekt nowelizacji Kodeksu karnego. Kilka uwag szczegółowych na tle ogólniejszych refleksji [Subsequent bill to amend the Criminal Code: Some detailed comments against the background of general reflections], [in:] Z. Jędrzejewski, M. Królikowski, Z. Wiernikowski, S. Żółtek (ed.), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego [Between the theory and practice of criminal law: Professor Lech Gardocki jubilee book]*, Warszawa: Wydawnictwo C. H. Beck, 2014.

Sroka T., Kara ograniczenia wolności [Non-custodial penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Criminal law amendment of 2015]*, Kraków: Wydawnictwo KIPKF, 2015.

Sroka T., Koncepcje jedności kary ograniczenia wolności w nowym modelu tej kary po nowelizacji z 20 lutego 2015 r. [Uniformity conception of a non-custodial penalty in the new model of this penalty after the amendment of 20 February 2015], *Palestra* 2015, no. 7–8.

Szymanowski T., Nowelizacja prawa karnego wykonawczego – przegląd ważniejszych zagadnień [Penalty execution law amendment – review of key issues], *Palestra* 2015, no. 7–8.

Szymanowski T., *Przestępczość i polityka karna w Polsce w świetle faktów i opinii społeczeństwa w okresie transformacji [Crime and penal policy in Poland in the light of facts and public opinion in the transformation period]*, Warszawa: Wydawnictwo Wolters Kluwer SA, 2012.

Szymanowski T., *S*kazania na bezwzględne kary pozbawienia wolności jako następstwo nieefektywnej polityki karnej [Definitive imprisonment sentencing as a result of inefficient penal policy], *Państwo i Prawo* 2014, no. 4.

Statement of reasons for the bill to amend the Act on the Criminal Code and the Act on the Penalty Execution Code of 22 December 2015.

Statement of reasons for the bill to amend the Act on the Criminal Code (developed by the Criminal Code Codification Committee, edited on 5 November 2013), CzPKiNP [Czasopismo Prawa Karnego i Nauk Penalnych] 2013, vol. 4.

Statement of reasons for the government bill of 15 May 2014 to amend the Act on the Criminal Code and some other laws and the projects of secondary legislation to these acts, paper no. 2393.

Zoll A., Środki związane z poddaniem sprawcy próbie i zamiana kary [Measures connected with probation and a change of penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Criminal law amendment of 2015: Commentary]*, Kraków: Wydawnictwo KIPKF, 2015.

Zoll A., Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności [Political and criminal assumptions for the Criminal Code in the light of contemporary challenges], *Państwo i Prawo* 1998, no. 9–10.

ON THE UNDERLYING ASSUMPTIONS FOR THE 2015 CRIMINAL LAW REFORM AND THE MOST IMPORTANT CHANGES IN THE PENAL SYSTEM

Summary

The article deals with the most important amendments to the provisions of the Part on general issues of the Criminal Code introduced by Act of 20 February 2015 in the context of criminal and political assumptions for the criminal law reform. Taking this into account, the article discusses the aims of the reform and then analyses particular solutions the legislator intends to use to implement it. As the main aim of the criminal law reform was to change the deficiently implemented penal policy towards petty and medium impact crimes, where conditionally suspended imprisonment was a dominating penalty, it was decided that the most important changes are those that aim to limit the application of suspended sentences and make non-custodial penalties the main measure of legal penal response. Thus, the analysis is focused on the key regulation for the whole reform, i.e. a conditionally suspended sentence and its numerous modifications. Moreover, the article discusses new solutions of Article 37a CC introducing a fine and a non-custodial penalty for crimes that are subject to statutory imprisonment not exceeding eight years, the issue of repealing the directive on fining laid down in Article 58 § 2 CC, thorough modification of a non-custodial penalty and a new solution of the so-called mixed penalty laid down in Article 37b CC.

Key words: *criminal law reform*, *change in the penal system*, *conditionally suspended imprisonment sentence*, *non-custodial penalties*, *fine*, *community service*, *the so-called mixed penalty*

O ZAŁOŻENIACH REFORMY PRAWA KARNEGO MATERIALNEGO Z 2015 R. I NAJWAŻNIEJSZYCH ZMIANACH W SYSTEMIE KARANIA

Streszczenie

Przedmiotem artykułu są najważniejsze zmiany wprowadzone do przepisów części ogólnej kodeksu karnego na mocy ustawy z 20 lutego 2015 r., przedstawione w kontekście założeń kryminalno-politycznych reformy prawa karnego. Mając to na uwadze, w artykule omówiono cele reformy, a następnie analizie poddano poszczególne rozwiązania, za pomocą których ustawodawca zmierza do ich realizacji. Ponieważ głównym celem reformy prawa karnego było dążenie do zmiany wadliwie realizowanej polityki karnej w zakresie drobnej i średniej przestępczości, w której dominującą pozycję zajmuje kara pozbawienia wolności z warunkowym zawieszeniem jej wykonania, uznano, że najważniejszymi zmianami są takie, które zmierzają do ograniczenia stosowania warunkowego zawieszenia wykonania kary i uczynienia z kar nieizolacyjnych głównego środka reakcji prawnokarnej. W związku z tym analizie poddana została kluczowa dla całej reformy regulacja warunkowego zawieszenia wykonania kary i jej liczne modyfikacje, a ponadto omówiono: nowe rozwiązanie przewidziane w art. 37a k.k. wprowadzające możliwość orzeczenia grzywny oraz kary ograniczenia wolności za przestępstwa zagrożone karą pozbawienia wolności nieprzekraczającą 8 lat, problem uchylenia dyrektywy wymiaru grzywny zawartej w art. 58 § 2 k.k., gruntowną modyfikację kary ograniczenia wolności oraz nową instytucję tzw. kary mieszanej, ujętą w art. 37b k.k.

Słowa kluczowe: *reforma prawa karnego*, *zmiany w systemie karania*, *kara pozbawienia wolności z warunkowym zawieszeniem jej wykonania*, *kary nieizolacyjne*, *grzywna*, *kara ograniczenia wolności*, *tzw. kara mieszana*

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LEGISLATIVE CHANGES REGARDING DIRECTIVES ON SENTENCING

VIOLETTA KONARSKA-WRZOSEK

The amendment to the Criminal code of 20 February 2015 (Journal of Laws of 2015, item 396), which entered into force on 1 July 2015, introduced important changes in the field of directives on sentencing for commission of misdemeanours. It introduced new directives as well as thoroughly changed those articulated in the Criminal Code of 1997. All these directives concern the issue of choice of penalty for misdemeanour perpetrators and they aim to stop imprisonment being the most common response to forbidden acts that are not of the highest harmfulness level in the Polish justice system and become a reaction *ultima ratio* ruled only if it is indispensable in order to achieve targets of a repressive measure. Since 1 July 2015, there have been special directives in common criminal law on the choice and judgement of imprisonment with regard to all basic types of misdemeanours distinguished in the Polish criminal law based on their impact, i.e. (1) petty misdemeanours, (2) medium impact misdemeanours and (3) profound impact misdemeanours.

A special directive on the choice of penalty for petty misdemeanours that include forbidden acts carrying only a non-custodial sentence as well as ones carrying alternative sanctions that, apart from non-custodial sentences, envisage also short-term imprisonment (not exceeding one year, two years, three years and in exceptional cases five years) – was formulated in Article 58 § 1 CC. The directive, which in its first version limited the possibility of rendering unconditional imprisonment sentence (i.e. one that cannot be suspended) for petty misdemeanours, now limits the choice and rendering of imprisonment sentences in any form, i.e. both unconditional imprisonment and conditionally suspended imprisonment sentences. The directive on the choice laid down in Article 58 § 1 CC constitutes preference of rendering, in case of petty misdemeanours, non-custodial sentences, i.e. a fine or community service. Imprisonment envisaged as an alternative sanction may be rendered only when another penalty or penal measure cannot meet the objectives specified in Article 53 § 1 CC. Having in mind that directive on the choice of the penalty type, a court shall always consider non-custodial penalties first and then, 'as a last resort', a suspended imprisonment sentence (provided

the perpetrator meets the conditions of Article 69 CC) or unconditional imprisonment in accordance with the *ultima ratio* principle of rendering an imprisonment sentence in case of petty misdemeanours.

A special directive on imposing penalties for misdemeanours of medium impact was originally formulated in Article 58 § 3 CC. It referred only to some misdemeanours of that group (i.e. lesser medium ones) carrying a simple sanction as a single penalty: imprisonment not exceeding five years (or this penalty and a fine). In case of misdemeanours of this impact level, instead of the imprisonment sanction a court could render one of non-custodial penalties, i.e. a fine or a community service. The imposition of the so-called alternative penalty instead of the imprisonment sanction was to the discretion of a court. The provision of Article 58 § 3 CC did not contain any premises of the use of that possibility; neither did it formulate any restrictions or exclusions. It contained, however, a suggestion that an alternative non-custodial penalty may be imposed and indicated that it should take place when a court imposes a penal measure at the same time[1]. A lack of any restrictions on the application of non-custodial penalties in Article 58 § 3 did not mean that a court could make use of that possibility in every case. There were special directives on the imposition of penalties for hooliganism (see Article 57a § 1 CC stipulating imposition of a penalty prescribed in the sanction and even with its extraordinary enhancement of at least its lowest statutory threshold) and for multi-recidivists, professional criminals (i.e. those for whom the commission of crime is the source of income), criminals operating in an organised group or criminal organisation with an aim to commit crime as well as perpetrators of crimes of a terrorist nature (see the provision of Article 64 § 2 and Article 65 § CC ordering the imposition of imprisonment with its extraordinary enhancement of at least its lowest statutory threshold). A special directive allowing for the imposition of alternative penalties for imprisonment laid down in Article 58 § 3 CC was repealed in the amendment of 20 February 2015.

The discussed amendment introduced a new provision of Article 37a to the Criminal Code. Its content is similar to the content of the repealed Article 58 § 3 CC. It allows for the imposition of an alternative non-custodial penalty in the form of a fine or community service (except for the variant limited to the obligations of Article 72 § 1 (4)–(7a) CC, which is planned in the government bill to amend the Criminal Procedure Code and some other acts of 8 January 2016 to be repealed from Article 34 § 1a (3) CC[2]) in case of every misdemeanour carrying an imprisonment penalty not exceeding eight years. This means that – as it did before – there is a broad possibility of rendering one of the non-custodial sentences instead of imprisonment that is prescribed for this kind of forbidden acts, but not only for those lesser misdemeanours of the group of medium impact ones but for all medium impact misdemeanours, including those more profound. The provision of Article 37a CC, apart from the broadening of the scope of application

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[1] For more see V. Konarska-Wrzosek, Szczególne dyrektywy sądowego wymiaru kary [Special directives on judicial penalty imposition], [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary [Study of penalties: Judicial penalty imposition]*, System Prawa Karnego [Criminal Law System], Vol. 5, Warszawa 2015, pp. 295–298.

[2] See Article 3 (1) (a) of the Bill to amend the Act – Criminal Procedure Code and some other acts, the Sejm Paper no. 207.

of alternative penalties for all kinds of misdemeanours carrying a simple sanction of imprisonment not exceeding eight years (i.e. eight years inclusive), gave up indicating that the possibility should be applied, especially when a court also imposes a penal measure. This significant extension of the possibility of applying one of non-custodial penalties instead of imprisonment not exceeding eight years was possible mainly because of the addition of new content to non-custodial penalties, which caused that the penalties are more severe and painful, of stronger preventive impact, and substitute for imprisonment in a broader range of cases than ever before. It must be noticed, however, that a court's decision on imposing an alternative non-custodial penalty must result in unavoidable inability to impose a cumulative fine penalty when it is optional as well as obligatory. It is strictly connected with the characteristic feature of our criminal law, which envisages imposition of a fine as a statutory penalty prescribed for a given act or together with imprisonment (see Article 33 § 2 CC) and does not allow for the imposition of a fine together with a non-custodial penalty (unlike when it is pursuant to penal fiscal law – Article 26 § 1 of the Penal Fiscal Code and Article 110 PFC).

Although the wording of Article 37a CC is quite clear and its similarity to the norm of the repealed provision of Article 58 § 3 CC is big, its legal and penal status and function is highlighted in jurisprudence. Some researchers into criminal law believe that the provision of Article 37a CC formulates a special directive on judicial sentencing enabling courts to impose alternative non-custodial penalties for misdemeanours carrying imprisonment not exceeding eight years[3]. Some other researchers express a different opinion (inter alia A. Zoll and J. Majewski)[4] because they believe that the provision of Article 37a CC modifies simple sanctions that are prescribed for such misdemeanours, introducing a non-custodial alternative, and as a result a single sanction is changed into a complex alternative one, which offers an opportunity to choose a fine, a non-custodial penalty or imprisonment. Such an opinion was expressed in the statement of reasons for the amendment of 20 February 2015[5]. In accordance with this point of view, the provision of Article 37a CC does not formulate a directive on judicial sentencing but expresses a certain general principle of statutory penalties imposition. What confirms the thesis is the fact that Article 37a CC is in Chapter IV CC entitled PENALTIES, which provides regulations on imprisonment, and not in Chapter VI CC entitled PRINCIPLES OF THE IMPOSITION OF PENALTY AND PENAL MEASURES, where the repealed Article 58 § 3 CC was[6].

However, it is difficult to approve of the opinion, but not because it is questioned whether statutory norms can be contained in the general part of the Criminal Code

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[3] See e.g. A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015, p. 323; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2016, p. 165; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz Komentarz [Criminal Code: Commentary]*, Warszawa 2016 (gone to press).

[4] A. Zoll and J. Majewski discussed that several times, inter alia at XII Kolokkwium Bielańskie on 20 May 2015.

[5] See Statement of reasons for the Bill to amend the Act – Criminal Code and some other acts of 20 February 2015 (Journal of Laws of 2015, item 396), p. 13.

[6] See a broad discussion of this issue by M. Małecki, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Amendments to criminal law of 2015: Commentary]*, Kraków 2015, pp. 284–294.

and not only in special provisions of the Act. In fact, hardly anyone questions this nowadays[7]. For the need of further considerations, however, it will be purposeful to indicate that, in the author's and some other researchers' opinion, the domain of the statutory penalty imposition also includes, apart from indications regarding a penalty or penalties prescribed in sanctions of special provisions, those regulations of the general part of the CC that lay down minimum and maximum limits of particular penalty types and regulate issues connected with imposition of penalties prescribed for obligatory application[8]. Any regulations regarding penalty imposition, including those modifying it in some way in relation to penalty threat, if they are to be applied optionally, they belong to the domain of judicial penalty imposition[9]. We deal with such a situation based on the provision of Article 37a CC. It indicates that in case of misdemeanours carrying a penalty of imprisonment not exceeding eight years, a fine or a non-custodial penalty **may be imposed instead of** imprisonment penalty prescribed in the sanction. Nobody can do it but a court. A court has discretion to impose imprisonment, a fine or a non-custodial penalty restricting liberty. The provision of Article 37a CC allows courts – within the limits of standard, not extraordinary, imposition of penalties – to give up imposing a penalty of imprisonment prescribed in the sanction and impose one of non-custodial alternative penalties instead, and leaves the decision whether to make use of this possibility to courts. Thus, the norm included in Article 37a CC constitutes a special directive on penalties imposition addressed to courts, which are not bound to implement it but can choose to do this. **The provision of Article 37a CC does not change the type of sanction[10]. It remains a simple sanction** limited to a threat of imprisonment penalty imposition for misdemeanours. It is only indicated to courts that, being authorised by statute, they may decide not to render sentences in compliance with the sanction but the directive laid down in Article 37a CC.

The provision of Article 37a CC might perform a function of transforming simple (homogeneous) sanctions into alternative sanctions if it were formulated differently, e.g. *Whenever a special provision envisages imprisonment penalty not exceeding eight years, it shall not be interpreted as a simple sanction but as an alternative one that also includes non-custodial penalties in the form of a fine or restriction of liberty that*

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[7] See M. Melezini, *Ustawowy a sądowy wymiar kary [Statutory and judicial penalty imposition]*, [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary [Study of penalties: Judicial penalty imposition]*, System Prawa Karnego [Criminal Law System], Vol. 5, Warszawa 2015, pp. 149–157.

[8] V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym [Directives on the choice of a penalty in the Polish criminal legislation]*, Toruń 2002, p. 42 and 44; A. Marek, *Prawo karne [Criminal law]*, Warszawa 2009, pp. 337–338; J. Raglewski, *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (Analiza dogmatyczna w ujęciu materialnoprawnym) [Exceptional penalty moderation in the Polish system of criminal law (Dogmatic analysis from substantive law perspective)]*, Kraków 2008, pp. 42–47; Z. Sienkiewicz, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne [Criminal law]*, Warszawa 2010, pp. 365–366.

[9] See V. Konarska-Wrzosek, Modyfikacje w zakresie zagrożeń karnych przewidziane w ramach zwykłego sądowego wymiaru kary [Modifications to penal threat envisaged within simple judicial penalty imposition], [in:] J. Majewski (ed.), *Nadzwyczajny wymiar kary [Extraordinary penalty imposition]*, Toruń 2009, p. 63.

[10] See a contradictory opinion by e.g. M. Małecki, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Amendments to criminal law of 2015: Commentary]*, Kraków 2015, p. 286 and 289; E. Hryniewicz-Lach [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna [Criminal Code. General issues]*, Vol. II, Warszawa 2015, p. 43, seems to express a similar opinion.

is laid down in Article 34 § 1a (1), (2) or (4)[11]. Such wording would not make it be a directive on a judicial imposition of a penalty but a regulation within the area of statutory penalty imposition.

Here a question arises whether the issue of the legal character of the provision of Article 37a CC is important from a practical point of view or is purely theoretical. It has an important practical dimension. If the opinion that the provision of Article 37a CC in its present or possibly amended form transforms simple (homogeneous) sanctions envisaging imprisonment not exceeding eight years into alternative ones were common, this would result in a change of the envisaged sanctions in the whole criminal law and blur the differences in the legislator's legal and penal assessment of various types of disorderly conduct between petty misdemeanours carrying an alternative sanction laid down in a special regulation and misdemeanours of medium impact, which – as the legislator believed to be appropriate – as a rule carries imprisonment and not more lenient sentences. Moreover, there would be no need for the exceptional solution of mitigation of a penalty for crimes that are classified as misdemeanours, which results in the same effects as far as a penalty imposition is concerned, and for the application of which some special conditions must be met (see Article 60 § 1–4 and § 6 (3) and (4) CC). The assumption that Article 37a CC constitutes a special directive of a judicial penalty imposition does not undermine the legislator's abstract assessment of particular types of disorderly conduct nor finely developed intra-statutory justice between different types of disorderly conduct, but just allows courts broad individualisation of assessment of each medium impact misdemeanour and the imposition of non-custodial penalties instead of imprisonment if a court considers that it is sufficient to achieve the objectives of punishment. The formulation of such a directive on judicial imposition of penalties, as laid down in Article 37a CC, allows for rationalisation and individualisation of the standard penalty imposition without the need to use an institution of exceptional mitigation of a penalty, which requires meeting special premises in order to be applied, and cannot and should not be commonly applied because it is of exceptional character.

Moreover, it is necessary to raise here that sharing an opinion that the provision of Article 37a CC *ex lege* modifies simple sanctions of imprisonment not exceeding eight years transforming them into alternative sanctions would inevitably have to lead to the necessity of applying to some of the crimes carrying imprisonment not exceeding five years a special directive on the choice of a penalty envisaged in Article 58 § 1 CC. This would cause that in all cases when the statute envisages only an imprisonment penalty not exceeding five years in a sanction for a given type of crime, because of Article 37a CC and next Article 58 § 1 CC, a court, as a rule, would not be able to impose imprisonment unless it decided that none of non-custodial sentences would be able to fulfil the objectives of punishment. Here, another question must be asked, i.e. whether the differentiation of sanctions between various types of misdemeanours, which is envisaged in the present act, is rational and whether the present expression of legal and penal assessment reflected in the type and amount of a penalty envisaged in the

[11] Noticing numerous drawbacks to the norm laid down in Article 37a CC, M. Małecki proposes quite similar interpretation of its normative content; see *Ibid*., [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015 [Amendments to criminal law of 2015]*, p. 288. The problem, however, consists in the fact that the discussed provision in its current form does not express such meaning.

sanction is not out-dated. If that were a diagnosis with regard to penal threats, a review and possible change of sanctions for crimes classified as misdemeanours, or perhaps all crimes classified in our legal order, would be an absolutely better solution. It seems to be a definitely better and more efficient way of influencing judicial judgements than formulation of various directives on penalties imposition, which can but do not have to be respected in the judicial process of penalties imposition, especially if they are not formulated in a quite categorical and extremely optional way as in the case of Article 37a CC.

Drawing conclusions from the discussion of the normative regulation laid down in Article 37a CC, which causes serious interpretational differences and, in case of an opinion different from the above-presented one, destroys the logic and coherence of the system of sanctions prescribed for particular types of disorderly conduct in the field of the whole criminal law and falsifies the picture of real sanctions, it seems to be justified to return to the regulation that existed before the amendment of 2015. In my opinion, it would be purposeful to repeal the provision of Article 37a CC and reintroduce the competence to impose non-custodial alternative penalties in Chapter VI in Article 58 § 3 CC with the limitation of that possibility to misdemeanours carrying imprisonment not exceeding five years. It is quite commonly believed that a possibility of imposing non-custodial penalties envisaged in Article 37a CC with regard to misdemeanours carrying imprisonment not exceeding eight years is too far reaching[12]. *De lege ferenda* – taking into account the bill to amend the Criminal Code that is under development in order to eliminate from the main part of a penalty of imprisonment obligations specified in Article 72 § 1 (4)–(7a) CC aimed to be applied on their own or with other measures, the reintroduced provision of Article 58 § 3 CC might read: *If a crime carries imprisonment not exceeding five years, a court may impose a fine or a non-custodial penalty instead of imprisonment*.

Because of their placement in Chapter IV on PENALTIES, the legal and penal character of the provisions of Article 37b CC may raise some doubts as they allow courts to impose the so-called mixed (joined) penalty that consists in combining short imprisonment, i.e. not exceeding three months (if a misdemeanour carries imprisonment not exceeding ten years) or up to six months (if a misdemeanour carries at least ten years' imprisonment) and a non-custodial sentence not exceeding two years. In case of imposition of such a mixed penalty, first imprisonment must be served unless the statute stipulates otherwise (Article 37b CC *in fine*). In comments on this provision, questions are asked whether a mixed penalty is a new type of penalty or just a certain combination of already existing penalties. Asking that question, A Grześkowiak answers it rightly stating that if it were a new type of penalty, it should have been placed in the catalogue of penalties. However, the catalogue of penalties remains unchanged[13]. The analysis of the provision of Article 37b CC, which allows courts, at their own discretion, to impose mixed penalties instead of imprisonment, leads to a conclusion that this is

[12] See e.g. T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 165; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 321.

[13] Compare A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 326–327.

a case of a new, successive directive on judicial imposition of penalties with regard to all misdemeanours carrying only imprisonment (as well as imprisonment and a fine), including misdemeanours of the highest impact (carrying sanctions envisaging ten years' imprisonment or twelve years' imprisonment). Making use of the possibility created by the new provision of Article 37b CC, courts may (taking into account general and special directives on penalties imposition), in case of perpetrators of a misdemeanour carrying imprisonment not exceeding ten years, impose short imprisonment (between one and three months), and in case of misdemeanours of the highest impact carrying imprisonment of at least ten years, impose imprisonment for a period from one to six months and a non-custodial penalty for a period from one month to two years. As a result of making use of the possibility provided by Article 37b CC, courts will be able to impose (in case of perpetrators of some misdemeanours that can or must carry a cumulative fine) three different penalties at the same time, i.e. imprisonment, a non-custodial penalty and a fine. They will of course have to remember that the total harshness resulting from penalties and penal measures cannot exceed the degree of guilt (Article 51 § 1 CC) and that when a statute lays down an obligation to impose a penalty prescribed in the sanction, an alternative mixed penalty cannot be imposed (see Article 57a § 1, Article 64, Article 65 § 1 and Article 178 § 1 CC).

The introduction of the directive on penalties imposition to Article 37b CC is, according to the statement of reasons, to prevent, on the one hand, devaluation of assessment of higher impact misdemeanours because of broad imposition of suspended imprisonment penalties and, on the other hand, imposition of unconditional imprisonment in the situation when the possibility of imposing suspended imprisonment sentences was limited in the amended Article 69 CC. The statement of reasons also indicates that a short-term imprisonment being a part of a mixed penalty may be imposed as an unconditional one or with conditional suspension of its execution. Then, there are arguments for the introduction of a possibility of imposing a mixed penalty instead of imprisonment because in many situations the imposition of a short-term isolation penalty is sufficient to achieve adequate results in the field of special prevention, and the role of imprisonment is to establish a convict's conduct that is socially desired[14]. It seems that the introduction of a mixed penalty solution to the system of criminal law, which in general deserves positive assessment, is accompanied by a lack of necessary gradation of penal response and some serious inconsistency. It is connected with admission of a possibility of conditional suspension of imprisonment imposed within a mixed penalty. The adopted solution is acceptable in case of medium impact misdemeanours, i.e. those carrying imprisonment not exceeding eight years. However, in case of perpetrators of most serious misdemeanours (carrying imprisonment not exceeding ten years or twelve years), it raises serious doubts. In such cases a penalty should be significantly different from a penalty for medium impact or petty misdemeanours. If courts commonly impose mixed penalties (and this was the intention of its introduction to the system), the difference in penal liability for acts of different impact will be blurred. It is not good from the perspective of justice as well as prevention. The necessity of maintaining

[14] See Statement of reasons for the Bill to amend the Act – Criminal Code and some other acts of 20 February 2015 (Journal of Laws of 2015, item 396), pp. 11–12.

differentiation of penal sanction's harshness based on the impact of an act committed by a perpetrator requires that imprisonment imposed for high impact misdemeanours within a mixed penalty should be unconditional and efficiently executed in order to play the role of a short and just shock penalty. In case of high impact misdemeanour perpetrators who do not deserve unconditional imprisonment, when it does not exceed one year, there are no obstacles in the way of courts applying conditional suspension of the execution of an imprisonment penalty pursuant to Article 69 CC and not apply a mixed penalty.

Seeing the need to differentiate penal sanctions for perpetrators of medium impact misdemeanours in comparison to those convicted for high impact misdemeanours, in my paper presented at a scientific conference on the directions of change in the contemporary criminal law organised in connection with Professor Zofia Sienkewicz's jubilee (on 29 September 2015 in Wrocław), I formulated a proposal *de lege ferenda* to amend Article 37b CC by adding after the words *not exceeding six months* ***without conditional suspension*** *and a non-custodial penalty not exceeding two years*. That is why I fully support the proposal to introduce changes within Article 37b CC included in Article 3 (2) of the Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016, where there is an addition stating that "Article 69 § 1 is not applicable". The decision contained in a separate sentence refers to all cases of imposition of the so-called mixed (cumulative) penalty. This means that imprisonment imposed within a mixed penalty together with a non-custodial sentence cannot be suspended, i.e. it will have to be imposed in the form of unconditional imprisonment resulting in a convict's real isolation in prison. A non-custodial penalty execution will start, as a rule, on a convict's release from prison unless some kind of *lex specialis* stipulates otherwise allowing for the change of sequence (see Article 37b, last sentence *in fine* CC and Article 17a PEC).

It is rightly raised in the statement of reasons for an amendment to the content of Article 37b CC that "the essence of penal response in the form of a mixed penalty consists in a short-term imprisonment and then a longer non-custodial penalty. This way, imprisonment is to function as a deterrent and be some sort of real warning to the convict. (…)"[15].

As far as the regulations contained in Article 37b CC are concerned, it also seems purposeful to formulate a proposal *de lege ferenda* to move its contents that are especially directive in character from Chapter VI CC to Article 58 § 4 CC.

BIBLIOGRAPHY

Bojarski T., [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2016.

Grześkowiak A., [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015.

[15] See Statement of reasons for the Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016 (the Sejm Paper no. 207), p. 17.

Hryniewicz-Lach E., [in:] M.Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna [Criminal Code. General issues]*, Vol. II, Warszawa 2015.

Konarska-Wrzosek V., *Dyrektywy wyboru kary w polskim ustawodawstwie karnym [Directives on the choice of a penalty in the Polish criminal legislation]*, Toruń 2002.

Konarska-Wrzosek V., Modyfikacje w zakresie zagrożeń karnych przewidziane w ramach zwykłego sądowego wymiaru kary [Modifications to penal threat envisaged within simple judicial penalty imposition], [in:] J. Majewski (ed.), *Nadzwyczajny wymiar kary [Extraordinary penalty imposition]*, Toruń 2009.

Konarska-Wrzosek V., Szczególne dyrektywy sądowego wymiaru kary [Special directives on judicial penalty imposition], [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary [Study of penalties: Judicial penalty imposition]*, System Prawa Karnego [Criminal Law System], Vol. 5, Warszawa 2015.

Konarska-Wrzosek V., [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2016 (gone to press).

Małecki M., [in:] W.Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Amendments to criminal law of 2015]*, Kraków 2015.

Marek A., *Prawo karne [Criminal law]*, Warszawa 2009.

Melezini M., Ustawowy a sądowy wymiar kary [Act on judicial penalty imposition], [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary [Study of penalties: Judicial penalty imposition]*, System Prawa Karnego [Criminal Law System], Vol. 5, Warszawa 2015.

Raglewski J., *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (Analiza dogmatyczna w ujęciu materialnoprawnym) [Exceptional penalty moderation in the Polish system of criminal law (Dogmatic analysis from substantive law perspective)]*, Kraków 2008.

Sienkiewicz Z., [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne [Criminal law]*, Warszawa 2010.

Uzasadnienie do projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z dnia 20 lutego 2015 r. [Statement of reasons for the Bill to amend the Act – Criminal Code and some other acts of 20 February 2015] (Journal of Laws of 2015, item 396).

Uzasadnienie do projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw datowanego na dzień 8 stycznia 2016 r. [Statement of reasons for the Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016], (the Sejm Paper no. 207).

LEGISLATIVE CHANGES REGARDING DIRECTIVES ON SENTENCING

Summary

The article is a dogmatic and legal analysis of new regulations introduced by the amendment of 20 February 2015 to Articles 58 § 1, 37a and 37b CC. The author presents the opinion that the regulations articulate special directives on judicial imposition of penalties for petty, medium and high impact misdemeanours stipulating statutory preferences with respect to the choice of a penalty provided that such choice is envisaged in the sanction or it is possible to apply a non-custodial alternative penalty when a crime carries a simple sanction of just imprisonment or a possibility of imposing a mixed penalty composed of short imprisonment and a non-custodial penalty. The author is especially against the interpretation of the provision of Article 37a CC according to which it transforms all simple sanctions for misdemeanours carrying imprisonment

not exceeding eight years into alternative sanctions composed of imprisonment and a fine or a non-custodial penalty. The author points out a series of negative results of such interpretation and presents proposals *de lege ferenda* with regard to modification of the analysed norms as well as a change of their placement in the General Issues chapter of the Criminal Code.

Key words: *amendment to the Criminal Code of 20 February 2015*, *penalty imposition*, *misdemeanours*, *special directives on penalty imposition*, *interpretational doubts regarding Article 37a and 37b CC*, *proposals* de lege ferenda

ZMIANY LEGISLACYJNE DOTYCZĄCE DYREKTYW WYMIARU KARY

Streszczenie

Artykuł zawiera analizę dogmatycznoprawną nowych uregulowań, wprowadzonych przez nowelę z dnia 20 lutego 2015 r., zawartych w art. 58 § 1, 37a i 37b k.k. Autorka stoi na stanowisku, że przepisy te artykułują dyrektywy szczególne na użytek sądowego wymiaru kary za występki o lekkim, średnim lub poważnym ciężarze gatunkowym, określające ustawowe preferencje w zakresie wyboru rodzaju kary, gdy taki wybór jest przewidziany w sankcji albo możliwości zastosowania wolnościowej kary zamiennej, gdy przestępstwo jest zagrożone sankcją prostą przewidującą tylko karę pozbawienia wolności lub też możliwości orzeczenia kary mieszanej składającej się z krótkiej kary pozbawienia wolności i kary ograniczenia wolności. Autorka w szczególności neguje trafność wykładni przepisu art. 37a k.k., w myśl której przekształca on wszystkie sankcje proste grożące za występki przewidujące karę pozbawienia wolności nieprzekraczającą 8 lat w sankcje alternatywne zawierające oprócz tej kary także karę grzywny lub karę ograniczenia wolności. Autorka wskazuje na szereg negatywnych skutków takiej wykładni i przedstawia określone propozycje *de lege ferenda* zarówno co do modyfikacji treści analizowanych unormowań, jak i zmiany ich usytuowania w Części ogólnej k.k..

Słowa kluczowe: *nowelizacja k.k. z 20 lutego 2015 r.*, *wymiar kary*, *występki*, *dyrektywy szczególne wymiaru kary*, *wątpliwości wykładnicze przepisów art. 37a i 37b k.k.*, *postulaty* de lege ferenda

Ius Novum
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CRIME OF COERCION (ARTICLE 191 CC) AFTER AMENDMENTS OF 10 SEPTEMBER 2015

MAREK MOZGAWA
KATARZYNA NAZAR

In the Penal Code of 1932, coercion was included in Article 251 (in Chapter XXXVI – Crimes against liberty). In accordance to this provision, whoever uses force or an illegal threat with the purpose of compelling another person to act, to desist from or to submit to acting in a specified manner shall be subject to the penalty of imprisonment of up to two years or detention of up to two years. The provision of Article 167 CC[1] of 1969 (lied down in Chapter XXII – Crimes against liberty) was given a bit different wording. The provision of Article 191 § 1 CC of 1997 is closer to its counterpart in the PC of 1932 (Article 251) than to Article 167 CC of 1969. Following the example of the Penal Code of 1932, the new legislation criminalised coercion of another person "to act, desist from or submit to acting" in a specified manner, and not "to conduct himself in a specified manner"[2] as it was laid down in the Criminal Code of 1996. Moreover, the scope of criminalisation was narrowed down by the use of a term "violence against a person" instead of a broad term "violence" that was used formerly, and by addition of a type of aggravated crime (if a perpetrator acts in order to extort a debt – Article 191 § 2 CC). The Act of 10 September 2015 (amending the Act – Criminal Code, the Act – Building regulation and the Act – Misdemeanour Procedure Code)[3] adds a new provision: Article 191 § 1a[4], which justifies closer examination of the crime of coercion.

[1] "Whoever uses force or illegal threat with the purpose of compelling another person to conduct himself in a specified manner shall be subject to the penalty of deprivation of liberty for up to two years, limitation of liberty or a fine".

[2] J. Wojciechowska [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej Rozdziały XXIII, XXIV, XXV i XXVII kodeksu karnego. Komentarz [Crimes against liberty, freedom of conscience and belief, right to sexuality and decency as well as dignity and bodily integrity: Chapters 23, 24, 25 and 27 of the Criminal Code. Commentary]*, Warszawa 2001, p. 40.

[3] Journal of Laws of 2015, item 1549.

[4] "Whoever uses violence persistently or hinders another person from using an apartment with the purpose laid down in § 1 is subject to the same penalty."

1. BASIC TYPE UNDER ARTICLE 191 § 1 CC

a. Individual liberty of choosing conduct according to one's will; in other words, individual freedom to choose to act in a certain manner or not, the freedom of choice of conduct, is subject to protection[5]. As L. Peiper rightly noticed (still based on the PC of 1932): "In fact, every man should have absolute freedom to choose what they want to do, what they want to desist from doing and what they want to submit to; this freedom refers to legal steps (e.g. entering into a contract, making their last will etc.) as well as to their physical activities (sitting down, driving, walking, eating etc.); thus, it protects persons, their property (…) and their things, constituting non-pecuniary value (…), or in general this legal and physical state of things in the centre of which an aggrieved person is and which they want or do not want to preserve. This freedom in its entire scope is protected in Article 251 (at present Article 191 CC – authors)"[6].

Attention must be drawn, however, to the fact that the analysed provision does not protect against all limitations to the freedom of conduct, but only those that occurred in case of the use of force or an illegal threat. Other ways of influencing another person (e.g. deceit) are, from the point of view of Article 191 CC, irrelevant although they may be morally wrong or relevant but from the point of view of other provisions[7].

b. Crime of coercion under Article 191 CC is committed by whoever uses violence against another person or an illegal threat in order to compel another person to act, desist from or submit to acting in a specified manner. Thus, the provision defines two ways of a culprit's action that can consist in the use of violence against another person or an illegal threat (or both types of conduct together). Therefore, it is necessary to discuss these concepts more thoroughly.

The first method of culprit's action specified in the provision of Article 191 CC is the use of violence. Although the term has been used in criminal law for years, there are serious differences in its understanding (similarly in relation to the establishment of the relation between this term and an illegal threat)[8]. M. Surkont even notices that there are not many terms that are "equally unclear and difficult to define" as the concept of the use of violence[9]. Usually, definitions mention the use of physical force of physical influence. J. Śliwowski believes that violence is "the use of physical force, it is direct coercion with the use of ravishment"[10]. K. Daszkiewicz-Pluszyńska puts it similarly ("violence consists

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[5] M. Surkont, *Przestępstwo zmuszania w polskim prawie karnym [Crime of coercion in Polish criminal law]* Gdańsk 1991, p. 48; also see J. Kosonoga [in:] *Kodeks karny. Komentarz [Criminal Code: Commentary]*, R.A. Stefański (ed.), Warszawa 2015, p. 1098.

[6] L. Peiper, *Komentarz do kodeksu karnego, prawa o wykroczeniach i przepisów wprowadzających obie te ustawy [Commentary on the Criminal Code, Misdemeanour Code and secondary legislation for the two acts]*, Kraków 1936, p. 509.

[7] A. Spotowski [in:] I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego. O przestępstwach w szczególności [Criminal law system: on crimes in particular]*, vol. IV, Part 2, Ossolineum 1989, p 37; also see N. Kłączyńska [in:] *Kodeks karny. Część szczególna. Komentarz [Criminal Code – Special issues: Commentary]*, J. Giezek (ed.), Warszawa 2014, pp. 474–475.

[8] A. Spotowski [in:] *System… [System…]*, p. 40; J. Wojciechowska [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa… [Crimes…]*, p. 43.

[9] M. Surkont, *Przestępstwo… [Crime…]*, p. 56.

[10] J. Śliwowski, *Prawo karne [Criminal law]*, Warszawa 1979, p. 385.

in the use of physical force"[11]). In I. Andrejew's opinion, it is connected with "the use of physical force that compels another person to act, desist from acting or submit to something"[12]. According to M. Siewierski, the concept of violence "should be understood in a broad sense, not only as a direct influence on bodily integrity of the aggrieved (e.g. by hitting, pushing etc.), but also as any other physical act having impact on their body or psyche in such a severe way that it subjugates them to a perpetrator's will"[13]. A. Spotowski criticises the above-mentioned ways of interpreting violence and states that the former ones are too general (and because of that, they do not make it possible to establish the limits of violence), and the latter one (proposed by M. Siewierski) does not make it possible to distinguish violence from a threat and, moreover, "assumes the existence of violence only in case of subjugation to a perpetrator's will, while violence also occurs when the compelled person has not submitted to a perpetrator's will"[14]. It is worth highlighting M. Surkont's interesting observations that "the characteristic feature of violence is that by physical influence it aims to subdue the will of the aggrieved and impose certain conduct desired by a perpetrator. It is enough to determine the use of physical force even if it does not have the features of a prohibited act"[15]. However, it can be assumed that T. Hanausek provides the most complete (and the most relevant) definition of violence. According to him, "Violence is such influence with the use of physical means that is to either prevent their wilful decisions to occur or be implemented by obstructing or overcoming the resistance of the compelled persons, or to make these decisions be made in the way desired by a perpetrator by exerting pressure on the compelled person's motivational processes with the use of actually caused hardship[16]. Analysing the above definition, A. Spotowski rightly states that we can find all necessary features of violence in it, i.e. (a) clear meaning that it consists in influence with the use of physical means; (b) an element of overcoming the compelled person's resistance (although sometimes it may be also connected with obstructing such resistance); (c) indication that actually caused hardship can be an element of violence. The last element in connection with the criterion of influencing with the use of physical means makes it possible to distinguish between violence and a threat[17]. In accordance with the above interpretation, violence may take the form of *vis absoluta* as well as *vis compulsiva*[18].

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[11] K. Daszkiewicz-Paluszyńska, *Groźba w polskim prawie karnym [Threat in Polish criminal law]*, Warszawa 1958, p. 20.

[12] I. Andrejew, *Kodeks karny. Krótki komentarz [Criminal Code: a short commentary]*, Warszawa 1981, p. 141.

[13] M. Siewierski [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny, Komentarz [Criminal Code: Commentary]*, Warszawa 1977, p. 427.

[14] A. Spotowski [in:] *System... [System…]*, p. 41.

[15] M. Surkont, Tzw. karalna samowola w ramach przestępstwa zmuszania [So-called punishable wilfulness within the crime of coercion], *Nowe Prawo* 1987, No. 9, pp. 84–85.

[16] T. Hanausek, *Przemoc jako forma działania przestępnego [Violence as a form of criminal act]*, Kraków 1966, p. 65.

[17] A. Spotowski [in:] *System… [System…]*, pp. 41–42.

[18] Inter alia A. Marek, *Prawo karne [criminal law]*, Warszawa 2006, pp. 482–483, M. Filar [in:] M. Filar (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2014, p. 1107; J. Kędzierski, O właściwą treść i wykładnię przepisu regulującego przestępstwo zmuszania – art. 191 § 1 k.k. [For appropriate contents and interpretation of the provision regulating the crime of coercion – Article 191 § 1 CC] [in:] *Ius et Lex, Księga jubileuszowa ku czci Profesora Adama Strzembosza [Ius et Lex. Professor Adam Strzeębosz jubilee book]*, A. Dębiński, A. Grześkowiak, K. Wiak (ed.), Lublin

Based on Article 167 CC of 1969, since the term "violence" is used in a general way, it was assumed in jurisprudence that its broad interpretation is justified. Thus, it was assumed that violence might consist not only in direct influence on the compelled but also in indirect influence, i.e. the environment of the compelled (i.e. things surrounding them and people being in close relation with them)[19]. The judicature presented the same stand. Inter alia, the ruling of the Supreme Court of 12 August 1974 indicated that. It stated: "The essence of a criminal act specified in Article 167 § 1 CC consists in (with the exception of a situation when only a threat occurs) a perpetrator's use of violence, i.e. broadly understood physical act aimed directly against the aggrieved, which subdues them to submit to a perpetrator's will and specified conduct, or against a thing possessed by the aggrieved, which limits the freedom of will of the aggrieved in the scope of possession of the thing or the use of it"[20].

Article 191 CC introduces a term "violence against a person" instead of a broad term "violence". It must be noticed that in the provisions of the binding CC, the legislator clearly distinguishes between the terms "violence" (e.g. Article 197 § 1) and "violence against a person" (e.g. Article 153 § 1), which undoubtedly indicates different scopes of the terms. Therefore, based on the Criminal Code of 1997, there is a limitation (in relation to Article 167 § 1 CC of 1969) of the term "violence" as one of the forms of compelling to "violence against a person"[21]. As the Supreme Court noticed in its resolution of 10 December 1998[22], "Violence against a person as a form of compelling – as understood in Article 191 § 1 CC – may only consist in direct physical influence on a person and does not include indirect influence (the so-called indirect violence) consisting in the treatment of things". It seems that in jurisprudence a dominant opinion is that *de lege lata* violence against a person should be interpreted in a narrow way (i.e. as violence targeting a person and not things), although there are doubts whether this limitation of criminalisation is right[23]. The supporters of the narrow interpretation of violence emphasise that *de lege lata* it concerns the use of force directly against a person compelled or other persons if this way a perpetrator wants to exert pressure on the conduct of the aggrieved (e.g. force used against a child may be a way of compelling a mother to conduct in a specified way); the exchange of the door locks in order to prevent somebody from entering a house or cutting off the supply of water or energy does not constitute violence any more; such cases should be solved in the course of civil proceedings[24]. A. Zoll, supporting the

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2002, p. 137; also the Supreme Court in its resolution of 10 December 1998, I KZP 22/98, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 1999, No. 1–2, item 2.

[19] T. Hanausek, *Przemoc… [Violence…]*, p. 139; A. Spotowski [in:] *System… [System…]*, pp. 42–43.

[20] Rw 403/74, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 1974, No. 11, item 216. Also compare the ruling of the Appellate Court in Katowice of 26 March 1998, II AKa 8/98, *Orzecznictwo Sądów Apelacyjnych* 1998, No. 11–12, item 66, *Prokuratura i Prawo* – supplement 1998, No. 11–12, item 29.

[21] M. Mozgawa [in:] J. Warylewski (ed.), *System Prawa Karnego, Przestępstwa przeciwko dobrom indywidulanym [Criminal law system: Crimes against publicity rights]*, vol. X, Warszawa 2012, p. 469.

[22] I KZP 22/98, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 1999, No. 1–2, item 2.

[23] A. Marek, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2010, s. 439.

[24] The supporters of a narrow interpretation of violence based on Article 191 CC are inter alia: Compare J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo [Criminal Code: Commentary. Judicial decisions]*, Warszawa 2002, p. 362; A. Marek, *Kodeks… [Criminal Code…]*, p. 439; O. Gór-

narrow interpretation of violence in general, notices however that the regulation adopted in Article 191 § 1 CC does not exclude penalisation of the use of violence directly against a thing if the use of force against a thing takes the form of a punishable threat (e.g. a perpetrator damages a set of fine china in order to compel its owner to return a debt[25]). Some authors, despite the change of the provision, state that there are no grounds for exclusion of violence against things from the scope of the provision, e.g. M. Filar[26], K. Grzegorczyk[27], R. Góral[28], M. Wysocki[29], J. Wyrembak[30]. These authors' opinions are perhaps rational, however, one cannot lose sight of what is obvious. The legislator (who, as we assume, is a "rational legislator") consciously changed the term "violence" into "violence against a person" and there is no doubt that the two concepts are not the same (otherwise their differentiation based on the Criminal Code would be groundless). It would be difficult to refute a statement that the term "violence" has a broader meaning than "violence against a person'. Supporting the narrow understanding of violence based on Article 191 CC, it is necessary to notice that the systemic and historic interpretation is an argument for it[31]. It is also worth emphasising that the reasons for the Criminal Code of 1997 clearly indicated: "The Code stipulates that it is violence against a person in order to exclude its application instead of the provisions of the civil law"[32]. The fact that the adopted solution (narrowing the scope of violence only to violence against a person) is, as it seems, wrong cannot lead to interpretation *contra legem*. It must also be underlined that the Constitutional Tribunal (in its judgement SK/8/00 of 9 October 2001) stated the narrowing of the scope of application of Article 191 § 1 CC is in compliance with

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niok, *Nowa kodyfikacja karna. Krótkie komentarze [New criminal codification: Short commentaries]*, Warszawa 1999, vol. 7, p. 59; M. Mozgawa [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015, p. 512; L. Paprzycki, Przemoc przemocy nierówna [Violence may be of different types], *Rzeczpospolita* of 14 April 1999; W. Cieślak, Glosa a gloss of approval on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Przegląd Sądowy* 1999, No. 10, p. 141 and subsequent ones.

[25] A. Zoll [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz, t. II, Komentarz do art. 117–277 k.k. [Criminal Code – Special issues: Commentary, Vol. II, Commentary on Articles 117–277 CC]*, Kraków 2013, p. 613; according to M. Filar: "Because when a perpetrator wanting to compel another person to conduct himself in a specified manner breaks their set of fine china, he commits a crime to their detriment (it has already been instituted) and not only threatens he is going to commit it". M. Filar, Critical gloss on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Państwo i Prawo* 1999, No. 8, p. 116.

[26] M. Filar, Critical gloss on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Państwo i Prawo* 1999, No. 8, p. 115.

[27] K. Grzegorczyk, Critical gloss on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Wojskowy Przegląd Prawniczy* 1999, No. 1–2, pp. 161–162.

[28] R. Góral, *Kodeks karny. Praktyczny komentarz [Criminal Code: Practical commentary]*, Warszawa 2005, p. 303.

[29] M. Wysocki, Przemoc wobec osoby w rozumieniu art. 191 k.k. [Violence against a person in accordance with Article 191 CC], *Prokuratura i Prawo* 1999, No. 3, p. 64; *ibid*., Critical gloss on the resolution of the Supreme Court of 10 December 998, I KZP 22/98, *Orzecznictwo Sądów Polskich* 1999, No. 4, pp. 169–171.

[30] J. Wyrembak, Critical gloss on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Przegląd Sądowy* 1999, No. 7–8, p. 142; *ibid*., Szkolna argumentacja nie przekonuje [School arguments are not convincing], *Rzeczpospolita*, of 6 May 1999.

[31] M. Mozgawa [in:] *System… [Criminal law system…]*, p. 472.

[32] *Nowe kodeksy karne z 1997 r. z uzasadnieniami [New Criminal Codes of 1997 with reasons]*, Warszawa 1997, p. 195.

Article 30 and Article 2 of the Constitution[33]. *De lege lata* imposing compulsion on a person by affecting things is unpunished unless it has the statutory features of other crimes (e.g. damage to property – article 288 CC) or misdemeanours (e.g. unauthorised use of someone else's property – Article 127 Misdemeanour Code, damage to property worth less than one quarter of the minimum salary). In case of a threat of damaging, impairing or making something unsuitable for use (obviously under the condition that it is worth more than one quarter of the minimum salary) we deal with a threat of committing a crime (within the scope of an illegal threat), which implicates liability under Article 190 CC[34].

The second method of a perpetrator's acting indicated in the provision of Article 191 CC is a threat. An illegal threat (Article 115 § 12 CC) includes a punishable threat and a threat of causing a criminal proceeding or a threat of disseminating information dishonouring the aggrieved or their next of kin. Within an illegal threat, a threat of committing a crime (Article 190 § 1 CC) is especially significant. It is laid down in Article 115 § 12 CC as the most serious one among other types of threats. It constitutes a crime against liberty while other types of an illegal threat are activities aiming at achieving a particular objective at the time of committing various crimes, e.g. during coercion or rape. The Criminal Code that is in force at present, in Article 190, specifies "a threat of committing a crime". Thus, it is not important for the existence of a punishable threat whether a perpetrator announces the commission of a felony or a misdemeanour. The phrase "threatens to commit a crime" classifies an act as an illegal threat as defined in Article 115 § 12 CC. Its essence is an announcement of the commission of a crime (an illegal and punishable act), thus an announcement of the commission of a felony or a misdemeanour against the threatened or their next of kin. A threat is influence on the psyche of another person by an announcement of the wrong that is going to happen to the threatened from the threatening party or another person whose conduct is influenced by the threatening party. Usually, the wrong announced to the threatened person is to happen in case they desist from the perpetrator's will, but there is also a possibility of a threat that is not connected with any demand and is only intended to elicit a state of fear of a threat institution. The persons threatened must be unambiguously specified although a threat does not have to be made in their presence. A threat does not have to be immediately carried out. It may constitute a future danger. For the existence of a crime, it is not necessary for a perpetrator to undertake any steps to carry out a threat, or to have the real intention of carrying it out or an actual possibility of carrying it out as well as what the aim of a threat is[35]. What is only significant is the subjective perception of a threat by the aggrieved, i.e. whether it actually evoked the feeling of fear that it will be carried out, whether it caused the feeling of fear or danger[36]. It is possible to threaten, i.e. to announce that one is going to get something bad to happen, in different ways. The Criminal Code that is in force in Poland at present does not introduce any limitations to the form of a threat. It is

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[33] *Orzeczenia Trybunału Konstytucyjnego* 2001, No. 7, item 211 (with a gloss of approval by A.R. Światłowski, *Prokuratura i Prawo* 2002, No. 5, item 75).

[34] A. Marek, *Kodeks… [Criminal Code…]*, s. 439.

[35] K. Daszkiewicz-Paluszyńska, Groźba… [Threat…], s. 137–138; also see M. Filar [in:] M. Filar (ed.), *Kodeks…* [*Criminal Code…*], p. 1099.

[36] See the ruling of the Supreme Court of 27 April 1990, IV KR 69/90, *Przegląd Sądowy* 1993, no. 5.

important that the addressees understand that they are going to suffer hardship. In case of a punishable threat, they should realise that a crime is to be committed to their detriment or the detriment of their next of kin. A threat may be explicit or implicit. The form of a threat is sometimes determined by circumstances of an event, especially personal features of the threatening party and an addressee of a threat[37]. The crime of a punishable threat is a crime of immediate effect where the effect is causing a fear that a threat will be carried out. Carrying out a threat, i.e. the commission of the crime announced, cannot be treated as an effect. For the existence of a crime under Article 190 CC, carrying out a threat is not significant. Neither can one agree with the opinion that the crime is committed when a threat is issued[38]. A crime of a punishable threat has been specified in the Polish criminal law as a common and intentional crime that may be committed with a direct intention. Another form of intention, i.e. potential intent, raises controversies[39].

An announcement of causing a criminal proceeding, unlike a punishable threat, does not occur as a crime in itself and undertaking steps causing a criminal proceeding by a person who has learned about a commission of a crime is not only a permitted act but in accordance with Article 304 CPC, reporting a crime is a civic duty. A threat of this kind would remain unpunished if its perpetrator has only made it or even carried it out. But the knowledge of a crime cannot be used to compel other persons to conduct themselves in a specified manner[40]. A punishable threat of causing a criminal proceeding constitutes a means of coercion[41]. By "influencing, exerting pressure on the will of the aggrieved, a perpetrator wants to achieve desired conduct, extorts (…) submission to his will"[42]. Truthfulness or untruthfulness of data being grounds for a threat and the conscience of this untruthfulness are not significant for the existence of coercion. Illegal threat maintains this character both when it is based on invented facts and when these are real facts (when

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37 Compare W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego I rosyjskiego, obowiązującego w Polsce [Criminal law: on crimes in particular. Comparative lecture on Austrian, German and Russian criminal law binding in Poland]*, Warszawa 1924, p. 228.

38 M. Siewierski [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks… [Criminal Code…]*, p. 426; this opinion is expressed by inter alia J. Wojciechowski, *Kodeks karny… [Criminal Code…]*, p. 360 and R. Góral, who stated that the consequence of this crime is invoking a fear of a threat fulfilment and the commitment takes place with its issue; see *Ibid*., *Kodeks… [Criminal Code…]*, p. 302.

39 There are a number of supporters of a direct intention: S. Goczałkowski [in:] W. Makowski (ed.), *Encyklopedja podręczna prawa karnego [Pocket encyclopaedia of criminal law]*, vol. II, Warszawa 1934–1936, p. 575; M. Siewierski [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny... [Criminal Code…]*, p. 426; W. Świda, *Prawo karne [Criminal law]*, Warszawa 1978, p. 519; D. Gajdus [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki [Criminal law: Theoretical and practical issues]*, Warszawa 1986, p. 343; A. Marek, *Kodeks… [Crinminal Code…]*, p. 437; A. Zoll [in:] A. Zoll (ed.), *Kodeks… [Criminal Code…]*, p. 603. The following authors present a different opinion: O. Górniok [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, T. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, vol. I, Gdańsk 2005, p. 186; similarly R. Góral, *Kodeks… [Criminal Code…]*, p. 304; A. Spotowski [in:] *System… [Criminal law system…]*, p. 35; K. Daszkiewicz-Paluszyńska, *Groźba... [Threat…]*, p. 147 and subsequent ones.

40 For more: K. Nazar-Gutowska, *Groźba bezprawna w polskim prawie karnym [Illegal threat in Polish criminal law]*, Warszawa 2012, p. 73 and subsequent ones.

41 M. Surkont, *Przestępstwo… [Crime…]*, p. 96 and subsequent ones.

42 Ruling of the Cupreme Court of 12 August 1974, Rw 403/74, *Orzecznictwo Sądu Najwyższegi Izba Karna i Wojskowa* 1974, no. 11, item 216.

the threatened person really committed a crime, which a perpetrator threatens to reveal)[43]. A threat based on invented facts, however, can constitute an efficient means of coercion.

A threat of causing a criminal proceeding does not only refer to a threat of causing a criminal proceeding in case of a crime but also a proceeding in case of a fiscal crime[44]. A threat does not refer, however, to a proceeding in case of a misdemeanour or fiscal misdemeanour[45] nor a proceeding in cases against minors.

Still under the Criminal Code of 1969, it was rightly raised that a threat of causing a criminal proceeding is an announcement of initiating a criminal proceeding against the threat addressee and his next of kin[46]. The opinion remained in force at present[47]. A threat of causing a criminal proceeding covers an announcement of reporting the commission of a crime prosecuted ex officio as well as an announcement of filing a motion to initiate private prosecution or an announcement of filing a motion to prosecute. However, an announcement of taking steps in connection with the current proceeding, e.g. an announcement of an intention to testify against someone, should not be treated as a threat of causing a criminal proceeding.

A threat of causing a criminal proceeding that aims only to protect a legal good infringed in the course of a crime by a person to whom it is addressed is excluded from the scope of a punishable threat under the statute in force.

Another form of an illegal threat is a threat of disseminating information dishonouring the aggrieved or their next of kin. A threat of disseminating information dishonouring, if it does not aim to compel someone, does not constitute a crime. In this kind of act, a perpetrator demands that the threatened persons conduct themselves in a specified manner, thus a perpetrator influences the psyche of the compelled persons. The demand is based on the intent to use the possessed information about the aggrieved or their next of kin. Therefore, a person who coerces another person does not create a situation in which the aggrieved person must conduct himself in a specified manner, but finds such a situation and makes use of it[48]. The contents of the analysed threat are to refer to

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[43] M. Surkont, *Przestępstwo… [Crime…]*, p. 97.

[44] A. Wąsek [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, T. Tyszkiewicz, A. Wąsek, *Kodeks karny… [Criminal Code…]*, vol. I, p. 843; similarly J. Majewski [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz [Criminal Code – General issues: Commentary]*, vol. 1, Kraków 2004, p. 1448. In the ruling of 5 February 1935, the Supreme Court decided that an illegal threat will "be e.g. compelling the aggrieved by an announcement of an intention to report an alleged infringement of tax law", ruling of the Supreme Court of 5 February 1935, I K 1177/34, *Orzecznictwo Sądu Najwyższego* (K) 1935, no. 9, item 380.

[45] W. Świda, *Prawo… [Criminal Law]*, p. 520 i A. Spotowski [in:] *System… [Criminal law system…]*, p. 46, also compare different opinions: K. Daszkiewicz-Paluszyńska, Groźba… *[Threat…]*, p. 103.

[46] Compare W. Wolter [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem [Criminal Code with a commentary]*, Warszawa 1973, p. 380; also A. Zoll [in:] K. Buchała (ed.), *Komentarz do kodeksu karnego. Część ogólna [Commentary on Criminal Code: General issues]*, Warszawa 1990, p. 406.

[47] See A. Wąsek [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, T. Tyszkiewicz, A. Wąsek, *Kodeks karny... [Criminal Code…]*, vol. I, p. 843.

[48] For more on this topic: M. Surkont, Zapowiedź rozgłoszenia wiadomości uwłaczającej czci jako postać groźby bezprawnej [Suggestion of disseminating information insulting dignity as a form of lawless threat], *Nowe Prawo* 1989, no. 5–6, pp. 101–113.

dishonouring "information". It is an expression that is broader than in case of defamation where concepts of "conduct" and "features" are used. According to M. Surkont, the term "information" used in the definition of an illegal threat seems to be more adequate. This is because there are circumstances which cannot be treated as the conduct of the aggrieved or classified as features but are undoubtedly dishonouring, e.g. dissemination of information that a person has been turned out or slapped across the face. In this author's opinion, a term "information" seems to practically exhaust the scope of the contents of information that can insult[49]. Disseminated information is to dishonour, thus it is information that discredits, impairs a good reputation of the aggrieved. A perpetrator of the discussed form of a threat menaces reputation, authority and moral values of the threatened. It may consist in ridiculing, accusing someone of a shameful act or compromising someone. All this is to influence the aggrieved person's will, steer his conduct in a desired direction[50]. The dishonouring information a perpetrator threatens to disseminate may be true or false. The person who is threatened as well as his next of kin is undoubtedly aggrieved. There is only an open question whether it concerns only the next of kin who are alive or also those who are dead[51]. A threat maintains its illegal character regardless of whether a perpetrator intends to carry it out.

In accordance with the wording of the provision of article 191 § 1 CC, a perpetrator (using the above-mentioned means, i.e. violence or a threat) must act with the purpose of compelling another person to act in a specified manner, to desist form acting or submit to that. The subject to this act is another person who a perpetrator compels to conduct himself in a specified manner; in case of violence, the subject to influence may also be a person whose conduct is to influence the decision of the compelled. Obviously, the term "another person" refers only to a natural person, and coercion of a collective entity may lead to classification of other crimes (e.g. Article 128 §§ 3 CC, Article 232 CC)[52]. Using the word "to act", we mean a situation in which the aggrieved wants to remain passive (does not will to be active, i.e. act) and a perpetrator compels him to be active (act), which is a legal or just an actual act[53]. As far as other forms are concerned, i.e. desisting from and submitting to, they consist in passive conduct of the aggrieved. As L. Peiper emphasised, "the difference, however, lies in that when desisting the aggrieved does not do anything and as a result nothing happens in this sphere, when submitting the aggrieved also does not do anything or what is to happen is something that the aggrieved does not want and probably would not peacefully submit to if he were not under a perpetrator's coercion. What happens in case of submission by the aggrieved, may happen as a result of a perpetrator's or another person's will or

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[49] M. Surkont, *Przestępstwo... [Crime…]*, pp. 111–112.

[50] *Ibid*., p. 112.

[51] According to M. Surkont "although termination of physical personality breaks legal protection of the dead, but in many cases dissemination of insulting information may impair the reputation of the alive next of kin. This can be the aim of the person compelling", *Ibid*., *Przestępstwo… [Crime…]*, p. 114.

[52] L. Pepier, *Komentarz… [Commentary…]*, p. 510; A. Zoll [in:] A. Zoll (ed.), *Kodeks… [Criminal Code…]*, p. 615. Also compare the reasons for the ruling of the Appellate Court in Katowice of 12 January 2006, II Aka 448/05, *Orzecznictwo Sądów Apelacyjnych* 2007, No. 7, item 32, *Krakowskie Zeszyty Sądowe* 2007, No. 7–8, item 82.

[53] L. Pepier, *Komentarz… [Commentary...]*, p. 510.

because of other reasons independent of anyone's will (e.g. a perpetrator compels the aggrieved to submit to the natural flow of liquid onto his land"[54].

From the point of view of the statutory features of the crime of coercion under Article 191 § 1 CC, it is not important whether the compelled person was obliged to act in a specified manner, desist from it or submit to it. Obviously, unlawfulness of the institution of the features of this type of a prohibited act may be subject to exemption in case of a countertype occurrence[55]. It seems that there may be a state of necessity, self-defence, scolding minors or self-help. Action within someone's powers or professional duties may be especially important within this subject matter; there are numerous cases of legalised use of violence – usually in the form of direct coercive measures (e.g. the use of coercive measures by the Police: Articles 16–17 of Act on the Police of 6 April 1990[56], by the Internal Security Agency: Articles 25–26 ISA and IA[57] of 24 May 2002, by the Central Anticorruption Bureau: Articles 15–16 CAB of 9 June 2006[58]). Coercion takes place many times in case of authorisation to deprive a person of liberty.

Based on the Penal Code of 1932, it was debatable when a crime of coercion may be recognised as committed (which resulted from the legislator's use of a phrase "whoever … compels another person" in Article 251). Some pointed out that it occurs at the moment of the use of violence or a threat and not at the moment of compelling to act, desist from or submit to acting because the provision protects liberty and the term "compels" cannot be interpreted as "leads to" but as synonymous to "uses violence or a threat"[59]. Others, on the other hand, presented a stand that a crime under Article 251 is committed only at the time of compelling (to act, desist from or submit to acting), and not at the moment of using measures laid down in the statute because of the fact that the legislator did not specify clearly that it refers only to the use of violence or a threat[60]. As per the Criminal Code of 1969, the dispute did not take place because the legislator used an unambiguous phrase "whoever uses violence, a threat…" (and per Article 191 CC of 1997, a phrase "whoever makes use of violence, a threat…"). Such approach (both "uses" and "makes use") leads to a conclusion that a crime of coercion is committed at the moment of using violence or a threat, and the fact whether the aggrieved conducted himself following a perpetrator's will is not included in the scope of the statutory features of the crime of coercion[61]. *De lege lata* coercion is undoubtedly a formal crime[62].

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[54] *Ibid*., p. 510.

[55] A. Zoll [in:] A. Zoll (ed.), *Kodeks… [Criminal Code…]*, p. 611.

[56] Uniform text, Journal of Laws of 2015, item 355 of 16 March 2015.

[57] Uniform text, Journal of Laws of 2015, item 1929 of 20 November 2015.

[58] Uniform text, Journal of Laws of 2014, item 1411 of 17 November 2014.

[59] J. Makarewicz, *Kodeks karny z komentarzem [Criminal Code with a commentary]*, Lwów 1938, p. 562. As L. Peiper writes, "A crime is committed just by compelling (not by having compelled) someone; it does not make a difference whether an effect has been obtained, i.e. whether the aggrieved submitted to the perpetrator's will. icy, L. Peiper, *Komentarz… [Commentary…]*, p. 510.

[60] S. Glaser, A. Mogilnicki, *Kodeks karny – komentarz; prawo o wykroczeniach, przepisy wprowadzające, tezy z orzeczeń Sądu Najwyższego, wyciągi z motywów ustawodawczych [Criminal Code – Commentary: misdemeanour law, regulations on the implementation of the rulings of the Supreme Court, legislative reasons]*, Warszawa 1934, p. 809.

[61] A. Spotowski [in:] *System... [Criminal law system…]*, p. 50.

[62] J. Wojciechowska [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa… [Crimes…]*, p. 42; M. Mozgawa [in:] M. Mozgawa (ed.), *Kodeks… [Criminal Code…]*, p. 513.

c. A crime under article 191 § 1 CC is a common one. Its objective aspect does not raise any doubts. While per the Penal Code of 1932 there were doubts about the form of objective aspect of the existence of this crime, in case of Article 167 CC of 1969 as well as Article 191 of the Criminal Code that is in force at present there are no doubts that we deal with an intentional crime (thus, there is only a direct intention). The condition for liability is a perpetrator's action in order to compel another person to act, desist from acting or submit to acting; violence or a threat used by a perpetrator is just a means to achieve the intended objective[63]. In case a perpetrator has used violence or a threat without such an objective, he may be liable for the commission of another crime, e.g. under Article 217 CC (abuse of bodily integrity)[64].

2. BASIC TYPE UNDER ARTICLE 191 § 1A CC

On 7 January 2016, a ne provision of Article 191 § 1a was introduced to the Criminal Code, which criminalises the conduct of a perpetrator who with the purpose of achieving the aim specified in § 1 makes use of violence of another type persistently or in the way that substantially hinders another person from using an occupied apartment[65].

The prohibited act laid down in Article 191 § 1a consists in the fact that a perpetrator should:

a) act in order to achieve the aim specified in § 1,
b) use violence of another type (than specified in § 1),
c) act persistently or in a way that substantially hinders another person from using an occupied apartment.

Re. a) As it was mentioned earlier, in accordance with Article 191 § 1 CC, whoever uses violence against another person or an illegal threat with the purpose of compelling another person to act in a specified manner, desist from acting or submit to acting is liable under that provision. Thus, a perpetrator of a crime under Article 191 § 1a must also act with the purpose of compelling another person to specified conduct (to act or desist from acting) or submission.

Re. b) For the existence of a crime under Article 191 § 1a CC, it is necessary to use violence of another type than that specified in § 1. Therefore, as § 1 clearly indicates that it must only be violence against a person, in case of § 2 this type of violence is

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[63] A. Zoll [in:] A. Zoll (ed.), *Kodeks… [Criminal Code…]*, p. 616.

[64] J. Wojciechowska [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa… [Crimes…]*, p. 50.

[65] As the reasons for the Bill suggest, "There is commonly unpunished conduct such as cutting off electricity or central heating, supply of water, seizure of car keys, removing windows, bricking up the entrance to an apartment or locking rooms. Apartment owners who want to compel lodgers to leave often decide to flood the flats, devastate the building, pollute or destroy shared parts, e.g. by removing doors and windows. Article 191 § 1 CC results in helplessness of people against whom such actions are undertaken and inability to request the Police to undertake steps because the features specifying the action causing the crime of coercion to specified conduct do not cover this type of conduct (unlike the former regulation of article 167 of the Criminal Code of 1969)".

excluded and it refers only to the so-called violence against a thing (more precisely, influencing a person by dealing with a thing), i.e. the so-called indirect violence.

Re. c) A perpetrator must act persistently or in a way that substantially hinders another person from using an occupied apartment[66].

It is not simple to determine what "persistently" means. Although this feature occurs also in other provisions of the Criminal Code (Articles 209, 190a), also based on them it raises serious interpretational doubts. Obviously, one may quote a series of the Supreme Court judgements in this matter but they do not solve the problem. The judicature assumes that persistence means long lasting, repetitive conduct with the features of ill will and tenacity[67]. The judgement of the Supreme Court of 5 January 2001 states that persistence is antinomy of single or even multiple instances of a perpetrator's conduct (V KKN504/00)[68]. This shows how the judicature treats the issue of persistence, which in practice means only problems, i.e. as a rule even multiple instances of a perpetrator's conduct will not be sufficient and will meet with permanent refusal to initiate a proceeding (or discontinuance of a proceeding), as happens in case of Article 190a CC because of a lack of institution of the feature of persistence.

The situation is similar in connection with the feature of the way "substantially hindering" another person from using an occupied apartment. To hinder means "to create difficulties, obstacles, to make it difficult"[69] (but not to make it impossible). This manner must not only be (more or less) hindering but also substantially (to a big extent) hindering. It seems that the assessment whether the manner is or is not substantially hindering may be made only *in concerto* (in the reality of the given event)[70]. Most probably, the legislator wanted to make these types of conduct concerning hindering another person using an apartment that are not really substantial (i.e. insignificant) exempt from the scope of the provision application. One may wonder whether the solution was necessary because those insignificant difficulties would be examined with Article 1 § 2 CC in view (low level of social impact) [71].

What deserves attention is the fact that the legislator limited the subjective scope of the provision only and exclusively to an apartment. This narrowing is groundless because commercial premises should also be taken into account (there are many such premises in apartment blocks and their value is sometimes higher than the value of

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66 This means that there are various correlations between those situations possible: a perpetrator's persistent action that does not substantially hinder another person from using an occupied apartment; a perpetrator's persistent action that hinders another person from using an apartment in a moderate way; a perpetrator's persistent action that does not hinder another person from using an occupied apartment; a perpetrator's persistent action that at the same time substantially hinders another person from using an occupied apartment; a perpetrator's action that is not persistent (e.g. undertaken once) but at the same time substantially hindering another person from using an occupied apartment.

67 Ruling of the Supreme Court of 27 February 1996, II KRN 200/95, *Orzecznicwo Prokuratury i Prawa*, no. 10; Ruling of the Appellate Court in Kraków of 13 December 2000, II AKz 289/00, *Krakowskie Zeszyty Sadowe* 2000, vol. 12, item 28.

68 *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 2001, no. 7–8, item 57.

69 http://sjp.pl/utrudniaj%C4%85cy

70 Also see A. Michalska-Warias [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015, p. 542.

71 M. Mozgawa [in:] M. Mozgawa (ed.), *Kodeks… [Criminal Code…]*, p. 508.

apartments). A question also arises about the objective scope of the new type of crime and whom it is against. A "clear" model that the legislator certainly had in mind was a "bad" landlord and the aggrieved lodger. It may happen and surely often does. But in fact the scope of application of that provision is much wider. It can carry liability of e.g. the owner of an apartment in a block or even a lodger who, e.g. wants to compel a neighbour to leave (or influence their conduct, maybe in an objectively appropriate way) and uses this type of indirect violence against them (e.g. by cutting off the supply of energy with the use of the main electrical switch that is in the staircase). However, an owner (a lodger) of an apartment in a block (unfortunately) will not be liable under the provision if they undertake the same action against the owner (or e.g. a leaseholder) of neighbouring commercial premises whose business (although absolutely legal and objectively not a nuisance) subjectively disturbs them.

The crime under Article 191 § 1a is common, formal and may be committed only with direct intention (namely, *dolus coloratus*).

3. AGGRAVATED TYPE

In comparison with the Criminal Code of 1997, the aggravated type of the crime of coercion (Article 191 § 2 CC) is a novelty. It occurs when a perpetrator using violence or an illegal threat acts with the purpose of extorting the return of a debt (which carries a penalty of imprisonment for a period of three months to five years). As A. Marek emphasises, it is a new type of crime, which "is a response to these types of criminal conduct and often its very brutal forms that take place in practice"[72]. The provision of Article 191 § 2 specifies the aggravated type of coercion in relation to the provision of article 191 § 1 (and the relation between the two provisions is the relation of mutual exclusion). The crimes differ mainly because of the features characteristic of the objective aspect: in § 2 the scope of punishable conduct is limited only to action with the purpose of extorting the return of a debt"[73].

Based on the analysed provision, two basic issues occur: the first one concerns understanding the term "debt", the second the placement of the feature in the provision. As far as the definition of a debt is concerned, there is no doubt the meaning is the same as in the civil law. The definition of a debt is one of the most important concepts of the law of obligations and a rational legislator could not differentiate this term for the needs of different branches of law. If there were such an intention, it would have to be clearly specified in a statute. Thus, in accordance with the civil law, a debt means a creditor is entitled to demand a return of it based on an obligation relation between a creditor and a debtor that is composed of one or many claims or rights"[74]. It should

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[72] A. Marek, *Kodeks… [Criminal Code…]*, p. 440.

[73] P. Kardas, Zasada ochrony wolności a odpowiedzialność za wymuszenie zwrotu wierzytelności [Principle of protection of liberty vs. liability for extortion of a debt], [in:] *Prawnokarne aspekty wolności [Criminal law aspects of freedom]*, M. Mozgawa (ed.), Wolters Kluwer – Zakamycze 2006, pp. 157–158.

[74] For more on this topic compare Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna [Liabilities: General issues]*, Warszawa 2010, p. 11 and subsequent ones.

be given the same meaning under article 191 CC (as well as per the whole criminal law). It is worth mentioning, however, that the different understanding of a debt in the judgement of 5 March 2003 in which the Supreme Court stated that "it would be wrong to assume that a term "debt", constituting a feature of an aggravated crime of coercion, has strictly the same meaning as in the light of civil law."[75] It is difficult to approve of the arguments presented by the Supreme Court indicating the difficulties connected with civil law approach to the concept (necessity to establish whether the extorted debt was one in accordance with civil law, whether it really existed, in what amount and who the debtor is, which might cause the change a criminal proceeding into a civil proceeding, sometimes lengthy, without a real reason for that). It is a fact that the above-mentioned findings are not the easiest to establish but establishing them is a court's duty (irrespective of whether it is easy or difficult to do). Adopting an interpretation that is in fact to lead to make the work of criminal courts easier is inadmissible (and is in conflict with the provision).

The second problem that must be solved in order to properly carry out a dogmatic analysis of the provision seems to be whether the feature "debt" is classified as the subjective aspect of a crime or a feature constituting an objective aspect of a crime under Article 191 § 2 CC. Part of jurisprudence rightly classifies a "debt" as a feature of the subjective aspect (inter alia A. Marek, J. Wojciechowska, B. Michalski, O. Górniok, A. Zoll); others believe that it is an objective aspect of a crime (P. Kardas[76]). According to A. Marek, the condition for penalisation under Article 191 § 2 is that a debt really exists; it is not enough that a perpetrator claims the victim owes him a debt. Otherwise a perpetrator's act has the statutory features of extortion (Article 282 CC)[77]. A Wojciechowska puts it similarly, however, she believes that in case the benefit were independent, it should be classified a robbery (Article 280 CC[78]). According to O. Górniok, it is extortion[79]. B. Michalski thinks that per Article 191 § 2 a perpetrator compels the aggrieved to return an actual debt and in case of a misdemeanour under Article 282 there is no obligation relation whatsoever between a perpetrator and a victim (and a perpetrator's action is illegal from the very beginning)[80]. According to A. Zoll, the fact that a debt exists is a subjective element (although certainly for the institution of features of Article 191 § 2 CC it is necessary that an objective element, i.e. a purpose to recover a debt, also exists). Appellate courts judgements presented the same opinion (that a debt must really exist and thus, it constitutes an element of the subjective aspect of the aggravated type of coercion).[81] The Supreme Court presented

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[75] III KKN 195/01, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 2003, No. 5–6, item 55.

[76] P. Kardas, Zasada… [Principle…], p. 141 and subsequent ones.

[77] A. Marek, Kodeks… [Criminal Code…], p. 440.

[78] J. Wojciechowska [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna [Criminal Code: Special issues]*, vol. I, Warszawa 2004, p. 702.

[79] O. Górniok [in:] O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz Criminal Code: Commentary]*, vol. II, Gdańsk 2005, p. 191.

[80] B. Michalski [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna [Criminal Code: Special issues]*, vol. II, Warszawa 2006, p. 952.

[81] Compare e.g. the ruling of the Appellate Court in Kraków of 12 March 2003, II Aka 39/03, *Prokutatura i Prawo* – supplement 2003, No. 10, item 12, *Krakowskie Zeszyty Sądowe* 2003, No.

a different stand in the subject matter in its ruling of 5 March 2003[82] in which it stated: "For the exhaustion of the features of a crime of using violence or an illegal threat with the purpose of extorting the return of a debt (as laid down in Article 191 § 2 CC), it is sufficient that a perpetrator is convinced that a debt really exists and a person against whom he uses means specified in Article 191 § 1 CC, even indirectly, is a person who is capable (has a possibility, a duty etc.) of providing the benefit, i.e. giving the things, returning money, paying the interest etc." In the successive rulings (of 8 December 2004[83] and 5 December 2008[84]), the Supreme Court upheld its stand expressed in its ruling of 5 March 2003. The result of such an approach to the issue is the Supreme Court's conviction that a perpetrator's mistaken belief that a debt exists is not important for the legal assessment of a perpetrator's act because "A mistake as understood in Article 28 CC as a circumstance constituting a feature of a prohibited act may refer only to subjective features. The objective features cannot be included in the scope of a mistake as they are only typical of a perpetrator's psyche. Due to that they cannot be confronted with reality because as such they constitute that reality (…)"[85].

The aggravated type of coercion (Article 191 § 2) is a common and formal crime (committed at the moment of the use of violence or an illegal threat). The perpetrator can be not only a creditor but also a third person using violence or a threat with the purpose of recovering a debt owed to a third person who commissioned that debt recovery[86]. It is an intentional crime and as such may be committed only with a direct intention (because a perpetrator acts "with the purpose"). It is worth emphasising, however, that the purpose of a perpetrator's action makes it possible to differentiate the types of prohibited acts specified in Article 191 § 1 and § 2 CC. Based on § 1, it can be any type of acting, desisting from acting or submitting to acting to which a perpetrator wants to compel the aggrieved with the exception of the return of a debt. If the return of a debt is involved (i.e. a perpetrator, using violence against a person or a threat, acts with the purpose of its extortion) then it must be classified under Article 191 § 2 CC[87].

4, item 35; ruling of the Appellate Court in Białystok of 20 April 2000, II Aka 22/00, *Orzecznictwo Sądów Apelacyjnych* B 2000, No. 2, item 26; ruling of the Appellate Court in Kakowice of 10 January 2002, II Aka 340/01, *Krakowskie Zeszyty Sądowe* 2002, No. 4, item 12. After the Supreme Court issued a ruling of 5 March 2003, also appellate courts seem to approve of the stand of the Supreme Court. Compare e.g. the ruling of the Appellate Court in Katowice of 12 January 2006, II Aka 448/05, *Orzecznictwo Sądów Apelacyjnych* 2007, No. 7, item 32; ruling of the Appellate Court in Białystok of 30 March 2004, II Aka 62/04, *Orzecznictwo Sądów Apelacyjnych* B 2004, No. 3, item 26.

[82] III KKN 195/01, *Orzecznictwo Sądu Najwyższego Izna Karna i Wojskowa* 2003, No. 5–6, item 55, *Biuletyn Sądu Najwyższego* 2003, No. 5, item 12, *Wokanda* 2003, No. 11, item 20.

[83] V KK 282/04, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 2005, No. 1, item 10.

[84] K/K 200/08, *Lex* no. 486199.

[85] V KK 282/04, *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa* 2005, No. 1, item 10. The judicature treats such a mistake as a factual mistake (W. Cieślak, critical gloss on the ruling of the Appellate Court in Kraków of 6 March 2003, II Aka 231/03, *Palestra* 2004, No. 7–8, p. 292 and subsequent ones), or a legal mistake (J. Waszczyński, Gloss (of approval) on the ruling of the Supreme Court of 7 December 1973, IV KR 314/73, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1975, No. 10, item 219, p. 454).

[86] Ruling of the Supreme Court of 15 June 2010 r., II KIK 319/09, *Lex* no. 590222.

[87] M. Mozgawa [in:] *System… [Criminal law system…]*, p. 477.

CONCLUSION

The present construction of the provisions of Article 191 CC raises doubts. The introduction of Article 191 § 1a was unnecessary because the same (or even better) result might have been achieved by reference to the wording of the provision of Article 167 § 1 CC of 1969 (without the use of unclear features such as "persistent", "substantially hindering" and narrowing the scope of the provision application only to apartments). *De lege ferenda* the provision of Article 191 § 1 should read: "Whoever uses violence or an illegal threat with the purpose of compelling another person to act, desist from acting or submit to acting in a specified manner…". It is reasonable to repeal the provision of Article 191 § 1a because adoption of § 1 would also cover the so-called indirect violence (even in a broader scope than Article 191 § 1a CC does). It is also reasonable to reintroduce the mode of prosecution proposed for the basic type of coercion (with maintaining prosecution ex officio in case of the aggravated type).

BIBLIOGRAPHY

Andrejew I., Świda W., Wolter W., *Kodeks karny z komentarzem [Criminal Code with a commentary]*, Warszawa 1973.

Andrejew I., *Kodeks karny. Krótki komentarz [Criminal Code: a short commentary]*, Warszawa 1981.

Andrejew I., Kubicki L., Waszczyński J. (ed.), *System prawa karnego. O przestępstwach w szczególności [Criminal law system: on crimes in particular]*, vol. IV, Part 2, Ossolineum 1989.

Bafia J., Mioduski K., Siewierski M., *Kodeks karny, Komentarz [Criminal Code: Commentary]*, Warszawa 1977.

Bojarski T. (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015.

Buchała K. (ed.), *Komentarz do kodeksu karnego. Część ogólna [Commentary on Criminal Code: General issues]*, Warszawa 1990.

Cieślak W., Gloss on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Przegląd Sądowy* 1999, No. 10.

Cieślak W., Gloss on the ruling of the Administrative Court in Kraków of 6 March 2003, II Aka 231/03, *Palestra* 2004, No. 7–8.

Daszkiewicz-Paluszyńska K., *Groźba w polskim prawie karnym [Threat in Polish criminal law]*, Warszawa 1958.

Dębiński A., Grześkowiak A., Wiak K. (ed.), *Ius et Lex, Księga jubileuszowa ku czci Profesora Adama Strzembosza [Ius et Lex. Professor Adam Strzeębosz jubilee book]*, Lublin 2002.

Filar M. (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2014.

Filar M., Gloss on the resolution of the Supreme Court of 10 December 1998, I KZP 22/98, *Państwo i Prawo* 1999, No. 8.

Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz [Criminal Code – Special issues: Commentary]*, Warszawa 2014.

Glaser S., Mogilnicki A., *Kodeks karny – komentarz; prawo o wykroczeniach, przepisy wprowadzające, tezy z orzeczeń Sądu Najwyższego, wyciągi z motywów ustawodawczych [Criminal Code – Commentary: misdemeanour law, regulations on the implementation of the rulings of the Supreme Court, legislative reasons]*, Warszawa 1934.

Góral R., *Kodeks karny. Praktyczny komentarz [Criminal Code: Practical commentary]*, Warszawa 2005.

Górniok O., Hoc S., Kalitowski M., Przyjemski S. M., Sienkiewicz Z., Szumski J., Tyszkiewicz T., Wąsek A., *Kodeks karny. Komentarz [Criminal Code: Commentary]*, vol. I, Gdańsk 2005.

Górniok O., Hoc S., Kalitowski M., Przyjemski S. M., Sienkiewicz Z., Szumski J., Tyszkiewicz T., Wąsek A., *Kodeks karny. Komentarz [Criminal Code: Commentary]*, vol. II, Gdańsk 2005.

Górniok O., *Nowa kodyfikacja karna. Krótkie komentarze [New criminal codification: Short commentaries]*, Warszawa 1999, vol. 7.

Grzegorczyk K., Gloss on the resolution of the Supremme Court of 10 December 1998, I KZP 22/98, *Wojskowy Przegląd Prawniczy* 1999, No. 1–2.

Hanausek T., *Przemoc jako forma działania przestępnego [Violence as a form of criminal act]*, Kraków 1966.

Kunicka-Michalska B., Wojciechowska J., *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Rozdziały XXIII, XXIV, XXV i XXVII kodeksu karnego. Komentarz [Crimes against liberty, freedom of conscience and belief, right to sexuality and decency as well as dignity and bodily integrity: Chapters 23, 24, 25 and 27 of the Criminal Code. Commentary]*, Warszawa 2001.

Makarewicz J., *Kodeks karny z komentarzem [Criminal Code with a commentary]*, Lwów 1938.

Makowski W. (ed.), *Encyklopedja podręczna prawa karnego [Pocket encyclopaedia of criminal law]*, vol. II, Warszawa 1934–1936.

Makowski W., *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego i rosyjskiego, obowiązującego w Polsce [Criminal law: on crimes in particular. Comparative lecture on Austrian, German and Russian criminal law binding in Poland]*, Warszawa 1924.

Marek A. (ed.), *Prawo karne. Zagadnienia teorii i praktyki [Criminal law: Theoretical and practical issues]*, Warszawa 1986.

Marek A., *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2010.

Marek A., *Prawo karne [Criminal law]*, Warszawa 2006.

Mozgawa M. (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015.

Mozgawa M. (ed.), *Prawnokarne aspekty wolności [Criminal law aspects of freedom]*, Wolters Kluwer – Zakamycze 2006.

Nazar-Gutowska K., *Groźba bezprawna w polskim prawie karnym [Illegal threat in Polish criminal law]*, Warszawa 2012.

Nowe kodeksy karne z 1997 r. z uzasadnieniami [New Criminal Codes of 1997 with justification], Warszawa 1997.

Paprzycki L., *Przemoc przemocy nierówna [Violence may be of different types]*, *Rzeczpospolita* of 14 April 1999.

Peiper L., *Komentarz do kodeksu karnego, prawa o wykroczeniach i przepisów wprowadzających obie te ustawy [Commentary on the Criminal Code, Misdemeanour Code and secondary legislation for the two acts]*, Kraków 1936.

Radwański Z., Olejniczak A., *Zobowiązania – część ogólna [Liabilities: General issues]*, Warszawa 2010.

Stefański R.A. (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015.

Surkont M., *Przestępstwo zmuszania w polskim prawie karnym [Crime of coercion in Polish criminal law]*, Gdańsk 1991.

Surkont M., Tzw. karalna samowola w ramach przestępstwa zmuszania [So-called punishable wilfulness within the crime of coercion], *Nowe Prawo* 1987, No. 9.

Surkont M., Zapowiedź rozgłoszenia wiadomości uwłaczającej czci jako postać groźby bezprawnej [Suggestion of disseminating information insulting dignity as a form of lawless threat], *Nowe Prawo* 1989, No. 5–6.

Śliwowski J., *Prawo karne [Criminal law]*, Warszawa 1979.

Światłowski A.R., Gloss on the ruling of the Constitutional Tribunal of 9 October 2001, SK/8/00, *Prokuratura i Prawo* 2002, No. 5, item 75.

Świda W., *Prawo karne [Criminal law]*, Warszawa 1978.

Warylewski J. (ed.), *System Prawa Karnego, Przestępstwa przeciwko dobrom indywidulanym [Criminal law system: Crimes against publicity rights]*, vol. X, Warszawa 2012.

Waszczyński J., Gloss on the ruling of the Supreme Court of 7 December 1973, IV KR 314/73, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1975, No. 10, item 219.

Wąsek A. (ed.), *Kodeks karny. Część szczególna [Criminal Code: Special issues]*, vol. II, Warszawa 2006.

Wąsek A. (ed.), *Kodeks karny. Część szczególna [Criminal Code: Special issues]*, vol. I, Warszawa 2004.

Wojciechowski J., *Kodeks karny. Komentarz. Orzecznictwo [Criminal Code: Commentary. Judicial decisions]*, Warszawa 2002**.**

Wyrembak J., Gloss on the resolutions of the Supreme Court of 10 December 1998, I KZP 22/98, *Przegląd Sądowy* 1999, No. 7–8.

Wyrembak J., Szkolna argumentacja nie przekonuje [School arguments are not convincing], *Rzeczpospolita* of 6 May 1999.

Wysocki M., Gloss on the resolution of the Supreme Court of 10 October 1998, I KZP 22/98, *Orzecznictwo Sądów Polskich* 1999, No. 4.

Wysocki M., Przemoc wobec osoby w rozumieniu art. 191 k.k. [Violence against a person in accordance with Article 191 CC], *Prokuratura i Prawo* 1999, No. 3.

Zoll A. (ed.), *Kodeks karny. Część ogólna. Komentarz [Criminal Code – General issues: Commentary]*, vol. 1, Kraków 2004.

Zoll A. (ed.), *Kodeks karny. Część szczególna. Komentarz, t. II, Komentarz do art. 117–277 k.k. [Criminal Code – Special issues: Commentary, Vol. II, Commentary on Articles 117–277 CC]*, Kraków 2013.

CRIME OF COERCION (ARTICLE 191 CC) AFTER AMENDMENTS OF 10 SEPTEMBER 2015

Summary

The provision of Article 191 § 1 CC of 1997, as far as its construction is concerned, is closer to its counterpart in the Penal Code of 1932 (Article 251) than to Article 167 CC of 1969. Following the example of the PC of 1932, criminalisation covers compelling another person "to act, desist from acting or submit to acting" in a specified manner and not "to conduct himself in a specified manner" as it was formulated in the CC of 1969. However, the scope of penalisation was narrowed by the use of a phrase "violence against a person" instead of formerly used "violence" understood broadly and a new aggravated type of the crime was added (if a perpetrator acts with the purpose of compelling the return of a debt – Article 191 § 2 CC). Act of 10 September 2015 introduced a new provision of Article 191 § 1a CC which reads: "Whoever with the purpose specified in § 1 uses violence of another type persistently or in a way substantially hindering another person from using an occupied apartment is subject to the same penalty." This solution is assessed to be

pointless; the same effect can be achieved by reference to the wording of the provision of Article 167 § 1 CC of 1969 (without the use of unclear features such as "persistently", "substantially hindering" and narrowing the scope the provision application only to apartments). *De lege ferenda* the provision of Article 191 § 1a should read: "Whoever uses violence or an illegal threat with the purpose of compelling another person to act, desist from acting or submit to acting in a specified manner…" and the provision of Article 191 § 1a should be repealed. It is also reasonable to reintroduce the mode of prosecution proposed for the basic type of coercion (with maintaining prosecution ex officio in case of the aggravated type).

Key words: *coercion*, *violence*, *illegal threat*, *extortion*, *debt*

PRZESTĘPSTWO ZMUSZANIA (ART. 191 K.K.) PO ZMIANACH Z 10 WRZEŚNIA 2015 R.

Streszczenie

Przepis art. 191 § 1 k.k. z 1997 r. pod względem konstrukcji jest bardziej zbliżony do swojego odpowiednika z k.k. z 1932 r. (art. 251) niż do art. 167 k.k. z 1969 r. Wzorem k.k. z 1932 r. kryminalizacją objęto zmuszanie innej osoby do określonego „działania, zaniechania lub znoszenia", a nie – jak było to w k.k. z 1969 r. – do „określonego zachowania się". Zawężono natomiast zakres penalizacji poprzez użycie określenia „przemoc wobec osoby", a nie – jak było to poprzednio – szerokiego sformułowania „przemoc" oraz dodano typ kwalifikowany przestępstwa (jeżeli sprawca działa w celu wymuszenia zwrotu wierzytelności – art. 191 § 2 k.k.). Ustawą z dnia 10 września 2015 r. wprowadzono nowy przepis art. 191 § 1a k.k. w brzmieniu: „Tej samej karze podlega, kto w celu określonym w § 1 stosuje przemoc innego rodzaju uporczywie lub w sposób istotnie utrudniający innej osobie korzystanie z zajmowanego lokalu mieszkalnego". Zabieg ten należy ocenić jako chybiony; ten sam efekt można by osiągnąć nawiązując do brzmienia przepisu art. 167 § 1 k.k. z 1969 r. (bez używania nieostrych znamion takich jak „uporczywie", „w sposób istotnie utrudniający" i zawężania zakresu funkcjonowania przepisu jedynie do lokali mieszkalnych). *De lege ferenda* przepis art. 191 § 1 powinien uzyskać brzmienie: „Kto stosuje przemoc lub groźbę bezprawna w celu zmuszenia innej osoby do określonego działania, zaniechania lub znoszenia…", zaś przepis art. 191 § 1a winien zostać skreślony. Zasadne jest również przywrócenie wnioskowego trybu ścigania odnośnie do typu podstawowego zmuszania (przy pozostawieniu ścigania z urzędu w przypadku typu kwalifikowanego).

Słowa kluczowe: *zmuszanie*, *przemoc*, *groźba bezprawna*, *wymuszenie*, *wierzytelność*

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CONCEPT OF LIABILITY IN POLISH ENVIRONMENTAL LAW

WOJCIECH RADECKI

The key issues in every field of law, including environmental law, are sanctions and liability for violation of their provisions. Without sanctions, without an ability to activate mechanisms of liability, law would be a set of wishes and would not play its role. The present article is an attempt to find an answer to the question whether environmental law has developed its own concept of liability or makes use of the forms of liability that had already been developed and what the tendencies in the field are.

1. SCOPE OF ENVIRONMENTAL LAW

Detailed establishment of the scope of environmental law is a difficult task, if feasible at all. I will make use of Jerzy Sommer's concept, modifying it a little. He includes five thematic sections in environmental law:

1) Emission control law, which is the largest set of regulations governing the protection of water, air and soil against pollution, protection against noise and radiation, and waste management;
2) Traditional natural resources law, which is a set of regulations governing the protection of precious wildlife areas and animal, plant and fungus species;
3) Mineral resources law regulating the use of mineral resources: fossil fuels, water, agricultural areas and forests, as well as the use of wildlife resources (e.g. fish and game);
4) Regulations governing decision-taking in the field of environmental protection, especially spatial planning, environmental impact assessment, access to information on the environment and also organisational issues;
5) Regulations governing the control of products from the point of view of their impact on the environment; these include, inter alia, laws on the production of chemical, cosmetics, fertilizers, pesticides and herbicides, genetically modified organisms etc.[1]

[1] J. Sommer, *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury [Environmental law effectiveness and its conditions: Issues of its structure adroitness]*, Wrocław 2005, p. 40–42.

It is worth noticing, however, that waste management law has an evident tendency to get independent (there are several acts on this issue in Poland) and be separated from environmental law, which does not change its essence as a set of provisions governing the protection of the environment[2].

It is not easy to find an answer to the question whether environmental law perceived this way is a separate branch of law. Although there are opinions, originating from the former century, that environmental law demonstrates features of independent, or at least getting independent, branch of law[3], an opinion that the question whether environmental law is a separate branch of law should be treated as open is more convincing. We can speak, however, about a legal system of environmental protection as an entirety of those legal norms that are to define requirements in the field of environmental protection. Environmental law can also be recognised as a branch of law in the didactic or cognitive sense[4].

The legal system of environmental protection consists of dozens of acts and even more abundant secondary legislation, but the nucleus of this field of law is constituted by four normative acts:

1) Act – Environmental law[5],
2) Act on nature protection[6],
3) Act – Water law[7],
4) Act on waste[8].

2. CONCEPT OF LIABILITY

According to a commonly accepted definition by Wiesław Lang, liability consists in accepting negative consequences prescribed by law in connection with events or states of things being subject to negative normative classification and legally attributed to a specified entity in a given legal order[9]. Referring these features to the sphere of environmental protection, we can differentiate the following structural elements of liability in environmental protection:

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[2] Compare J. Jerzmański, *Ustawa o odpadach. Komentarz [Act on waste: Commentary]*, Wrocław 2002, p. 52.

[3] The most outstanding representatives of this approach are L. Jastrzębski, *Prawo ochrony środowiska w Polsce [Environmental law in Poland]*, Warszawa 1990, pp. 74–75 and R. Paczuski, *Prawo ochrony środowiska [Environmental law]*, Bydgoszcz 2000, p. 73.

[4] A. Lipiński, *Prawne podstawy ochrony środowiska [Legal basis for environmental protection]*, Warszawa 2010, p. 24.

[5] Act of 27 April 2001 – Environmental law (uniform text, Journal of Laws of 2013, item 1232, with amendments that followed).

[6] Act of 16 April 2004 on nature protection (uniform text, Journal of Laws of 2015, item 1651, with amendments that followed).

[7] Act of 18 July 2001 – Water law (uniform text, Journal of Laws of 2015, item 469, with amendments that followed).

[8] Act of 14 December 2012 on waste (Journal of Laws of 2013, item 2,1 with amendments that followed).

[9] W. Lang, Struktura odpowiedzialności prawnej [Liability structure], *Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika*, vol. 31 – Prawo VIII [Law VIII], Toruń 1968, p. 12.

1) A liable entity that can be a natural person, a legal person or an organisational unit with no legal identity;
2) An event or state of things being subject to negative normative classification; it may be harm to the environment, threat of damage or just a violation of environmental protection requirements;
3) A rule of attributing an event or state of things to a liable entity; it may be the rule of culpability as grounds for liability for crimes and misdemeanours, the principle of risk that is characteristic of some forms of civil liability or the rule of a proximate cause typical of the forms of administrative liability;
4) Negative consequences for a liable entity which may have personal impact (e.g. imprisonment as a penalty for crime) or pecuniary (e.g. damages, a fine or an order to stop business activities endangering the environment).

3. TYPES OF LIABILITY IN ENVIRONMENTAL PROTECTION

3.1. INTRODUCTION

Environmental law is a basic protection act in the Polish legal system. It contains Chapter VI – Liability in environmental protection, which is divided into three parts:
Part I. Civil liability (Articles 322–328),
Part II. Criminal liability (Articles 329–361),
Part III. Administrative liability (Articles 362–375).

In order to understand the legislative concept of liability, it is not only what is contained in Chapter VI, but also what is not contained in it. I mean two groups of provisions.

The first one contains provisions on liability for crimes against the environment that are not contained in the Act – Environmental law. It has been intentionally done by the legislator, who, four years ago, included groups of features of the most important crimes in this area in Chapter XXII – Crimes against the environment of the Criminal Code[10], making it unnecessary to specify these crimes in the basic act protecting the environment.

The second one contains provisions on administrative pecuniary penalties and increased (sanction-like) fees, which are not included in Part III – Administrative liability of Chapter VI of Environmental law but in its Part VI – Financial legal measures.

The legislator's stand results from a substantial error consisting in the failure to notice the basic difference between administrative pecuniary penalties and increased fees on the one hand, and standard (not increased) ones on the other hand. An administrative pecuniary penalty and an increased fee are measures of legal responsibility and a standard (not increased) fee is not because an administrative pecuniary penalty is a sanction for infringement of the requirements of a decision – due to a negative normative assessment of this infringement, and an increased fee is a sanction for a lack of a required decision

[10] Act of 6 June 1997 – Criminal Code (Journal of Laws No. 88, item 553 with amendments that followed).

– due to a negative normative assessment of this lack. On the other hand, a standard (not increased) fee is not a sanction because there is nothing blameworthy, nothing that is subject to a negative normative assessment, in the fact that an entity uses the environment based on a decision and in accordance with its requirements. In Chapter V of Environmental law, the legislator tried to hide this feature including standard fees, increased fees and administrative pecuniary penalties in one common category of financial legal measures. Most probably, the legislator got the impression that if a legal measure is not classified as a liability measure, it will cease to be one. But it will not, because the legislator's role is not to decide what is a liability measure and what is not because this results from the essence of the given measure. That is why there is no doubt that the administrative pecuniary penalties and increased fees prescribed in Environmental law are liability measures, which should have been placed not in Chapter V but in Chapter VI of the statute.

Environmental law has not developed its own form of liability. What is called liability in environmental protection is, in fact, a combination of three basic forms of liability: civil, criminal and administrative ones[11]. Obviously, one can add, as it was once proposed, employee, professional, organisational (statutory in social organisations), constitutional (before the Tribunal of State) and international liability[12], but:

– international liability is a problem typical of international law,
– constitutional liability is, in Poland, a totally dead letter as is the Tribunal of State,
– organisational (statutory in social organisations) liability is a debatable issue,
– as far as employee liability (including professional one) is concerned, although at the time of the first Polish act on environmental protection[13] it was the subject matter of a separate monograph[14], in the current legal state nobody refers to this issue at present.

That is why it is necessary to keep discussing the three types of liability: civil, criminal and administrative ones distinguished in Chapter VI of Environmental law.

Seemingly, Environmental law developed its own type of liability in the form of responsibility for prevention and remediation of damage to the environment (protected species, water and soil). In Poland, it is the issue covered in a different act[15], transposing Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage[16]. However, it is applicable only to some types of damage and its legal character

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[11] W. Radecki, *Odpowiedzialność prawna w ochronie środowiska [Liability in environmental protection]*, Warszawa 2002, p. 84.

[12] R. Paczuski, *Prawo ochrony środowiska [Environmental law]*, Bydgoszcz 2000, p. 136.

[13] Act of 31 January 1980 on environment protection and development (uniform text, Journal of Laws of 1994 No. 49, item 196, with amendments that followed).

[14] W. Radecki, *Ochrona środowiska jako obowiązek pracowniczy w świetle obowiązującego w PRL ustawodawstwa [Environmental protection as employees' duty in the light of the legislation of the Polish People's Republic]*, Bydgoszcz 1987, especially Chapter 7: *Odpowiedzialność prawna za naruszenie pracowniczego obowiązku ochrony* środowiska *[Liability for infringement of the employees' duty to protect the environment]*, pp. 40–68.

[15] It is Act of 13 April 2007 on prevention and remedying of environmental damage (uniform text, Journal of Laws of 2014, item 1789, with amendments that followed).

[16] See B. Rakoczy, *Odpowiedzialność za szkodę w środowisku. Dyrektywa 2004/35/WE Parlamentu Europejskiego i Rady. Komentarz [Liability for damage to the environment. Directive 2006/35/EC of the European Parliament and of the Council: Commentary]*, Toruń 2010.

is controversial. Basically, it is classified as administrative liability[17], however, there are opinions that it is administrative in its form but civil in its contents[18]. Anyway, it is not an independent form of liability but links elements of administrative and civil as well as criminal liability if one takes into account that a failure to undertake prevention and remediation activities has the features of offences.

3.2. CIVIL LIABILITY

The assumption made by the Polish legislator is clear: liability for harm caused by having impact on the environment is subject to Civil Code[19] unless the statute (i.e. the Act – Environment law) stipulates otherwise (Article 322 of Environmental law).

Article 323 (1) of Environmental law envisages a solution that reminds statutory claims: *rei negatoria* and *rei vindicatio*. The legislator awards it to everyone who is endangered by harm or who has incurred harm caused by unlawful impact on the environment. The entitled party may demand that the entity responsible for harm:

1) make restitution of the state according to the law, and
2) undertake preventive measures, especially install facilities and devices protecting against danger and infringement, or
3) if it is impossible or excessively difficult – cease to do what causes danger or infringement.

Pursuant to Article 323 (2), if danger or infringement refers to the environment as the common good, a claim can be made by:

– the Treasury,
– a territorial self-government unit,
– an environmental organisation.

Article 324 of Environmental law refers to Article 435 § 1 CC, which links liability based on risk with the fact whether an enterprise responsible for damage is set in motion by natural forces. This means that pursuant to the Civil Code, an enterprise causing damage in the environment is liable:

– under Article 435 § 1 CC if it is set in motion by natural forces due to risk,
– under Article 415 CC if it is not set in motion by natural forces due to its fault.

Article 324 of Environmental law changes this regulation in such a way that if an enterprise causing damage belongs to companies of increased risk or high risk of industrial breakdown as laid down in Article 248 of Environmental law (the classification depends on the type, category and amount of dangerous substances in the company and is specified in detail in secondary legislation), it is liable under Article 435 § 1 CC due to risk even if it is not set in motion by natural forces.

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[17] M. Górski, *Odpowiedzialność administracyjnoprawna w ochronie środowiska [Administrative liability in environmental protection]*, Warszawa 2008, p. 22 and subsequent ones.

[18] W. Radecki, *Ustawa o zapobieganiu szkodom w środowisku i ich naprawie. Komentarz [Act on preventing harm to the environment and remedying them: Commentary]*, Warszawa 2007, p. 18.

[19] Act of 23 April 1964 – Civil Code (uniform text, Journal of Laws of 2014, item 121, with amendments that followed) hereinafter referred to as CC.

Eventually, Article 325 of Environmental law establishes a rule under which liability for damage caused by the impact on the environment is not excluded based on a circumstance in which the activity causing damage is carried out based on a decision and within its limits, which in fact means that lawlessness is not a condition for liability.

3.3. CRIMINAL LIABILITY

Looking at Part II – Criminal liability of Chapter VI of Environmental law, we can notice that it envisages only liability for misdemeanours, calling that criminal liability. And this is right because, as it is established in criminal law doctrine, liability for offences is also criminal liability, although carrying reduced legal consequences[20]. However, the core of the regulation on liability in environmental protection is liability for crimes, but the most important crimes against the environment are classified in Chapter XXII of the Criminal Code entitled Crimes against the environment, which is composed of only eight articles, which can be divided into two clearly distinct groups:

1) crimes connected with the protection of nature, including the traditional conservation of nature (Article 181 and Articles 187 and 188 of the Criminal Code).
2) crimes connected with pollution, including waste and radiation (Articles 182–186 of the Criminal Code).

There are many crimes theoretically classified as ones against the environment, which are not included in Chapter XXII and which can be divided into:

I. Statutory crimes, including:
   1. Crimes against common safety, which have features of acts that have a direct harmful impact on the environment, e.g. violent release of nuclear energy or of ionising radiation (Article 163 § 1(4) of the Criminal Code), spread of a contagious disease of plants or animals (Article 165 § 1(2) of the Criminal Code) or unlawful manufacturing, processing, accumulating, using and trading in dangerous substances and devices (Article 171 of the Criminal Code).
   2. A crime of felling trees in a forest with a purpose of appropriation (Article 290 of the Criminal Code).
   3. A crime of hampering or preventing environmental inspection (Article 225 § 1 of the Criminal Code).

II. Crimes not included in the Code but classified in other statutes, which in jurisprudence[21] are divided into four groups:
   1. Crimes supplementing Chapter XXII of the Criminal Code:
      a) A crime of polluting marine waters[22],

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[20] A. Marek, [in:] *System Prawa Karnego. Tom 1. Zagadnienia ogólne [Criminal law system: Volume 1 – General issues]*, (ed.) A. Marek, Warszawa 2010, p. 46.

[21] W. Radecki, Przestępstwa przeciwko środowisku [Crimes against the environment], [in:] *System Prawa Karnego. Tom 8. Przestępstwa przeciwko państwu i dobrom zbiorowym [Criminal law system. Volume 8 – Crimes against the state and public goods]*, (ed.) L. Gardocki, Warszawa 2013, pp. 448–449.

[22] Article 35a of the Act of 16 March 1995 on prevention of polluting marine waters by ships (uniform text, Journal of Laws of 2015, item 434).

b) Crimes connected with international and domestic conservation of plant and animal species[23],
c) Crimes of causing various threats, including endangering the environment in connection with the use of genetically modified organisms[24].

2. Crimes against natural resources:
   a) A crime of animal poaching and other hunting-related crimes[25],
   b) A crime of fish poaching and other fishing-related crimes[26],
   c) Crimes of unjustified or inhumane slaughter of animals and ill-treatment of animals[27],
   d) Crimes of banned animal testing[28],
   e) Crimes of serious damage to the environment or direct danger of such damage as a result of illegal geological activities or mining[29].
3. Crimes connected with the use of waters:
   a) A crime of hampering and preventing the use of water for rescue purposes, a crime of causing danger to water facilities, a crime of destroying or impairing soil under water or water banks while using waters[30],
   b) Crimes of unlawful dumping of sewage to the sewerage[31].
4. Other crimes against the environment:
   a) Crimes of using chemicals in the way that may endanger the environment[32],
   b) Crimes of lawless trade in asbestos or products containing asbestos[33],
   c) A crime of defiance of the state sanitary inspector's decision to banning some activities due to the protection of the environment[34],

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[23] Articles 127a, 128 and 128a of the Act of 16 April 2004 on nature protection (uniform text, Journal of Laws of 2015, item 1651 with amendments that followed).

[24] Articles 58–64 of the Act of 22 June 2001 on microorganisms and genetically modified organisms (uniform text, Journal of Laws of 2015, item 806).

[25] Articles 52 and 53 of the Act of 13 October 1995 – Hunting law (uniform text, Journal of Laws of 2013, item 1226, with am Act of amendments that followed).

[26] Article 27c of the Act of 18 April 1985 on freshwater fishery (uniform text, Journal of Laws of 2015, item 652).

[27] Article 35 of the Act of 21 August 1997 on animal protection (uniform text, Journal of Laws of 2013, item 856, with amendments that followed).

[28] Article 66 of the Act of 15 January 2015 on protection of animals used for scientific and educational purposes (Journal of Laws, item 266).

[29] Article 176 of the Act of 9 June 2011 – Geological and mining law (uniform text, Journal of Laws of 2015, item 196).

[30] Articles 189–191 of the Act of 18 July 2001 – Water law (uniform text, Journal of Laws of 2015, item 469, with amendments that followed).

[31] Article 28 (4) and (4a) of the Act of 7 June 2001 r. on municipal supply of water and sewage systems (uniform text, Journal of Laws of 2015, item 139).

[32] Articles 31–34 of the Act of 25 February 2011 on chemical substances and their mixtures (uniform text, Journal of Laws of 2015, item 1203).

[33] Article 7b of the Act of 19 June 1997 on the ban on use of materials containing asbestos (uniform text, Journal of Laws of 2004 no. 3, item 20, with amendments that followed).

[34] Article 37b of the Act of 14 March 1985 on the State Sanitary Inspection (uniform text, Journal of Laws of 2015, item 1412).

d) Crimes of unauthorised construction works that may endanger the environment[35],
e) Crimes connected with the use of substances that may endanger the ozone layer[36].

The catalogue of crimes against the environment is abundant but the catalogue of misdemeanours against the environment is incomparably larger. These are not only misdemeanours contained in the Misdemeanour Code[37] but also the so-called non-Code offences. Passing the MC in 1971, the legislator was not able to realise the significance of environmental protection, but one cannot overlook the importance of Chapter XIX – Forest, field and garden sabotage (Articles 148–166) including a characteristic codification of forest misdemeanours; in addition, single provisions on destroying levees (Article 80), destroying plants strengthening banks (Article 81), a failure to meet the requirements of fire safety in forests and fields (Article 82 § 3 and § 4), polluting some waters (Article 109), felling trees in forests to appropriate wood (Article 120), destroying, impairing or removing plants (Article 144), or littering in public places (Article 145). What is most important, however, is what is not contained in the MC. Almost every act on environmental protection contains provisions composed of several and sometimes even dozens of editorial units (articles, items, points, letters etc.), each of which characterises a different misdemeanour. For example:
– Act – Environmental law: Articles 329–360,
– Act – Water law: Article 192 (1) and (2), Article 193 (1)–(6), Article 194 (1)–(15),
– Act on nature protection: Article 127 (1) (a)–(e), (2) (a)–(d), (3), (5) and (6), Article 131 (1)–(14),
– Act on waste: Articles 171–192.

A common feature of liability for crimes and misdemeanours is that only natural persons are liable and only if they are found at fault while committing an act (in case of crimes: usually intentional, sometimes unintentional; in case of misdemeanours: usually intentional or unintentional, sometimes exclusively intentional). A limited exception to this rule is liability of collective entities[38]. A collective entity (a legal person or an organisational unit with no legal personality) can be liable for some crimes (never misdemeanours) provided that a natural person affiliated to the collective entity has been convicted for crime (or has been attributed crime commission in a different legal form). The exception to the rule of an exclusive natural person's liability for crimes or misdemeanours is limited because an entity other than a natural person is never liable for misdemeanours, and may be liable for a crime only if a natural person representing a collective entity or acting on its behalf has been found guilty of a crime, but not every one but only those that are laid down in the Act on liability of collective entities.

[35] Article 90 of the Act of 7 July 1994 – Building law (uniform text, Journal of Laws of 2013, item 1409, with amendments that followed).

[36] Articles 52 and 53 of the Act of 15 May 2015 on substances impoverishing the ozone layer and some fluorocarbons (Journal of Laws, item 881).

[37] Act of 20 May 1971 – Misdemeanour Code (uniform text, Journal of Laws of 2015, item 1094), hereinafter referred to as MC.

[38] Act of 28 October 2002 on collective entities' liability for forbidden acts carrying penalty (uniform text, Journal of Laws of 2015, item 1212).

It is important for environmental protection because Article 16 (1 (8)) of the Act on liability of collective entities indicates crimes against the environment, which result in a collective entity's liability when committed by a natural person. These are not all crimes against the environment but only those laid down in the Criminal Code and six special acts. A collective entity cannot be liable for any other crime against the environment and for a misdemeanour against the environment.

According to a constitutionally ordered concept implemented by the Misdemeanour Procedure Code[39], a common court (not an administrative court or an administrative organ) is the only organ authorised to examine a case of a crime and a misdemeanour and impose a penalty. The only exception to the rule is a fine-related procedure in connection with misdemeanours that are dealt with by the police or an entitled administrative organ. A fine-related procedure is a simplified mode that depends on the perpetrator's will to be punished and is known in every reasonable legal system.

3.4. ADMINISTRATIVE LIABILITY

Part III – Administrative liability of Chapter VI of Environmental law consists of 14 articles regulating:

1) The so-called administrative damages as a consequence of inability to impose an obligation to limit the impact on the environment and its endangerment and to restore the appropriate state (Articles 363–375),
2) Different variants of halting actions endangering the environment (Articles 363–375).

Halting actions endangering the environment as an administrative sanction for the infringement of protection requirements is also envisaged in other acts concerning environmental protection, especially the Water law and acts on waste.

4. LIABILITY FOR ADMINISTRATIVE TORTS IN ENVIRONMENTAL PROTECTION

Liability for forbidden acts carrying administrative pecuniary penalty, most often called 'administrative torts', deserves a separate discussion because it is not absolutely clear which branch of law it should belong to. This form of liability occurred in the Polish law on environmental protection in the early 1960s as a supplement to liability for crimes and misdemeanours, a supplement in the sense that only organisational units that could not be liable for crimes and misdemeanours were liable for administrative torts. This form of liability expanded to a great extent in the last decade of the 20th century and in particular in the 21st century sometimes substituting for liability not only for misdemeanours but also for crimes. That is why a question whether this is still administrative law or already criminal law seems to be justified.

[39] Act of 24 August 2001 – Misdemeanour Procedure Code (uniform text, Journal of Laws of 2013, item 395, with amendments that followed).

In 1990s, in Polish literature, a suggestion appeared that probably fines were a new form of criminal liability[40]. The idea was further developed and reflected in a three-word term "environmental criminal law" (a loan translation of the German *Umweltstrafrecht*[41]):

– which, *sensu stricto*, deals with liability for crimes against the environment,
– which, *sensu largo*, deals with liability for crimes and misdemeanours against the environment,
– which, *sensu largissimo*, deals with responsibility for crimes, misdemeanours and administrative torts against the environment[42].

The opinion is not an isolated one. Luminaries of the Polish criminal law doctrine firmly state that the provisions of administrative law prescribing various types of financial sanctions, often called "pecuniary penalties", imposed on business entities, their managers or governors as well as natural persons for administrative torts, do not belong to criminal law even in the broadest sense (*sensu largissimo*). These legal regulations have nothing in common with criminal law[43]. In fact, they have a lot in common with criminal law, which can be easily proved if one takes into account the evolution of the regulations on liability for administrative torts. This concerns three models of administrative pecuniary penalties in the field of environmental protection.

The first model that can be called a "tariff one" is laid down in the Acts: Environmental law and on nature protection. To put it simply, an organ imposing a penalty establishes the level of environmental requirements infringement (e.g. to what extent the admissible level of water or air pollution has been exceeded or what type and size the illegally felled tree was) and then, based on adequate tables, it calculates and imposes a penalty, which in terms of criminal law, is a "fixed penalty notice" but this fixing is based on the use of tariffs. It is true that similarity of this model to criminal law seems to be the smallest because the contemporary criminal law, as a rule, does not apply fixed penalty notices any longer. However, it is not so, in fact. Environmental law has developed an instrument of postponement of penalty payment provided that the perpetrator undertakes steps to eliminate the cause for a penalty. If the undertaking proves to be successful, the incurred cost is deducted from the amount of the penalty imposed and as they are usually higher than the penalty, the punished entity does not pay anything. Should the undertaking prove to be unsuccessful, the punished entity has to pay the full amount. The similarity to the criminal suspension of penalty execution is so evident that even the first model may be said to be similar to criminal liability.

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[40] W. Radecki, Kary pieniężne w polskim systemie prawnym. Czy nowy rodzaj odpowiedzialności karnej? [Pecuniary penalties in the Polish legal system: Are they a new type of criminal liability?], *Przegląd Prawa Karnego* 1996, no. 14–15, pp. 5–18.

[41] However, the German *Umweltstrafrecht* covers liability for crimes against the environment only; see inter alia M. Kloepfer, H.P. Vierhaus, Umweltstrafrecht, München 1995.

[42] W. Radecki, Polskie prawo karne środowiska – próba spojrzenia syntetycznego [Polish environmental criminal law – a synthetic look attempt], *Ius Novum* 2009, no. 1, p. 70.

[43] A. Marek, [in:] *System Prawa Karnego. Tom 1. Zagadnienia ogólne [Criminal law system: Volume 1 – General issues],* (ed.) A. Marek, Warszawa 2010, p. 46.

The second model was developed in the 21st century mainly in detailed statutes regulating waste disposal[44] and it can be called "flexible penalty imposition". The legislator assigns the minimum and maximum pecuniary penalty (the maximum is usually a few, but may also be several dozen, times higher than the maximum fine, which is PLN 5,000 under the Misdemeanour Code, but it happens that the minimum pecuniary penalty is higher than the maximum fine under MC) and then indicates a provision that should be taken into consideration when imposing the penalty. It is quite easy to notice the similarity with the directives on penalty imposition laid down in Article 53 of the Criminal Code and Article 33 MC. The basic differences are:

– firstly, administrative organs (in general, voivodeship environmental protection inspectors) impose pecuniary penalties and the final decision may be appealed against to an administrative court, not a common court;
– secondly, even if the legislator recommends taking the level of an act's harmfulness into account, they do avoid specifying it as "social" harmfulness, most probably in order to avoid treating liability for administrative torts in the same way as liability for crimes and misdemeanours. But the answer to the question what kind of harmfulness it is, there is no sensible answer but "social";
– thirdly, there is no information whatsoever on the objective aspect, to put it simply, fault because, according to the dominating theoretical opinion, administrative liability is objective in nature, regardless of fault. But is it only "objective" or already "absolute"? And this is not the same.

It is worth mentioning that, in the Act on the international movement of waste, the legislator preceded the features of the subjective aspects of torts with a statement that they can be committed "just unintentionally", but the features of the objective aspects of those torts were not preceded with the words. It is clear that torts of the first group can be committed intentionally or unintentionally, but there is no liability if a perpetrator cannot be ascribed being "just unintentional". A question must arise what to do with torts of the second group, those most serious according to the statute conception. A criminal law specialist, having in mind the rule of Article 8 of the Criminal Code (it may be committed without intent if the law so stipulates), will answer with no hesitation that they can only be committed intentionally. An administrative law specialist might give a completely different answer – they can be committed without being just unintentional since administrative liability assumes an objective character. It must also be noticed that the Constitutional Tribunal recommends that, in case of objective liability, a violator of a provision should be able to be released from liability by proving that the infringement of provisions results from circumstances for which he is not responsible[45].

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[44] Chronologically, these are the following Acts: of 20 January 2005 on recycling vehicles disposed of (uniform text, Journal of Laws of 2015, item 140, with amendments that followed), of 29 June 2007 on international movement of waste (uniform text, Journal of Laws 2015, item 1048), of 24 April 2009 on batteries (uniform text, Journal of Laws of 2015, item 687), of 13 June 2013 on packaging and packaging waste management (Journal of Laws, item 888), of 11 September 2015 on electric and electronic equipment disposal (Journal of Laws, item 1688).

[45] Ruling of the Constitutional Tribunal of 1 July 2014 – SK 6/12, text in Journal of Laws 2014, item 926.

The third, mixed model appeared in the second decade of the 21st century in acts on waste, firstly in the amended Act of 2011 on municipal waste[46], and after a year in a new Act on waste[47]. In this model, some administrative torts carry fixed pecuniary penalties, some others carry pecuniary penalties based on complicated calculations, still some other penalties are imposed in the amount "from… to…".

The legislator's use of flexible sanctions, with sometimes quite detailed calculation of circumstances influencing the penalty imposition at the same time, timid attempts to introduce a subjective aspect (Act on international movement of waste), and judgements of the Constitutional Tribunal recently disapproving of absolute liability for administrative torts clearly make administrative torts be closer to criminal law than administrative law.

5. DEVELOPMENT TENDENCIES

Observing the development of legislation on environmental protection in recent years, one can notice an evident tendency to substitute liability for administrative torts for liability for misdemeanours. It can be easily illustrated with many examples but I will present two. The first one is a comparison of the "ozone" acts: the first one[48] with the new one[49]. In the first one, there were regulations on pecuniary penalties (Chapter 8) as well as criminal provisions (Chapter 9) characterising misdemeanours (Articles 38–45) and crimes (Article 47a). In the new one, Chapter 11 – Administrative pecuniary penalties and penal regulations characterises several dozen administrative torts (Articles 47–50) and two crimes (Articles 52 and 53); there are no misdemeanours there. The second example is the comparison of regulations on unlawful animal testing: the former[50] and the new ones[51]. Chapter 8 – Penal regulations of the former Act characterised crimes (Articles 38–41) and misdemeanours (Articles 42–46); there were no administrative torts. In the new Act, Chapter 9 characterises crimes and Chapter 10 – administrative torts; there are no misdemeanours.

But this is not all. The recent amendment of the Act on forests, which until 2015 did not have any penal provisions, is very characteristic. The legislator rightly assumed that the most important forest crimes are characterised in the Criminal Code and the most important misdemeanours in the MC. The situation changed with the introduction

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46 Act of 13 September1996 on maintaining cleanliness and order in municipalities (uniform text, Journal of Laws of 2013, item 1399, with amendments that followed).

47 Act of 14 December 2012 on waste (Journal of Laws of 2013, item 21, with amendments that followed).

48 Act of 20 April 2004 on substances impoverishing the ozone layer (uniform text, Journal of Laws of 2014, item 436).

49 Act of 15 May 2015 on substances impoverishing the ozone layer and some fluorocarbons (Journal of Laws, item 881).

50 Act of 21 January 2005 on animal testing (Journal of Laws No. 33, item 289 with amendments that followed).

51 Act of 15 January 2015 on protection of animals used for scientific and educational purposes (Journal of Laws, item 266).

of the latest amendment[52], which introduced the rules of liability for infringement of two EU directives on trade in wood. If we take into consideration that they refer to obtaining wood, inter alia, from rain forests, which endangers the environment on a global scale, i.e. they are very important issues, one could expect introduction of liability for crimes with indication that also legal persons are liable for such crimes. However, the legislator added Chapter 9a – Administrative pecuniary penalties to the Act on forests, thus characterising only administrative torts in Articles 66a-66g.

6. CONCLUSIONS

Over the several dozen years of the history of the Polish law on environmental protection, no special form of liability typical of only environmental law has been developed. We have a combination of three "classical" forms of this liability: civil, criminal and administrative ones. As far as criminal and civil liability is concerned, the legislator in fact adopted a "code-related" concept, which means that civil liability is subject to the Civil Code with some modifications introduced by the Act – Environmental law. And with regard to criminal liability in both variants (for crimes and misdemeanours), although neither the Criminal Code nor the Civil Code contains exhaustive lists of crimes and misdemeanours against the environment, through the rules of liability included in the Code applicable to non-code crimes and misdemeanours, both Codes integrate environmental criminal law *sensu stricto* and *sensu largo*. The situation with administrative torts, i.e. forbidden acts carrying an administrative pecuniary penalty, is completely different. They dominate in liability for environmental protection, and the evolution of legislation places liability for administrative torts closer to liability for crimes and misdemeanours, giving grounds for differentiating environmental criminal law *sensu largissimo*, which is not developed on the stable foundation determining general rules of liability.

The actual situation shows features of a flagrant paradox. The Misdemeanour Code developed with great diligence at the beginning of the1970s is becoming a legal act of less and less usefulness in the field of environment protection because its provisions are becoming marginal in comparison with the regulations on liability for administrative torts. Moreover, even the penal provisions *sensu stricto* are becoming less important than those on administrative torts, which the latest amendment to the Act on forests confirms best.

It must be mentioned that unlike liability for crimes and misdemeanours, which the provisions of the Criminal Code and Misdemeanour Code regulate respectively, liability for administrative torts is not covered by one general act determining conditions and rules for this liability. The scientific output is also meagre because, apart from a monograph[53] published several years ago, there is no broader theoretical discussion of the new phenomenon of stormy development of liability for administrative torts. It

[52] Act of 20 March 2015 amending the Act on forests and some other acts (Journal of Laws, item 671).

[53] D. Szumiło-Kulczycka, *Prawo administracyjno-karne [Administrative-criminal law]*, Kraków 2004.

is true that the issue has been discussed at numerous scientific conferences recently but a conclusion resulting from them that there is an urgent need to develop an act on the rules of liability for administrative torts has not encountered any legislative initiatives.

BIBLIOGRAPHY

Gardocki L. (ed.), *System Prawa Karnego. Tom 8. Przestępstwa przeciwko państwu i dobrom zbiorowym [Criminal law system. Volume 8 – Crimes against the state and public goods]*, Warszawa 2013.

Górski M., *Odpowiedzialność administracyjnoprawna w ochronie środowiska [Administrative liability in environmental protection]*, Warszawa 2008.

Jastrzębski L., *Prawo ochrony środowiska w Polsce [Environmental law in Poland]*, Warszawa 1990.

Jerzmański J., *Ustawa o odpadach. Komentarz [Act on waste: Commentary]*, Wrocław 2002.

Kloepfer M., Vierhaus H.-P., *Umweltstrafrecht*, München 1995.

Lang W., Struktura odpowiedzialności prawnej [Liability structure], *Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika*, vol. 31 – Prawo VIII [Law VIII], Toruń 1968.

Lipiński A., *Prawne podstawy ochrony środowiska [Legal basis for environmental protection]*, Warszawa 2010.

Marek A. (ed.), *System Prawa Karnego. Tom 1. Zagadnienia ogólne [Criminal law system: Volume 1 – General issues]*, Warszawa 2010.

Paczuski R., *Prawo ochrony środowiska [Environmental law]*, Bydgoszcz 2000.

Radecki W., *Ochrona środowiska jako obowiązek pracowniczy w świetle obowiązującego w PRL ustawodawstwa [Environmental protection as employees' duty in the light of the legislation of the Polish People's Republic]*, Bydgoszcz 1987.

Radecki W., Kary pieniężne w polskim systemie prawnym. Czy nowy rodzaj odpowiedzialności karnej? [Pecuniary penalties in the Polish legal system: Are they a new type of criminal liability?], *Przegląd Prawa Karnego* 1996, no. 14–15.

Radecki W., *Odpowiedzialność prawna w ochronie środowiska [Liability in environmental protection]*, Warszawa 2002.

Radecki W., *Ustawa o zapobieganiu szkodom w środowisku i ich naprawie. Komentarz [Act on preventing harm to the environment and remedying them: Commentary]*, Warszawa 2007.

Radecki W., Polskie prawo karne środowiska – próba spojrzenia syntetycznego [Polish environmental criminal law – a synthetic look attempt], *Ius Novum* 2009, no. 1.

Rakoczy B., *Odpowiedzialność za szkodę w środowisku. Dyrektywa 2004/35/WE Parlamentu Europejskiego i Rady. Komentarz [Liability for damage to the environment. Directive 2006/35/EC of the European Parliament and of the Council: Commentary]*, Toruń 2010.

Sommer J., *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury [Environmental law effectiveness and its conditions: Issues of its structure adroitness]*, Wrocław 2005.

Szumiło-Kulczycka D., *Prawo administracyjno-karne [Administrative-criminal law]*, Kraków 2004.

CONCEPT OF LIABILITY IN POLISH ENVIRONMENTAL LAW

Summary

Environmental law, understood as a set of provisions governing the protection of components of the environment and the protection against harmful impact on the environment, has not been fully developed as a branch of law yet. In the several dozen years' long history of the Polish environmental law, a special form of liability typical of environmental law has not come into being. We deal with a combination of three "classical" forms of such liability: civil, administrative and criminal. As far as civil liability is concerned, the legislator adopted a "code-related" concept, according to which civil liability is applicable only under the Civil Code with some modifications resulting from the Act – Environmental law. With regard to criminal liability in its two variants, i.e. for crimes and for misdemeanours, although neither the Criminal Code nor the Misdemeanour Code contains an exhaustive list of crimes and misdemeanours against the environment, through code-related rules of liability applicable to non-code crimes and misdemeanours, both Codes function as "clamps" fastening environmental criminal law *sensu stricto* (crimes) and *sensu largo* (crimes and misdemeanours). The situation is completely different concerning administrative liability for forbidden acts carrying administrative pecuniary penalties, which are called administrative torts. Liability for such acts already dominates liability in the environmental protection and evolution of legislation places liability for administrative torts closer to liability for crimes and misdemeanours giving grounds for differentiating environmental criminal law *sensu largissimo* (crimes, misdemeanours and administrative torts), which is not, however, built on a stable foundation determining general rules of liability.

Key words: *environmental protection*, *civil*, *criminal and administrative liability*, *crime*, *misdemeanour*, *administrative torts*

KONCEPCJA ODPOWIEDZIALNOŚCI W POLSKIM PRAWIE OCHRONY ŚRODOWISKA

Streszczenie

Prawo ochrony środowiska, rozumiane jako zbiór przepisów o ochronie komponentów środowiska i ochronie przed szkodliwymi oddziaływaniami na środowisko, nie jest jeszcze w pełni ukształtowaną gałęzią prawa. W kilkudziesięcioletniej historii polskiego prawa ochrony środowiska nie doszło do powstania szczególnej formy odpowiedzialności prawnej, właściwej tylko prawu ochrony środowiska. Mamy tu do czynienia z kombinacją trzech „klasycznych" form takiej odpowiedzialności: cywilnej, administracyjnej i karnej. Jeśli chodzi o odpowiedzialność cywilną, to ustawodawca przyjął koncepcję „kodeksową", według której odpowiedzialność cywilna następuje na podstawie kodeksu cywilnego z modyfikacjami wniesionymi ustawą – Prawo ochrony środowiska. Jeśli chodzi o odpowiedzialność karną w obu wariantach, tj. za przestępstwa i za wykroczenia, to wprawdzie ani kodeks karny, ani kodeks wykroczeń nie zawierają wyczerpujących list przestępstw i wykroczeń przeciwko środowisku, ale poprzez kodeksowe zasady odpowiedzialności stosowane do przestępstw i wykroczeń pozakodeksowych oba kodeksy są klamrami spinającymi prawo karne środowiska *sensu stricto* (przestępstwa) i *sensu largo* (przestępstwa i wykroczenia). Zupełnie inaczej rzecz się ma z odpowiedzialnością administracyjną za czyny zabronione pod groźbą administracyjnej kary pieniężnej, zwane deliktami administracyjnymi.

Odpowiedzialność za takie czyny już zajmuje dominującą pozycję w instrumentarium odpowiedzialności prawnej w ochronie środowiska, a ewolucja ustawodawstwa zbliża odpowiedzialność za delikty administracyjne do odpowiedzialności za przestępstwa i wykroczenia, dając podstawę do wyróżnienia prawa karnego środowiska *sensu largissimo* (przestępstwa, wykroczenia i delikty administracyjne), które wszakże nie jest zbudowane na trwałym fundamencie określającym generalne zasady odpowiedzialności.

Słowa kluczowe: *ochrona środowiska*, *odpowiedzialność cywilna*, *karna i administracyjna*, *przestępstwo*, *wykroczenie*, *delikt administracyjny*

PUBLIC PROSECUTION CONSUMPTION IN THE POLISH CRIMINAL PROCESS

RYSZARD A. STEFAŃSKI

Discontinuance of preparatory proceeding – without instituting an investigation or an enquiry (Article 327 § 1 CPC) or reopening (Article 327 § 2 CPC) or a reversal of the decision on discontinuing the proceeding by the Attorney General (Article 328 § 1 CPC) – results in the loss a public prosecutor's right to prosecute[1]. In literature, it is called an expiry of the right to prosecute[2] or public prosecution consumption[3]. As the Supreme

[1] R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. II, Warszawa 2004, p. 484; resolution of the Supreme Court of 26 September 2002, I KZP 23/02, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2002, no. 11–12, item 98, ruling of the Supreme Court of 18 January 2006, IV KK 378/05, LEX no. 172220, ruling of the Supreme Court of 9 October 2008 – V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, item 1992.

[2] M. Siewierski, [in:] S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1966, p. 35; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1971, p. 55, J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne [Polish criminal procedure]*, Warszawa 2014, p. 190; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz do art.1–424 [Criminal Procedure Code: Commentary on Articles 1–424]*, vol. I, Warszawa 2013, p. 127.

[3] R.A. Stefański, Podstawy i przyczyny umorzenia postępowania przygotowawczego [Grounds and reasons for preparatory proceeding discontinuance], *Prokuratura i Prawo* 1996, no. 2–3, p. 31; M. Rogalski, [in:] *System Prawa Karnego Procesowego. Dopuszczalność procesu [Criminal procedure law system: Admissibility of a trial]*, vol. IV, (ed.) M. Jeż-Ludwichowska, A. Lach, Warszawa 2015, p. 199; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 127; W. Grzeszczyk, Gloss on the decision of the Supreme Court of 8 January 2008, V KK 416/07, *Prokuratura i Prawo* 2008, no. 10, p. 168; *ibid*., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2012, p. 54; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2014, p. 151; A. Sakowicz, [in:] K.T. Boratyńska, A. Górski, M. Królikowski, A. Sakowicz, M, Warchoł, A. Ważny, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) A. Sakowicz, Warszawa 2015, p. 97; M. Kurowski, [in:] B. Augustyniak,

Court noticed, "The consumption of public prosecution takes place when a prosecutor loses his right to prosecute. It is always connected with a fixed public prosecutor's action and can be reflected in two ways. In the first one, this negative procedural premise consists in the expiry of the right to prosecute because of valid discontinuance of the preparatory proceeding against the given suspect unless there is a possibility of reopening that proceeding (Article 327 § 2 CPC), or unless there is a reversal of the order on discontinuance by the Attorney General (Article 328 CPC). Then, this kind of a procedural situation is not treated as a negative premise of *res judicata*, because it results from the decision issued not by a court but a prosecutor. (…) It must be noticed, however, that the essence of the premise is inability to file – in those indicated cases – an indictment, but also a possibility of regaining the right to prosecute through the application of instituting, reinstating (Article 327 CPC) or reversing a valid procedural decision by the Attorney General"[4].

There is no consensus of opinion in the jurisprudence and judicature on the legal grounds for discontinuance of the preparatory proceeding due to public prosecution consumption. Two contrary opinions developed, the first one assuming that, in spite of differences, the legal grounds are laid in Article 17 § 1 (7) *in principio* CPC[5], the other that the circumstance precluding such a proceeding occurs in Article 17 § 1 (11) CPC[6].

K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) D. Świecki, vol. I, Warszawa 2013, p. 135.

[4] Decision of the Supreme Court of 16 December 2015, II KK 347/15, LEX no. 1948881.

[5] W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne [Criminal procedure law: General issues]*, vol. I, Poznań 2000, p. 158; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 56; T. Grzegorczyk, Wygaśnięcie prawa oskarżyciela publicznego dom oskarżania [Expiry of public prosecutor's right to prosecute], *Problemy Praworządności* 1980, no. 2, p. 14; K. Marszał, Gloss on the resolution of the Supreme Court of 26 September 2002, I KZP 23/2002, *Orzecznictwo Sądów Polskich* 2003, no. 9, item 105; M. Rogalski, *Przesłanka powagi rzeczy osądzonej w procesie karnym [Premise of res judicata in the criminal process]*, Zakamycze 2005, pp. 491–492; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 114; F. Prusak, *Nadzór prokuratora nad postępowaniem przygotowawczym [Preparatory proceeding under public prosecutor's supervision]*, Warszawa 1984, p. 230. J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne…[Polish criminal procedure…]*, p. 190; Z. Gostyński, S. Zabłocki, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 311; B. Szyprowski, Kontrola prawomocnych orzeczeń wydanych w postępowaniu przygotowawczym [Supervision of valid judgements issued during preparatory proceeding], *Prokuratura i Prawo* 1999, no. 9, p. 20; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego, Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2007, p. 151; W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym [Influence of the victim on the course of preparatory proceeding in the Polish criminal process]*, Zakamycze 2006, p. 268; decision of the Supreme Court of 26 November 2002, II KZ 47/02, OSNKW 2003, no. 3–4, item 35, ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992, ruling of the Supreme Court of 2 March 2011, IV KK 399/10, Biuletyn Prawa Karnego 2011, no. 8, item 1.2.4, I abandon the opinion expressed earlier (R.A. Stefański, *Podstawy i przyczyny… [Grounds and reasons for…]*, p. 31).

[6] F. Prusak, *Komentarz do kodeksu postępowania karnego [Commentary on the Criminal Procedure Code]*, vol. 1. Warszawa 1999, p. 111; M. Kurowski, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 136.

The third opinion that the grounds are laid in Article 17 § 1 (9) CPC[7] applies only to a judicial proceeding because in case a public prosecutor files an indictment when the right to do so has expired causes that a prosecutor becomes a non-entitled party.

Actually, the consumption of public prosecution has features that bring it close to *res judicata* but only when discontinuance is applied *ad personam*, because only then it refers to the same perpetrator and the same act and is similar to it as far as legal consequences are concerned.

It is commonly stated in literature that discontinuance of the preparatory proceeding is of the same importance as a court judgement and thus it creates *res judicata* in the same scope as if a court adjudicated, and it results in proceeding discontinuance under Article 17 § 1 (7) *in principio* CPC[8]. It is assumed that the lack of grounds for proceeding reopening means a negative procedural premise similar to *res judicata* as far as legal consequences are concerned[9].

Thus, a legal question arises whether Article 17 § 1 (7) CPC constitutes grounds for discontinuance in case of former discontinuance of the preparatory proceeding *in rem*. There are different opinions on this matter expressed in jurisprudence and judicial judgements.

Due to that, discontinuance is limited to a proceeding *in personam* and it is stated that discontinuance of the preparatory proceeding *in rem* does not result in the same consequence because it is possible to reopen it at any time[10]. The Supreme Court directly stated: "Discontinuance of the preparatory proceeding at the '*in rem*' stage, as one that may be reinstated at any time, does not exhaust '*res judicata*'"[11].

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[7] D. Strzelecki, Konsumpcja skargi publicznej [Consumption of public prosecution], *Prokuratura i Prawo* 2016, no. 2, p. 40.

[8] W. Daszkiewicz, *Prawo karne procesowe… [Criminal procedure law…]*, p. 158; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 56; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, pp. 396 and 491; J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 114; J. Skorupka, [in:] *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) J. Skorupka, Warszawa 2015, p. 75; decision of the Supreme Court of 26 November 2002, II KZ 47/02, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2003, no. 3–4, item 35, ruling of the Supreme Court of 17 November 2004, C KK 342/04, Orzecznictwo Sadu Najwyższego w Sprawach Karnych no. 1, item 2103, ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992, ruling of the Supreme Court of 2 March 2011, IV KK 399/10, Biuletyn Prawa Karnego 2011, No. 8, item 1.2.4.

[9] A. Murzynowski, Przyczynek do zagadnienia ważności czynności procesowych wykonanych w niedopuszczalnym postępowaniu karnym [Contribution to the issue of validity of procedural actions performer in an inadmissible criminal proceeding], *Nowe Prawo* 1962, no. 7–8, p. 995.

[10] J. Skorupka, [in:] *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 75; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 152; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, p. 516; E. Skrętowicz, Gloss on the ruling of the Supreme Court of 28 february 1979, V KR 168/78, OSP 1980, no. 5, p. 219, decision of the Supreme Court of 4 May 2006, V KK 384/04, *Biuletyn Prawa Karnego* 2010, no. 12, item 31, ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992.

[11] Decision of the Supreme Court of 4 May 2006, V KK 384/05, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2006, no. 1, item 944. Also J. Skorupka, [in:] *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 75.

There is also an opinion that it also refers to discontinuance of a proceeding *in rem*. This was admitted by the Supreme Court, which stated:

– "Public prosecutor's valid decision on preparatory proceeding discontinuance under Article 280 § 1 [at present 322 § 1] and Article 11 (2) [at present 17 § 1 (3)] CPC in connection with Article 26 § 1 [at present 1 § 2] CPC, in which it is stated that a given person has committed an act specified in the Criminal Code but of an insignificant social danger (…), it constitutes *res judicata* as understood in Article 11 (7) [at present 17 § 1 (7)] CPC also in the event the person was not presented charges and was not examined as a suspect before the issue of the decision (Article 269 [at present 313] CPC)"[12]. Treating discontinuance of the preparatory proceeding *in rem* as *res judicata* is in conflict with its essence, which consists in the fact that there was a valid judgement in a given case against a given person[13].
– "A prosecutor's valid decision on discontinuance of the preparatory proceeding under Article 17 § 1 (3) CPC, in which it is stated that a given person has committed an act specified in the Criminal Code but of an insignificant social danger constitutes *res judicata* as understood in Article 17 § 1 (7) CPC also in the event the person was not presented charges and was not examined as a suspect before the issue of the decision, constitutes a contempt of Article 313 CPC"[14].

It is emphasised in literature that the preparatory proceeding may be conducted, even though it has been discontinued, as a result of its continuation without reopening or reversing the decision on discontinuing it by the Attorney General, or instituting a new proceeding. In the latest case, there are two types of proceedings and only in that situation *res judicata* may be considered and not in the case of inadmissible continuation of the proceeding, because there may be one decision on its institution regarding one proceeding. One cannot assume that the initiation of a chronologically later proceeding took place within the same process. Thus, the possibility of considering Article 17 § 12 (7) CPC as grounds for discontinuance is *a limine* declined[15].

It is assumed that *res judicata* constitutes an obstacle to conducting the chronologically second proceeding when it was instituted after the decision on discontinuance of the former investigation in the same case and against the same person had become valid and it was done irrespective of the proceeding concluded formerly[16].

It is rightly emphasised that the assumption that defective conduction of the preparatory proceeding that took place after its former discontinuance always constitutes a procedural obstacle in the form of *res judicata* would make Article 327 § 4 CPC useless as it stipulates proceeding discontinuance in case of proceeding reinstatement

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[12] Decision of the Supreme Court of 17 June 1994, WZ 122/94, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1994, no. 9–10, item 64 with critical glosses by R. Kmiecik, *Wydawnictwo Polskie Prawo* 1995, no. 3–4, pp. 78–84; B. Mik, *Prokuratura i Prawo* 1995, no. 11–12, pp. 79–93 and approval by J. Tylman, *Wydawnictwo Polskie Prawo* 1995, no. 3–4, p. 85 and subsequent ones.

[13] M. Rogalski, *Przesłanka powagi rzeczy osądzonej…. [Premise of res judicata…]*, p. 142.

[14] Ruling of the Supreme Court of 15 February 2012, II KK 201/11, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2012, no. 6, item 60 with a gloss of approval by R. Kmiecika, *Państwo i Prawo* 2013, no. 7, pp. 120–124. The Supreme Court expressed a different stand in the ruling of 27 August 1974, IV KR 172/74, not published.

[15] D. Strzelecki, *Konsumpcja skargi… [Consumption of public prosecution]*, pp. 44–45.

[16] *Ibidem*, p. 47.

despite a lack of grounds for so doing[17]. Article 17 § 1 (7) CPC would be sufficient for the assessment of these types of proceeding competitiveness[18].

The appropriate legal grounds for preparatory proceeding discontinuance in case the former one was validly discontinued are laid down in Article 17 § 1 (11) CPC.

Supporters of the opinion rightly emphasise that *res judicata* may only result from a judgement rendered by a court, not by a prosecutor[19]. Adjudication on the same act committed by the same person does not occur in the judgement issued by a court and this is a basic condition for *res judicata*[20]. A prosecutor does not adjudicate on the matter but only decides on actual or legal inadmissibility of a trial, which at the moment when the decision becomes valid results in a ban established by the principle *ne bis in idem*[21]. Apart from that, it cannot take place in the event former discontinuance of the proceeding took place in the *in rem* phase because of no subjective identity.

The judicature rightly assumes:

– "The public prosecutor's loss of the right to prosecute, as a result of discontinuance of the preparatory proceeding, becomes a separate procedural obstacle to continue, as well as to reopen, a discontinued investigation or an inquiry, but is also a relative obstacle, i.e. an avoidable one. Its elimination can take place via instituting a discontinued proceeding (Article 327§ 1 CPC) or reopening it (Article 327 § 2 CPC), or reversing a valid discontinuance decision as groundless by the Attorney General (Article 328 CPC) providing the decisions are taken according to law. Each of them causes that a public prosecutor can continue the formerly discontinued preparatory proceeding and thus regains the right to prosecute. Consequently, if after the discontinuance of an investigation or an inquiry a prosecutor, not applying the discussed instruments indicated in Article 327 or Article 328 CPC, files an indictment, a court should discontinue the proceeding due to the former discontinuance of the preparatory proceeding and the prosecutor's loss of the right to prosecute (Article 17 § 1 (11) CPC)"[22].
– "Since a senior prosecutor has not issued a decision on proceeding reinstatement, the inclusion of the obligation to discontinue a proceeding in the provision should be understood as the existence of a procedural obstacle different than the one laid down in Article17 § 1 (7) CPC; because, if the procedural obstacle were treated as *res judicata*, special and new grounds for proceeding discontinuance would not

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[17] R. Kmiecik, Prawomocność postanowień prokuratora w świetle k.p.k. z 1997 r. [Validity of a prosecutor's decisions in the light of the Criminal Procedure Code of 1997], [in:] *Nowy Kodeks postępowania karnego. Zagadnienia węzłowe [New Ciminal Procedure Code: Major issues]*, Kraków 1998, pp. 198–199.

[18] D. Strzelecki, *Konsumpcja skargi…. [Consumption of public prosecution]*, p. 46.

[19] M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski. H. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, pp. 55–56; W. Grzeszczyk, Gloss on the decision of the Supreme Court of 8 January 2008, V KK 416/07, *Prokuratura i Prawo* 2008, no. 10, pp. 166–171, decision of the Supreme Court of 16 December 2015, II KK 347/15, LEX no. 1948881.

[20] Ruling of the Supreme Court of 1 February 1962,V K 752/61, LEX no. 1632566, decision of the Supreme Court of 16 December 2015, II KK 347/15, LEX no. 1948881.

[21] W. Grzeszczyk, Gloss on the decision of the Supreme Court of 8 January 2008…, pp. 167–168.

[22] Decision of the Supreme Court of 28 October 2009, I KZP 21/09, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2010, no. 1, item 1.

be necessary (…). It must be noticed that the Criminal Procedure Code does not contain any procedural norms that directly define the consequences of unlawful (legally groundless) continuation of the preparatory proceeding. However, as the Criminal Procedure Code contains a norm that prescribes proceeding discontinuance because the decision on reinstituting it issued by a senior prosecutor was groundless, in accordance with the argument *a maiori ad minus*, the proceeding that has never been reinstated should also be discontinued. Thus, since groundless continuation of the discontinued preparatory proceeding does not constitute a violation of a ban on *res judicata* specified in Article 17 § 1 (7) CPC, it must constitute a procedural obstacle laid down in Article 17 § 1 (11) CPC. It is obvious that a prosecutor has not lost his right to prosecute (file an indictment) unconditionally. A prosecutor regains these entitlements, and thus the possibility of filing an indictment against M.O., when the proceeding is reinstituted by a senior prosecutor under Article 327 § 2 CPC"[23].

Public prosecution consumption, like *res judicata*, raises doubts whether it covers cases of former discontinuance in the *in rem* phase.

In jurisprudence, the consumption of public prosecution is limited to discontinuance of the preparatory proceeding *in personam*[24]. It is assumed that discontinuance of the preparatory proceeding makes it impossible to prosecute a person if the proceeding is not reopened (Article 327 § 2 CPC) or if the Attorney General does not reverse the valid order (Article 328 CPC).[25] Inability to file an indictment results from Article 327 § 2 CPC, which allows for reopening the validly discontinued preparatory proceeding against a person who was a suspect provided a prosecutor senior to the one who

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[23] Ruling of the Administrative Court in Lublin of 29 May 2002, II AKa 93/02, Przegląd Orzecznictwa, Appellate Prosecution Service in Lublin 2002, No. 19, p. 27–30.

[24] M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Siewierski, Kodeks postępowania karnego… [Criminal Procedure Code…], p. 55, J. Grajewski, S Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, pp. 127–128.

[25] Ruling of the Supreme Court of 6 November 2003 – II KK 5/03, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2003, item 2360, decision of the Supreme Court of 26 August 2004 – I KZP 11/04, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2004, no. 7–8, item 84, ruling of the Supreme Court of 18 January 2006 – IV KK 378/05, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2006, item 163, decision of the Supreme Court of 28 October 2009, I KZP 21/09, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2010, no. 1, item 1. Also M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: basic theoretical assumptions]*, Warszawa 1984, pp. 305–313; *ibid*., Gloss on the ruling of the Supreme Court of 17 July 1973, V KRN 264/73, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 1974, no. 7–8, p. 362–364; Z. Doda, A. Gaberle, *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz [Appellate review in criminal process: Supreme Court judgements: Commentary]*, vol. II, Warszawa 1997, p. 184–185; R.A. Stefański, *Podstawy i przyczyny… [Grounds and reasons…]*, p. 31; J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne… [Polish criminal procedure…]*, p. 190, M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, pp. 54–56; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego… [Criminal Procedure Code…]*, p. 152; M. Rogalski, Wygaśnięcie prawa do oskarżenia na skutek prawomocnego umorzenia postępowania przygotowawczego [Expiry of the right to prosecute resulting from preparatory proceeding discontinuance], [in:] *Z problematyki funkcji procesu karnego [Issues of the criminal process function]*, (ed.) T. Grzegorczyk, J. Izydorczyk, R. Olszewski, Warszawa 2013, p. 189.

issued or approved an order on discontinuance only if new, important facts or evidence unknown in the previous proceeding are disclosed or if there is a circumstance laid down in Article 11 § 3 CPC. Moreover, the Attorney General, according to Article 328 § 1 CPC, may reverse a valid order on discontinuance of the preparatory proceeding against a person who was a suspect if he recognises that the proceeding discontinuation was groundless unless it concerns a case in which a court approved the order on discontinuance. If filing an indictment were admissible despite former discontinuance of an investigation or an inquiry, the discussed provisions would be useless. It is rightly noticed in jurisprudence that the aim of the instruments is to protect citizens against charges that a public prosecutor had formerly abandoned, which is required due to the stability of legal relations[26].

There is also an opinion that the reason for discontinuance covers every instance of discontinuance of the proceeding in a case[27].

Solving the problem, it is necessary to answer the question whether in case of discontinuance of the preparatory proceeding in the *in rem* phase, a prosecutor can regain the lost right to prosecute only through instituting a discontinued proceeding or also through continuation of procedural actions within the current proceeding or performing them in another proceeding.

In jurisprudence, it is pointed out that in case of discontinuance of a proceeding *in rem* there is no full validity[28]. This does not mean, however, that it is possible to perform the proceeding after its discontinuance without instituting it anew. Article 327 § 1 CPC is an obstacle to perform the proceeding because according to it, the discontinued preparatory proceeding may be at any time instituted anew based on a prosecutor's order provided that it is not against a person who was a suspect in the former proceeding. It refers to discontinuance of both an investigation and an inquiry as well as the so-called crime record discontinuance (Article 325f § 1 CPC).

In jurisprudence, it is rightly assumed that:

– "After valid discontinuance of the preparatory proceeding, a prosecutor, without the application of instruments envisaged in Article 327 § 1 and 2 CPC and Article 328 CPC, does not have the right to public prosecution and cannot regain it by continuing procedural actions within the former proceeding or another proceeding. In a situation in which there is a lack of a procedural decision adequate to the stage in which the former proceeding was discontinued and envisaged in the above-men-

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[26] M. Siewierski, [in:] S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 36.

[27] T. Grzegorczyk, *Wygaśnięcie prawa oskarżyciela… [Expiry of a prosecutor's right…]*, p. 14; *ibid*., *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 151; J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 127; M. Kurowski, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego…. [Criminal Procedure Code…]*, p. 135; S. Steinborn, O procesowych konsekwencjach niedopuszczalnej kontynuacji prawomocnie zakończonego postępowania karnego (na tle poglądów Mariana Cieślaka) [On the procedural consequences of inadmissible continuance of validly concluded criminal proceeding (confronted with Marian Cieslak's opinions)], [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje [Professor Marian Cieślak: a person, work and follow-up]*, (ed.) W. Cieślak, S. Steinborn, Warszawa 2013, p. 24.

[28] J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne… [Polish criminal procedure...]*, p. 191.

tioned provisions, an indictment filed by a prosecutor must be treated as coming from a person who effectively disposed of his right. The right to prosecute, which a prosecutor disposed of, has not been regained following the procedure envisaged. (…) The statutory norm governing the rules of returning to a validly discontinued proceeding in the *in rem* stage is very clear and does not raise any doubts. The only form of reopening the discontinued proceeding envisaged by the statute is an order on instituting such a proceeding anew issued by a prosecutor (Article 327 § 1 CPC)"[29].

– "The characteristic feature of instituting a preparatory proceeding is the implementation of the principle of legalism in a criminal process in relation to a formerly discontinued case. Thus, such a possibility is taken into account when the course of a process has ended. Instituting the validly discontinued preparatory proceeding anew results in the annulment of the formerly issued order on discontinuance and means opening the way to continuing prosecution in compliance with the directive of legalism. Nevertheless, without issuing an order on instituting a proceeding specified in Article 327§1 CPC, a prosecutor does not possess the entitlement to prosecute and to file an indictment. (…) A valid order on discontinuance of the preparatory proceeding, also issued in the *in rem* stage, constitutes a certain legal state and has impact on the situation of various entities that took part in the concluded proceeding. The above-mentioned order creates a formal obstacle to undertaking other trial-related actions and its continuation. Thus, as long as the discussed order appears in legal transactions, a prosecutor cannot treat it as unimportant and non-binding"[30].
– In a situation when valid discontinuance of the preparatory proceeding in the *in rem* stage resulted in the expiry of public prosecution and procedural instruments allowing for its re-establishing have not been applied, a prosecutor does not have the right to prosecute although, as a rule, he is *ex lege* entitled to file and support a complaint in public prosecution cases. The former valid discontinuance of the proceeding was an expression of disposing of that entitlement and without the application of measures envisaged in Article 327 § 1 and 2 CPC and Article 328 CPC, a prosecutor does not possess the right to public prosecution and cannot regain it via continuation of procedural actions within the former proceeding or performing them in another proceeding"[31].

It is rightly emphasised in literature that instituting a proceeding anew is in its essence re-instituting a proceeding with regard to the same event that is not subject to the *ne bis idem* ban because there is a lack of subjective identity[32]. Since consumption of public prosecution is not the same as *res judicata*, it also occurs when the same act committed by the same person has been subject to discontinuation. In connection

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[29] Ruling of the Supreme Court of 9 October 2008, V KK 252/08, Orzecznictwo Sadu Najwyższego w Sprawach Karnych 2008, no. 1, item 1992.

[30] Ruling of the Supreme Court of 3 December 2015, file no. II KK 272/15 http://www.sn.pl/orzecznictwo/ SitePages/Baza_orzeczen. aspx?Sygnatura=II%20KK%20272/15.

[31] Decision of the Administrative Court in Katowice of 27 July 2011, II AKz 416/11, LEX no. 1102930.

[32] R. Kmiecik, Gloss on the decision of the Supreme Court of 17 June 1994, p. 78.

with that, it must be assumed that consumption of public prosecution takes place in the event of discontinuance of the preparatory proceeding conducted both *in rem* and *in personam*.

Such a situation also takes place in case a prosecutor has divided an act into two separate crimes. It has been wrongly assumed that in such a case it is possible to continue proceedings because it only means a change in a prosecutor's stand with regard to the specification and classification of the act[33]. The Supreme Court rightly stated: "If a prosecutor wrongly recognises two separate acts in one and discontinues the proceeding with regard to one of them, this does not only express a change in a prosecutor's stand regarding defining and classifying the act, but causes expiry of the right to prosecute that act. In a trial regarding one act, the principle of non-division of the trial matter does not allow for "dismembering" one act into several acts and adjudicating on non-independent fragments of the matter. Thus, discontinuance of the proceeding with regard to an act selected in this way excludes the possibility of continuing the proceeding with regard to the second of the isolated charges[34]".

Valid discontinuance of the proceeding binds a court, and an indictment and the judicial proceeding initiated in spite of a prosecutor's loss of the right to prosecute are deprived of legal significance. In case of reopening the proceeding, a court is obliged to examine whether the decision meets the requirements and in case the Attorney General has reversed the order on discontinuance, a court is obliged to check whether a six-month period has passed since the order became valid and final (Article 328 § 2 CPC)[35]. The Supreme Court is right to state: "Since, when an indictment is filed, a court has the right and is obliged to examine whether there are legal obstacles to the proceeding (Article 339 § 3 (1) and (2) CPC) and, in case there are such obstacles, discontinues the proceeding, it can also examine whether the Attorney General's former decision on the reversal of an order on discontinuance of the preparatory proceedings against a given person committing a given act providing a prosecutor with an entitlement to file an indictment was issued in compliance with time limits laid down in Article 328 § 2 CPC and does not violate the ban laid down in Article 328 § 1 sentence 2 CPC as well as whether the reversal has not been issued in spite of other negative procedural premises constituting legal obstacles to the effective annulment of a valid order on discontinuance of an investigation or an inquiry *in personam*. A prosecutor regains his entitlement to prosecute a person only if he had validly discontinued the preparatory proceeding and the order is reversed pursuant to the requirements of Article 328 CPC and there are no other legal obstacles to its effective reversal, and a court cannot allow

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[33] Resolution of the Supreme Court of 24 January 1963, VI KO 73/62, Orzecznictwo Sądu Najwyższego 1963, no. 9, item 169, ruling of the Supreme Court of 17 July 1974, V KRN 264/73, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1973, no. 12, item 163.

[34] Ruling of the Supreme Court of 18 January 2006 – IV KK 378/05, LEX nr 172220.

[35] Resolution of the Supreme Court of 20 September 1962, VI KO 19/62, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1963, no. 6, item 97, decision of the Supreme Court of 9 December 1974, V KRN 93/74, unpublished, ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1979, no. 7–8, item 82. Ruling of the Supreme Court of 9 April 1976, VI KR 38/76, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1977, No. 1, item 9.

for a judicial proceeding based on an indictment filed although a prosecutor has not regained the right to prosecute"[36].

In case a prosecutor reopens an investigation due to new important circumstances unknown in the former proceeding but next, in the course of evidentiary activities, the circumstances have not been confirmed, he should discontinue the reopened investigation[37]. The lack of new important circumstances unknown in the former proceeding is a negative premise of reopening the discontinued investigation, and thus, of continuing the proceeding.

Questioning this stand indicates that the result of the linguistic interpretation of Article 17 § 1 (9) CPC leads to a conclusion that it is applicable only to a situation when a prosecutor does not have the right to prosecute in the type of criminal proceeding at all, because an entitled prosecutor is one who is *ex lege* entitled to prosecute in case of a particular act. Pursuant to Article 45 § 1 CPC, a prosecutor is always entitled to prosecute in the proceeding with regard to an act that is subject to public prosecution, thus one can conclude that in case of this prosecutor, in the public prosecution mode, the premises of the analysed norm will never be fulfilled[38]. Therefore, it is believed that in case a prosecutor files an indictment with regard to an act that is subject to the public prosecution mode, however, the conducted investigation or an inquiry violates the requirements of Article 327 § 1 and 2 CPC or Article 328 § 1 CPC, there is no lack of an entitled prosecutor's complaint because an entitled prosecutor filed a complaint making use of his prerogative to prosecute[39].

Undoubtedly, the situation would be clear if the reason for discontinuance of the proceeding laid down in Article 17 § 1 (9) CPC were formulated as a lack of an entitled prosecutor's complaint but this does not mean, as suggested, that the current wording of the provision only referred to such a prosecutor who is not entitled to file particular types of complaints at all.

The Supreme Court ruled: "a lack of complaint filed by an entitled prosecutor (Article 17 § 1 (9) CPC) occurs not only when complaints have not been filed at all but also when a complaint has been filed by a prosecutor who has not acquired such entitlements"[40]. The Supreme Court rightly admitted that: "Filing a subsidiary

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[36] Decision of the Supreme Court of 28 October 2009, I KZP 21/09, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2010, no. 1, item 1 with a gloss of approval by M. Rogalski, Orzecznictwo Sądów Polskich 2011, no. 1, item 1 and comments of approval by W. Grzeszczyk, Przegląd uchwał i postanowień Izby Karnej Sądu Najwyższego w kwestiach prawnych (prawo karne procesowe – 2009 r.) [Review of resolutions and decisions of the Criminal and Military Chambers of the Supreme Court on legal questions (criminal procedure law of 2009), *Prokuratura i Prawo* 2010, no. 5, pp. 85–88; and R.A. Stefański, Przegląd uchwał Izby Karnej oraz Izby Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2009 r. [Review of resolutions of the Criminal and Military Chambers of the Supreme Court regarding criminal procedure law of 2009], *Wydawnictwo Polskie Prawo* 2010, no. 2, pp. 79–82; resolution of the Supreme Court of 20 December 1962, VI KO 67/62, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1963, no. 9, item 167.

[37] Resolution of the Supreme Court of 4 June 1964, VI KO 10/64, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1964, no. 9, item 139.

[38] D. Strzelecki, Konsumpcja skargi…. [Consumption of…], pp. 49–50.

[39] *Ibidem*, p. 50.

[40] Ruling of the Supreme Court of 16 March 2006, V KK 85/06, *Biuletyn Prawa Karnego* 2006, no. 6, item 1.2.7.

indictment in circumstances when requirements laid down in Article 55 § 1 CPC have not been met is equivalent to a lack of an entitled prosecutor's complaint"[41].

Expiry of the right to file a complaint also results in discontinuance of the proceeding with regard to a fragment of an act because in fact it refers to the same matter as, pursuant to the principle of indivisibility of a trial, adjudication on a fragment of the factual grounds for liability covers it as a whole. Expiry of the right to prosecute is sometimes recognised in case of valid discontinuance of the preparatory proceeding *ad rem*. This way the ban *ne bis in idem* is extended to a person who, before discontinuance of the preparatory proceeding, was not examined as a suspect. It is wrongly assumed in the judicature that "Undoubtedly, the features of the crime of burglary defined in Article 279 § 1 CC include, apart from the theft of property, the elimination of a physical barrier blocking access to that property. This crime, although involving two actions, each of which could be treated as exhausting the features of separate crimes under Article 288 § 1 CC and under Article 278 § 1 CC, is in fact one physical act and one crime carrying a more severe penalty because the theft of property was connected with the elimination of the physical barrier. Since a prosecutor ordered discontinuance of the proceeding with regard to the more severe part of the act, it affects the whole physical act the accused are charged with"[42].

A prosecutor regains the right also as a result of an appeal against the order on discontinuance filed by a person deemed to be a victim if a court reverses the order and refers the case to a prosecutor, even if in the further stages of the criminal process, after an indictment has been filed by a prosecutor, it is established that a person deemed to be a victim and acting in the process as such does not have the features required to be treated as a victim, e.g. due to that, their appeal is not adjudicated on[43].

A prosecutor's decision on instituting the preparatory proceeding anew or reopening it is subject to a court's supervision in case of filing an indictment after these decisions. In literature and court judgements, it is stated that a court not only has the right but also a duty to supervise a prosecutor's decisions on reopening the validly discontinued preparatory proceeding, which results from Article 17 § 1 (7) CPC.[44] The Supreme

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[41] Ruling of the Supreme Court of 26 February 2014, III KK 6/14, Orzecznictwo Sądu Najwyższego Prokuratura i Prawo 2014, no. 5, item 9.

[42] Ruling of the Supreme Court of 6 November 2003, II KK 5/03, Lex no. 82307.

[43] Decision of the Supreme Court of 28 July 2011, III KK 54/11, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 2011, no. 9, item 86.

[44] S. Śliwiński, *Wznowienie postępowania karnego w prawie Polski na tle porównawczym [Comparative analysis of criminal proceeding re-opening in Polish law]*, Warszawa 1957, pp. 167–180; M. Cieślak, Przegląd orzecznictwa Sądu Najwyższego w zakresie procesu karnego (II półrocze 1962 r.) [Review of the Supreme Court judgements on criminal process (2nd half of 1962)], *Nowe Prawo* 1963, no. 10, p. 1126; W. Daszkiewicz, Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – 1963 r.) [Review of the Supreme Court judgements (criminal procedure law – 1963)], *Państwo i Prawo* 1964, no. 7, p. 119; S. Waltoś, Gloss on the resolution of the Supreme Court of 4 June 1964, VI KO 10/64, *Państwoo i Prawo* 1965, no. 1, pp. 167–170; *ibid*., *Model postępowania przygotowawczego na tle prawnoporównawczym [Comparative legal analysis of preparatory proceeding models]*, Warszawa 1968, pp. 354–355; A. Kaftal, *Kontrola sądowa postępowania przygotowawczego [Preparatory proceeding under judicial supervision]*, Warszawa 1974, pp. 165–166; W. Boczkowski, Z problematyki podjęcia i wznowienia umorzonego postępowania przygotowawczego oraz uchylenia prawomocnego postanowienia o jego umorzeniu [Issues of instituting and re-opening discontinued preparatory proceeding and reversal of a valid decision on its discontinuance], *Palestra* 1976, no. 11,

Court indicated that: "A court does not only have the right but also a duty to supervise a prosecutor's decisions with respect to reopening the formerly discontinued preparatory proceeding. Because reopening the discontinued proceeding eliminates a procedural obstacle, i.e. a charge of occurring validity and due to that the premise should be examined by a court *ex officio* in the same way as every procedural premise is"[45].

The issue of a court's grounds for supervising the Attorney General's decision on reversal of a valid order on discontinuance of the preparatory proceeding looks differently. It is not subject to a court's examination because the assessment whether the order on discontinuance of the preparatory proceeding was really groundless is the Attorney General's exclusive entitlement. The wording of Article 328 § 1 CPC unambiguously indicates that discontinuance is subject to reversal if the Attorney General recognises its groundlessness[46]. However, a court is entitled to supervise whether the Attorney General has met the requirement of the six-month period since the order on discontinuance became valid and final when reversing the order to the disadvantage of the suspect is possible (Art. 328 § 2 CPC)[47].

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p. 35; A. Murzynowski, Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1977, no. 2, p. 291; E. Gutkowska, Problematyka ponownego wszczęcia umorzonego postępowania przygotowawczego [Issues of re-opening discontinued preparatory proceeding], *Problemy Praworządności* 1977, no. 7–8, p. 32; T. Grzegorczyk, *Wygaśnięcie prawa… [Expiry of …]*, pp. 24–25; E. Skrętowicz, Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1980, no. 5, item 92; M. Cieślak, Z. Doda, Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1979 roku) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1979)], *Palestra* 1980, no. 12, p. 99; F. Prusak, Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1981, no. 1, pp. 138–144; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, p. 515; resolution of the Supreme Court of 20 September 1962, VI KO 19/62, Orzecznictwo Sadu Najwyżższego 1963, no. 5, item 97, resolution of the Supreme Court of 4 June 1964, VI KO 10/64, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1964, no. 9, item 139; decision of the Supreme Court of 19 June 1975, II KZ 136/75, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1975, no. 8, item 113; ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1979, no. 7–8, item 8.

[45] Ruling of the Supreme Court of 9 April 1976, IV KR 38/76, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1977, no. 1, item 9 with a gloss by A. Murzynowski, *Nowe Prawo* 1977, no. 2, pp. 291–296.

[46] T. Grzegorczyk, *Wygaśnięcie prawa… [Expiry of…]*, p. 27; M, Rogalski, *Przesłanki powagi rzeczy osądzonej… [Premise of res judicata…]*, pp. 517–518.

[47] Resolution of the Supreme Court of 20 September 1962, VI KO 19/62, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1963, no. 6, item 97; decision of the Supreme Court of 19 June 1975, II KZ 136/75, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa 1975, no. 8, item 113; M. Cieślak, Z. Doda, Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1975 r.) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1975)], *Palestra* 1976, no. 6, pp. 53–59; M. Rogalski, *Przesłanka powagi rzeczy osądzonej… [Premise of res judicata…]*, p. 518.

BIBLIOGRAPHY

Augustyniak B., Eichstaedt K., Kurowski M., Świecki D., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) D. Świecki, vol. I, Warszawa 2013.

Bafia J., Bednarzak J., Flemming M., Kalinowski S., Kempisty H., Siewierski M., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1971.

Boratyńska K.T., Górski A., Królikowski M., Sakowicz A., Warchoł M., Ważny A., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, (ed.) A. Sakowicz, Warszawa 2015.

Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S.M., Stefański R.A., Zabłocki S., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. II, Warszawa 2004.

Boczkowski W., Z problematyki podjęcia i wznowienia umorzonego postępowania przygotowawczego oraz uchylenia prawomocnego postanowienia o jego umorzeniu [Issues of instituting and re-opening discontinued preparatory proceeding and reversal of a valid decision on its discontinuance], *Palestra* 1976, no. 11.

Cieślak M., Przegląd orzecznictwa Sądu Najwyższego w zakresie procesu karnego (II połowa 1962 r.) [Review of the Supreme Court judgements on criminal process (2nd half of 1962)], *Nowe Prawo* 1963, no. 10.

Cieślak M., *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: Basic theoretical assumptions]*, Warszawa 1984.

Cieślak M., Gloss on the ruling of the Supreme Court of 17 July 1973, V KRN 264/73, Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1974, no. 7–8.

Cieślak M., Doda Z., Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1975 r.) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1975)], *Palestra* 1976, no. 6.

Cieślak M., Doda Z., Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (II półrocze 1979 roku) [Review of the Supreme Court judgements on criminal procedure (2nd half of 1979)], *Palestra* 1980, no. 12.

Daszkiewicz W., Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – 1963 r.) [Review of the Supreme Court judgements (criminal procedure law – 1963)], *Państwo i Prawo* 1964, no. 7.

Daszkiewicz W., *Prawo karne procesowe. Zagadnienia ogólne [Criminal procedure law: General issues]*, vol. I, Poznań 2000,

Doda Z., Gaberle A., *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz [Appellate review in criminal process: Supreme Court judgements: Commentary]*, vol. II, Warszawa 1997,

Grajewski J., Paprzycki L.K., Steinborn S., *Kodeks postępowania karnego. Komentarz do art. 1–424 [Criminal Procedure Code: Commentary on Articles 1–424]*, vol. I, Warszawa 2013.

Grzegorczyk T., Wygaśnięcie prawa oskarżyciela publicznego do oskarżania [Expiry of a public prosecutor's right to prosecute], *Problemy Praworządności* 1980, no. 2.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2014.

Grzegorczyk T., Tylman J., *Polskie postępowanie karne [Polish criminal procedure]*, Warszawa 2014.

Grzeszczyk W., Gloss on the decision of the Supreme Court 8 January 2008, V KK 416/07, *Prokuratura i Prawo* 2008, no. 10.

Grzeszczyk W., Przegląd uchwał i postanowień Izby Karnej Sądu Najwyższego w kwestiach prawnych (prawo karne procesowe – 2009 r.) [Review of resolutions and decisions of the Supreme Court on legal questions (criminal procedure law – 2009)], *Prokuratura i Prawo* 2010, no. 5.

Grzeszczyk W., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2012.

Gutkowska E., Problematyka ponownego wszczęcia umorzonego postępowania przygotowawczego [Issues of re-opening discontinued preparatory proceeding], *Problemy Praworządności* 1977, no. 7–8.

Hofmański P.,. Sadzik E, Zgryzek K., *Kodeks postępowania karnego, Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2007.

Jeż-Ludwichowska M. (ed.), Lach A. (ed.), *System Prawa Karnego Procesowego. Dopuszczalność procesu [Criminal procedure law system: Admissibility of a trial]*, vol. IV, Warszawa 2015.

Kaftal A., *Kontrola sądowa postępowania przygotowawczego [Preparatory proceeding under judicial supervision]*, Warszawa 1974.

Kalinowski S., Siewierski M., *Kodeks postępowania karnego Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1966.

Kmiecik R., Gloss on the decision of the Supreme Court of 17 June 1994, WZ 122/94, *Wojskowy Przegląd Prawniczy* 1995, no. 3–4.

Kmiecik R., Prawomocność postanowień prokuratora w świetle k.p.k. z 1997 r. [Validity of prosecutor's decisions in the light of the Criminal Procedure Code of 1997], [in:] *Nowy Kodeks postępowania karnego. Zagadnienia węzłowe [New Criminal Procedure Code: Major issues]*, Kraków 1998.

Kmiecik R., Gloss on the ruling of the Supreme Court of 15 February 2012, II KK 201/11, Państwo i Prawo 2013, no. 7.

Marszał S.K., Gloss on the resolution of the Supreme Court of 26 September 2002, I KZP 23/2002, Orzecznictwo Sądów Polskich 2003, no. 9, R.

Mik B., Gloss on the decision of the Supreme Court of 17 June 1994, WZ 122/94, *Prokuratura i Prawo* 1995, no. 11–12.

Murzynowski A., Przyczynek do zagadnienia ważności czynności procesowych wykonanych w niedopuszczalnym postępowaniu karnym [Contribution to issues of procedural actions performed in an inadmissible criminal proceeding], *Nowe Prawo* 1962.

Murzynowski A., Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1977, no. 2.

Prusak F., Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, *Nowe Prawo* 1981, no. 1.

Prusak F., *Nadzór prokuratora nad postępowaniem przygotowawczym [Preparatory proceeding supervision by public prosecutor]*, Warszawa 1984.

Prusak F., *Komentarz do kodeksu postępowania karnego [Commentary on the Criminal Procedure Code]*, vol. 1. Warszawa 1999.

Rogalski M., *Przesłanka powagi rzeczy osądzonej w procesie karnym [Premise of res judicata in criminal proceeding]*, Zakamycze 2005.

Rogalski M., Gloss on the decision of the Supreme Court of 28 October 2009, I KZP 21/09, M. Rogalski, Orzecznictwo Sądów Polskich 2011, no. 1.

Rogalski M., Wygaśnięcie prawa do oskarżenia na skutek prawomocnego umorzenia postępowania przygotowawczego [Expiry of the right to prosecute resulting from preparatory proceeding discontinuance], [in:] *Z problematyki funkcji procesu karnego [Issues of the criminal process function]*, (ed.) T. Grzegorczyk, J. Izydorczyk, R. Olszewski, Warszawa 2013.

Skorupka J., (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2015.

Skrętowicz E., Gloss on the ruling of the Supreme Court of 28 February 1979, V KR 168/78, Orzecznictwo Sądów Polskich 1980, no. 5.

Stefański R.A., Podstawy i przyczyny umorzenia postępowania przygotowawczego [Grounds and reasons for preparatory proceeding discontinuance], *Prokuratura i Prawo* 1996, no. 2–3.

Stefański R.A., Przegląd uchwał Izby Karnej oraz Izby Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2009 r. [Review of resolutions of the Criminal Chamber and Military Chamber of the Supreme Court on criminal procedure law in 2009], *Wojskowy Przegląd Prawniczy* 2010, no. 2.

Steinborn S., O procesowych konsekwencjach niedopuszczalnej kontynuacji prawomocnie zakończonego postępowania karnego (na tle poglądów Mariana Cieślaka) [On the procedural consequences of inadmissible continuance of validly concluded criminal proceeding (confronted with Marian Cieślak's opinions)], [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje [Professor Marian Cieślak: a person, work and follow-up]*, (ed.) W. Cieślak, S. Steinborn, Warszawa 2013.

Strzelecki D., Konsumpcja skargi publicznej [Consumption of public prosecution], *Prokuratura i Prawo* 2016, no. 2.

Szyprowski B., Kontrola prawomocnych orzeczeń wydanych w postępowaniu przygotowawczym [Supervision of valid judgements issued in preparatory proceeding], *Prokuratura i Prawo* 1999, no. 9.

Sych W., *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym [Influence of the victim on the course of preparatory proceeding in the Polish criminal process]*, Zakamycze 2006.

Śliwiński S., *Wznowienie postępowania karnego w prawie Polski na tle porównawczym [Comparative analysis of criminal proceeding re-opening in Polish law]*, Warszawa 1957.

Tylman J., Gloss on the decision of the Supreme Court of 17 June 1994, WZ 122/94, *Wojskowy Przegląd Prawniczy* 1995, no. 3–4.

Waltoś S., Gloss on the resolution of the Supreme Court of 4 June 1964, VI KO 10/64, *Państwo i Prawo* 1965, no. 1,

Waltoś S., *Model postępowania przygotowawczego na tle prawnoporównawczym [Comparative legal analysis of preparatory proceeding models]*, Warszawa 1968.

PUBLIC PROSECUTION CONSUMPTION IN THE POLISH CRIMINAL PROCESS

Summary

The article deals with the so-called consumption of public prosecution consisting in a prosecutor's loss of the right to file an indictment in case he discontinued the preparatory proceeding and it was not instituted anew (Article 327 § 1 CPC) or re-opened (Article 327 § 2 CPC), or the Attorney General did not reverse a valid order on its discontinuance (Article 328 § 1 CPC). The loss of the right to file a complaint results in discontinuance of the reopened proceeding, but the reason for discontinuance presented in jurisprudence and the judicature is *res judicata* (Article 17§ 1 (7) CPC) or another circumstance excluding prosecution (Article 17 § 1 (11) CPC). The author is for the latter opinion and provides arguments for it.

Key words: *indictment*, *consumption of public prosecution*, *public prosecutor*, *preparatory proceeding*, *discontinuance*

KONSUMPCJA SKARGI PUBLICZNEJ W POLSKIM PROCESIE KARNYM

Streszczenie

Przedmiotem artykułu jest tzw. konsumpcja skargi publicznej, polegająca na tym, że oskarżyciel publiczny traci prawo do wniesienia aktu oskarżenia w wypadku, gdy umorzył postępowanie przygotowawcze, a nie nastąpiło jego podjęcie na nowo (art. 327 § 1 k.p.k.) lub jego wznowienie (art. 327 § 2 k.p.k.) albo Prokurator Generalny nie uchylił prawomocnego postanowienia o jego umorzeniu (art. 328 § 1 k.p.k.). Utrata prawa do skargi powoduje umorzenie postępowania ponownie wszczętego, lecz w doktrynie i judykaturze jako przyczynę umorzenia przyjmuje się powagę rzeczy osądzonej (art. 17 § 1 pkt 7 k.p.k.) lub inną okoliczność wyłączającą ściganie (art. 17 § 1 pkt 11 k.p.k.). Autor opowiada się za tą ostatnią koncepcją i przytacza argumenty przemawiające za nią.

Słowa kluczowe: *akt oskarżenia*, *konsumpcja skargi publicznej*, *oskarżyciel publiczny*, *postępowanie przygotowawcze*, *umorzenie*

Ius Novum
2/2016

APPOINTED COUNSEL FOR THE DEFENCE IN THE POLISH CRIMINAL PROCEEDING

JACEK KOSONOGA

GENERAL REMARKS

Due to the way in which the defence relation is established in the criminal proceeding, defence counsel chosen by the accused and ex officio appointed counsel for the defence may be distinguished. The former results from a contract entered into by the accused and his defence lawyer, the latter is a lawyer appointed by the court president or a judicial officer, or based on the court's decision. Counsel for the defence may be appointed in procedural circumstances strictly defined in the statute. In the preparatory proceeding, counsel for the defence is appointed if the accused proves that they cannot afford to employ a defence lawyer without prejudice to their and their family's necessary support and maintenance (Article 78 § 1 CPC). On the other hand, in the judicial proceeding, counsel for the defence is appointed on demand of the accused with no need to provide any reasons (Article 80 § 1 CPC). Regardless of that, counsel for the defence may be also appointed in the event of obligatory defence and the accused has no counsel of their choice (Article 81 § 1 CPC). The statute lays down a range of special provisions that oblige the proceeding organ to appoint counsel for the defence in connection with a given proceeding.

The right to appointed counsel for the defence is not only a complex theoretical issue but also a key practical aspect of law enforcement. First of all, however, it is an institution that has been substantially changed as a result of the latest amendment to the Criminal Procedure Code of 27 September 2013[1]. Thus the discussed subject matter is especially topical.

[1] Act of 27 September 2013 amending Act–Criminal Procedure Code and some other acts (Journal of Laws, item 1247 with subsequent amendments). The Act entered into force on 1 July 2015.

COUNSEL FOR THE DEFENCE APPOINTED DUE TO THE FINANCIAL STATUS OF THE ACCUSED

The financial situation of the accused constitutes grounds for appointing counsel for the defence only in the preparatory proceeding. At the stage of the proceeding before a court it is an unimportant circumstance. The accused who has not chosen defence counsel may demand that the court appoint counsel for the defence if they prove that they cannot afford to employ a defence lawyer without prejudice to their and their family's necessary support and maintenance (Article 78 § 1 CPC).

The financial status of the accused is subject to examination from the moment of filing an application. Counsel should be appointed when the accused has no means to cover the defence lawyer's costs as well as when the possessed means are insufficient to cover these costs and live at the subsistence level. It cannot be assumed, however, that a "hidden" source of income and potential income opportunities determine the financial situation[2]. The courts rightly decide that if the accused had spent the possessed means on something else than a defence lawyer and it had not been a necessary expenditure, Article 78 § 1 CPC cannot be applied[3].

The legislator does not settle the form in which the accused should prove their financial status being grounds for the appointment of counsel. Article 78 § 1 CPC does not require that the accused provide documents confirming their financial status but only that they prove that they cannot afford to employ a defence lawyer without prejudice to their and their family maintenance. Thus, the requirement may be met through the submission of a declaration on one's financial status in writing. These can be various certificates containing information on remuneration, pension, possession, family members as well as (one's own and family members') health condition resulting in increased expenditure[4]. There may also be some other important circumstances such as unemployment, education, being dependent on parents or guardians, liability to pay maintenance or alimony, etc.[5] Obviously, a court may withdraw the appointment of counsel if it finds that the circumstances constituting grounds for the appointment of counsel do not actually exist (Article 78 § 2 CPC). It can occur when the accused misinforms the proceeding organ or when their financial situation changes[6].

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2 Ruling of the Supreme Court of 17 July 2014, V Kz 26/14, Lex no. 1487098.

3 Ruling of the Supreme Court of 27 January 2010, II KO 117/09, OSNKW 2010 no. 4, item 38.

4 See ruling of the Supreme Court of 25 November 2010 – V KZ 70/10, Biuletyn Prawa Karnego 2010, no. 9, item 1.2.12.

5 See A. Zachuta, Bezpłatna pomoc prawna z urzędu [Ex officio appointed free legal assistance] (Article 78 § 1 CPC), *Przegląd Sądowy* 2005, no. 7–8, pp. 194–196.

6 For more see T. Grzegorczyk, [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in criminal proceeding after 1 July 2015: Guide to amendments]*, Warszawa 2015, pp. 47–48; also see J. Giezek, Obrońca i pełnomocnik z urzędu w procesie karnym – założenia a rzeczywistość [Counsel for the defence and proxy ex officio in criminal proceeding – assumptions and reality], *Jurysta* 2002, No. 7–8, p. 48 and the following; P. Kardas, Projektowany model obrony z urzędu a zasada prawdy materialnej [Designed model of defence ex officio and a principle of objective truth], *Palestra* 2013, No. 5–6, p. 9 and the following; S. Kowalski, Problematyka obrony z urzędu w postępowaniu karnym – na tle wyroku Trybunału Konstytucyjnego z dnia 8 października 2013 r., K 30/11 [Defence ex officio in criminal proceeding against the background of the sentence of the Constitutional Tribunal of 8 October 2013, K 30/11], [in:]

The opinion that depriving the accused of the right to appointed counsel for the defence in the situation laid down in Article 78 § 1 CPC is a flagrant contempt of this provision and Article 6 CPC and violates the standards of a fair trial remains up-to-date[7]. It is similar to the statement that dismissing a motion to appoint counsel for the defence without former information of the accused about the need to support the circumstances with appropriate documents (Article 16 § 2 CPC) violates a court's loyalty and results in depriving the accused of the right to defence, which can influence the adjudication[8].

What can arouse doubts is whether appointed counsel for the defence under Article 78 § 1 CPC acts only until the end of the preparatory proceeding or whether Article 84 § 1 CPC determines the temporary scope of action of the appointed counsel for the defence, i.e. whether the counsel shall act in the whole proceeding including undertaking steps after the sentence comes into force. The former idea dominates jurisprudence[9]. However, it seems that the content of Article 78 § 1 CPC neither excludes nor modifies the provision of Article 84 § 1 CPC. The former provision refers to the conditions for appointing counsel for the defence and the latter defines time limits for the counsel's acting in the proceeding. As a result, the appointed counsel for the defence in the preparatory proceeding under Article 78 § 1 CPC acts until the moment determined in Article 84 § 1 CPC. Adoption of the defence in stages would be also doubtful from the pragmatic point of view because it would mean that – in case the accused expresses the will to continue to have appointed counsel – they would be represented by different defence lawyers, which would reduce the efficiency of defence actions. The approval of such an opinion would disrupt defence. For example, a different defence lawyer would have to participate in a session regarding a motion filed under Article 335 CPC than the one who participated in developing its content. As a result, he would support a motion he had not formulated. Thus, appointing new counsel for the defence only because one stage of the proceeding has ended does not have any substantial grounds[10].

(ed.) D. Gil, *Prawo sądowe w orzecznictwie Trybunału Konstytucyjnego [Court rules in the judicial decisions of the Constitutional Tribunal]*, Lublin 2014, p. 46 and subsequent ones; R.A. Stefański, Prawo do wyznaczenia obrońcy z urzędu ze względu na niezamożność [Right of appointed counsel for the defence because of poorness], [in:] (ed.) A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński, *Skargowy model procesu karnego. Księga ofiarowana Prof. S. Stachowiakowi [Adversarial model of criminal proceeding: Book presented to Professor S. Stachowiak]*, Warszawa 2008, p. 343 and subsequent ones.

[7] Sentence of the Supreme Court of 29 January 2002, II KKN 386/99, OSN *Prokuratura i Prawo* 2002, No. 10, item 6.

[8] See sentences of the Supreme Court of 8 December 1996 – III KKN 67/96 Wokanda 1997, no. 2, p. 8; sentence of the Supreme Court of 18 December 2002 – II KK 326/02, unpublished; sentence of the Supreme Court of 29 January 2002 – II KKN 386/99, OSNPK 10/02 item 6.

[9] See e.g. T. Grzegorczyk, *Obrońca i pełnomocnik… [Counsel for the defence and proxy…]*, p. 63 and the following; D. Świecki, *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych [Procedural actions undertaken by counsel for the defence and proxy]*, Warszawa 2015, p. 50; K. Eichstaedt [in:] D. Świecki (ed.), *Kodeks postępowania karnego – Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2015, p. 355.

[10] See S. Steinborn, O kilku kontrowersjach i wątpliwościach dotyczących obrońcy i pełnomocnika z urzędu wyznaczanych w postępowaniu sądowym na żądanie strony [On some controversies and doubts concerning counsel for the defence and proxy appointed on a party's demand], [in:] *Studia i Analizy Sądu Najwyższego, Materiały Naukowe [Studies and Analyses of the Supreme Court: Scientific materi-*

COUNSEL FOR THE DEFENCE APPOINTED ON DEMAND OF THE ACCUSED

The amendment to the Criminal Procedure Code of 27 September 2013 to a great extent increased the contradictoriness of a court proceeding and limited a court's paternalism towards the parties to the trial, especially towards the accused. The natural consequence of that fact was making it easier for the accused to have counsel for the defence. As a result it was assumed that at this stage – in order to maintain the principle of the equality of arms – the use of the right to appointed counsel for the defence should only result from the will of the accused. Under Article 80 § 1 CPC, following the motion filed by the accused who does not have a defence lawyer of their choice, the president of a court, a court or a judicial officer appoints counsel for the defence – unless Article 79 § 1 or 2 CPC or Article 80 CPC (obligatory defence) is applicable. In such a case, counsel for the defence must take part in the trial. Pursuant to the same rules, the accused may demand that counsel for the defence be appointed in order to perform a given procedural action in the course of a court proceeding (Article 80a § 2 CPC).

In order to avoid the possibility of overusing the rights laid down in Article 80a § 1 and first of all Article 80a § 2 CPC, a limitation was introduced and a successive appointment of counsel for the defence is allowed only in specially substantiated cases (Article 80a § 3 CPC). The bill to amend the statute did not contain this limitation and it was connected with a risk of proceeding obstruction. Under Article 80a § 2 CPC in connection with Article 80a § 1 CPC, a motion filed by the accused is binding for a court and he assesses on his own what court proceeding actions require counsel's participation. Taking into account the fact that even partial participation in a court proceeding requires time to get to know the case files, Article 80a § 2 CPC might be treated instrumentally in some situations. For example, the accused might file a motion to appoint counsel for the defence in connection with every event of interviewing successive witnesses. If the time necessary to respond to the motion, the appointment of counsel for the defence and the necessity to get to know the case files are taken into account, the behaviour of the accused – although in agreement with *favor defensionis* – might cause excessive unreasonable delay of the trial. Regardless of the above, the lack of limitation of Article 80a § 3 CPC was controversial also from the point of view of the need to maintain the adopted defence policy. In extraordinary cases, one might imagine the participation of many defence lawyers in a court proceeding and each of them implementing different defence ideas[11]. Eventually, however, the possibility was rightly eliminated and a rule was introduced that re-appointment of counsel for the defence may take place only in specially substantiated circumstances. Thus, on the

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als], vol. II, Warszawa 2015, p. 114; M. Wąsek-Wiaderek, Aktywność obrońcy i pełnomocnika na etapie postępowania przejściowego [Activenes of counsel for the defence and proxy at the preparatory proceeding stage] [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in criminal proceeding after 1 July 2015: Guide to the amendments]*, Warszawa 2015, p. 230 and subsequent ones.

[11] See J. Kosonoga, Kilka uwag na temat projektowanych zmian w kodeksie postepowania karnego [Some comments of planned amendments to the Criminal Procedure Code], *Ius Novum* 2012, no. 1, p. 10 and subsequent ones.

one hand, the accused must take decisions to what extent a defence lawyer should be involved in the trial and, on the other hand, a judicial organ must assess – in the context of a general proceeding principle (Article 6 CPC) – the grounds for re-appointment of counsel for the defence (Article 80a § 3 CPC).

A motion to appoint counsel for the defence under Article 8a § 1 should be filed within seven days from the date of serving a summons on the accused or delivery of notification of the trial. Motions that are filed after the deadline are dealt with if this does not cause a trial adjournment (Article 353 § 5 CPC).

COUNSEL FOR THE DEFENCE APPOINTED BECAUSE OF A LACK OF OBLIGATORY DEFENCE COUNSEL

Obligatory defence in the criminal proceeding takes place when the regulations impose on the accused an obligation to use the assistance provided by counsel for the defence. It constitutes an exception to the right to free-will defence and is an obligation to have counsel for the defence and their participation in strictly limited cases[12]. The accused cannot decline to have such defence or renounce their right to defence at all, or refuse to accept the appointment of counsel for the defence and their participation in trial if they do not have a defence attorney of their choice.

Thus, the appointment of counsel for the defence takes place when defence is obligatory and the accused does not have a defence lawyer of their own choice. Because of the need to prefer counsel for the defence of one's own choice as the one that is a more favourable to the accused form of developing the defence relationship, it is rightly suggested that before appointing counsel for the defence the accused or a person authorised to act on their behalf should be informed that there is an obligatory defence case requiring the appointment of counsel for the defence if the interested parties do not indicate a will to appoint one of their choice, give them an adequate short time limit and then, if the accused does not appoint defence attorney of their own choice, counsel for the defence should be appointed[13].

The procedural importance of obligatory defence is clear. It was emphasised already in the pre-war period that there are situations in which the accused is deemed to be unable to defend and that is why they need the assistance of a qualified entity[14]. There are public reasons and the need of adequate representation of the interests of the accused[15]. It is also important that it is necessary to keep balance between the parties

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[12] R. Stefański, *Obrona obligatoryjna w polskim procesie karnym [Obligatory defence in the Polish criminal proceeding]*, Warszawa 2012, p. 34.

[13] T. Grzegorczyk, *Obrońca w postepowaniu przygotowawczym… [Counsel for the defence in the preparatory proceeding…]*, p. 123.

[14] Bill to amend Act – Criminal Procedure Code with the statement of reasons, Warszawa – Lwów, 1926–1927, p. 184; also see S. Kalinowski, M. Siewierski, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1960, p. 130.

[15] S. Śliwiński, *Polski proces karny przed sądem powszechnym, Zasady ogólne [Polish criminal proceeding before a common court: Basic rules]*, Warszawa 1959, p. 195.

to the proceeding[16]. Counsel for the defence is to secure the interests of the accused and take all the necessary procedural steps. All this is aimed at creating conditions for the complete exercise of the formal and physical right to defence[17].

It is also rightly believed that obligatory defence is in the interest of justice; it is also in the public interest, which requires that individual rights should always be properly protected, and that the procedural aim should be achieved in conditions ensuring real defence feasibility[18].

In the criminal proceeding, the accused must have counsel for the defence, inter alia, when they are not 18 years old yet (Article 79 § 1 CPC). It is important how old they are in the course of the trial, which means that when the accused is 18 in the course of the proceeding, the obligation to have counsel for the defence stops being in force *ex lege*[19]. *Ratio legis* in this case is clear and accounts to a need to ensure assistance of a qualified lawyer to persons who do not have enough experience and knowledge that would let them defend themselves in a criminal proceeding. The requirement of having a defence lawyer depends on the age of the accused. It is not important whether the accused is adult but if they are 18 years old. A minor who becomes an adult as a result of marriage (Article 10 § 2 of the Civil Code) but is not 18 years old must have counsel for the defence as specified in Article 10 § 2 CPC. A person is 18 years old at the beginning of the day equivalent to the day of their birth[20].

The accused must also have counsel for the defence when they are deaf, dumb or blind (Article 79 § 1 CPC). Undoubtedly, this kind of physical impairment directly translates into disability of defending themselves, including first of all communicating with the proceeding organ. There is no need, however, to prove that in a particular case it limits the exercise of the right to defence. The fact that this kind of impairment takes place is sufficient[21].

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[16] S. Kalinowski, *Polski proces karny w zarysie [Polish criminal procedure outline]*, Warszawa 1981, p. 92.

[17] M. Siewierski [in:] M. Siewierski, J. Tylman, M. Olszewski, *Postępowanie karne w zarysie [Criminal procedure outline]*, Warszawa 1971, p. 107 and subsequent ones; sentence of the Supreme Court of 15 January 2008, V KK 190/07, OSNKW 2008, no. 2, item 19.

[18] S. Kalinowski, *Polski proces karny w zarysie [Polish criminal procedure outline]*, Warszawa 1981, p. 92; T. Grzegorczyk, *Obrońca w postępowaniu przygotowawczym [Counsel for the defence in the preparatory proceeding]*, Łódź 1988, p. 16; fore more see R. Stefański, *Obrona obligatoryjna... [Obligaatory defence…]*, p. 34 and the following; C. Kulesza, *Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej [Efficiency of counsel for the defence participation in the criminal proceeding – comparative perspective]*, Kraków 2005, p. 336; P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym, Kraków 2006 [Principle of the right to defence in the Poolish criminal proceeding]*, p. 42; A. Kaftal, Z problematyki obrony formalnej i materialnej w projekcie kodeksu postępowania karnego [Issues of constitutional and statutory right to defence in the bill on criminal procedure code], *Palestra* 1968, no. 1, p. 77 and subsequent ones.

[19] T. Grzegorczyk, *Obrońca i pełnomocnik z urzędu… [Counsel for the defence and proxy ex officio…]*, pp. 51–52; R. Stefański, Obrona obligatoryjna po 1 lipca 2015 r. [Obligatory defence after 1 July 2015], [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015]*, Warszawa 2015, pp. 28–29.

[20] Compare S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna [Commentary on the Civil Code. Volume one. General issues]*, Warszawa 2011, p. 80.

[21] A. Kaftal, Glosa do uchwały SN z dnia 17 czerwca 1968 r. [Gloss on the resolution of the Supreme Court of 17 June 1968], VI KZP 26/68, Palestra 1969, no. 1, p. 116; F. Prusak, Wątpliwości co

It is the proceeding organ's responsibility to assess circumstances laid down in Article 79 § 1 CPC. The decision should be taken based on the expert opinion of a physician who is a specialist in the field, e.g. an otorhinolaryngologist or an ophthalmologist. The fact that the accused is deaf, dumb or blind can be confirmed by a document certifying their disability. A proceeding organ itself can state that the impairment exists based on the direct contact with the accused[22]. The terms used in Article 79 § 21 (2) CPC are not legal in character and, generally speaking, refer to a person's health condition. Thus, the determination of their meaning requires medical science consultation, especially in the field of ophthalmology, otorhinolaryngology and speech-language pathology[23].

Psychical health impairment constitutes another premise for obligatory defence. There should be no doubt that in fact every disability of that kind may hamper defence to some extent. Since the CPC of 1928, the legislator has been using a premise of justified doubt if the accused is free from mental disorder[24]. As a result of the amendment of 27 September 2013, the formula was given up and two separate normative circumstances were formulated. From 1 July 2015, the accused must have counsel for the defence if, firstly, there is a justified doubt whether their ability of recognising the significance of an act or controlling their conduct was limited or did not exist during the commission of the act (Article 79 § 1 (3) CPC), secondly, there is a justified doubt whether the psychic health condition of the accused allows for their participation in defence or conducting defence on their own and reasonably (Article 79 § 1 (4) CPC).

As it was raised in the statement of reasons for the amendment, the changes mainly fulfil the demands of jurisprudence and incorporate the right stand of the judicial decisions[25]. They are based on the division of the bases of obligatory defence laid down in Article 79 § 1 CPC into those resulting from premises occurring *tempore criminis* (item (3)) and *tempore procedendi* (item (4)). Thus, in the former case, unlike in the past, premises of obligatory defence do not refer to the concept of 'being free of mental disorder' that is difficult to define, but to the content of Article 31 § 1 and 2 of the Criminal Code as the basis for assessment whether there are premises for excluding

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do poczytalności oskarżonego jako podstawa obligatoryjnego udziału obrońcy w postępowaniu karnym [Doubts whether the accused is sane as grounds for obligatory participation of counsel for the defence in the criminal proceeding], *Palestra* 1969, no. 1, p. 36; H. Gajewska, Uzasadnione wątpliwości co do poczytalności oskarżonego jako przesłanka obrony niezbędnej [Justified doubts whether the accused is sane as a premise of indispensable defence], *NP* 1980, nr 3, s. 37.

[22] R. Stefański, *Obrona obligatoryjna po 1 lipca 2015 r…. [Obligatory defence after 1 July 2015…]*, p. 30; J. Satko, A. Seremet, Przesłanki obowiązkowej obrony oskarżonego głuchego, niemego lub niewidomego (art. 70 § 1 pkt 1 k.p.k.) [Premises of obligatory defence of the accused who is deaf, dumb or blind (Article 70 § 1 (1) CPC], *Palestra* 1995, no. 9–10, p. 40.

[23] For more see R. Stefański, *Obrona obligatoryjna… [Obligatory defence…]*, pp. 107–123; S. Orzechowska, Ułomności fizyczne oskarżonego jako podstawa obrony obligatoryjnej [Physical impairment of the accused as grounds for obligatory defence], *Ius Novum* 2010, no. 3, p. 84 and subsequent ones.

[24] For more see R. Stefański, Kształtowanie się obrony obowiązkowej w kodeksie postępowania karnego z 1997 r. [Development of obligatory defence in the Criminal Procedure Code of 1997] [in:] K. Dudka, M. Mozgawa (ed.), *Kodeks karny i kodeks postępowania karnego po dziesięciu latach obowiązywania. Oceny i perspektywy zmian [Criminal Code and Criminal Procedure Code after ten years of being in force: Assessment and prospects for amendment]*, Warszawa 2009, p. 208 and subsequent ones.

[25] Judgement of the Supreme Court of 29 June 2010, I KZP 6/10, OSNKW 2010, no. 8.

or mitigating criminal liability. On the other hand, the premises laid down in item (4) serve the assessment whether the accused has the possibility of exercising the right to defence in the course of criminal proceeding, to carry out the defence on one's own and efficiently. A different character of premises in the two cases, i.e. *tempore criminis* and *tempore procedendi*, decides on the necessity of defining these bases in separate editorial units and as a result a separate assessment of their occurrence[26].

A premise laid down in Article 79 § 1 (3) CPC unambiguously refers to the state of insanity (Article 31 § 1 CC) and sanity limited to a significant extent (Article 31 § 2 CC). This way, the solution eliminates the former dilemmas connected with the interpretation of the concept of "a good reason to doubt the sanity of the accused". Formerly, it was not clear whether it referred to a doubt whether sanity was non-existent or limited and to what extent. Undoubtedly, the discussed premise refers to the time of committing a forbidden act[27].

The Criminal Code lays down three reasons of insanity: mental deficiency, mental disease and other mental disturbance, which means that the circumstances constitute sources of disturbance of consciousness or will referred to in Article 79 § 1 (3) CPC. Mental state of the accused must raise serious doubts whether their ability to recognise the significance of an act or manage their conduct was non-existent or limited to a significant extent. Thus, obligatory defence is not applicable when there is a good reason to doubt that the accused could recognise the significance of a forbidden act or could manage their conduct was limited but not to a significant extent[28].

Premises of obligatory defence due to the mental state *tempore proceeded* are more complex. It is connected with a doubt whether the mental health condition of the

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[26] Statement of reasons for the Bill to amend Act: Criminal Procedure Code, Act: Criminal Code and some other acts, Sejm of VII term, Sejm Paper no. 870, p. 31.

[27] See e.g. E. Habzda-Siwek, Dylematy związane z opinią o stanie zdrowia psychicznego oskarżonego (refleksje wokół art. 202 k.p.k.) [Dilemmas in connection with the opinion on the mental health of the accused (comments on Article 202 CPC)], [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. Rocznicy urodzin Profesora A. Gaberle [Penal sciences vs. problems of contemporary criminality: Professor A. Gaberle's 70th birth anniversary jubilee book]*, Warszawa 2007, p. 188 and the following; A. Płatek, Poczytalność oskarżonego „w czasie postępowania" czy psychiczna zdolność do „rozumnej obrony"? [Sanity of the accused 'in the course of the proceeding' or 'psychical ability' to 'defend reasonably'?], *Palestra* 2009, no. 5–6, p. 70 and the following.

[28] R. Stefański, Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 r. [Constitutional right to obligatory defence in the light of the amendment of 27 September 2013] [in:] M. Kolendowska-Matejczuk, K. Szwarc (ed.), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty [Right to defence in a penal proceeding: selected issues]*, Warszawa 2014, p. 22; for more see, e.g. J.K. Gierowski, L.K. Paprzycki, *Niepoczytalność i psychiatryczne środki zabezpieczające. Zagadnienia prawno materialne, procesowe, psychiatryczne i psychologiczne [Insanity and psychiatric prevention measures: substantive legal, procedural, psychiatric and psychological issues]*, Warszawa 2013; A. Golonka, *Niepoczytalność i poczytalność ograniczona [Insanity and limited sanity]*, Warszawa 2013; A. Liszewska, Strona podmiotowa czynu i wina a niepoczytalność [Perpetrator's attitude and guilt vs. insanity], [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Prof. A. Zolla [The rule of law and penal law. Professor A. Zoll jubilee book]*, (ed.) P. Kardas, T. Sroka, W. Wróbel, vol. II, Warszawa 2012, pp. 635–649; W. Kozielewicz, Pojęcie niepoczytalności w doktrynie prawa karnego i orzecznictwie Sądu Najwyższego [Concept of insanity in the criminal law doctrine and judgements of the Supreme Court], *Palestra* 2007, No. 1–2, pp. 76–85.

accused allows him to participate in the proceeding or whether the state allows them to defend themselves on their own and rationally.

The exit point in this case is the assessment of the state of mental health of the accused. It is a broad concept, which is defined in various ways. Most generally, it is understood as a state with no mental disturbances, i.e. such disturbances of mental activities that contemporary knowledge treats as sickness-related phenomena[29]. On the other hand, in psychiatric literature, mental health is described as a set of individual features and reactions that do not diverge from psychical norm, i.e. inter alia, harmonious balance of often contradictory tendencies resulting from the features of character, temperament, inclinations and intellectual activities of a given individual in order to satisfy individual and environmental needs, including social ones[30].

The concept of a person with mental disturbances is also defined in normative terms. It is a person mentally ill (demonstrating psychiatric disorders), mentally impaired or showing other disturbances of psychic activities, which in accordance with contemporary medical knowledge are classified as psychiatric disorders and the person affected needs health care or other forms of assistance and care necessary to live in a family and social environment[31]. The definition, because of its basic importance in the legal system, should constitute a normative determinant in the assessment of a premise of obligatory defence laid down in Article 79 § 1 (4) CPC[32].

To assume that a premise of obligatory defence occurs, it is necessary to state that mental state does not allow the accused to participate in the proceeding or to defend themselves on their own and rationally. In the former case, the mental state is so bad that it does not allow for active participation in the proceeding; precludes the accused from appearing before court and taking procedural steps that are part of the right to defence. In the latter case, the criteria are highly assessment-related. It is a situation where the accused is not capable of defending on one's own and rationally. The justification of the amendment points out that the aim of using the premises of "being self-reliant" and "rational" in defending oneself was to establish objective criteria but at the same time referring to a certain pattern of ordinary conduct where there is a physical possibility of assessing one's own behaviour and granted rights[33].

However, the adopted criterion is highly evaluative and unclear, especially in the context of the assessment of what conduct should be assumed as rational within the exercise of the right to defence and what conduct should be denied that feature. From the point of view of a court, the assessment may be completely different from

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[29] Compare W.S. Gomułka, W. Rewerski (ed.), *Encyklopedia zdrowia [Encyclopaedia of Health]*, vol. I, Warszawa 1992, pp. 1077–1078.

[30] L. Korzewniowski, S. Pużyński, *Encyklopedyczny słownik psychiatrii [Encyclopaedic dictionary of psychiatry]*, Warszawa 1986, p. 627; also see A. Bilikiewicz, Zakres psychiatrii oraz jej miejsce w kulturze i wśród innych dyscyplin nauki [Scope of psychiatry and its place in culture and other sciences], [in:] A. Bilikiewicz (ed.), *Psychiatria. Podręcznik dla studentów medycyny [Psychiatry: textbook for medical students]*, Warszawa 2007, p. 22.

[31] Article 3 (1) of Act of 19 August 1994 on the protection of mental health (Journal of Laws of 2011, no. 231, item 1375).

[32] R. Stefański, *Obrona obligatoryjna po 1 lipca 2015… [Obligatory defence after 1 July 2015…]*, pp. 38–39.

[33] Statement of reasons for the Bill amending Act – Criminal Procedure Code, Act – Criminal Code and some other acts, Sejm of VII term, Sejm Paper No. 870, p. 31.

the one from the point of view of defence or prosecution. The wording of Article 79 § 1 (4) CPC *a contrarious* suggests that the premise will not occur if the assessment of the health condition of the accused allows for the assumption that their defence will be self-reliant and rational. It seems, however, that even self-reliant defence with the participation of a professional defence lawyer may be deemed to be irrational, i.e. unwise, imprudent and incautious[34]. In this sense it would probably be a better solution, proposed in jurisprudence, to use the term "reasonable", i.e. simply speaking conducted with real discernment[35]. Such a criterion seems to be more measureable as it refers to the perception of the accused and not to the assessment of the quality of their defence actions, which is in general very subjective. Editorial simplification eliminating the discussed doubts might result in the following wording of Article 79 § 1 (4) CPC: "there is a justified doubt whether the state of psychic health of the accused allows for the participation in the proceeding or self-reliant exercise of the right to defence". Another proposal might be an assumption that the premise in fact constitutes "another circumstance hindering the exercise of the right to defence" in accordance with Article 79 § 2 CPC, which, on the other hand, would cause a necessity to give up the regulation.

Participation of counsel for the defence in criminal proceeding is also obligatory in the event a court decides it is indispensable because of other circumstances impeding defence (Article 79 § 2 CPC). The range of circumstances that match the discussed premise is very broad and its interpretation in jurisprudence is not unambiguous[36]. The wording of Article 79 § 2 CPC provides that these must be circumstances "impeding" defence, i.e. semantically, such ones that constitute an obstacle to achieve something, cause that something becomes more difficult, obstruct, complicate[37]. The level of difficulties in performing defence by the accused in person is subject to a court's discretion. The rulings rightly point out that, although the wording of Article 79 § 2 CPC lacks a term classifying the level in which defence is impeded (e.g. considerably, to a great extent etc.), it should be agreed that not every difficulty experienced in defence can give grounds for obligatory participation of counsel for the defence in the proceeding. Existence of adequate limitations should be derived from the word „indispensable, which is used by the legislator purposefully, as well as from the rules of logic and life experience, in the light of which every case of accusation causes some kind of discomfort and creates difficulties. Thus, the institution laid down in the

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[34] S. Dubisz, *Uniwersalny słownik języka polskiego [Universal dictionary of the Polish language]*, Warszawa 2003, vol. IV, p. 188.

[35] R. Kmiecik, O poczytalności oskarżonego „w czasie postępowania" polemicznie [On sanity of the accused 'in the course of criminal proceeding' polemically], *Palestra* 2007, no. 5–6, p. 92.

[36] For more see J. Kosonoga, Przesłanki obrony obligatoryjnej w postępowaniu wykonawczym [Premises of obligatory defence in execution proceeding], [in:] I. Rzeplińska, A. Rzepliński, P. Wiktorska, M. Niełaczna (ed.), *Pozbawienie wolności – funkcje i koszty. Księga Jubileuszowa Profesora Teodora Szymanowskiego [Function and cost of imprisonment. Professor Teodor Szymanowski jubilee book]*, Warszawa 2013, p. 526 and subsequent ones.

[37] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego [Universal dictionary of the Polish language]*, vol. IV Warszawa 2003, pp. 1049–1050; H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny [Practical dictionary of contemporary Polish]*, vol. 44, Poznań 2003, p. 356.

provision is extraordinary in character and it should be applied to a significant level of defence impediment[38].

The amendment of 27 September 2013 also limited premises of obligatory defence because of crime classification restricting it to persons who are accused of committing a felony (Article 80 CPC). Obligatory defence because of other crimes and "detention" of the accused was repealed. The statement of reasons provides that the decision to repeal "detention" as a premise of automatic occurrence of the state of obligatory defence expresses a belief that in practice there is a lack of grounds for obligatory defence resulting only from the fact that any form of deprivation of liberty is applied, especially regardless of its time. The discussed changes are strictly connected with the change of the model of appointing counsel for the defence of one's own choice under Article 80a CPC, letting the accused (especially the detained one) demand an appointment of counsel for the defence[39]. It is a right solution that jurisprudence called for earlier[40].

APPOINTMENT OF COUNSEL FOR THE DEFENCE IN SPECIAL CASES

Counsel for the defence is also appointed in special cases. These are various situations in which a lack of counsel for the defence would constitute an inadmissible deficit in the right to defence. It takes place in:

– the event there is a conflict of interests of the accused persons defended by the same appointed counsel for the defence (Article 5§ 2 CPC);
– if the accused notified of an interrogation of a witness under Article 185a § 1 CPC does not have a defence lawyer of their choice (Article 185a § 2 CPC)[41];
– if, in the case in which the accused must have counsel for the defence and has a retained defence lawyer of their choice, the defence lawyer or the accused revokes the respective sides of the arrangement under the power of attorney, provided that the accused has not appointed the counsel for the defence (Article 378 § 1 CPC);
– if a court does not rule the accused under detention who does have counsel for the defence be brought to the appellate trial (Article 451 § 1 CPC)[42];

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[38] Ruling of the Supreme Court of 17 February 2004, II KK 277/02, OSNKW 2004, no. 4, item 43; also see sentence of the Administrative Court in Katowice of 12 July 2001, II AKa 221/01, OSN Prokuratura i Prawo 2002, no. 5, item 21.

[39] Statement of reasons for the Bill amending Act – Criminal Procedure Code, Act – Criminal Code and some other acts, Sejm of VII term, Sejm Paper No. 870, p. 32.

[40] R. Stefański, *Obrona obligatoryjna…, [Obligatory defence…]*, pp. 390–391.

[41] Also see Article 185b § 1 CPC in connection with Article 185a § 1 CPC.

[42] Also see Article 439 § 3 CPC in connection with Article 451 CPC – with regard to a session concerning annulment of a ruling due to absolute appeal premises; Article 464 § 3 CPC in connection with Article 451 CPC – with regard to a session concerning a complaint about a ruling to terminate proceeding and about detention; Article 573 § 2 CPC in connection with Article 451 CPC – with regard to a hearing concerning a cumulative sentence; Article 597 CPC in connection with Article 451 CPC – with regard to a session concerning a change of ruling resulting in the execution of penalties only for the crimes in connection with which a perpetrator was transferred; Article 607e § 2 CPC in connection with Article 451 CPC – with regard to a session concerning a ruling to execute penalties only for the crimes that were grounds for a transfer of the wanted criminal.

– if the proceeding has been re-opened pursuant to a motion for the benefit of the accused and it is conducted after his death or there are grounds for the suspension of the proceeding, the president of the court shall appoint counsel for the defence unless the accused has already retained counsel for the defence (Article 458 CPC);
– if the person prosecuted in the state where a judgement has been issued does not stay in the territory of the Republic of Poland and does not have a defence lawyer (Article 607zj § 2 CPC);
– in the case regarding admissibility of taking over or transferring the execution of a penalty if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611fh § 1 CPC);
– in the case regarding the execution of penalties of monetary character if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611fh § 1 CPC);
– in the case regarding the execution of the forfeiture of property sentence if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611fx § 1 CPC);
– in the case regarding the execution of an imprisonment sentence if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611ti § 1 CPC);
– in the case regarding the execution of a suspended imprisonment sentence or a fine or another measure that is not a fine or a custodial penalty, or regarding a conditional release, a conditional discontinuance of the proceeding or any other conditional postponement of penalty execution if the convict who does not stay in the territory of the Republic of Poland does not have counsel for the defence (Article 611ue § 1 CPC);
– in the case regarding the execution of the European protection order if the person who is or was subject to criminal proceeding does not stay in the territory of the Republic of Poland and does not have counsel for the defence (Article 611wf § 1 CPC).

RULES FOR APPOINTING COUNSEL FOR THE DEFENCE

Ex officio appointed counsel for the defence is selected from the list of attorneys entitled to engage as defence counsel. The president of a court, a court or a judicial officer examines a motion to appoint counsel for the defence without delay (Article 81 a § 2 CPC). If there are circumstances indicating the necessity for immediate defence, the president of a court, a court or a judicial officer notify the accused and the counsel of the appointment in the way laid down in Article 137 CPC (Article 81a § 3 CPC). Detailed rules of appointing counsel for the defence are laid down in secondary regulations of the Minister of Justice of 27 May 2015 on ensuring that the accused has access to the assistance of appointed counsel for the defence[43].

[43] Secondary legislation of the Minister of Justice of 27 May 2015 on ensuring defence assistance ex officio for the accused (Journal of Laws item 816); for more see T. Grzegorczyk, *Obrońca i pełnomocnik z urzędu… [Counsel for the defence and proxy…]*, pp. 60–61; W. Grzyb, Obrona z urzędu w polskiej procedurze karnej – rozwiązania modelowe [Defence ex officio in the Polish criminal proceeding – model solutions], *Palestra* 2013, no. 5–6, p. 27 and subsequent ones.

The amendment of 27 September 2013 introduced a formerly unknown solution of suspension of the flow of time limitation for the performance of a procedural action – in case of a motion to appoint counsel for the defence – if the activities of counsel for the defence are the condition for its effectiveness. Pursuant to Article 127a § 1 CPC, if the condition for the effectiveness of the procedural action is its performance by defence counsel, the time limit for its performance shall be suspended for the party to the proceeding until the request for the appointment of counsel for the defence is examined. The statement of reasons highlights that the issue has already provoked controversies and divergent judgements often resulting in depriving a party of a real possibility of performing a procedural activity (e.g. filing a subsidiary indictment). The regulation is aimed at enabling a party to obtain a decision in the field of legal assistance provision in the way that does not cause a time-limit expiry. With respect to that, the solution matches the change of the rules of appointing counsel for the defence (Article 80a CPC). Because of guarantee reasons, it was right to introduce the possibility of suspending the flow of time limitation under the general provision of Article 127a CPC instead of introducing a possibility of filing a motion to reinstate the time limit in each case[44]. In the event counsel for the defence is appointed, the time limit for procedural actions starts when the party is delivered the appointment decision or order (Article 127q § 2 CPC).

In connection with that, a problem arises how to calculate the time limit in a situation when counsel for the defence does not find grounds for filing an extraordinary appeal measure in the form of cassation or a motion to re-institute the proceeding (Article 84 § 3 CPC). It is rightly assumed in jurisprudence that the time limit is also suspended for the time the defence counsel needs to consider undertaking a particular step and starts again when the accused is notified that the defence counsel has not found grounds for appeal[45]. This interpretation is of guarantee character and is pursuant to the adjudication practice developed before the amendment came into force. Court judgements used to state that in such situations the flow of time limit for cassation starts from the date when the accused is notified of the decision of the defence counsel and is 30 days regardless of the fact whether he filed the so-called own cassation motion or a request to appoint counsel for the defence in order to file the appeal, about which he must be informed[46].

Filing a request for the appointment of counsel for the defence to undertake a particular procedural action (Article 80a § 2 CPC) directly before its performance or even in the course of it is another issue. What especially needs considering is whether it is necessary to adjourn this action until a motion is examined. Two values are in conflict in this case: speed of proceeding and the right to defence. However, since the Act does not envisage a requirement of examining a motion before action is undertaken, there are no grounds to state that the proceeding organ has an absolute duty to adjourn the action, especially when the accused was able to file a motion for the appointment of counsel in advance.

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[44] Statement of reasons for the Bill amending Act – Criminal Procedure Code, Act – Criminal Code and some other acts, Sejm of VII term, Sejm Paper No. 870, pp. 115–116.

[45] T. Grzegorczyk, *Kodeks postepowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2015, p. 239.

[46] See ruling of the Supreme Court of 18 November 2009, II KZ 54/09, OSNKW 2010, no. 1, item 9, and of 22 December 2009, III KZ 87/09, OSNKW 2010, no. 5, item 46; also see rulings of 19 October 2000 Rutkowski v. Polska, complaint no. 45995/99, LEX no. 42829, or of 14 February 2006 Woźniak v. Polska, complaint no. 74454/01, LEX no. 482314.

BIBLIOGRAPHY

Bilikiewicz A., Zakres psychiatrii oraz jej miejsce w kulturze i wśród innych dyscyplin nauki [Scope of psychiatry and its position in culture and other fields of science], [in:] A. Bilikiewicz (ed.), *Psychiatria. Podręcznik dla studentów medycyny [Psychiatry: Handbook for students]*, Warszawa 2007.

Dmowski S., Rudnicki S., *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna [Commentary on the Civil Code. Book one. General issues]*, Warszawa 2011.

Gajewska H., Uzasadnione wątpliwości co do poczytalności oskarżonego jako przesłanka obrony niezbędnej [Justified doubts about sanity of the accused as grounds for indispensable defence], *NP* 1980, no. 3.

Gierowski J.K., Paprzycki L.K., *Niepoczytalność i psychiatryczne środki zabezpieczające. Zagadnienia prawno materialne, procesowe, psychiatryczne i psychologiczne [Insanity and psychiatric preventive measures: Substantive, procedural, psychiatric and psychological issues]*, Warszawa 2013.

Giezek J., Obrońca i pełnomocnik z urzędu w procesie karnym – założenia a rzeczywistość [Counsel for the defence and proxy ex officio in the criminal proceeding: Assumptions and reality], *Jurysta* 2002, No. 7–8.

Golonka A., *Niepoczytalność i poczytalność ograniczona [Insanity and limited sanity]*, Warszawa 2013.

Gomułka W.S., Rewerski W. (ed.), *Encyklopedia zdrowia [Encyclopaedia of health]*, vol. I, Warszawa 1992.

Grzegorczyk T., *Kodeks postepowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2015.

Grzegorczyk T., *Obrońca w postępowaniu przygotowawczym [Counsel for the defence in preparatory proceeding]*, Łódź 1988.

Grzegorczyk T., [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015: Guide to the amendments]*, Warszawa 2015.

Grzyb W., Obrona z urzędu w polskiej procedurze karnej – rozwiązania modelowe [Defence ex officio in the Polish criminal proceeding – model solutions], *Palestra* 2013, no. 5–6.

Habzda-Siwek E., Dylematy związane z opinią o stanie zdrowia psychicznego oskarżonego (refleksje wokół art. 202 k.p.k.) [Dilemmas connected with an opinion on the psychical state of the accused (reflections concerning Article 202 CPC)], [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. Rocznicy urodzin Profesora A. Gaberle [Penal sciences vs. problems of contemporary criminality. Professor A. Gaberle 70th birthday jubilee book]*, Warszawa 2007.

Kaftal A., Glosa do uchwały SN z dnia 17 czerwca 1968 r. [Gloss on the resolution of the Supreme Court of 17 June 1968], VI KZP 26/68, *Palestra* 1969, no. 1.

Kaftal A., Z problematyki obrony formalnej i materialnej w projekcie kodeksu postępowania karnego [Issues concerning right to defence and actual defence in the bill on Criminal Procedure Code], *Palestra* 1968, no. 1.

Kalinowski S., *Polski proces karny w zarysie [Polish criminal proceeding outline]*, Warszawa 1981.

Kalinowski S., Siewierski M., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 1960.

Kardas P., Projektowany model obrony z urzędu a zasada prawdy materialnej [Planned model of defence ex officio and the principle of objective truth], *Palestra* 2013, No. 5–6.

Kmiecik R., O poczytalności oskarżonego „w czasie postępowania" polemicznie [On sanity of the accused 'in the course of the proceeding' polemically], *Palestra* 2007, no. 5–6.

Korzewniowski L., Pużyński S., *Encyklopedyczny słownik psychiatrii [Encyclopaedic dictionary of psychiatry]*, Warszawa 1986.

Kosonoga J., Kilka uwag na temat projektowanych zmian w kodeksie postepowania karnego [Some comments on the planned amendments to the Criminal Procedure Code], *Ius Novum* 2012, no. 1.

Kosonoga J., Przesłanki obrony obligatoryjnej w postępowaniu wykonawczym [Premises of obligatory defence in execution proceeding], [in:] I. Rzeplińska, A. Rzepliński, P. Wiktorska, M. Niełaczna (ed.), *Pozbawienie wolności – funkcje i koszty. Księga Jubileuszowa Profesora Teodora Szymanowskiego [Imprisonment – functions and costs. Professor Teodor Szymanowski jubilee book]*, Warszawa 2013.

Kowalski S., Problematyka obrony z urzędu w postępowaniu karnym – na tle wyroku Trybunału Konstytucyjnego z dnia 8 października 2013 r., K 30/11 [Issue of defence ex officio in the criminal proceeding in the light of the ruling of the Constitutional Tribunal of 8 October 2013, K 30/11], [in:] *Prawo sądowe w orzecznictwie Trybunału Konstytucyjnego. [Court rules in rulings of the Constitutional Tribunal]*, (ed.:) D. Gil, Lublin 2014.

Kozielewicz W., Pojęcie niepoczytalności w doktrynie prawa karnego i orzecznictwie Sądu Najwyższego [Concept of insanity in the doctrine and rulings of the Supreme Court], *Palestra* 2007, No. 1–2.

Kulesza C., *Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej [Efficiency of participation of counsel for the defence in the criminal proceeding – comparative approach]*, Kraków 2005.

Liszewska A., Strona podmiotowa czynu i wina a niepoczytalność [Intention, guilt and insanity], [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Prof. A. Zolla [Rule of law and criminal law. Professor A. Zoll jubilee book]*, (eds.) P. Kardas, T. Sroka, W. Wróbel, vol. II, Warszawa 2012.

Orzechowska S., Ułomności fizyczne oskarżonego jako podstawa obrony obligatoryjnej [Physical impairment of the accused as grounds for obligatory defence], *Ius Novum* 2010, no. 3.

Płatek A., Poczytalność oskarżonego „w czasie postępowania" czy psychiczna zdolność do „rozumnej obrony"? [Sanity of the accused 'in the course of the proceeding' or psychical ability of 'reasonable defence'?], *Palestra* 2009, no. 5–6.

Prusak F., Wątpliwości co do poczytalności oskarżonego jako podstawa obligatoryjnego udziału obrońcy w postępowaniu karnym [Doubts about sanity of the accused as grounds for obligatory participation of counsel for the defence in the criminal proceeding], *Palestra* 1969, no. 1.

Satko J., Seremet A., Przesłanki obowiązkowej obrony oskarżonego głuchego, niemego lub niewidomego (art. 70 § 1 pkt 1 k.p.k.) [Premises of obligatory defence of the accused who is deaf, dumb or blind (Article 70 § 1 (1) CPC)], *Palestra* 1995, no. 9–10.

Siewierski M., Tylman J., Olszewski M., *Postępowanie karne w zarysie [Criminal proceeding outline]*, Warszawa 1971.

Stefański R.A., Prawo do wyznaczenia obrońcy z urzędu ze względu na niezamożność [Right to appoint ex officio counsel for the defence because of poorness], [in:] *Skargowy model procesu karnego. Księga ofiarowana Prof. S. Stachowiakowi [Adversarial model of the criminal proceeding. Book presented to Professor S. Stachowiak]*, (eds.) A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński, Warszawa 2008.

Stefański R., Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 r. [Constitutional right to defence and obligatory defence in the light of the amendments of 27 September 2013], [in:] M. Kolendowska-Matejczuk, K. Szwarc (ed.), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty [Right to defence in the penal proceeding: Selected aspects]*, Warszawa 2014.

Stefański R., Kształtowanie się obrony obowiązkowej w kodeksie postępowania karnego z 1997 r. [Development of obligatory defence in the Criminal Procedure Code of 1997], [in:] K. Dudka, M. Mozgawa (ed.), *Kodeks karny i kodeks postępowania karnego po dziesięciu latach obowiązywania. Oceny i perspektywy zmian [Criminal Code and Criminal Procedure Code after ten years of being in force]*, Warszawa 2009.

Stefański R., Obrona obligatoryjna po 1 lipca 2015 r. [Obligatory defence after 1 July 2015], [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015: Guide to the amendments]*, Warszawa 2015.

Stefański R., *Obrona obligatoryjna w polskim procesie karnym [Obligatory defence in the Polish criminal proceeding]*, Warszawa 2012.

Steinborn S., O kilku kontrowersjach i wątpliwościach dotyczących obrońcy i pełnomocnika z urzędu wyznaczanych w postępowaniu sądowym na żądanie strony [On some controversies and doubts concerning counsel for the defence and proxy in court proceeding on demand of a party], [in:] *Studia i Analizy Sądu Najwyższego, Materiały Naukowe [Studies and Analyses of the Supreme Court: Scientific materials]*, vol. II, Warszawa 2015.

Śliwiński S., *Polski proces karny przed sądem powszechnym, Zasady ogólne [Polish criminal proceeding before a common court: General rules]*, Warszawa 1959.

Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2015.

Świecki D., *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych [Procedural activities of counsel for the defence and proxy in criminal cases]*, Warszawa 2015.

Wąsek-Wiaderek M., Aktywność obrońcy i pełnomocnika na etapie postępowania przejściowego [Activeness of counsel for the defence and proxy at preparatory proceeding stage], [in:] P. Wiliński (ed.), *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in criminal proceeding after 1 July 2015: Guide to the amendments]*, Warszawa 2015.

Wiliński P., *Zasada prawa do obrony w polskim procesie karnym [Principle of the right to defence in the Polish criminal proceeding]*, Kraków 2006.

Zachuta A., Bezpłatna pomoc prawna z urzędu (art. 78 § 1 k.p.k.) [Ex officio appointed free legal assistance (Article 78 § 1 CPC)], *Przegląd Sądowy* 2005, no. 7–8, pp. 194–196.

APPOINTED COUNSEL FOR THE DEFENCE IN THE POLISH CRIMINAL PROCEEDING

Summary

The article discusses the institution of appointed counsel for the defence in the criminal proceeding after the amendment of 27 September 2013. It analyses particular conditions for the appointment of counsel for the defence: poorness of the accused and lack of obligatory defence counsel. Separate consideration is given to the issue of the appointment of counsel for the defence on the request of the accused and the appointment of counsel to undertake particular procedural actions. The mode and rules of appointing defence counsel are also discussed.

Key words: *criminal proceeding*, *right to defence*, *ex officio appointed counsel for the defence*, *obligatory defence*, *appointment of counsel for the defence*, *right of the poor*

OBRONA Z URZĘDU W POLSKIM PROCESIE KARNYM

Streszczenie

W opracowaniu odniesiono się do instytucji obrony z urzędu w procesie karnym po nowelizacji z dnia 27 września 2013 r. Analizie poddano poszczególne przesłanki wyznaczenia obrońcy z urzędu w postaci niezamożności podejrzanego i braku obrońcy obligatoryjnego. Odrębne rozważania poświęcono kwestii wyznaczenia obrońcy na żądanie oskarżonego oraz problematyce wyznaczenia obrońcy do poszczególnych czynności procesowych. Przedmiotem rozważań uczyniono także zagadnienie trybu i zasad wyznaczania obrońcy.

Słowa kluczowe: *postępowanie karne*, *prawo do obrony*, *obrona z urzędu*, *obrona obligatoryjna*, *wyznaczenie obrońcy*, *prawo ubogich*

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EVIDENTIARY PROCEEDINGS BEFORE AN APPELLATE COURT IN THE POLISH CRIMINAL TRIAL

ZBIGNIEW KWIATKOWSKI

The scope of the evidentiary proceedings that are conducted before a court *ad quem* determines a model of the appellate proceedings. In the contemporary systems of criminal procedure law, there are three models:
1) an appeal one,
2) a review one[1],
3) a mixed one[2].

An appeal model of the appellate proceeding, in the course of examination of the judgement appealed against, covers defaults in the field of law as well as wrong assessment of facts and errors in orders or judgements. In its classical form, an appellate court is a court that re-examines the evidence. In the appellate proceeding, a new sentence is pronounced with no possibility of revoking the sentence appealed against and referring the case to the court *a quo* for re-exanimation in the first instance[3]. In

[1] P. Rogoziński, Postępowanie dowodowe na rozprawie apelacyjnej w sprawach karnych [Evidentiary proceeding in the appellate hearing in criminal cases], *Studia Prawnicze* 2010, vol. 1, p. 145 and literature indicated there.

[2] D. Świecki, Konstytucyjna zasada dwuinstancyjności postępowania sądowego a możliwość reformatoryjnego orzekania w instancji odwoławczej w świetle wchodzącej w życie 1 lipca 2015 r. nowelizacji Kodeksu postępowania karnego, karnego [Constitutional principle of two-instance judicial proceeding and a possibility of amend judgement in the appellate instance in the light of Criminal Procedure Code amendment entering into force on 1 July 2015], [in:] *Polski proces karny i materialne prawo karne w świetle nowelizacji z 2013 r. Księga Jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal trial and substantive criminal law in the light of 2013 amendment. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk et al., Warszawa 2014, pp. 215–216 and literature indicated there.

[3] K. Marszał, System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure], [in:] *Studia Iuridica. Volume 33. Węzłowe zagadnienia procedury karnej. Księga ku czci Profesora Andrzeja Murzynowskiego [Key issues of criminal procedure. The book in honour of Professor Andrzej Murzynowski],* (ed.) P. Kruszyński, Warszawa 1997, pp. 164–165; K. Marszał (ed.), *Proces karny. Przebieg postępowania*, Katowice 2012, p. 218–219.

this model, the course of a trial is usually a three-instance procedure, which means that parties can file a cassation appeal against the sentence of the second instance to the Supreme Court, where only the interpretation of law may be ruled because facts had already been examined twice[4]. It is highlighted in jurisprudence[5] that "an appellate-cassation model creates a possibility of a two-stage control and noticing defaults that might have occurred in the judgement; on the other hand, however, it results in substantial lengthening of the proceeding".

A review model of the appellate proceeding was introduced to the Polish criminal procedure in the Act of 27 April 1949 on amending criminal procedure regulations[6], where Article 1 (110) of Book VIII, Chapter II was called: Chapter II Review. This way, 'review' substituted for 'appeal'. As a result of the change, a proposal for a two-instance procedure was implemented ensuring that the first-instance court examined facts and the second-instance court was only of control nature[7]. Thus, generally speaking, a review model is characterised by a two-instance procedure system, a possibility of requesting a control of a sentence with respect to the law as well as the facts, no binding limitations of appeal measures for the appellate court in case it is necessary to issue an amend judgement for the benefit of the accused, a possibility of passing a different judgement on the case matter from the one passed by the first instance court and totally to the benefit of the accused, and to a limited extent to their disadvantage[8]. On the other hand, in the evidentiary proceedings before the court *ad quem* in the review system, there is a principle that the court does not conduct evidentiary proceedings with regard to the case matter but finds the truth through the examination of the files[9]. The appellate court verifies the sentence appealed against based on the materials in the case files and the appeal proceeding is of a control nature. However, there is an exception because of the speed of proceeding. The appellate court may, in extraordinary situations, recognising the need to supplement the court proceeding, decide to examine evidence in the course of its proceeding if it contributes to the acceleration of the proceeding and it is not necessary to conduct a new court proceeding as a whole or its major part again.

Therefore, the adoption of a review model of the appellate proceeding in the Polish system of criminal proceedings made this proceeding be of a totally control nature in relation to the judgement passed by the first-instance court and the scope of the evidentiary proceeding before the court *ad quem* was reduced and adjusted to the need of efficient implementation of the principles of that court within the adopted appellate model[10].

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[4] K. Marszał (ed.), *Proces karny. Przebieg postępowania [Criminal trial: Course of proceeding]*, p. 219.

[5] *Ibid*.

[6] Journal of laws of 1949, No. 32, item 238.

[7] P. Rogoziński, *Postępowanie dowodowe [Evidentiary proceeding]*, p. 146.

[8] *Ibid*.

[9] S. Waltoś, *Proces karny. Zarys systemu. Wydanie 10 [Criminal trial outline, 10th edition]*, Warszawa 2009, pp. 357–359.

[10] M. Rogacka-Rzewnicka, Apelacyjny model kontroli odwoławczej [Appeal model of appellate review], [in:] *Nowe uregulowania prawne w Kodeksie postępowania karnego z 1997 r. [New legal regulations in the Criminal Procedure Code of 1997]*, (ed.) P. Kruszyński, Warszawa 1999, p. 364 and subsequent ones; K. Marszał (ed.), *Proces karny. Przebieg postępowania [Criminal trial: Course of proceeding]*, p. 219.

Article 1 (26) of Act of 29 June 1995 on amending the Criminal Procedure Code, Act on the military court system, Act on fees charged in criminal cases and Act on the procedure with regard to juveniles[11] changed the title of Chapter 40 'Review' into 'Appeal'. The statement of reasons for the governmental bill on Criminal Procedure Code of 1997 emphasises that "the change of the word 'review' into 'appeal' aptly reflects basic features of the appellate measure regulated in Chapter 49, [i.e. appeal – Z. K.]. In the light of the regulation, the appellate court is designed to control the correctness of actual findings that are grounds for a sentence and can adjudicate on the "matter, including on the legal and penal consequences of finding the accused guilty" [12]. Thus, apart from the change of the term 'review' into 'appeal', the model of the appellate proceeding did not change in fact[13]. An appeal constituted a reflection of the former review developed on the elements of the former appeal and cassation of the interwar period and the existing model of the appellate proceeding did not have many features typical of the appeal model[14]. Thus, an appeal, apart from the name, did not introduce essential changes to the appellate proceeding, which remained a two-instance process.

The provision of Article 452 § 1 CPC of 1997[15] in its original wording was: "An appellate court shall not be allowed to conduct evidentiary proceedings pertaining to the intrinsic nature of the case". Thus, also in jurisprudence[16], the regulations excluding the possibility of conducting evidentiary proceedings "pertaining to the intrinsic nature of the case" from the appellate instance were described as regulations of a "cassation type". The regulation on admissibility of the evidentiary proceeding in the appellate proceeding constituted the opposite of the classical form of an appeal[17].

It must be noticed that in order to define the scope of admissibility of evidentiary proceeding before an appellate court, proper interpretation of Article 452 § 1 CPC will

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[11] Journal of Laws of 1995, No. 89, item 443.

[12] See *Nowe kodeksy karne z 1997 r. z uzasadnieniami – Kodeks karny, Kodeks postępowania karnego, Kodeks karny wykonawczy [New criminal codes of 1997 with statements of reasons: Criminal Code, Criminal Procedure Code, Penal Execution Code]*, Warszawa 1997, p. 436.

[13] T. Grzegorczyk, Ku usprawnieniu postępowania apelacyjnego i szerszemu reformatoryjnemu orzekaniu przez sąd odwoławczy [In order to improve appellate proceeding and broaden amend judgement by an appellate court], [in:] *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej [Supreme Court Judge Stanisław Zabłocki's 40th anniversary of work jubilee book]*, (ed.) P. Hofmański, Warszawa 2014, pp. 141–142.

[14] R. Kmiecik, Trójinstancyjny system apelacyjno-kasacyjny, czy dwuinstancyjna hybryda rewizyjno-kasacyjna, [Three-instance appeal-cassation system or two-instance review-cassation hybrid], [in:] *Lubelskie Towarzystwo Naukowe. Materiały z sesji naukowej „Kierunki i stan reformy prawa karnego" [Lublin Scientific Association. Materials from a scientific session called "Directions and state of criminal law reform"]*, Lublin 1995, p. 69; K. Marszał, *System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure]*, pp. 165–167.

[15] Act of 6 June 1997 – Criminal Procedure Code (Journal of Laws of 1997, No. 89, item 555 with subsequent amendments).

[16] R. Kmiecik, Z problematyki dowodu ścisłego i swobodnego w postępowaniu apelacyjnym i kasacyjnym [On evidence in the appellate and cassation proceeding], *Prokuratura i Prawo* 2003, no. 1, p. 15.

[17] K. Marszał, *System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure]*, p. 166; M. Rogacka-Rzewnicka, *Apelacyjny model kontroli odwoławczej [Appeal model of appellate review]*, p. 364 and subsequent ones.

be of great importance. The provision, what has already been indicated, excluded the possibility of evidentiary proceedings in the appellate-instance court with regard to the case matter as a functionally selected type of action[18]. However, it did not exclude evidentiary proceedings with regard to admission of evidence "pertaining to the intrinsic nature of the case" in exceptional procedural situations, which was directly confirmed by the wording of Article 452 § 2 CPC[19]. Based on the provision of Article 542 § 1 CPC, it was highlighted that, on the one hand, the second-instance court should not conduct evidentiary proceedings with regard to the case matter because it should not 'impersonate' the court *a quo* as its proceeding served the purpose of control of the sentence appealed against[20], and on the other hand, the possibility of conducting evidentiary proceedings with regard to the case matter in the appellate-instance court was sometimes absolutely necessary in order to properly hear the appeal[21]. Thus, T. Grzegorczyk[22] rightly stated that "the provision of Article 452 § 1 CPC did not forbid to conduct evidentiary proceedings with regard to the case matter in the appellate-instance court and only forbade to conduct evidentiary proceedings with respect to the case matter in the scope exceeding the limits laid down in § 2". The limits of legally admissible evidentiary proceedings in the course of the appellate proceeding are laid down in Article 452 § 1 CPC. As the provision of Article 452 § 2 CPC in its original wording was of extraordinary character, extended interpretation was not allowed to be applied to it pursuant to the principle *exceptiones non sunt extendendae*. The provision of Article 452 § 2 CPC in its original version read: "In exceptional cases the appellate court, if it finds the completion of a judicial examination necessary, may nevertheless take evidence directly at the appellate trial, if this will expedite the judicial proceeding, and there is no necessity to conduct the whole of it, or a major part thereof, anew. Before the appellate trial, the court may also issue an order on the admission of evidence."

In the light of the quoted provision, it was rightly assumed in jurisprudence[23] that "the statement included in it that the judicial examination completion is necessary indicates the proceeding before the first-instance court because the evidentiary proceeding is its most important part". The provision of Article 452 § 2 CPC laid down two conditions for the completion of the judicial examination in the course of the appellate proceeding. The first one was positive in character and required that the conduction of the evidentiary proceeding before the court *ad quem* contribute to the acceleration of the proceeding. The second, on the other hand, was negative in character and required that the proceeding should not be conducted again as a whole or in a major part. The normative form of the provision of Article 452 § 2 CPC also indicated that the conduction of the evidentiary proceeding in the course of the appellate trial was

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[18] P. Rogoziński, *Postępowanie dowodowe [Evidentiary proceeding]*, p. 158 and jurisprudence opinion quoted there.

[19] *Ibid*., p. 159

[20] A. Gaberle, *Dowody w sądowym procesie karnym. Teoria i praktyka [Evidence in the criminal court proceeding: Theory and practice]*, 2nd edition, Warszawa 2010, p. 82.

[21] S. Waltoś, *Proces karny. Zarys systemu [Criminal trial: System outline],* pp. 537–539.

[22] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2008, p. 974.

[23] D. Świecki, *Rozprawa apelacyjna w polskim procesie karnym [Appellate hearing in the Polish criminal trial]*, Warszawa 2006, p. 127.

left to the discretion of the court. The "appellate court" decided, [recognising – Z. K.] the need to complete a court examination, it can conduct the evidentiary proceeding in the course of its proceeding.

In the light of the conducted analysis of the provisions of Article 452 § 1 and 2 in the original wording, it must be stated that the appellate court could not conduct the evidentiary proceeding "pertaining to the intrinsic nature of the case" as a whole or in a major part. It could, however, in extraordinary situations, conduct the evidentiary proceeding "pertaining to the intrinsic nature of the case" but in a minor part and under the condition that it would contribute to the acceleration of the proceeding[24].

The scope of evidentiary proceeding conducted before the appellate court presented above did not fully match the appeal model of recognising appellate measures. Therefore, the Act of 27 September 2013 on amending Act – Criminal Procedure Code and some other acts[25] introduced substantial changes into the appellate proceeding, which stopped being a control proceeding only and became a proceeding aimed to not only control the judgement passed by the first-instance court subject to appeal but also to examine the case matter. The above-mentioned Act developed a mixed model of appellate proceeding containing elements of appeal, cassation and review typical of individual systems of appellate measures recognition[26]. Thus, it allowed for passing broader amend judgements and limited the possibility of cassation judgements by the appellate court and this way limited one of the main factors causing lengthening of the criminal proceeding and as a result generating the excessive length of proceedings[27].

The extension of the possibility of conducting evidentiary proceeding in the course of the proceeding before an appellate court (Article 452 CPC) was the most important change in this area. As a result of the amendment, Article 452 § 1 CPC was repealed. It constituted a cassation element of the appellate proceeding and clearly indicated a dominant control (review) function of the appellate proceeding[28]. As a system solution, the provision of Article 452 § 1 CPC *expressis verbis* indicated that the Polish model of the appellate proceeding, despite the change of the name of the appellate measure into "appeal" is not 'solely' appeal-related in character because an appellate court was not able to conduct the evidentiary proceeding in the same scope as the first-instance court.

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[24] *Ibid*., p. 130.

[25] Journal of Laws of 2013, item 1247 with subsequent amendments, Journal of Laws of 2015, item 396

[26] D. Świecki, *Konstytucyjna zasada dwuinstancyjności postępowania sądowego [Constitutional principle of two-instance judicial proceeding]*, pp. 215–216 and literature indicated there; S. Zabłocki, Między reformatoryjnością a kasatoryjnością, między apelacyjnością a rewizyjnością – ku jakiemu modelowi zmierza postępowanie odwoławcze po zmianach kodeksowych z lat 2013–2015? [Between amend and cassation judgements, between appeal and review judgements – what is the direction of appellate proceeding after the criminal codes amendments of 2013–2015?], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal trial after 1 July 2015: Guide to the amendments]*, (ed.) P. Wiliński, Warszawa 2015, p. 416 and literature indicated there

[27] See Statement of reasons for the Bill amending the Criminal Procedure Code, the Sejm Paper no. 870/VII; T. Grzegorczyk, Podstawowe kierunki projektowanych zmian procedury karnej [Basic directions of planned amendments to criminal procedure], *Państwo i Prawo* 2012, no. 11, p. 26.

[28] R. Kmiecik, Zasada kontroli [Principle of control], [in:] *System Prawa Karnego Procesowego. T. 3. Zasady procesu karnego. Cz. 2 [System of criminal procedure law, Vol. 3, Criminal trial rules, Part 2]*, (ed.) P. Wiliński, Warszawa 2014, p. 1671.

Thus, it was rightly stated in jurisprudence[29]: "the provision of Article 452 § 1 CPC was in the review mode because in connection with Article 452 § 2 CPC it assigned the appellate court a control function and not one relating to the examination of the case matter".

It is worth mentioning that the repealing of § 1 of Article 452 CPC in connection with the amendment of § 2 of Article 452 CPC, which after the change stipulated: "An appellate court shall issue an order on the admission of evidence in the course of its proceeding if there is no necessity to conduct the whole proceeding again (…)", and the new wording of § 2 of Article 437 CPC, indicates that the legislator aimed to increase the appellate mode of the second-instance proceeding with respect to the evidentiary proceeding, thus to limit its cassation character via the possibility of revoking the sentence appealed against and referring the case to the first-instance court for re-examination in order to complete the evidentiary proceeding.

In the literature on the criminal proceeding[30], it is rightly indicated that the changes in Article 452 § 2 CPC apply to a few issues. Firstly, using an obligating mode in Article 452 § 2 CPC, the legislator gave this provision an imperative character. Pursuant to Article 452 § 2 CPC, in the wording after the amendment, "the court (…) shall conduct the evidentiary proceeding, and not only may (…) conduct the evidentiary proceeding". Thus, meeting other conditions imposes on the court *ad quem* an obligation to conduct the evidentiary proceeding. Secondly, eliminating the phrase "in exceptional cases", the legislator eliminated the condition substantially narrowing the possibility of conducting the evidentiary proceeding in the course of an appellate proceeding. Thirdly, the negative condition for conducting the evidentiary proceeding was substantially limited because pursuant to the wording of Article 452 § 2 CPC after the amendment, it was not admissible only in the event of the necessity to conduct the whole court proceeding again and not also in the case of a major part of it. Thus, the conduction of a major part of the court proceeding again became possible in the appellate proceeding. Fourthly, the amended provision of Article 452 § 2 CPC used the Polish term 'evidence' as a plural noun instead of the former singular noun form. This kind of normative approach might have constituted grounds for limiting the scope of the evidentiary proceeding before the appellate court. Therefore, after the amendment, the scope of the evidentiary proceeding before the court *ad quem* is very broad and the only restriction is, as it was pointed out earlier, the ban on conducting the whole proceeding again.

The first problem that appeared in connection with Article 452 § 2 CPC concerned the evidentiary initiative in the appellate proceeding. In other words, the problem concerned the question of the relationship between Article 167 § 1 CPC and Article 452 § 2 CPC. Analysing the above-mentioned issue, it must be noticed that the bill developed by the Criminal Law Codification Committee and then the original governmental bill proposed

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[29] D. Świecki, Apelacja obrońcy i pełnomocnika po zmianach [Counsel's and proxy' appeal after the amendment], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal trial after 1 July 2015: Guide to the amendments],* (ed.) P. Wiliński, Warszawa 2015, p. 441.

[30] S. Steinborn, Postępowanie dowodowe w instancji apelacyjnej w świetle nowelizacji Kodeksu postępowania karnego [Evidentiary proceeding in the appellate-instance in the light of the Criminal Procedure Code amendment], *Prokuratura i Prawo* 2015, no. 1–2, p. 150.

the following wording of § 2 of article 452 CPC: "Recognising the need to complete a court proceeding, the appellate court shall conduct the evidentiary proceeding in the course of its proceeding also ex officio if it contributes to the acceleration of the proceeding and there is no necessity to conduct the whole proceeding again"[31].

This normative approach was supposed to enable the court *ad quem* to conduct the evidentiary proceeding if it were not duplication of the whole trial before the court *meriti* but only a repetition of its major part. Eventually, however, the decision was not to adopt the provision of Article 452 § 2 CPC in the above-presented form, which as a result means that the legislator did not intend to regulate the issue by introducing the evidentiary initiative rule different from Article 167 CPC[32].

Interpreting the provision of Article 452 § 2 CPC in its wording after the amendment of the Act of 27 2013 amending Act – Criminal Procedure Code and some other acts, one might conclude that it allowed for the evidentiary proceeding ex officio with no further restrictions except for those laid down[33]. It would be difficult to accept such interpretation of the provision of Article 452 § 2 CPC due to a lack of system coherence and being in conflict with criminal procedure reform *ratio legis*[34]. Thus, it is rightly highlighted in jurisprudence[35] that the provision of Article 452 § 2 CPC after the amendment did not normalise the evidentiary initiative in the appellate proceeding but regulated only the issue of admissibility of the evidentiary proceeding in the appellate proceeding while the issue of the evidentiary initiative remained totally outside its scope.

The discussion of conditions for admissibility of the evidentiary proceeding in the appellate proceeding laid down in Article 452 § 2 CPC raises a question in what situations this kind of need might occur. It must be emphasised that in the proceeding before the court *a quo* the evidentiary proceeding is one of the most essential procedural actions. It is so because it is exploratory in character. And the condition for the evidentiary proceeding in it is the evidentiary initiative of the party who files a motion to conduct it. The proceeding organ is obliged to decide whether the evidence is admissible after establishing that circumstances laid down in Article 170 § 1 (1)–(5) CPC do not take place. In extraordinary situations, justified by special circumstances, the court may admit evidence and conduct the evidentiary proceeding *ex officio* (*argumentum ex* Article 167

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[31] T. Grzegorczyk, *Podstawowe kierunki projektowanych zmian [Basic directions of planned amendments]*, p. 28.

[32] For more on the topic see S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 151.

[33] A. Sakowicz, Postępowanie dowodowe w postępowaniu apelacyjnym. Zarys problematyki [Evidentiary proceeding in appellate proceeding], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015: Guide to amendments]*, (ed.) P. Wiliński, Warszawa 2015, p. 457 and jurisprudence opinions indicated there.

[34] P. Mirek, Nowy model postępowania dowodowego przed sądem II instancji – aspekty praktyczne nowelizacji art. 452 k.p.k. [New model of evidentiary proceeding before second-instance court – practical aspects of amending Article 452 CPC], *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 2014, no. 2, p. 52; S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 152.

[35] S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, pp. 152–153.

§ 1 *in fine* CPC). Then, the decision on admissibility of evidence is sufficient. The rules are not changed in the appellate proceeding because Article 167 CPC is included in Part V of the Criminal Procedure Code entitled "Evidence", thus it refers to all stages of the proceeding before the court, also the appellate proceeding and not just the proceeding before the first-instance court[36].

It must be remembered, however, that on 1 July 2015 the character of the appellate proceeding changed and it was developed in a way different from the first-instance proceeding. Undoubtedly, it influenced the conditions for the evidentiary proceeding in the appellate proceeding. In this context, Article 433 § 1 CPC was really important. Pursuant to it, "The Appellate Court shall hear the case within the limits of the appellate measure and brought charges, taking into account the content of Article 447 § 1–3, and to a greater extent only if so prescribed in Article 435, Article 439 § 1, Article 440 and Article 455". As a result, it meant that the most important things for the judgement were only the evidence and circumstances connected with the appellate charges the grounds for which the appellate court was to examine or which were issues subject to adjudication ex officio. Thus, evidentiary motions not connected with charges brought in the appellate measure should be dismissed because they were unimportant for the judgement in the appellate proceeding.

Thus, the appellant was obliged to formulate charges in the appellate measure that he files (Article 427 § 1 CPC) and the court *ad quem* examined the case within the limits of the appeal and charges brought (Article 433 § 1 CPC). As a result, this meant that issues that parties did not formulate remained outside the scope of cognition of the appellate court unless there are situations requiring adjudicating *ex officio*. Thus, if the appellant does not bring a charge of the contempt of the procedure law regulations consisting in groundless dismissal of an evidentiary motion with respect to the hearing of a witness, but does it during the appellate proceeding, then the court *ad quem* cannot conduct such an evidentiary proceeding because the appellate measure lacks an adequate charge formulation. Therefore, the discussion so far leads to the conclusion that the condition *sine qua non* for admissibility of a party's evidentiary motion in the appellate proceeding and its conduction before the court *ad quem* was in connection with charges formulated in the appellate measure[37].

It is worth paying attention to the fact that not only a party filing an appeal has the right to the evidentiary initiative in the appellate proceeding but also the party that did not file this appellate measure. Because of the relation between an evidentiary motion and an appeal charge, the party did not have complete freedom to file evidentiary motions[38]. The appellate court could also admit evidence ex officio if it had decided that it was an exceptional case justified by special circumstances (argumentum ex Article 167 § 1 *in fine* CPC). Thus, it is rightly stated in literature[39], that it might be new evidence as well as the evidentiary proceeding conducted before the first-instance court or evidence known in that proceeding but not examined. The appellate court

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[36] *Ibid*., p. 152 and jurisprudence opinions indicated there.

[37] Also S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, pp. 154–155.

[38] *Ibid*., p. 156 and literature indicated there.

[39] *Ibid*.

could also admit new evidence provided by a party in the event of a decision that the condition laid down in Article 167 § 1 *in fine* CPC was met[40].

Discussing the evidentiary proceeding before the appellate court, it must be pointed out that in the light of the former normative state, there was an opinion in jurisprudence[41] that "the evidentiary proceeding before the court *ad quem* due to its nature should be extraordinary in character. Although the legislator eliminated the scope of the evidentiary proceeding conducted by the appellate court with respect to the case matter, it was not deprived of the character of supplementary proceeding. This is why the appellate court [after 1 July 2015 – Z. K.] will still be only entitled to complete the judicial trial and not to substitute for the first-instance court". The quoted opinion does not deserve approval. It must be noticed that the normative form of the amended provision of Article 452 § 2 CPC did not give grounds for its interpretation as indicated above. Quite the contrary, it must be stated that repealing § 1 of Article 452 CPC and new wording of § 2 of Article 452 CPC constituted a clear basis for the evidentiary proceeding with respect to the case matter in the appellate proceeding[42]. Also a grammatical interpretation of Article 437 § 1 *in principio* CPC justified this point of view because it stipulated: "After examining the appellate measure, the court shall decide whether the decision subject to review shall be sustained, amended or reversed as a whole or in part". The quoted provision treated the judgement's amendment and reversal equally. On he other hand, the amend judgement was mentioned in § 2 of Article 437 CPC before the cassation decision and the only condition for passing the amend judgement was that the assembled evidence warranted it. The provision of Article 437 § 2 CPC did not require that the assembled evidence be examined only before the first-instance court[43]. S. Steinborn[44] rightly noticed that "in the amended provisions governing the appellate proceeding and general regulations with regard to the appellate proceeding, there was no provision resulting in a ban on examining evidence by the appellate court in order to eliminate a lack or default in the evidentiary proceeding before the first-instance court". The provision of Article 458 CPC *expressis verbis* stipulates: "The provisions with respect to proceedings before a court of the first instance shall be applied to proceedings before an appellate court accordingly (…)". It also applies to the provisions governing the examination of evidence.

In the light of the former discussion, it must be stated that P. Mirek's opinion that the appellate proceeding conducted after 1 July 2015 was of review character only does not find sufficient grounds. To tell the truth, the appellate proceeding was not exploratory in character because the legislator did not adopt a complete appeal model. But it was not only of a review nature either as evidence as to the case matter might also be examined in it.

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[40] *Ibid*., p. 157 and literature indicated there.

[41] P. Mirek, *Nowy model postępowania dowodowego przed sądem II instancji [New model of evidentiary proceeding before second-instance court]*, p. 50.

[42] T. Grzegorczyk, *Ku usprawnieniu postępowania apelacyjnego [In order to improve appellate proceeding]*, p. 154; S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 160.

[43] S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 160 and literature indicated there.

[44] *Ibid*.

The above discussion leads to the conclusion that appellate proceedings after the amendment of the Criminal Procedure Code by the Act of 27 September 2013 amending the Act – Criminal Procedure Code and some other acts was mixed: reviewing and exploratory in character[45]. As a result, it meant that if the conditions laid down in Article 452 § 2 CPC were met, a party before the court *ad quem* would examine evidence in the course of the appellate proceeding under the same conditions as before the court *ad quo*, but in the appellate proceeding there were some time restrictions with regard to the provision of new facts or evidence in the event the appellant could not have indicated them before the court of the first instance, which results from the content of Article 427 § 3 CPC. After the evidentiary proceeding in the course of the appellate one before the court *ad quem*, it was also admissible to pass an amend judgement.

Presenting the evidentiary proceeding conducted before the court *ad quem*, it is necessary to mention that the governmental Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016[46] proposes the maintenance of the most basic foundations of the mixed appeal-amend model of the appellate proceeding[47]. The author of the proposal to make the evidentiary proceeding conducted by the first-instance court possess inquisitorial features, manifested in the possibility of admitting and examining evidence by the court *ex officio* and in a court's activeness in the course of the evidentiary proceeding, directly translates into solutions adopted in the appellate proceeding in the sense that the principles of evidentiary activeness of the court *a quo* should be also applied to the court *ad quem* examining evidence in the appellate proceeding. Thus, the inquisitorial, within the scope of the evidentiary initiative, character of the evidentiary proceeding before the court *a quo* from the appellate perspective means that potential defaults within the evidentiary proceeding resulting not only from the insufficient activeness of the parties to the proceeding but also resulting from defaults of the first-instance court because of the lack of its activeness in the course of the evidentiary proceeding should be amended in the course of adequate actions of the appellate court, which is fully authorised to examine evidence and pass an amend judgement based on that.

Summing up the discussion, it must be stated that the mixed model of the appellate proceeding maintained in the above-mentioned Bill to amend the Criminal Procedure Code obliges the court *ad quem* to examine evidence in the course of the appellate proceeding in the same scope as a court of the first instance and to pass an amend judgement. In the event of filing an appeal by non-professional entities that are not obliged to formulate objections against the resolution (*argumentum ex* Article 427 § 1 CPC), an appellate court is obliged to check the resolution appealed against in its full scope and decide whether to sustain, amend or reverse the decision subject to review as a whole or in part (*argumentum ex* Article 437 § 1 *in principio* CPC). However, should it occur that it is necessary to conduct the whole trial again, the appellate court should not conduct the evidentiary proceeding but should reverse the decision appealed

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45 *Ibid*., p. 161.

46 See the Sejm Paper No. 207.

47 See Statement of reasons for the governmental Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016, the Sejm Paper No. 207, pp. 45–46.

against and refer the case to the first-instance court for re-examination (*argumentum ex a contrario* Article 452 § 2 CPC).

What also requires discussing is an issue that can be expressed in the following way: does the inquisitorial character of evidentiary proceeding before the first instance court, which also translates into the proceeding before the court *ad quem* and admissibility of amend judgement by the court, match the constitutional principle of the two-instance court proceeding system?[48]. Analysing this issue, it is necessary to highlight that the rulings of the Constitutional Tribunal[49] indicate that the principle of two-instance court proceedings results in the necessity to fulfil three conditions:

1) access to the second instance, i.e. the right to appeal;
2) examination of the appeal by a court of a higher level;
3) development of an adequate form of the proceeding before the second-instance court so that the court could examine the case and pass a well-grounded judgement.

Jurisprudence[50] and the rulings of the Constitutional Tribunal[51] indicate that the essence of the two-instance proceeding is to ensure the review of decisions made by the first-instance courts via double assessment of facts and the legal aspects of the case (double examination of the case). The two-instance court proceeding does not mean, however, a necessity of examining each finding and each change made by the court in the course of the proceeding twice, especially the findings of the appellate court. In its ruling of 11 March 2003, SK 8/02[52], the Constitutional Tribunal stated that the judgement of the appellate court based on the findings that are different from the finding of the lower-instance court is not a first-instance judgment because of that. Assuming that the appellate court becomes to some extent a court of the first instance would result in the creation of a kind of three-instance proceeding because there should be the right to appeal against its decision – an appeal against an appellate judgement.

In the light of the above discussion, it is easy to notice that the principle of the two-instance court proceeding is perceived in the Constitutional Tribunal rulings as the right to appeal to the appellate instance against the decisions of organs acting as the first instance in the formal meaning of the terms, which refers to the issue of ensuring an instance-structured review of the passed judgements and not every issue or particular issues constituting grounds for its issue[53].

Thus, in the light of the rulings of the Constitutional Tribunal, it is necessary to differentiate the constitutional guarantee of the two-instance court proceeding from statutorily established limits to appellate court judgements. As a result, this means that

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[48] The issue is only signalled here, as its importance requires a separate work.

[49] D. Świecki, *Konstytucyjna zasada dwuinstancyjności postępowania sądowego [Constitutional principle of two-instance judicial proceeding]*, pp. 219–220 and rulings of the Constitutional Tribunal quoted there.

[50] *Ibid*., p. 220 and jurisprudence opinions indicated there.

[51] See ruling of the Constitutional Tribunal of 13 July 2009, SK 46/08, OTK-A 2009, no. 7, item 109; ruling of the Constitutional Tribunal of 31 March 2009, SK 19/08, OTK-A 2009, no. 3, item 20; ruling of the Constitutional Tribunal of 16 November 1999, SK 11/99, OTK-A 1999, no. 7, item 158; ruling of the Constitutional of 12 June 2002, P 13/01, OTK-A 2002, no. 4, item 42.

[52] OTK-A 2003, no. 3, item 20.

[53] D. Świecki, *Konstytucyjna zasada dwuinstancyjności postępowania sądowego [Constitutional principle of two-instance judicial proceeding]*, p. 222.

the court *ad quem* rendering a different judgement as to the case matter, following the will of the legislator, overtakes the entitlements of the first-instance court. Although, in such a situation, the appellate court judgement is not subject to review via standard appellate measures, it constitutes a decision of the second-instance court, which was given such competence[54].

The above-presented discussion leads to the conclusion that the constitutional principle of the two-instance court proceeding is not an obstacle to authorise the appellate court to find different facts and render a decision based on both evidence indicated during the first instance proceeding and wrongly assessed and evidence indicated in the course of the appellate proceeding[55]. Thus, it does not violate the constitutional standard resulting from the provisions of Article 78 and Article 176 (1) of the Constitution of the Republic of Poland because the constitutional principle of the two-instance proceeding must be interpreted formally, not substantively[56].

BIBLIOGRAPHY

Nowe kodeksy karne z 1997 r. z uzasadnieniami – Kodeks karny, Kodeks postępowania karnego, Kodeks karny wykonawczy [New criminal codes of 1997 with statements of reasons: Criminal Code, Criminal Procedure Code, Penal Execution Code], Warszawa 1997.

Gaberle A., *Dowody w sądowym procesie karnym. Teoria i praktyka [Evidence in the criminal court proceeding]*, 2nd edition, Warszawa 2010.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2008.

Grzegorczyk T., Ku usprawnieniu postępowania apelacyjnego i szerszemu reformatoryjnemu orzekaniu przez sąd odwoławczy [In order to improve appellate proceeding and broaden amend judgement by an appellate court], [in:] *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej [Supreme Court Judge Stanisław Zabłocki's 40th anniversary of work jubilee book]*, (ed.) P. Hofmański, Warszawa 2014.

Grzegorczyk T., Podstawowe kierunki projektowanych zmian procedury karnej [Basic directions of planned amendments to criminal procedure], *Państwo i Prawo* 2012, no. 11.

Kmiecik R., Trójinstancyjny system apelacyjno-kasacyjny, czy dwuinstancyjna hybryda rewizyjno-kasacyjna [Tree-instance appeal-cassation system or two-instance review-cassation hybrid], [in:] *Lubelskie Towarzystwo Naukowe. Materiały z sesji naukowej „Kierunki i stan reformy prawa karnego" [Lublin Scientific Association. Materials from a scientific session called "Directions and state of criminal law reform"]*, Lublin 1995.

Kmiecik R., Z problematyki dowodu ścisłego i swobodnego w postępowaniu apelacyjnym i kasacyjnym [On evidence in the appellate and cassation proceeding], *Prokuratura i Prawo* 2003, no. 1.

Kmiecik R., Zasada kontroli [Principle of control], [in:] *System Prawa Karnego Procesowego. T. 3. Zasady procesu karnego. Cz. 2 [System of criminal procedure law, Vol. 3, Criminal trial rules, Part 2]*, (ed.) P. Wiliński, Warszawa 2014.

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[54] *Ibid*., p. 223 and literature indicated there

[55] *Ibid*.

[56] S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 165 and literature indicated there.

Marszał K. (ed.), *Proces karny. Przebieg postępowania [Criminal trial: Course of proceeding]*, Katowice 2012.

Marszał K., System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure], [in:] *Studia Iuridica. Volume 33. Węzłowe zagadnienia procedury karnej. Księga ku czci Profesora Andrzeja Murzynowskiego [Key issues of criminal procedure. The book in honour of Professor Andrzej Murzynowski]*, (ed.) P. Kruszyński, Warszawa 1997.

Mirek P., Nowy model postępowania dowodowego przed sądem II instancji – aspekty praktyczne nowelizacji art. 452 k.p.k. [New model of evidentiary proceeding before second-instance court – practical aspects of amending Article 452 CPC], *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 2014, no. 2.

Rogacka-Rzewnicka M., Apelacyjny model kontroli odwoławczej [Appeal model of appellate review], [in:] *Nowe uregulowania prawne w Kodeksie postępowania karnego z 1997 r. [New legal regulations in the Criminal Procedure Code of 1997]*, (ed.) P. Kruszyński, Warszawa 1999.

Rogoziński P., Postępowanie dowodowe na rozprawie apelacyjnej w sprawach karnych [Evidentiary proceeding in the appellate hearing in criminal cases], *Studia Prawnicze* 2010, vol. 1.

Sakowicz A., Postępowanie dowodowe w postępowaniu apelacyjnym. Zarys problematyki [Evidentiary proceeding in appellate proceeding], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015: Guide to amendments]*, (ed.) P. Wiliński, Warszawa 2015.

Steinborn S., Postępowanie dowodowe w instancji apelacyjnej w świetle nowelizacji Kodeksu postępowania karnego [Evidentiary proceeding in the appellate-instance in the light of the Criminal Procedure Code amendment], *Prokuratura i Prawo* 2015, no. 1–2.

Świecki D., Konstytucyjna zasada dwuinstancyjności postępowania sądowego a możliwość reformatoryjnego orzekania w instancji odwoławczej w świetle wchodzącej w życie 1 lipca 2015 r. nowelizacji Kodeksu postępowania karnego [Constitutional principle of two-instance judicial proceeding and a possibility of amend judgement in the appellate instance in the light of Criminal Procedure Code amendment entering into force on 1 July 2015], [in:] *Polski proces karny i materialne prawo karne w świetle nowelizacji z 2013 r. Księga Jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal trial and substantive criminal law in the light of 2013 amendment. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk et al., Warszawa 2014.

Świecki D., Apelacja obrońcy i pełnomocnika po zmianach [Counsel's and proxy' appeal after the amendment], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal trial after 1 July 2015: Guide to the amendments]*, (ed.) P. Wiliński, Warszawa 2015.

Świecki D., *Rozprawa apelacyjna w polskim procesie karnym [Appellate hearing in the Polish criminal trial]*, Warszawa 2006.

Waltoś S., *Proces karny. Zarys systemu. Wydanie 10 [Criminal trial outline, 10th edition]*, Warszawa 2009.

Zabłocki S., Między reformatoryjnością a kasatoryjnością, między apelacyjnością a rewizyjnością – ku jakiemu modelowi zmierza postępowanie odwoławcze po zmianach kodeksowych z lat 2013–2015? [Between amend and cassation judgements, between appeal and review judgements – what is the direction of appellate proceeding after the criminal codes amendments of 2013–2015?], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal trial after 1 July 2015: Guide to the amendments]*, (ed.) P. Wiliński, Warszawa 2015.

EVIDENTIARY PROCEEDINGS BEFORE AN APPELLATE COURT IN THE POLISH CRIMINAL TRIAL

Summary

The article presents the evidentiary proceeding before the appellate court. The analysis of the issue shows that the model of the appellate proceeding determines the scope of the evidentiary proceeding conducted before the court *ad quem*. In the appeal model of the appellate proceeding, the examination of the decision appealed against covers the default as to the scope of the law and the erroneous assessment of facts as well as an inappropriate judgement. Within this model the appellate court re-examines evidence and renders a new judgement, with no possibility of reversing the judgement appealed against and remanding the case to the first-instance court for re-hearing.

The review model of the appellate proceeding is a two-instance proceeding process. In this model, the court *ad quem* does not conduct the evidentiary proceeding as to the case matter but finds the truth based on the examination of the case files.

The mixed model of appellate proceeding contains the elements of appeal, cassation and review. This allows for broader amend judgements by the appellate court and limits cassation decisions by the court *ad quem*.

Key words: *appellate court*, *appellate proceeding*, *evidentiary proceeding*

POSTĘPOWANIE DOWODOWE PRZED SĄDEM ODWOŁAWCZYM W POLSKIM PROCESIE KARNYM

Streszczenie

W artykule przedstawiono postępowanie dowodowe przed sądem odwoławczym. Analizując tę problematykę wskazano, iż zakres postępowania dowodowego prowadzonego przed sądem *ad quem* determinuje model postępowania odwoławczego. W apelacyjnym modelu postępowania odwoławczego kontrola zaskarżonego orzeczenia obejmuje uchybienia zarówno w zakresie prawa, jak i błędną ocenę ustaleń faktycznych oraz błędy przy wymiarze kary. W tym modelu sąd apelacyjny ponownie przeprowadza dowody i wydaje zupełnie nowy wyrok, bez możliwości uchylenia zaskarżonego wyroku i przekazania sprawy sądowi pierwszej instancji do ponownego rozpoznania. Rewizyjny model postępowania odwoławczego charakteryzuje się dwuinstancyjnością postępowania. W tym modelu sąd *ad quem* nie przeprowadza postępowania dowodowego co do istoty sprawy, lecz poznaje prawdę na podstawie akt sprawy. Mieszany model postępowania odwoławczego zawiera w sobie elementy apelacyjności, kasatoryjności i rewizyjności. To sprawia, iż umożliwia on szersze orzekanie reformatoryjne przez sąd odwoławczy oraz ogranicza orzekanie kasatoryjne przez sąd *ad quem*.

Słowa kluczowe: *sąd odwoławczy*, *postępowanie odwoławcze*, *postępowanie dowodowe*

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COMMUNICATIONS INTERCEPTION AND OBTAINING TELECOMMUNICATIONS BILLINGS BY AUTHORISED ENTITIES WITHIN THEIR OPERATIONAL AND INTELLIGENCE ACTIVITIES IN POLAND

MACIEJ ROGALSKI

INTRODUCTION

The article focuses on the issue of communications interception and obtaining telecommunications billings by authorised entities, e.g. the Police, within their operational and surveillance activities. The regulations concerning communications interception and obtaining billings are laid down in a few statutes in Poland. Communications interception and obtaining billings for the needs of the criminal proceeding are regulated in Articles 218–218b CPC and Article 241 CPC. Apart from that, communications interception and obtaining billings are also admissible for the needs of the so-called authorised entities' operational and surveillance activities based on special acts. At present, there are eight such entities: Policja [the Police][1], Straż Graniczna [the Border Guard][2], the Fiscal Intelligence[3], Żandarmeria Wojskowa [the Military Police][4], Służba Kontrwywiadu Wojskowego [the Military Counterintelligence Service][5], Agencja Bez-

[1] Act of 6 April 1990 on the Police, Journal of Laws of 2015, item 355 with amendments that followed (Act on the Police) and Act of 10.

[2] Act on the Border Guard of 12 October 1990, Journal of Laws of 2014, item 1402 with amendments that followed (BG).

[3] Act of 28 September 1991 on fiscal control, Journal of Laws of 2015, item 553 with amendments that followed (FC).

[4] Act of 24 August 2001 on the Military Police and other military order organs, Journal of Laws of 2013, item 568 with amendments that followed (MP).

[5] Act of 9 June 2006 on the Military Counterintelligence Service and on the Military Intelligence Service of 10 January 2014, Journal of Laws of 2014, item 253 with amendments that followed (MCS and MIS).

pieczeństwa Wewnętrznego [the Internal Security Agency][6], Centralne Centralne Biuro Antykorupcyjne [Central Anticorruption Bureau][7] and the Customs Service[8]. The article does not thoroughly discuss the issue of recording telephone communication, i.e. the so-called tapping, and video and audio recording of persons in rooms, vehicles or places other than public ones[9].

OPERATIONAL AND SURVEILLANCE ACTIVITIES AND OPERATIONAL CONTROL

1. The concept of operational and surveillance activities first occurred in the Polish legislation in Act of 14 July 1983 on the Ministry of the Interior and the scope of operations of its organs[10]. In jurisprudence, operational and surveillance activities are described as a separate system of (authorised entities') low-key or secret activities conducted beyond the criminal process in order to prevent or combat crime and other legally determined negative social phenomena[11].

It is necessary to distinguish operational control within operational and surveillance activities, which is one of the forms of operational and surveillance activities. Operational control is secret and may be conducted by the eight above-mentioned authorised entities. Until recently, the Acts envisaged three types of operational control that each of the eight entities could perform. It could concern the control of the correspondence contents, the control of communications contents and the use of technical devices in order to

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[6] Act of 24 May 2002 on the Internal Security Agency and on the Intelligence Agency of 22 October 2015, Journal of Laws of 2015, item 1929 with amendments that followed (ISA and IA).

[7] Act of 9 June 2006 on the Central Anticorruption Bureau, of 4 September 2014, Journal of Laws of 2014, item 1411 with amendments that followed (CAB).

[8] Act of 27 August 2009 on the Customs Service, Journal of Laws of 2009, no. 168, item 1323 with amendments that followed (CS).

[9] See J. Bratoszewski, L. Gardocki, Z. Gostyński, S. Przyjemski, R. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code]*, vol. I, Warszawa 2003, pp. 1017–1018; K. Marszał, Podsłuch w polskim procesie karnym de lege lata i de lege ferenda [Tapping in the Polish criminal process *de lege lata* and *de lege ferenda*], [in:] Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok [Penal science problems. Papers presented to Professor Oktawia Górniok], *Prace Naukowe Uniwersytetu Śląskiego*, Katowice 1996, no. 150, p. 343; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Zakamycze 2005, p. 590.

[10] Journal of Laws No. 38, item 172 with amendments. See A. Taracha, *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawnopodatkowe [Operational and surveillance actions. Forensic science and tax law aspects]*, Lublin 2006, p. 12.

[11] See T. Hanausek, *Kryminalistyka. Zarys wykładu [Forensic science: lecture outline]*, Kraków 1996, p. 96; P. Chrzczonowicz, Społeczeństwo inwigilowane w państwie prawa [Society under surveillance in the rule of law state], [in:] P. Chrzczonowicz, V. Kwiatkowska-Darul, K. Skowroński (ed.), *Materiały z konferencji naukowej [Scientific conference papers]*, Toruń 2003, pp. 153–154. Also see W. Kozielewicz, Postępowanie w przedmiocie zarządzenia kontroli operacyjnej [Proceeding connected with ordering operational monitoring], [in:] L. Paprzycki, Z. Rau, *Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna [Practical elements of combating organised crime and terrorism. Modern technologies and operational work]*, Warszawa 2009, pp. 509–510; A. Sakowicz, *Opinia o projekcie ustawy o czynnościach operacyjno-rozpoznawczych [Opinion on the bill on operational and surveillance actions]*, the Sejm paper No. 353, www.sejm.gov.pl; D. Zalewski, A. Melezini, *Ustawa o kontroli skarbowej. Komentarz praktyczny [Act on anti-fraud control: Practical commentary]*, Warszawa 2015, Legalis, commentary on Article 36.

obtain information and evidence and record them, especially the contents of telephone conversations and other information transferred with the use of telecommunications networks. Act of 15 January 2016 amending Act on the Police and some other acts (Act of 15 January 2016)[12] extended the scope of control adding a new type in the form of "obtaining data contained in data storage devices, telecommunications network terminal equipment and IT and telecommunications systems".

2. There is an opinion in literature that operational control consisting in the use of technical devices is different from the control of the contents of correspondence. It is assumed that the control of correspondence includes only the interception of letters, postcards or other forms of information transfer with the use of traditional forms of communication[13]. However, it is necessary to adopt the broad concept of control of the contents of correspondence, i.e. covering not only interception of correspondence in the form of letters, postcards or other forms of transmitting information with the use of traditional forms of communication but also the control conducted with the use of technical measures[14]. It is not important in what form the contents are transferred, i.e. whether it is done on paper or in an electronic form. The way in which the control is performed is, in fact, of secondary importance from the technical point of view. As a result, it must be admitted that the "control of the contents of correspondence" as well as the "operational control of correspondence" means practically the same. In jurisprudence, a concept of an electronic document is used and it means a logically coherent piece of information processed in a computer system, or more broadly an IT system, i.e. for example a text, graphic or music file[15]. In the same way the scope is understood in Article 218 § 1 CPC. It is assumed that the provision is also applicable to the interception of correspondence sent by electronic mail[16].

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[12] Journal of Laws of 2016, item 147.

[13] Compare J. Kudła, Wybrana problematyka czynności operacyjno-rozpoznawczych na tle uwag de lege ferenda projektu ustawy o czynnościach operacyjno-rozpoznawczych [Selected issues of operational and surveillance activities in the light of *de lege ferenda* bill on operational and surveillance activities], [in:] L. Paprzycki, Z. Rau (ed.), *Praktyczne elementy... [Practical elements...]*, *op. cit.*, p. 533; D. Szumiło-Kulczycka, *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego [Operational and surveillance actions and their relation to the criminal process]*, Warszawa 2012, p. 162.

[14] See S. Dubisz (ed.), *Uniwersalny słownik języka polskiego [Universal dictionary of the Polish language]*, vol. 2, Warszawa 2003, p. 453; E. Sobol (ed.), *Słownik wyrazów obcych [Dictionary of foreign words]*, Warszawa 2002, p. 601. Also see I. Dobosz, *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym [Privacy of communication as publicity right and its protection in civil law]*, Kraków 1989, p. 17; T. Taras, O dopuszczalności i legalności podsłuchu telefonicznego [On admissibility and lawfulness of telephone tapping], *Annales UMCS*, section G, Lublin 1960, p. 51; K. Dudka, Zatrzymanie korespondencji w projekcie kodeksu postępowania karnego z 1995 r. na tle przepisów obowiązujących [Postal interception in the bill on criminal proceeding of 1995 in the light of binding regulations], *Prokuratura i Prawo* 1996, no. 4; K. Dudka, *Kontrola korespondencji i podsłuch w polskim procesie karnym [Interception of communication in the Polish criminal process]*, Lublin 1998, p. 10.

[15] See P. Ochman, Spór o pojęcie dokumentu w prawie karnym [Dispute over a concept of a document in criminal law], *Prokuratura i Prawo* 2009, no. 1, p. 33.

[16] See P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2011, pp. 1231–1232.

The Act of 15 January 2016 removes the former doubts in the discussed scope because it specifies operational control consisting in "obtaining and recording the contents of correspondence, including correspondence conducted with the use of electronic communication means" (see, for example, Article 19 (6.3) of Act on the Police amended by Act of 15 January 2016). Thus, the provision defines that it does not apply to correspondence in the paper form but also with the use of electronic communication means. Formerly, Article 19 (6.1) of Act on the Police referred to operational control in the form of "control of correspondence" but did not indicate the form of correspondence, which could raise doubts described above.

RULING OF THE CONSTITUTIONAL TRIBUNAL OF 30 JULY 2014, FILE NO. K 23/11

1. The practice of operational and surveillance activities that have been in use so far demonstrates numerous problems, including constitutional ones[17]. The Constitutional Tribunal issued many rulings concerning them. The key one is the ruling of 30 July 2014, K 23/11[18], in which the Constitutional Tribunal defines, inter alia, the conditions for admissibility of operational and surveillance activities. Taking into account the former judgements of the Constitutional Tribunal and the European Court of Human Rights as well as the Court of Justice of the European Union (ECJ) concerning provisions regulating secret ways of obtaining information about individuals by public authorities in a democratic state ruled by law, the Constitutional Tribunal determined in its ruling the minimum requirements that regulations limiting constitutional freedoms and rights must fulfil. The Constitutional Tribunal indicated, inter alia, that

– the collection, retention and processing of personal data, especially data concerning private matters, is admissible only based on a clear and precise statutory provision;
– it is absolutely necessary to precisely determine in an act which state organs are authorised to collect and process data on individuals, including the right to use operational and surveillance activities;
– an act must determine the conditions for secret obtaining information on persons that are only detection of serious crimes and preventing them; an act should indicate the types of such crimes;
– an act must determine categories of persons who may be subject to operational and surveillance activities;
– operational and surveillance activities should be a subsidiary means of obtaining information or evidence against individuals when it is not possible to obtain them in a different, less bothersome way;

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[17] Compare the ruling of the Constitutional Tribunal of 12 December 2005, K 32/04, *Orzecznictwo Trybunału Konstytucyjnego – A* 2005, No. 11, item 132; Z. Rau, Czynności operacyjno-rozpoznawcze w polskim systemie prawa – działania w kierunku uniwersalnej ustawy [Operational and surveillance actions in the Polish legal system – steps towards a universal statute], [in:] L. Paprzycki, Z. Rau, *Praktyczne elementy... [Practical elements...]*, *op. cit*., p. 720.

[18] Journal of Laws of 2014, item 1055.

– an act should determine the maximum period of applying operational and surveillance methods towards an individual that cannot exceed the framework necessary in a democratic state ruled by law;
– it is absolutely necessary to precisely normalise in an act the procedure of taking a decision to launch operational and surveillance activities, especially including the requirement of obtaining an independent organ's consent to use secret methods of collecting information;
– it is necessary to determine in an act precise rules of dealing with the material collected in the course of operational and surveillance activities, especially the rules of using it and disposing of unnecessary and inadmissible data;
– it is necessary to inform individuals about a secret procedure of obtaining information on them, in a reasonable time after the end of the procedure and, on the interested person's motion, asking a court to examine and assess whether the activities were legal[19].

2. Checking the provisions regulating operational and surveillance activities and taking into account recommendations in the ruling of 30 July 2014, K 23/11, the Constitutional Tribunal stated, inter alia, discrepancies in the following provisions regulating operational and surveillance activities:
1) Article 27 (1) in connection with Article 5 (1.2.b) ISA and IA and Article 2, Article 47 and Article 49 in connection with Article 31 (3) of the Constitution;
2) Article 20c (1) of Act on the Police; Article 10b (1) BG; Article 36b (1.1) FC; Article 30 (1) MP; Article 28 (1. 1) ISA and IA; Article 32 (1.1) MCS and MIS; Article 18 (1.1) CAB; Article 75d (1) CS – because they do not envisage independent supervision of the provision of telecommunications data specified in Article 180c and Article 180d of Act of 16 July 2004 – Telecommunications law (TL)[20], are inconsistent with Article 47 and Article 49 in connection with Article 31 (3) of the Constitution;
3) Article 19 of Act on the Police; Article 9e BG; Article 36c FC; Article 31 MP; Article 27 ISA and IA; Article 31 MCS and MIS; Article 17 CAB – in the scope in which they do not envisage a guarantee of immediate, supervised by a commission and recorded disposal of materials containing information banned to be used as evidence, the secrecy of which has not been waived by a court or a waiver of which was not admissible, are in contradiction to Article 42 (2), Article 47, Article 49, Article 51 (2) and Article 54 (1) in connection with Article 31 (3) of the Constitution;
4) Article 28 ISA and IA; Article 32 MCS and MIS; Article 18 CAB – in the scope in which they do not envisage disposal of data that are of no significance for the proceeding, are in contradiction to Article 51 (2) in connection with Article 31 (3) of the Constitution;

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[19] Ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, part. III. 5.

[20] Journal of Laws of 2004, No. 171, item 1800 with amendments that followed.

5) Article 75d (5) CS in the scope in which it allows for the retention of the material other than the one containing information important for the proceeding in fraudulent misdemeanours or crimes specified in Chapter 9 of the Act of 10 September 1999 – Penal Fiscal Code (PFC)[21], is in contradiction to Article 51 (4) of the Constitution.

Re. 1. The provision of Article 27 (1) of Act on ISA and IA referred to Article 5 (1.2) of Act on ISA and IA. On the other hand, the provision of Article 5 (1.2.b) of Act on ISA and IA indicated crimes against the economic foundations of the state. The ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, stated Article 27 (1) in connection with Article 5 (1.2.b) of Act on ISA and IA was in contradiction to Article 2, Article 47 and Article 49 in connection with Article 31 (3) of the Constitution of the Republic of Poland. In the reasons for the ruling, the Constitutional Tribunal indicated that neither the Criminal Code nor any other act uses a term "crimes against the economic foundations of the state", when referring to the names of particular forbidden acts, their defining elements or the titles of chapters on particular types of crimes. Due to the legislator's use of an unclear term, referring to undefined "crimes against the economic foundations of the state", real limits to secret interference into human freedoms and rights are not specified clearly enough and are determined by organs responsible for law application. In the Constitutional Tribunal's opinion, this state of things in is conflict with the constitutional principle of the specificity of legal provisions in the law-making process (Article 2 of the Constitution) and the principle of statutory forms of the limitation upon the exercise of constitutional freedoms and rights (Article 31 (3) of the Constitution)[22].

Implementing the ruling, the legislator gave Article 27 (1.2) of Act on the ISA and IA the following wording: "A court, on a written motion filed by the Head of the ISA, after having obtained the consent of the Attorney General in writing, may take a decision on ordering operational control – provided other measures proved to be inefficient or will be useless – in the course of performing operational and surveillance activities undertaken by the ISA in order to recognise, prevent and detect crimes specified in Chapters XXXV–XXXVII of the Criminal Code and Chapters 6 and 7 of the Penal Fiscal Code – if they are against the economic foundations of the state – and in order to obtain and record evidence of these crimes and pursue their perpetrators." The new wording of the provision eliminates previous reservations. Firstly, what the Constitutional Tribunal questioned, it does not refer to "crimes against the economic foundations of the state" in general but refers to specific decisions of the Criminal Code and Penal Fiscal Code. Secondly, it orders the application of the principle of subsidiarity. Operational control may be ordered only when other measures prove to be inefficient or are useless. "Other measures" should be understood as other forms of operational and surveillance activities that are not classified as operational control. "Inefficiency" means lack of expected results and "uselessness" – lack of possibility of obtaining expected results with the use of a particular measure. In literature, it is assumed that filing a motion to order operational control, an adequate organ must

[21] Journal of Laws of 2013, item 186, with amendments that followed.
[22] Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, Part III.5.

prove inefficiency of former activities or present arguments for high probability of uselessness of traditional methods of criminal analysis[23]. Thirdly, it clearly indicates the aim of operational and surveillance activities undertaken by the ISA, i.e. recognition, prevention and detection of crime.

The adopted solutions are in accordance with the judgement of 8 April 2014 of the Court of Justice of the European Union, which in joined cases C293/12 and C594/12 (judgement of 8 April 2014 ECJ)[24] ruled Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC was invalid (Directive 2006/24/EC)[25]. Directive 2006/24/EC was implemented in the Polish law with the amendment of Telecommunications law of 24 April 2009[26]. The amendment imposed an obligation on telecommunications companies of retention and then – on request of authorised organs – provision of communications data laid down in Article 180c and Article 180d TL. Thus, it created legal framework for the authorised entities of access to these data. In the judgement of 8 April 2014, the ECJ indicated that Directive 2006/24/EC was limited to a general reference in Article 1 (1) to a concept of "serious crime" as defined by each Member State in its national law. The lack of a definition of "serious crime" in Directive 2006/24 causes that there is a clear borderline in which cases telecommunications data may be subject to retention and use.

Re. 2. According to the ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, the provisions of Article 20c (1) of Act on the Police, Article 10b (1) BG; Article 36b (1.1) FC; Article 30 (1) MP; Article 28 (1.1) ISA and IA; Article 32 (1.1) MCS and MIS; Article 18 (1.1) CAB; Article 75d (1) CS – because they do not envisage independent supervision of communications data provision laid down in Article180c and Article 180d TL, were ruled to be in contradiction to Article 47 and Article 49 in connection with Article 31 (3) of the Constitution. In the reasons for this part of the ruling, the Constitutional Tribunal indicated that one of the requirements that statutory provisions entitling specified organs to obtain telecommunications data must meet is the creation of mechanisms of independent supervision. Since the collection of the data is secret, with no knowledge or will of the parties about which information is retained and with a limited social supervision, the lack of independent supervision of the state organs over the process poses a risk of misuse. It not only may contribute to unjustified interference into human freedoms and rights but also constitute threat for democratic mechanisms of power exercise. The obligation of statutory provision of procedural mechanisms preventing arbitrariness in obtaining telecommunications data is even

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[23] See W. Kozielewicz, Postępowanie w przedmiocie zarządzenia kontroli operacyjnej [Proceeding connected with ordering operational monitoring], [in:] L. Paprzycki, Z. Rau, *Praktyczne elementy... [Practical elements...]*, *op. cit*., p. 511; ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, Part III.6.

[24] Journal of Laws of 2014, L 105, p. 54.

[25] L 105/54 PL, Official Journal of the European Union of 13 April 2006.

[26] Act of 24 April 2009 amending the Act – Telecommunications law and some other acts, Journal of Laws of 2009, item 1445.

stronger because no provision has imposed an obligation to obtain a court's consent (or a consent of another organ independent of organs demanding the provision of these data or organs superior to them) to provide the authorised organs with the data specified in Article 180c and Article 180d TL. The procedure did not even require obtaining a public prosecutor's consent. The legislator did not also envisage major elements of control *ex post* legitimising undertaken activities. Thus, obtaining telecommunications data by the Police was under no control independent of the organ obtaining data[27].

Act of 15 January 2016 introduced a lot of changes in the acts regulating activities of entities authorised in the area. For example, Article 20c of Act on the Police questioned in the ruling of the Constitutional Tribunal was given new wording. But what is of key importance for the implementation of the ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, are the provisions of Article 20ca of Act on the Police added after Article 20c: "Article 20ca (1) A regional court having jurisdiction over the area where the Police unit is based supervises telecommunications, postal or Internet data obtained by that Police unit. (2) The Police unit mentioned in (1), in compliance with the provisions on the protection of classified information, provides a court mentioned in (1) in half-year periods reports on:

1) the number of cases of obtaining telecommunications, postal and Internet data in the period covered by the report and the type of the data;
2) legal classification of forbidden acts in connection with which an organ requested telecommunications, postal or Internet data or information on obtaining data in order to save life or health of a person or back up search or rescue operations.
3) Within the supervision mentioned in (1), a regional court may get acquainted with the material giving grounds for the provision of telecommunications, postal or Internet data to the Police.
4) A regional court informs the Police unit about the outcome of the examination within 30 days after its completion.
5) Supervision mentioned in (1) is not applicable to obtaining data under Article 20cb (1)".

Thus, the provision of Article 20ca of Act on the Police introduces subsequent supervision that is an admissible solution from the point of view of constitutional norms. It should ensure the implementation of the constitutional principle of supervising public institutions' operations. The created mechanism should make it possible for services responsible for the state security and public order to efficiently combat threats. On the other hand, it created a system of supervision of obtaining communications, postal or Internet data by the Police. A regional court having jurisdiction over the area where the Police unit obtaining data is based was made responsible for the supervision. Court supervision meets the requirement of the supervisory organ's independence from the government. Police officers obtaining data are also not in direct or indirect subordination relation with that organ.

The adopted solution in the subsequent form, as it has already been indicated, is admissible from the point of view of the norms of the Constitution. The solution gives preference to activities of services responsible for the state security and public order.

[27] Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, Part III.10.4.

However, a question is raised whether it would not be better, from the point of view of the protection of citizens' freedoms and rights but also taking into account the interests of the services, to adopt a solution ensuring prior supervision by a court. Subsequent supervision might be applied in cases when the Police or other services' activities were necessary without delay. Prior supervision would contribute to the improvement of appropriateness of the Police and other organs' motions as well as their number.

Secondly, a question is raised about the efficiency of the adopted solution in practice. In other words, to what extent will a court's supervision be real and not only nominal? It must be pointed out that data will be submitted to a court relatively rarely, in half-year periods. A regional court may, within its powers, get acquainted with the material justifying provision of telecommunications, postal and Internet data to the Police and as a result inform the Police about the examination outcome. After that, the activeness of a court in the process of verifying the appropriateness of data provision ends. There is no established procedure in case a court finds out that the provision of data violated binding regulations.

Thirdly, the introduction of the model of a court's prior supervision of potential access to telecommunications data would be conducive to real implementation of the principle of subsidiarity in obtaining data. The condition for access to data would be the exhaustion by the Police or other services of other legal measures that do not influence privacy or secrecy of communications.

The critical comments presented above find grounds in the judgement of 8 April 2014 of the ECJ. The Court stated that obtaining access to data by adequate state organs is not subject to prior supervision by a court or another independent administrative organ. A court or an independent administrative organ should supervise the provision and use of data so that it is limited to cases when it is absolutely necessary to meet a given objective[28]. Thus, the ECJ clearly speaks of prior supervision by an independent organ.

Re. 3. The Constitutional Tribunal, in its ruling of 30 July 2014, K 23/11, also stated that Article 19 of Act on the Police; Article 9e BG; Article 36c FC; Article 31 MP; Article 27 ISA and IA; Article 31 MCS and MIS; Article 17 CAB – in the scope of which they do not envisage ensuring immediate, supervised by a commission and recorded disposal of material containing information banned to be used as evidence, the secrecy of which has not been waived by a court or a waiver of which was not admissible – were in contradiction to Article 42 (2), Article 47, Article 49, Article 51 (2) and Article 54 (1) in connection with Article 31 (3) of the Constitution.

In the reasons for this part of the ruling, the Constitutional Tribunal indicated the lack of sufficient procedural guarantees of the protection of confidentiality of information passed to entities that are trusted because of their professional secrecy privilege. The regulations in question do not envisage – in a way that does not raise interpretational doubts – obligation of a court's prior supervision of data being collected or a possible waiver of professional secrecy privilege in a given case. The discussed

[28] Theses 60–62 of the judgement of 8 April 2014 of the Court of Justice of the European Union, Journal of Laws of 2014, L 105.

acts do not guarantee that in case of a justified suspicion that collected material contains information protected by the professional secrecy privilege, a court will perform additional verification of the material and possibly waive professional secrecy before the material is transferred to officers of the services or a public prosecutor. The questioned provisions do not also envisage a procedure of disposing of the information collected in the course of operational control that constitutes professional secrecy. In the Constitutional Tribunal's opinion, there is no interpretational doubt that these grounds cannot be derived from, inter alia, appropriately used Article 238 § 3–5 and Article 239 CPC. The Constitutional Tribunal presented especially negative assessment of the lack of adequate solutions concerning professional secrecy that, due to its significance for the materialisation of such values as the right to defence and the freedom of press, should be especially protected against disclosure of its contents to services making use of operational control[29].

Act of 15 January 2016 introduced necessary changes in acts the provisions of which were negated in the discussed scope. The provisions of Act on the Police may be an example. In accordance with the Bill, an addition of items 15f–15j was made after item 15e in Article 19.

Due to the contents of the ruling of the Constitutional Tribunal, the provisions of Article 15j of Act on the Police are important as they envisage an obligation to immediately and under the supervision of a commission dispose of the material the use of which is inadmissible in the criminal proceeding and record it. The Police unit was obliged to immediately inform a public prosecutor about the disposal of this material. In accordance with Article 19 (15j) of Act on the Police in the version after the amendment of 15 January 2016: "The Police unit is obliged to implement a court order on disposing of the material specified in Article 19 (15h) and to immediately, under the supervision of a commission dispose of the material the use of which is inadmissible in the criminal proceeding and record it. The Police unit immediately informs a public prosecutor specified in (15g) about the disposal of the material."

The solutions adopted in the Act of 15 January 2016 did not eliminate discrepancies in the norms regulating obtaining information in the course of operational and surveillance activities, *de lege lata* allowing for recording such communications that cannot be used as evidence in the criminal proceeding. The binding norms having guarantee features that are envisaged in the provisions of the CPC with regard to professional secrecy are becoming seeming ones because, despite the ban on introducing material being professional secrecy to the criminal proceeding, the legislator – although indirectly, through ambiguous statutory regulation – allows for its collection and retention by services authorised to apply operational control. It is especially visible in the area of the protection of the professional secrecy privilege of defence attorneys and journalists, which – under the CPC – are subject to unconditional legal protection and evidentiary ban that cannot be waived[30].

The presented issue was also noticed in the judgement of 8 April 2014 of the ECJ. The Court stated that Directive 2006/24/EC applies to all persons using electronic

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[29] Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, Part III.11.8.
[30] *Ibid*.

communications services whose data are retained. It refers even to those persons towards whom there are no grounds whatsoever, factual or legal, to initiate the criminal proceeding. The Directive does not envisage any exceptions. This means that it is also applied to persons whose communications and information obtained during these communications are subject to professional secrecy privilege under national law[31].

Re. 4. The ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, states that the provisions of Article 32 MCS and MIS, and Article 18 CAB – in the scope in which they envisage disposal of the data that are insignificant for the conducted proceeding – were in contradiction to Article 51 (2) in connection with Article 31 (3) of the Constitution. In the formerly binding provisions, there were no procedures for verification and disposal of insignificant data, i.e. useless for further proceeding. In accordance with Article 51 (2) of the Constitution, public authorities shall not acquire, retain and make accessible information on citizens other than that which is necessary in a democratic state ruled by law. The assessment of necessity should be conducted taking into account the principle of proportionality resulting from Article 31 (3) of the Constitution. In its judgements, the Constitutional Tribunal explained the concept of "data necessary in a democratic state", indicating that "in a democratic state ruled by law it is not necessary to retain information on citizens obtained in the course of operational activities because of potential usefulness of this information. It can be applied only in connection with a given proceeding conducted based on a statute allowing for limitation of freedoms because of security of the state and public order". The condition for secret acquisition of information on individuals, including their telecommunications data, is establishment of a procedure of immediate selection and disposal of unnecessary and inadmissible material. This solution prevents unauthorised use of legally collected information by the state organs and its retention just in case it is useful for other purposes in the future[32].

Act of 15 January 2016, implementing the ruling of the Constitutional Tribunal, introduced adequate changes to the provisions of acts that were negated in the discussed scope. The provision of Article 28 (7) ISA and IA is an example. In accordance with the provision, data that are insignificant for the criminal proceeding or are not significant for security of the state must be immediately, under the supervision of a commission disposed of and the disposal must be recorded.

Re. 5. The ruling of the Constitutional Tribunal of 30 July 2014, K 23/11, stated that the provision of Article 75d (5) CS in the scope in which it allows for retention of material other than that containing information significant for a proceeding in fiscal misdemeanours or crimes specified in Chapter 9 of Act of 10 September 1999 – Penal Fiscal Code (FCC)[33] was in contradiction to Article 51 (4) of the Constitution.

The questioned provision read as follows: "Material obtained in the course of activities undertaken based on Article 75d (2) CS that do not contain information significant for a proceeding connected with fiscal misdemeanours or crimes must be

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[31] Theses 57–58 of the judgement of 8 April 2014 of the Court of Justice of the European Union, Journal of Laws of 2014, L 105.

[32] Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, Part III.12.2.

[33] Journal of Laws of 2013, item 186, with amendments.

immediately and under the supervision of a commission disposed of and the disposal must be recorded." In the reasons for the ruling, the Constitutional Tribunal indicated that although the provision of Article 75d (5) CS obliges the Customs Service to dispose of telecommunications data that are insignificant for a proceeding conducted by the Customs Service, it specifies the conditions for retention of the material in a too broad way. Material that is subject to disposal is only the one that does not contain information significant for a proceeding in fiscal misdemeanours or crimes[34].

Act of 15 January 2016 in Article 75d (6) stipulates that "telecommunications or Internet data that are insignificant for criminal or penal fiscal proceeding shall be immediately, under the supervision of a commission disposed of and the disposal must be recorded". The provision of Article 75d (6) of the Bill, compared to the former Article 75d (5) CS, from the point of view of the issue of the scope of collected data, has not been substantially changed. The Constitutional Tribunal pointed out in the reasons for its ruling that correct interpretation of Article 75d (5) CS, from constitutional perspective, does not give grounds for giving it such a broad content as the legislator did. The provision regulating conditions for collecting data (5) is contained in the same editorial unit as the provision regulating the aim of their collection (1). Thus, both provisions should be interpreted collectively. Then, the understanding of the questioned provision will be limited only to fiscal misdemeanours and crimes laid down in Chapter 9 PFC to which Article 75d (1) CS refers[35].

3. Act of 15 January 2016 not only introduced changes resulting from the ruling of 30 July 2014, K 23/11, but in addition it broadened the competence of entities authorised to conduct operational control. Article 19 (6) of Act on the Police can be an example. In accordance with the former wording of the provision, operational control included:

1) controlling correspondence contents;
2) controlling communications contents;
3) using technical means making it possible to acquire information and evidence in a secret way and record them, especially the contents of telephone conversations and other information transferred with the use of telecommunications networks.

In accordance with the new wording of Article 19 (4) of Act on the Police, operational control may also consist in "acquiring and recording data contained in data storage devices, telecommunications network terminal equipment, IT systems as well as information and communications technology systems". Article 19 (6.2) of Act on the Police clearly indicates that operational control also includes "acquiring and video and audio recording of persons in rooms, vehicles and places other than public ones". It is worth drawing attention to broadening operational control by adding acquiring and recording data contained in "telecommunications network terminal equipment". In accordance with Article 2 (43) TL, telecommunications network terminal equipment means "telecommunications equipment for direct or indirect connection to the end

[34] Journal of Laws of 2014, item 1055; http://trybunal.gov.pl; *Legalis* no. 994752, Part III.12.4.
[35] *Ibid*.

of the network". In other words, it is simply a telephone. Taking into account how technologically sophisticated they are, especially mobile handsets, and how many functions they have, operational control will mean access to an enormous amount of information (emails, short messages, personal data, files etc.).

4. It can be observed that there is a big difference between the provisions of the CPC and the provisions of special acts with regard to collecting and making data accessible. In case of the CPC, there are two basic groups of provisions regulating the issues: controlling and recording conversations (Article 237 and the following CPC) and provision of correspondence, communications and billings (Article 218–218b CPC). For example, the construction of operational control laid down in Article 19 (6.4) of Act on the Police adopted in Act of 15 January 2016 blurs these differences. Access to telephones means the ability of controlling a conversation conducted e.g. with the use of the short messaging system. Another example of different provisions of the CPC and special acts may be the provisions regulating the time limit for operational control and tapping. For example, in the former Article 19 (9) of Act on the Police, there was a possibility of prolonging the total length of control to a total of six months (Article 19 (8) of Act on the Police) but with no indication of a maximum period for which operational control can be prolonged next time. In the new Article 19 (9) of Act on the Police, it is specified that the decision on prolonging operational control may be issued for the subsequent periods that can total no longer than 12 months. Thus, the 12-month period of operational control is inconsistent with Article 238 § 1 CPC, which envisages controlling and recording telephone communications for a period of three months and its possible extension for the maximum of another three months, i.e. a total of six months.

CONCLUSIONS

Act of 15 January 2016 substantially amended acts regulating operation of entities authorised to conduct operational and surveillance activities. The changes were mainly the implementation of the ruling of the Constitutional Tribunal of 30 July 2014, K 23/11. In this scope, the changes should be assessed positively. However, not all the amendments implement postulations suggested earlier. A court's subsequent supervision of acquired data can be an example. The adoption of the principle of subsequent supervision as well as the lack of detailed regulations of the procedure in case of violation of law may cause that the supervision will become seeming. There was no attempt to develop solutions envisaging subsequent supervision in urgent situations and prior supervision as a rule.

It must be also highlighted that Act of 15 January 2016 introducing changes extended the powers of services in the field of acquiring new data and information. The extension of operational control by adding access to data in telephones is an example of that.

Act of 15 January 2016 did not introduce at least partial or differentiated, depending on the size of entity obliged to provide data, charges for the entities providing data. Introduction of even symbolic fees would certainly increase the level of conscientiousness in paying attention to the quantity of requested data and their types. In Poland, a big number of data demanded by authorised entities is still a serious problem.

The changes introduced to special acts deepen the differences between these regulations and analogous solutions in the CPC. The examples of that may be the scope of operational control that, apart from provision of correspondence, communications and telephone billings, envisages acquiring and recording data contained in data storage devices and telecommunications networks terminal equipment, IT as well as information and communications technology systems, or a period of control and recording conversations laid down in the CPC and operational control laid down in special acts.

BIBLIOGRAPHY

Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S., Stefański R., Zabłocki S., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentray]*, vol. I, Warszawa 2003.

Chrzczonowicz P., Społeczeństwo inwigilowane w państwie prawa [Society under surveillance in the rule of law state], [in:] Chrzczonowicz P., Kwiatkowska-Darul V., Skowroński K. (ed.), *Materiały z konferencji naukowej [Scientific conference papers]*, Toruń 2003.

Dobosz I., *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym [Privacy of communication as publicity right and its protection in civil law]*, Kraków 1989.

Dubisz S. red. *Uniwersalny słownik języka polskiego [Universal dictionary of the Polish language]*, vol. 2, Warszawa 2003.

Dudka K., Zatrzymanie korespondencji w projekcie kodeksu postępowania karnego z 1995 r. na tle przepisów obowiązujących [Postal interception in the bill on criminal proceeding of 1995 in the light of binding regulations], *Prokuratura i Prawo* 1996, no. 4.

Dudka K., *Kontrola korespondencji i podsłuch w polskim procesie karnym [Interception of communication in the Polish criminal process]*, Lublin 1998.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Zakamycze 2005.

Hanausek T., *Kryminalistyka. Zarys wykładu [Forensic science: lecture outline]*, Kraków 1996.

Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, vol. I, Warszawa 2011.

Kozielewicz W., Postępowanie w przedmiocie zarządzenia kontroli operacyjnej [Proceeding connected with ordering operational monitoring], [in:] Paprzycki L., Rau Z., *Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna [Practical elements of the fight against organised crime and terrorism: modern technologies and operational methods]*, Warszawa 2009.

Kudła J., Wybrana problematyka czynności operacyjno-rozpoznawczych na tle uwag de lege ferenda projektu ustawy o czynnościach operacyjno-rozpoznawczych [Selected issues of operational and surveillance activities in the light of *de lege ferenda* bill on operational and surveillance activities], [in:] *Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna [Practical elements of the fight against organised crime and terrorism: modern technologies and operational methods]*, (ed.) Paprzycki L., Rau Z., Warszawa 2009.

Marszał K.: Podsłuch w polskim procesie karnym *de lege lata* i *de lege ferenda* [Tapping in the Polish criminal process *de lege lata* and *de lege ferenda*], [in:] Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok [Penal science problems. Papers presented

to Professor Oktawia Górniok], *Prace Naukowe Uniwersytetu Śląskiego*, Katowice 1996, no. 150.

Ochman P., Spór o pojęcie dokumentu w prawie karnym [Dispute over a concept of a document in criminal law], *Prokuratura i Prawo* 2009, no. 1.

Rau Z., Czynności operacyjno-rozpoznawcze w polskim systemie prawa – działania w kierunku uniwersalnej ustawy [Operational and surveillance actions in the Polish legal system – steps towards a universal statute], [in:] Paprzycki L., Rau Z., *Praktyczne elementy zwalczania przestępczości zorganizowanej i terroryzmu. Nowoczesne technologie i praca operacyjna [Practical elements of combating organised crime and terrorism. Modern technologies and operational work]*, Warszawa 2009.

Sakowicz A., *Opinia o projekcie ustawy o czynnościach operacyjno-rozpoznawczych [Opinion on the bill on operational and surveillance actions]*, the Sejm paper No. 353, www.sejm.gov.pl.

Sobol E. (ed.), *Słownik wyrazów obcych [Dictionary of foreign words]*, Warszawa 2002.

Szumiło-Kulczycka D., *Czynności operacyjno-rozpoznawcze i ich relacje do procesu karnego [Operational and surveillance actions and their relation to the criminal process]*, Warszawa 2012.

Taracha A., *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawnopodatkowe [Operational and surveillance actions. Forensic science and tax law aspects]*, Lublin 2006.

Taras T., *O dopuszczalności i legalności podsłuchu telefonicznego [On admissibility and lawfulness of telephone tapping]*, Annales UMCS, section G, Lublin 1960.

Zalewski D., Melezini A., *Ustawa o kontroli skarbowej. Komentarz praktyczny [Act on fiscal control]*, Warszawa 2015, Legalis, a commentary on Article 36.

COMMUNICATIONS INTERCEPTION AND OBTAINING TELECOMMUNICATIONS BILLINGS BY AUTHORISED ENTITIES WITHIN THEIR OPERATIONAL AND INTELLIGENCE ACTIVITIES IN POLAND

Summary

The article focuses on the issue of communications interception and obtaining telecommunications billings by authorised entities, e.g. the Police, within their operational and surveillance activities. In Poland, apart from courts and the prosecution service, these entities are authorised to collect this information. Their entitlements are laid down in statutes regulating their functioning. The Constitutional Tribunal of the Republic of Poland in its ruling of 30 July 2014, K 23/11, stated that a series of provisions regulating operational and surveillance activities are in contradiction to the Constitution. The amendments to these acts take into account the ruling of the Constitutional Tribunal. The article discusses the changes and presents the new solutions.

Key words: *operational and surveillance activities*, *operational control*, *authorised entities*, *correspondence*, *communications*, *telecommunications billings*

POZYSKIWANIE KORESPONDENCJI, PRZESYŁEK I WYKAZU POŁĄCZEŃ W RAMACH CZYNNOŚCI OPERACYJNO-ROZPOZNAWCZYCH UPRAWNIONYCH PODMIOTÓW W POLSCE

Streszczenie

Przedmiotem artykułu jest problematyka pozyskiwania przez tzw. uprawnione podmioty, np. Policję, w ramach czynności operacyjno-rozpoznawczych, korespondencji, przesyłek i wykazu połączeń. W Polsce, poza sądami i prokuraturą, podmioty te są uprawnione do pozyskiwania tego rodzaju informacji. Uprawnienia wskazanych podmiotów są przewidziane w ustawach szczególnych, które regulują ich działalność. W wyroku z dnia 30 lipca 2014 r., sygn. K 23/11, polski Trybunał Konstytucyjny stwierdził niezgodność szeregu przepisów regulujących czynności operacyjno-rozpoznawcze z postanowieniami polskiej Konstytucji. Nowela ustaw regulujących te uprawnienia uwzględnia wyrok Trybunału Konstytucyjnego. Artykuł omawia zmiany i przedstawia nowe uregulowania w tym zakresie.

Słowa kluczowe: *czynności operacyjno-rozpoznawcze*, *kontrola operacyjna*, *uprawnione podmioty*, *korespondencja*, *przesyłki*, *wykaz połączeń telekomunikacyjnych*

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UNCONVENTIONAL WAYS OF ADJUDICATION IN CRIMINAL CASES WITHIN THE SOLUTIONS IN THE POLISH TRIAL

MARIA ROGACKA-RZEWNICKA

Criminal proceeding, because of the geographical location of Poland and the influence of the Continental legal culture resulting from it, has a relatively unambiguous juridical identity. Still in the times of development of the inquisitorial-adversarial formula for a trial (18th century), the basic assumptions of which are still valid although in a modified form, we were the state where the European ideal models of a new order in criminal law were not only well-known ones but also propagated and implemented within the bounds of possibility. The dialectics of history with its fundamental assumption of continuous transformation of reality was reflected in an extremely tragic way in Poland in the late 18th century. When other nations were developing and strengthening their states in the spirit of the Enlightenment at that time, Poland was losing its independence, thus the ideology of that time was an argument in striving for the state's integrity and independence rather than a programme of political and social transformation. The Enlightenment calls for rationalism and utilitarianism were of minor significance in the First Polish Republic while the idealistic concepts were relatively very important. They were reflected in the broadly exposed idea of "making the nation happy". The motive was a lead thread of "Zbiór praw sądowych" [Collection of court cases] by A. Zamoyski and its main thesis was that it is necessary to make laws "which should aim at the community's happiness, which should tie all the estates of the realm with a knot of common good"[1]. The codification initiatives emphasised the significance of moral arguments. H. Kołłątaj, during the Sejm session on 28 June 1791, said: "It is necessary (…) to pass moral acts that, through continuous education and uniform customs, would establish Poles' character, which is unstable, imitative and eager to change. Would you like the once established character to be spoiled? It is necessary to provide Polish nation with

[1] *Zbiór praw sądowych przez ex kanclerza Andrzeja Zamoyskiego ordynata Zamoyskiego ułożony w roku 1778 drukiem ogłoszony [Collection of court laws developed by then-Chancellor Andrzej Zamoyski and published in 1778]*, Warszawa 1874, s. 5.

civil and criminal laws so that the former diligently safeguard justice among the citizens and the latter prevent crime"[2]. Apart from patriotic and civic motivation, there were prestigious motives for introducing reforms in the spirit of the Enlightenment connected with the honourable participation in the Republic of Letters. This meant confirmation of belonging to the European community, which was in Poland possible thanks to the Enlightenment and very well educated king Stanisław August Poniatowski[3]. At the end of the 18th century, despite an extremely unfavourable political situation, several legislative reforms were introduced in the Polish Republic, which reflect new political and social ideas. Their range and developed theories make historians speak of Polish Enlightenment, which exposes, apart from general proposals, ideas taking into account the specificity of our situation. The reforms were made in criminal law and resulted in many achievements in the field. Poland was one of the first countries in the world that abolished the use of torture in judicial proceeding and penalisation of sorcery (October 1776)[4]. It was done earlier only in England (1629), Prussia (1629) and Austria (spring 1776). William Coxe, a famous English writer, wrote about this event: "as expressive of his majesty's right judgement as of his benevolence. It is an infinite satisfaction to see the rights of humanity extending themselves in countries, where they had been but little known; a circumstance that must cast a great reflection on those nations which, like France, have attained the highest pitch of civilisation, and yet retain the useless and barbarian custom of torture"[5].

The movement for humanitarian criminal law had many powerful promoters in Poland, e.g. Sebastian Czochron, Tomasz Kuźmirski, Teodor Ostrowski, Józef Weyssenhoff, Józef Szymanowski, Teodor Waga, Stanisław Konarski, Andrzej Stanisław Załuski, Stanisław Lubomirski, Franciszek Ksawery Dmochowski and others. A famous work of the time "Crimes and punishments" by Cesare Beccaria (1864) was well known to Polish representatives of the humanitarian movement. It was also taught at our universities (in the 18th century, 18 copies of the book were in the library of the Jagiellonian University and 14 copies in the library of the University of Warsaw).

The conclusion from the first part of the discussion is that Poland, always aspiring to belong to the western civilisation, in the late 18th century adopted the most significant achievements of juristic culture of the European continent to its legal order. The partitions of Poland precluded the implementation of the initiated reforms but a voluntary and complete return to those standards took place when Poland regained its independence in 1918. The dilemmas resulting from our geographical location have

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[2] Mowa Hugona Kołłątaja na sesji sejmowej dnia 28.06.1791 [Hugon Kołłątaj's speech at the Sejm session on 28 June 1791], [in:] *Kodeks Stanisława Augusta. Zbiór dokumentów [Stanisław August's Code: Collection of documents]*, (ed.) S. Borowski, Warszawa 1938, p. 9.

[3] A. Zahorski, *Spór o Stanisława Augusta [Dispute over Stanisław August]*, Warszawa 1988, p. 7 and subsequent ones.

[4] The event was commemorated by coining a special medal with the following inscription: Mękami wyciągać zawsze wątpliwe wyznania zbrodni, pociągać do sądu obwinionych o rzekome związki z mocą szatańską zakazał sejm roku 1776 na wniosek króla Stanisława Augusta [To obtain doubtful confession by means of tortures, to take to the court accused of alleged contacts with Satan, the parliament abolished it in 1776 by King Stanisław August's suggestion].

[5] W. Coxe, *Podróż po Polsce [Travels into Poland]*, [in:] *Polska stanisławowska w oczach cudzoziemców [Stanisław August Poniatowski's Poland through the eyes of foreigners]*, Polish translation by E. Suchodolska, Warszawa 1963, vol. 1, p. 673.

never been connected with legal principles but only with a particular choice between the solutions preferred by the German or French legal doctrines. Close proximity of Germany was a natural factor in the perception of solutions developed there, which is reflected especially in substantive criminal law. German concept of criminal law dominated criminal Code of 1932, and French legal thought had greater influence on the content of Criminal Procedure Code of 1928. The interwar period was famous for many achievements in the field of law, to which many distinguished lawyers contributed. That is why the legislation of those times is believed to be a model for our times.

The above-mentioned dialectic variability of reality causes natural changes in law. Criminal proceeding is affected more often and to a greater extent than other fields because of the necessity of functional and pragmatic adjustment of its solutions to current conditions. In the 1990s, this phenomenon was greater than all the legal change processes before. It coincided with political transformation in Poland, however, was not a domain of only our reality. There are many references to its presentation but – in compliance with the title – I will focus on unconventional ways of adjudicating in criminal cases. Departure from classical forms of justice administration existing in the continental system started on a large scale in Poland when the Criminal Procedure Code of 6 June 1997 entered into force, i.e. on 1 September 1998[6]. It must be added that ideological arguments for new solutions had occurred many years before but formal conditions for the introduction of structural changes came into being with the new code. This circumstance is worth mentioning because in other states (e.g. Germany) real changes in the way of adjudicating in criminal cases preceded normative changes envisaging such a possibility. The application of plea agreements, which appeared in the procedural practice of German courts long before 2009, when *Strafprozessordnung* was admitted, is an example. The processes took place in Poland concurrently. They were based on the concept of restorative justice presented as an alternative to the classical idea of criminal law, i.e. the idea of retributive justice. Restorative justice has its roots in the Anglo-Saxon type of trial and this original model resulted in the development of criminal procedure towards the solutions of common law in many countries on the Continent. The adoption of some solutions of that model has not meant undermining the ethnic, continental principles of the criminal procedure in those countries, however, non-uniform share of culturally foreign, Anglo-Saxon juristic order in particular states caused the development of individual regulatory differences.

Two most important spheres of criminal process transformation can be distinguished. One concerns types of applicable procedures, the other – means of justice administration in criminal cases. In the former, the factor that recently influenced the change of the character of the criminal procedure to the greatest extent was the increase in the significance of the principle of contradictoriness in the traditionally inquisitorial-adversarial systems. As S. Waltoś writes, the history of criminal process describes competition between the principle of contradictoriness and the principle of the inquisitorial (investigative) system[7]. Poland is an example showing that changes within

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[6] Journal of Laws No. 88, item 553 with subsequent amendments.

[7] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu [Criminal process: System outline]*, Warszawa 2013, p. 274. For more see: P. Hofmański, Zasada kontradyktoryjności [Principle of contradictoriness], [in:] *System Prawa Karnego Procesowego [System of criminal procedure law]*, Volume III, Part 1

that principle introduced by Act of 27 September 2013[8] influenced the construction of a trial and, as a result, the model of criminal proceeding, especially in the scope of proceeding before a court. While in the majority of continental European states the strengthening of the directive on contradictoriness had a neutral effect on the trial construction, in Poland the effect of the reform went beyond the framework of the former system[9].

It must be noticed that the former regulatory model of the principle of contradictoriness, being in force before 1 July 2015, took into account all initial structural assumptions, especially Poland's belonging to the area of the continental legal culture. One of its basic indicators is a model of getting to the truth in the criminal proceeding different from that in the common law system. Partial decisions, on which the overall standard of the implementation of the principle of contradictoriness depends, were adequately incorporated into the framework, taking into account all the most important directives. They also took into consideration all the most important attributes of the principle, especially those connected with the implementation of the right to defence and partially also many other procedural entitlements. A series of amendments to Criminal Procedure Code have served that aim directly or indirectly since it entered into force in 1998. Some of them resulted from the adoption of the judgements of the European Court of Human Rights and the Constitutional Tribunal. The above-mentioned statements emphasised that in the period directly before the amendment to the CPC of 27 September 2015 entered into force, the principle of contradictoriness with respect to all its solutions was a coherent element of our (continental) legal order construction. It was expressed in binding guarantees ensuring the parties to the trial equal procedural position in it. The entitlements constituting the content of the principle of contradictoriness included first of all the right to defence, openness of the trial, access to information on available measures and other competences. Over the last years, most reformatory actions in the field of criminal process have focused on strengthening those directives, which resulted in the increased role of the principle of contradictoriness in the court proceeding. The system functioned in conjunction with the assumption that a court plays an active role in the jurisdictive proceeding. Pursuant to the continental concept of a trial, a court is eventually responsible for the outcome of the proceeding. In this model, the principle of factual truth is connected with the court's entitlement to actively try to discover it. In order to do this, a judge *ex officio* can examine evidence and interfere in the

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Zasady procesu karnego [Principles of criminal process], (ed.) P. Wiliński and P. Hofmański, Warszawa 2013, p. 656 and subsequent ones.

[8] Journal of Laws, item 1247.

[9] M. Rogacka-Rzewnicka, Nowa kultura poszukiwania prawdy w procesie karnym w świetle nowelizacji kodeksu postępowania karnego na podstawie ustawy z 27 września 2013 roku. Perspektywa systemowa [New culture of seeking truth in the criminal proceeding in the light of the amendment to the Criminal Procedure Code under the Act of 27 September 2013: System-based perspective], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal process in the light of the amendment of 2013. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk, Warszawa 2014, pp. 107–124; *ibid*., Zagadnienia uwarunkowań systemowych w realizacji zasady kontradyktoryjności w postępowaniu karnym [Issues of systemic conditions in the implementation of the principle of contradictoriness in criminal proceeding], [in:] *Przyszłość prokuratury po zmianach w 2015 r. Praca zbiorowa [Future of prosecution service after the amendment of 2015. Collective work]*, Warszawa 2015, p. 23.

evidentiary proceeding in other ways. Simultaneous binding of the principle of parties' active participation and of the inquisitorial system, giving a court a possibility of active involvement in the course of a trial, constitutes a dominant element of the characteristic of the continental type of criminal proceeding. The differences between particular states consist in the position of a cursor on the line of the two parallel assumptions. The principle of contradictoriness has a significant and exposed position in this model. It is difficult to question the thesis that contradictoriness serves discovering the truth best. S. Waltoś expressed this thought in the following way: "What can guarantee finding truthful, factual evidence more efficiently than the application of the Roman directive *audiatur et altera pars*, which is the essence of the principle of contradictoriness?"[10]. At the same time, it must be added that it is not expressed *expressis verbis* in the Criminal Procedure Code, although there is room in it designed for many key principles of criminal proceeding. The change in this direction was not considered even in connection with the latest reform, which exposed the importance of the principle of contradictoriness in the Polish criminal process, making it an engine of serious legal change that started on 1 July 2015.

It must be emphasised that strengthening the contradictoriness of a trial by the extension of its partial attributes has been a general European trend of recent years. The only exception was the Italian criminal process, in which the Anglo-Saxon model of contradictoriness was initially adopted but then the experiment was gradually abandoned[11]. The indicated direction of change dominating in continental Europe did not mean *a limine* simultaneous lessening of the role of a court. In the model adopted on the Continent, the functional relation between contradictoriness and the inquisitorial system did not consist in exclusion but supplementary co-existence of the two principles. In Poland, this model pattern was in force until 1 July 2015. The Act of 27 September 2013, which transformed the former system of classical continental framework of contradictoriness into a concept of Anglo-Saxon type of contradictoriness, introduced a radical change[12]. Article 167 § 1 CPC is mostly responsible for that change. The provision stipulates: "in the proceeding before a court, which was initiated on a party's initiative, evidence after its admission by a court president, a bench chair or a court, is examined by parties. In case a party

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[10] S. Waltoś, Kontradyktoryjność a prawda materialna [Contradictoriness and factual truth], [in:] *Kontradyktoryjność w polskim procesie karnym [Contradictoriness in the Polish criminal process]*, (ed.) P. Wiliński, Warszawa 2013, p. 39; also see R. Stefański, Inicjatywa dowodowa w znowelizowanym kodeksie postępowania karnego [Evidentiary initiative in the amended Criminal Procedure Code], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku… [Polish criminal process in the light of the amendment of 2013…]*, p. 175.

[11] M. Warchoł, Włoski proces karny [Italian criminal process], [in:] *System Prawa Karnego Procesowego [Criminal press law system]*, Volume II, *Proces karny-rozwiązania modelowe w ujęciu prawnoporównawczym [Criminal process – model solutions in legal comparison]*, (ed.) P. Kruszyński and P. Hofmański, Warszawa 2014, pp. 541, 544 and 619–622.

[12] M. Błoński, B. Najman, Inicjatywa dowodowa przed sądem pierwszej instancji w świetle zasady kontradyktoryjności i szybkości postępowania. Wybrane zagadnienia [Evidentiary initiative before a court of first-instance in the light of the principle of contradictoriness and fast proceeding: Selected issues], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku… [Polish criminal process in the light of the amendment of 2013...]*, Inicjatywa dowodowa przed sądem pierwszej instancji w świetle zasady kontradyktoryjności i szybkości postępowania. Wybrane zagadnienia, [in:] *Polski proces karny w świetle nowelizacji z 2013 roku… [Polish criminal process in the light of the amendment of 2013...]*, pp. 185–186.

filing an evidentiary motion has not appeared before a court, and in exceptional situations justified by extraordinary circumstances, a court may admit evidence and examine it *ex officio*". The regulation substituted for the former wording of Article 167 CPC, pursuant to which "evidence shall be taken upon a motion of the parties, an entity specified in Article 416 or *ex officio*" and caused a change in numerous regulations structurally and functionally connected with the discussed norm. Currently, the Polish Criminal Procedure Code assumes the broadest range of implementation of the principle of contradictoriness in comparison with the remaining legislatures of the continental legal order[13]. A new amendment has already been prepared in opposition to this direction. It envisages an entire return to the legal solutions for a criminal process that were in force before 1 July 2015. The reform is planned to enter into force on 1 April 2016, which in case of the principle of contradictoriness means restoration of its former, traditional form. This will mean that the short, less than yearly experience of the functioning of the new model of court proceeding in Poland, which is close to the Anglo-Saxon one, will not provide arguments for the assessment of change connected with the concept of contradictoriness. Although this aspect of the reform will most probably be just an episode, the problem of legal solutions' compliance with the conditions of the system in which they function should each time evoke reflection in the course of undertaken legislative actions. The system environment unwittingly determines specific choices in the field of legal solutions. It is a specific determinant of directions and scopes of legislators' freedom. It is not about determinants a priori delimiting free choice but about respecting the principles of legal order, the element of which is law as the entirety of its achievements and conditions. The continental model of law and the system of common law constitute the most characteristic and symptomatic juristic cultures of the contemporary world. The actual process of bringing the solutions of these two models closer is feasible and may be efficient only in particular frameworks. Within the scope of deeper structural conditions, its success is not obvious. Undoubtedly, it does not provide irrebuttable examples. The adoption of typical Anglo-Saxon legal institutions in the continental European states took place with modifications, like in case of a jury, or was a failure, like in case of reception of full or very broad contradictoriness. There is a more complex background to these consequences and many diagnoses have been formulated in jurisprudence. Based on them one can state that the accusatory process is typical of societies with a particular sociological and cultural profile. This classification refers to the anthropological concept of societies by an outstanding French philosopher of Greek origin, Cornelius Castoriadis, although, because of obvious reasons, it cannot be thoroughly discussed in this article. According to M. Weber, on the other hand, the appellate model is typical of societies devoted to individualism and autonomy of individuals' will and marking success in rivalry with others. These qualities are commonly identified with states belonging to the area of common law[14]. M. Foucault, A. Garapon and J. Papadopulos conducted interesting analyses of differences between Anglo-Saxon and continental systems from the same sociological and cultural perspective,

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[13] For more see: M. Rogacka-Rzewnicka, *Zagadnienia uwarunkowań systemowych… [Issues of systemic conditions…]*, p. 23 and subsequent ones.

[14] A. Mittone, La défense pénale en Italie, [in:] *La défense pénale, Actes du XIXème congrès de l"Association Française de Droit Pénal, Lyon*, 19-20-21 November 2009, Revue Pénitentiare et de Droit Pénal, Numero spécial 2010, p. 242.

which result in the provision of grounds for other methods of getting to the truth in a criminal process[15]. The diagnosis of a failure of the idea to expand the principle of contradictoriness in the Italian criminal process presented by A. Mittone in 1988 also confirms it. This author argues that the abandonment of the initial contradictoriness regulation similar to our current solution resulted from limited possibilities of adopting the new system because of totally different cultural features of the Italian society than in Anglo-Saxon ones, e.g. devotion to the idea of solidarity, catholic thought domination or the significance of the concept of non-antagonist conflict resolution[16]. I only signal the problem of non-legal factors participation in the development of global legal solutions, but I recognise its importance to drawing conclusions on the regulation of the principle of contradictoriness in this article.

The example of Italy is especially meaningful due to the fact that after the experiment of the adoption of the formula of contradictoriness to the Criminal Procedure Code of 1988, the formulas of Anglo-Saxon contradictoriness and abandonment of the directive on factual truth, relatively quickly, under the influence of criticism of the model expressed, inter alia, by the Constitutional Court of Italy, a withdrawal from those changes started. Although the above-quoted A. Mittone's statement is simplified, it is a diagnosis of the failure of the initial idea of contradictoriness in the Italian criminal process that is absolutely worth considering. The example should not be ignored in the course of designing the principle of contradictoriness in our Criminal Procedure Code.

The conclusion is that, based on the comparison of the examples of most often analysed legislations, the current normative state of the principle of contradictoriness in the Polish criminal proceeding goes beyond the limits of an average European standard. It assumes integration of this directive with inquisitorial-adversarial conditions for a trial expressed, on the one hand, by regulations allowing parties to exercise contradictory proceeding within their procedural entitlements and, on the other hand, broad possibilities of a court in order to discover the truth, which is essential for subsidiary judgements as well as judgements on the trial subject matter. A growing importance of the principle of contradictoriness of the criminal proceeding observed in other countries in recent years occurs at most as the strengthening of individual procedural guarantees within other procedural principles functionally connected with the directive on contradictoriness. The model of contradictoriness has not been changed anywhere, except Poland, which was the subject of my thorough study in the publications indicated in the footnotes. As it was already mentioned, after the initial introduction of the Anglo-Saxon model of contradictoriness in Italy, it proved to be deficient and infeasible.

Due to the fact that the amended procedure has been in force in Poland for only a few months and a planned temporariness of the current concept of contradictoriness, reaching any conclusions on the functioning of the new solution is neither possible, nor purposeful. Most probably, as far as this part of the regulation is concerned, there will be a revival of the legal solutions that were in force under the Codes of 1928 and 1969.

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[15] For more see: M. Rogacka-Rzewnicka, *Nowa kultura poszukiwania prawdy w procesie karnym… [New culture of seeking truth in the criminal proceeding…]*, pp. 107–124.

[16] A. Mittone, *La défense pénale en Italie…*, p. 242.

With the introduction of the Criminal Procedure Code of 1997, new, not envisaged in the Polish law before, means of a plea bargain occurred[17]. Initially, these were two institutions: conviction without a trial (Article 335 CPC) and conviction based on the motion of the accused to be sentenced without evidentiary proceeding (Article 387 CPC). In both cases, their application was limited to petty misdemeanours (the former measure was applied to misdemeanours carrying imprisonment not exceeding five years, the latter to misdemeanours carrying imprisonment not exceeding eight years). After an initial reservation about the new possibilities of concluding trials and a conservative attitude of the proceeding organs as well as the parties to the proceeding, the significance of these measures quickly increased in the adjudication practice and they gained full approval. In the course of the successive amendments to the Criminal Procedure Code, the limits to a plea bargain were extended and the measure was admitted in more serious criminal cases. Today, there are almost no doubts that the institution is indispensable for appropriate administration of justice. Thanks to a plea bargain application, it was possible to overcome some problems of the Polish system of justice administration, especially those connected with the excessive length of the criminal proceedings. Nowadays, over 50% of criminal cases are concluded based on a plea agreement and, according to the authors of the amendment to the Code passed on 27 September 2013, eventually, it is to reach the level of 80%[18]. The estimate was calculated based on the forecast for new measures of concluding trials to be applied from 1 July 2015 and further extension of the range of the current regulation. It may be assumed that the current scope of admissibility of a plea bargain application is extremely broad. Based on that, a thesis was formulated that the directive on a plea bargain meets the criteria for recognising it as a major principle of the Polish criminal process[19]. The institution of a conviction without a trial (Article 335 CPC) is applicable to all misdemeanours, i.e. all acts carrying a penalty of imprisonment from two to twelve years, and a conviction based on the motion of the accused to be sentenced without evidentiary proceeding (Article 387 CPC) is possible in case of all crimes, including those classified as a felony. Based on that, it can be noticed that the idea of a plea bargain in Poland went beyond the limits established in the continental legal order. The initial concept of plea agreements assumed their application to petty crimes that are commonly committed, habitually performed by perpetrators, dealt with in a standard way and bothersome

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[17] There is extremely abundant literature devoted to the issue, including monographs (M. Zbrojewska, *Dobrowolne poddanie się karze w kodeksie postępowania karnego [Motion of the accused to be sentenced without trial laid down in the Criminal Procedure Code]*, Białystok 2002; E. Kruk, *Wyrok skazujący sądu pierwszej instancji w trybie art. 335 k.p.k. [First-instance court sentence based on Article 335 CPC]*, Zakamycze 2005; S. Steinborn, *Porozumienia w polskim procesie karnym [Plea agreements in the Polish criminal process]*, Zakamycze 2005; K. Girdwoyń, *Konsensualny wymiar kary. Instytucje powszechnego procesu karnego [Consensual penalty imposition: Institutions of common criminal process]*, Warszawa 2006).

[18] S. Waltoś, P. Hofmański, *Proces karny*…, s. 640.

[19] P. Wiliński, Zasada konsensualizmu w polskim procesie karnym [Criminal process…], [in:] *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu [Supreme Court Judge Stanisław Zabłocki's jubilee book]*, Warszawa 2014, p. 593 and subsequent ones.

for law enforcement institutions[20]. The conditions for using the plea bargain mode are met in many states and they are reflected in limitations to the scope of statutory penalties prescribed and their individual amount within a given measure. In our Code, the sphere of limitation covers individual premises of admissibility of plea agreements that are strict and obligatory conditions in character. They show some differences as far as the scale of individual plea bargaining measures are concerned, correlated with the specificity of the stage of their application, but common requirements include: lack of doubts concerning the circumstances of a crime commission and the guilt of the perpetrator, a proceeding organ's conviction that, in spite of procedural simplification applied, the objectives of the proceeding will be achieved and the necessity of taking into account the interests of victims that are protected by law.

At the same time, in the situation with big possibilities of unconstrained development of the contents of a judgement, the provisions of the Code do not specify close directives for a court on a penalty imposition in a case conclusion based on a plea agreement. After 1 July 2015, courts possess a wide range of measures deciding on the legal position of the accused in a sentence rendered based on a plea agreement. *Expressis verbis*, it was envisaged in the Criminal Procedure Code that an agreement may also apply to the issue of court proceeding costs to be incurred by the accused. The most important, however, are the means of developing the contents of a judgement that are contained in the substantive criminal law, thanks to which the accused can make use of numerous benefits. Pursuant to Article 60a CC, a court is entitled, regardless of the conditions laid down in Article 60 § 1–4 CC, to apply extraordinary mitigation of a penalty, withdraw from a penalty imposition and impose only a penal measure, forfeiture or a compensation measure, with a reservation that, apart from extraordinary penalty mitigation, other legal concessions to the accused are applicable only when a misdemeanour he committed carries an imprisonment penalty not exceeding five years.

The new measures that entered into force on 1 July 2015 influence the current range of consensual proceeding in criminal cases. They include the institution laid down in Article 338a CPC, which is a specific variant of a conviction based on the motion of the accused to be sentenced without evidentiary proceeding, and a measure laid down in Article 59a CPC, which is called in jurisprudence "restitutive discontinuance". The added provision of Article 338a CPC extends admissibility of a conviction based on the motion of the accused to be sentenced without evidentiary proceeding to the stage before a trial. Until 1 July 2015, such a possibility, pursuant to Article 387 CPC, was envisaged only at the stage of the hearing. The regulation allowing the accused to file a motion to issue a decision convicting him and sentencing to a specified penalty or a penal measure without evidentiary proceedings still before he is notified on the term of a trial is aimed at motivating the accused to file such motions at the earliest stage of the court proceeding. This results in the possibility of faster conclusion of the criminal proceeding, which is also important from the economic point of view. It must be added

[20] M. Rogacka-Rzewnicka, Obrońca i pełnomocnik wobec instytucji dobrowolnego poddania się karze [Counsel for the defence and proxy vs. the institution of a motion to be sentences without evidentiary proceeding], [in:] *Obrońca i pełnomocnik… [Counsel for the defence and proxy…]*, p. 258 and subsequent ones.

that the institution regulated in Article 338a CPC is applicable only to misdemeanours. In case of a felony, its application has been excluded.

A measure laid down in Article 59a CC is a typical manifestation of the consensual and restitutive direction in criminal law[21]. The provision stipulates: "If, before the first-instance hearing starts, the perpetrator who has not been convicted for a deliberate crime with the use of violence before, rectified the damage or compensated victims for doing wrong, a court shall, on the victim's motion, discontinue the criminal proceeding with regard to a misdemeanour carrying imprisonment not exceeding three years and a misdemeanour against property carrying imprisonment not exceeding five years as well as a misdemeanour specified in Article 157 § 1 (§ 1). In the event of a crime committed to the detriment of more than one victim, the condition for the application of the institution is rectification of the damage and compensation for doing wrong concerning all victims (§ 2). Pursuant to § 3 of the provision, a special circumstance giving grounds for the assumption that the decision did not comply with the need to achieve the objectives of a penalty is an obstacle to discontinuance.

The consensual trend is one of the most characteristic manifestations of the Polish criminal law transformation. Poland resembles other states in this field, with earlier reservations. The development of consensual attitude resulted not only in decrease in the importance of a classical trial and structural transformation of the criminal procedure, but also contributed to the change in criminal process philosophy. This extremely interesting motif may only be signalled but certainly deserves a thorough discussion.

It must be emphasised that when the Act was passed on 27 September 2013 and, to some extent, also when another Act amending criminal law was passed on 20 February 2015, it was not possible to predict that the multi-dimensional change in the Polish criminal procedure that was to redirect the principle of contradictoriness of criminal proceeding from the former continental form towards the Anglo-Saxon model will prove to be ephemeral to such an extent that nowadays we can only speak of it as a theoretical legal experiment. The new model of criminal proceeding being in force from 1 July 2015 does not allow for formulating any conclusions on the effects of the reform. When it was at the first stage of its implementation, it was almost certain that there would be a withdrawal from its directional assumption of strengthening contradictoriness of a trial as well as other solutions. The official bill to amend the Criminal Procedure Code and some other acts was ready on 23 December 2015. It is to enter into force on 1 April 2016.

The latest reform of the criminal procedure exerts direct influence on legal solutions within the subject matter of this article. Although the amendment has not been settled yet, it is very probable to be implemented, thus it is worth presenting, especially with respect to the part referring to the two unconventional instruments of resolving criminal cases that are discussed here.

As far as contradictoriness is concerned, an almost full revival of the solutions constituting determinants of this principle and its normative surrounding is envisaged. If everything did not take place in the circumstances of chaos and a legislative sinusoid, the change itself might be easily explained and rational arguments for it found. They

[21] M. Królikowski, R. Zawłocki, *Prawo karne [Criminal law]*, C.H. Beck 2015, pp. 421–422.

are, inter alia, motives serving as grounds for developing criticism of the current form of the principle of contradictoriness. The above-mentioned most important argument of cultural and structural alienation of the Anglo-Saxon model of contradictoriness in countries representing the continental legal order requires exposing again. Therefore, the same reasons that were decisive for a polemic attitude towards the currently binding formula of contradictoriness influence the assessment of the latest bill with respect to the scope of revival of the former framework of functioning of the principle in the criminal process. Another task is to improve the conditions for the implementation of a contradictory trial in order to eliminate the deficiencies of the model that was in force before 1 July 2015, which were grounds for radical legal amendments to the Act of 27 September 2013.

The bill to change the Criminal Procedure Code of December 2015 envisages the limitation of consensualism in favour of the revival of the classical model of criminal cases resolution. This direction of change, motivated by excessive share of such measures in criminal substantive and procedure law and the resulting infringement of the objective of criminal proceeding, i.e. retribution for the commission of a forbidden act, includes proposals to repeal Article 59a CC, Article 60a CC and Article 338a CPC and to limit the application of Article 387 CPC.

As it was mentioned earlier, unconventional – in comparison with the classical concept of criminal law – procedures and means of response to crime are in general commonly accepted in the contemporary legal systems. Also, in accordance with the former statement, the scale of their application in other states includes a really smaller scope of possibilities with regard to the range of cases as well as sanctions. On the other hand, the legislator's argument of no compliance of this institution with the classical objectives of criminal law is questionable and, first of all, ignores current transformations of measures and forms of response to crime. As a result of postmodernist transformation of common criminal law, global transformations are taking place in this area. In fact, the key issue focuses on rational establishment of the limits for these processes. Looking from this perspective, one must approve of the proposal envisaged in Article 387 CPC to limit the application of a conviction based on a motion of the accused to be sentenced without evidentiary proceeding to crimes carrying imprisonment not exceeding 15 years instead of the present possibility of applying this mode even to a felony. On the other hand, other proposals to limit consensual modes are at least controversial. Admissibility of a motion of the accused to be sentenced without evidentiary proceeding filed at the earliest stage of the court proceeding under the provision of Article 338a CPC was excluded on a priori grounds. Such a possibility may be considered to be a desired one from the point of view of process economics if a case does not raise factual and legal doubts. The proposal to repeal Article 59a CC is not convincing, either, especially as it is in the situation when the regulation, undoubtedly with a certain potential, basically had no opportunity to be applied in practice. The proposal to repeal Article 60a CC is assessed similarly. The reason for giving up more lenient penalties accompanying plea agreements is not fully understandable. An issue that is exposed in the latest proposals to repeal Article 59a CC, Article 60a CC and Article 338a CPC is their non-compliance with the legislator's concept of criminal law. It seems that in the exposition of such an assessment, it is necessary to take into account various conditions of functioning of the

contemporary criminal process, including feasibility of the designed system based on calculation and empiric verification. It is recognised that the development of procedural consesualism to a great extent contributed to solving many problems connected with justice administration in criminal cases, which causes that this circumstance should not be ignored in the course of change development.

Summing up, it must be stated that the main theme of the article, apart from the issue strictly constituting its contents, discusses subsidiary issues, which hamper firmness of assessment and conclusions. This difficulty results first of all from instability or even unsteadiness of the criminal proceeding system in Poland. Since the Criminal Procedure Code was passed in 1997, stability in the sphere has not been achieved, and the last period can be called real legislative aberration. This state prevents a diagnosis of current assumptions and principles of our procedure. What is worst, however, is that the conducted legislative experiments have real influence on real people's lives.

BIBLIOGRAPHY

Błoński M., Najman B., Inicjatywa dowodowa przed sądem pierwszej instancji w świetle zasady kontradyktoryjności i szybkości postępowania. Wybrane zagadnienia [Evidentiary initiatice before a court of first-instance in the light of the principle of contradictoriness and fast proceeding: Selected issues], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal process in the light of the amendment of 2013. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk, Warszawa 2014.

Coxe W., Podróż po Polsce [Travels into Poland], [in:] *Polska stanisławowska w oczach cudzoziemców [Stanisław August Poniatowski's Poland through the eyes of foreigners]*, Polish translation by E. Suchodolska, Warszawa 1963, vol. 1.

Girdwoyń K., *Konsensualny wymiar kary. Instytucje powszechnego procesu karnego [Consensual penalty imposition: Institutions of common criminal process]*, Warszawa 2006.

Hofmański P., Zasada kontradyktoryjności [Principle of contradictoriness], [in:] *System Prawa Karnego Procesowego [System of criminal procedure law]*, Volume III, Part 1: *Zasady procesu karnego [Principles of criminal process]*, (ed.) P. Wiliński and P. Hofmański, Warszawa 2013.

Królikowski M., Zawłocki R., *Prawo karne [Criminal law]*, C.H. Beck 2015.

Kruk E., *Wyrok skazujący sądu pierwszej instancji w trybie art. 335 k.p.k. [First-instance court sentence based on Article 335 CPC]*, Zakamycze 2005.

Lach A., Obrońca i pełnomocnik wobec instytucji skazania bez rozprawy [Counsel for the defence and proxy vs. the institution of conviction without trial], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in criminal proceeding after 1 July 2015: Guide to the amendments]*, (ed.) P. Wiliński, Warszawa 2015.

Mittone A., La défense pénale en Italie, [in:] *La défense pénale, Actes du XIXème congrès de l"Association Française de Droit Pénal, Lyon*, 19-20-21 novembre 2009, Revue Pénitentiare et de Droit Pénal, Numero spécial 2010.

Mowa Hugona Kołłątaja na sesji sejmowej dnia 28.06.1791[Huggon Kołłątaj's speech at the Sejm session on 28 June 1791], [in:] *Kodeks Stanisława Augusta. Zbiór dokumentów [Stanisław August's Code: Collection of documents]*, (ed.) S. Borowski, Warszawa 1938.

Rogacka-Rzewnicka M., Nowa kultura poszukiwania prawdy w procesie karnym w świetle nowelizacji kodeksu postępowania karnego na podstawie ustawy z 27 września 2013 roku. Perspektywa systemowa [New culture of seeking truth in the criminal proceeding in the light of the amendment to the Criminal Procedure Code under the Act of 27 September 2013: System-based perspective], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal process in the light of the amendment of 2013. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk, Warszawa 2014.

Rogacka-Rzewnicka M., Obrońca i pełnomocnik wobec instytucji dobrowolnego poddania się karze [Counsel for the defence and proxy vs. the institution of a motion to be sentences without evidentiary proceeding], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach Counsel for the defence and proxy in a criminal proceeding after 1 July 2015: Guide to the amendments]*, (ed.) P. Wiliński, Warszawa 2015.

Rogacka-Rzewnicka M., Zagadnienia uwarunkowań systemowych w realizacji zasady kontradyktoryjności w postępowaniu karnym [Issues of systemic conditions in the implementation of the principle of contradictoriness in criminal proceeding], [in:] *Przyszłość prokuratury po zmianach w 2015 r. Praca zbiorowa [Future of prosecution service after the amendment of 2015. Collective work]*, Warszawa 2015.

Stefański R., Inicjatywa dowodowa w znowelizowanym kodeksie postępowania karnego [Evidentiary initiative in the amended Criminal Procedure Code], [in:] *Polski proces karny w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal process in the light of the amendment of 2013. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk, Warszawa 2014.

Steinborn S., *Porozumienia w polskim procesie karnym [Plea agreements in the Polish criminal process]*, Zakamycze 2005;

Waltoś S., Kontradyktoryjność a prawda materialna [Contradictoriness and factual truth], [in:] *Kontradyktoryjność w polskim procesie karnym [Contradictoriness in the Polish criminal process]*, (ed.) P. Wiliński, Warszawa 2013.

Waltoś S., Hofmański P., *Proces karny. Zarys systemu [Criminal process: System outline]*, Warszawa 2013.

Warchoł M., Włoski proces karny [Italian criminal process], [in:] *System Prawa Karnego Procesowego [Criminal press law system],* Volume II *Proces karny-rozwiązania modelowe w ujęciu prawnoporównawczym [Criminal process – model solutions in legal comparison]*, (ed.) P. Kruszyński and P. Hofmański, Warszawa 2014.

Wiliński P., Zasada konsensualizmu w polskim procesie karnym [Consensual principle in the Polish criminal process], [in:] Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego *Stanisławowi Zabłockiemu [Supreme Court Judge Stanisław Zabłocki's jubilee book]*, Warszawa 2014.

Zahorski A., *Spór o Stanisława Augusta [Dispute over Stanisław August]*, Warszawa 1988.

Zbiór praw sądowych przez ex kanclerza Andrzeja Zamoyskiego ordynata Zamoyskiego ułożony w roku 1778 drukiem ogłoszony [Collection of court laws developed by then-Chancellor Andrzej Zamoyski and published in 1778], Warszawa 1874.

Zbrojewska M., *Dobrowolne poddanie się karze w kodeksie postępowania karnego [Motion of the accused to be sentenced without trial laid down in the Criminal Procedure Code]*, Białystok 2002.

UNCONVENTIONAL WAYS OF ADJUDICATION IN CRIMINAL CASES WITHIN THE SOLUTIONS IN THE POLISH TRIAL

Summary

The article raises the issue of transformation of the ways of criminal adjudication and the use of various means of response to crime in the context of general statutory trends and specific solutions in the Polish criminal proceeding. The issues selected from the multiplicity and variety of potential research perspectives of the subject are the new form of the principle of contradictoriness and post-classic measures of justice administration in criminal cases. The legislative actions undertaken recently with regard to criminal proceeding are a common background of these issues.

Key words: *criminal process*, *trial*, *directions of transformation*, *principle of contradictoriness*, *plea agreements/bargains*

ZAGADNIENIE NIEKONWENCJONALNYCH SPOSOBÓW ROZSTRZYGANIA SPRAW KARNYCH W ROZWIĄZANIACH POLSKIEGO PROCESU KARNEGO

Streszczenie

Niniejsze opracowanie podejmuje zagadnienie transformacji sposobów rozstrzygania spraw karnych oraz stosowanych środków reakcji na popełniane przestępstwa w aspekcie ogólnych trendów ustawodawczych oraz specyficznych rozwiązań polskiego postępowania karnego. Pośród wielości i różnorodności możliwych perspektyw badawczych tej problematyki wybrano i bliżej omówiono nowy kształt zasady kontradyktoryjności oraz postklasyczne środki realizacji wymiaru sprawiedliwości w sprawach karnych. Wspólnym tłem tych zagadnień są działania ustawodawcze w sferze procesu karnego, podejmowane w ostatnim czasie.

Słowa kluczowe: *proces karny*, *kierunki transformacji*, *zasada kontradyktoryjności*, *porozumienia procesowe*

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PUBLIC PROSECUTOR'S ACTIONS DURING A RECESS OR AN ADJOURNMENT IN THE MAIN TRIAL

JERZY SKORUPKA

1. The provision of Article 404a CPC specifying public prosecutor's actions during a recess or an adjournment in the main trial was added based on Article 5 (28) of the Act of 20 February 2015[1] and entered into force on 1 July 2015. In legal literature and professional debates, the provision is interpreted in various ways, which is important not only for the doctrine of criminal procedure law and appropriate understanding of the provision but especially for its appropriate application in practice. Major arguments result from the concept of "evidence" and "actions", which a public prosecutor may perform during a recess or an adjournment of the trial as well as the term "actions reserved for the court's jurisdiction". Doubts about the meaning of the above-mentioned terms probably result from the fact that the statement of reasons for the government Bill of 20 February 2015 lacks the legislator's stand on the objectives of the introduction of Article 404a and its meaning. The present article is an attempt to eliminate interpretational doubts by explaining the concepts in question.

2. At first, it is necessary to quote an earlier statement concerning the discussed provision. Having in mind a big discrepancy between the expressed opinions and the addition of the provision to the Criminal Procedure Code, and, as a result, a lack of earlier comments and court judgements as well as the significance for the practice of its application, big fragments of criminal law doctrine representatives' statements will be quoted.

At the stage of legislative proceeding, in his legal opinion, A. Sakowicz approves of the proposal to add Article 404a CPC, which assumes "a prosecutor will be provided with a possibility of supplementing evidence at the stage of the criminal proceeding". He expresses an opinion that the planned solution provides an opportunity to "supplement

[1] Journal of Laws of 2015, item 396.

evidence collected during the investigation at the stage of judicial proceeding". On the other hand, he criticises the "unlimited objective scope" of evidentiary actions that a public prosecutor can perform during a recess or an adjournment in the trial because "the model of the criminal proceeding (…) from 1 July 2015 will be closer to an adversarial one". Due to that, the author of the opinion proposes "to exclude a public prosecutor's possibility of conducting evidentiary actions after an indictment has been filed because the possibility of conducting them existed during the preparatory proceeding. Only a lack of that possibility would create the possibility of doing that during a judicial proceeding. Otherwise, the borderline between collecting evidence in the preparatory proceeding and a judicial proceeding would be blurred. It is also in conflict with the function the legislator prescribed for the final analysis of the material collected during the preparatory proceeding. This action is strictly connected with the right to defence and means the right of the accused to get acquainted with the material collected in the course of the preparatory proceeding within the limits of justified needs". In conclusion, A Sakowicz expresses an opinion that "the planned Article 404a CPC in an unlimited way provides a prosecutor with an opportunity to supplement evidence collected during the investigation at the stage of a judicial proceeding even in a situation where obtaining specific evidence was possible during the preparatory proceeding".

Thus, A. Sakowicz admits the possibility of performing actions by a prosecutor during a recess or an adjournment in the trial in order to supplement evidence that had been provided in an indictment, with a restriction that these cannot be evidentiary actions that, looking at it objectively, could have been conducted during the preparatory proceeding.

It seems that K. Dąbkiewicz expresses a similar opinion[2]. Namely, that the provision of Article 404a CPC "provides a public prosecutor with legal grounds for undertaking actions *sensu stricte* connected with seeking, at the time of a trial, evidence in order to present it before a court". According to this author, a public prosecutor can conduct procedural activities during a recess or an adjournment in the trial, which "are to lead to obtaining evidence supporting charges formulated in the indictment, especially in a situation when the grounds for them are challenged as a result of active attitude of the accused or his counsel in the course of the evidentiary proceeding". K. Dabkiewicz justifies this opinion with the fact that after 1 July 2015, the accused has an opportunity "to a greater extent than before, to take private steps to collect" evidence and then use it in the course of a trial, which is envisaged in Article 393 § 3 CPC. "If the trial essence is a combat, or a dispute between equal parties, each of them should be equipped with instruments that let it challenge the statements of the opponent. In a situation when the accused presents evidence challenging the theses of the charges against him not earlier than before a court, a public prosecutor cannot be deprived of the right to seek evidence that can confirm his theses and then file a motion to a court to admit that evidence. The only limitation is that the discussed action is reserved to the competence of a court"[3].

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[2] See K. Dąbkiewicz, *Kodeks postępowania karnego. Komentarz do zmian 2015 [Criminal Procedure Code: Commentary on the amendments]*, Warszawa 2015, p. .....

[3] *Ibid*.

Proper interpretation of K. Dąbkiewicz's stand is difficult because, on the one hand, he approves of the possibility of public prosecutor's procedural actions during a recess or an adjournment in the trial in order to obtain evidence in support of charges included in the indictment, and on the other hand, he speaks only about the right to seek evidence and file a motion to a court to admit it. It seems that the author thinks of a situation, in which a public prosecutor has an opportunity to conduct evidentiary activities, e.g. to interview a witness, and then file a motion to examine the witness before a court, and in the event of circumstances laid down in Article 391 § 1CPC, to read the person's interrogation record.

D. Świecki expresses a different opinion[4], namely, that "Article 404a introduces a public prosecutor's entitlement to conduct activities aimed at seeking evidence during the judicial proceeding in order to present it before a court". Discussing the phrase "presenting evidence before a court" used in Article 404a, the author believes that it means evidentiary proceeding before a court, which requires that an evidentiary motion should be filed. The word "evidence" refers not to evidentiary activity but to an evidentiary source that a public prosecutor intends to use before a court[5]. On the other hand, the limitation of the scope of conducted activities in the form of a statement that a public prosecutor's activities are excluded if they are reserved to the competence of a court indicates that the concept of "activities should be referred to such that may be conducted only based on a court's decision and before a court". According to D. Świecki, it refers to evidence provided by witnesses because in the judicial proceeding, direct examination is performed before a court. A court also admits evidence in the form of an expert opinion (Article 194 and 200 CPC), and based on Article 391 § 1 and 1a CPC, witnesses' testimonies provided in writing during the preparatory proceeding or before a court are read during the trial. In the judicial proceeding, a court also performs activities to collect data on the accused laid down in Article 213 and 213 § 1a CPC, as well as orders the conduction of a community inquiry (Article 214 CPC). This means that under Article 404a, a public prosecutor is not entitled to conduct an interrogation and then present its record or a witness's explanation". In D. Świecki's opinion, "there are no barriers to a public prosecutor or the police interviewing a person before proposing them to be examined as witnesses and developing a formal document recording that in order to present it before a court in support of an evidentiary motion". He is also convinced that this is why "the procedural situation of a public prosecutor and other parties, which after the amendment to Article 393 § 3 CPC are entitled to collect the so-called private evidence" has become equal. However, as "obtaining real evidence and private and official documents is not restricted to the competence of a court, a public prosecutor may seek and present this evidence before a court. Based on the discussed provision, a public prosecutor may perform activities aimed at establishing whether it is possible to conduct a certain evidentiary proceeding, e.g. establish a witness's place of residence or whether an expert will be able to develop

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[4] See D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Volume I, Warszawa 2015, p. 1047.

[5] *Ibid*.

an opinion on a complicated case. Within the scope of these actions, a prosecutor may request that the police conduct them"[6].

As far as the types of the activities that a public prosecutor may perform during a recess or an adjournment in the trial are concerned, R. Ponikowski[7] expresses the furthest reaching opinion, according to which a public prosecutor cannot perform any evidentiary activities during that period. He justifies this opinion stating: „the amended Criminal Procedure Code does not change model principles specifying the stages of the proceeding and establishing *dominus litis* of each of them. Since the start of a trial before a court, a court is the host of the trial (…). An evidentiary statute of repose has not been introduced either, thus the parties to the proceeding, including a public prosecutor, may at any stage of the trial, until its end (even at the stage of final speeches) propose evidentiary motions, the grounds of which have to be assessed by a court". According to R. Ponikowski, in compliance with Article 404a CPC, "a prosecutor will be entitled not only to prepare a motion to a court to examine evidence but also to consider the possibility of examining a particular type of evidence and the possibility of finding and bringing it to the trial and undertaking other such actions (except actions restricted to the competence of a court), with a possibility of requesting that the police perform the activities. The final result of the activities, however, will be a prosecutor's motion to a court to admit evidence and examine it before a court"[8].

3. The quoted statements made by the representatives of the criminal procedure law doctrine indicate that the possibility of performing evidentiary activities by a public prosecutor during a recess or an adjournment in the trial is justified by an adversarial form of a court proceeding and providing the accused with the right to seek evidence and present it before a court in order to challenge the charges in the indictment. It must be noticed, however, that the provision of Article 393 § 3 CPC does not constitute grounds for the accused to perform evidentiary activities aimed at obtaining a private document developed beyond the scope of the criminal proceeding. The accused cannot seize an object (a document) specified in Article 217 § 1 CPC and search a person or premises under Article 219 § 1 CPC in order to find such a document, not to speak about interrogating a witness. The provision of Article 393 § 3 CPC stipulates grounds only to read a private document developed beyond the scope of the proceeding, which means filing an adequate motion to admit evidence and examine it by a party in accordance with Article 167 § 1 CPC. Being in possession of a private document or knowing where it is, the accused may file a motion to examine the evidence resulting from the document, specifying the source and indicating circumstances (the evidentiary thesis) that the evidence is supposed to confirm. Thus, if the provision of Article 404a CPC is to constitute an equal procedural situation of a public prosecutor and the accused in an adversarial judicial proceeding, one of the parties should not be given broader entitlements than the other. If the accused is not entitled to perform evidentiary activities in the course of a trial, a public prosecutor should not have this right either.

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[6] *Ibid*.

[7] See R. Ponikowski, [in:] J. Skorupka (ed.) *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2015, p. 1035.

[8] *Ibid*.

Otherwise, it would result in a violation of the principle of an adversarial process in its basic aspect reflected in parties' equal rights and possession of the same measures of "trial by combat". Because of that, the opinion that the provision of Article 404a CPC constitutes grounds for performing evidentiary activities "undermining evidence that negates charges" during a recess or an adjournment in the trial is erroneous. The directive on an adversarial process obligates to assume that in an adversarial judicial proceeding the provision of Article 404a CPC entitles a public prosecutor to perform only such evidentiary activities to which the accused is also entitled, thus to seek sources of evidence and next to file a motion to a court to admit it.

It must be added that evidentiary activities are steps that can be taken only by procedural organs (a court, the prosecution office, the police and another state organ that the statute provides with the entitlements of the police) [9]. Thus, parties to the proceeding cannot perform evidentiary activities, e.g. an interrogation of the accused, a witness and an expert, a seizure or a search, a scene examination or an experiment during the proceeding, because they are restricted to the competence of the proceeding organs. The lack of parties' competence to perform evidentiary activities should not be confused with the examination of evidence by the parties, which is laid down in Article 167 § 1 CPC. The phrase "evidence shall be taken", which is used in Article 167 § 1 CPC, should be interpreted as "obtaining evidentiary measures from evidentiary sources and protecting them in the form envisaged by procedure law"[10] and "perception of evidentiary measures and their adoption for the proceeding organ's awareness"[11]. Thus, "the taking of evidence" will mean obtaining a testimony (an evidentiary measure) from a witness (an evidentiary source) by a public prosecutor in the course of an examination (hearing) and recording the testimony in the trial minutes so that parties and a court may get acquainted with its contents. It must be added that the taking of evidence by a party (prosecutors and the accused) requires that a competent organ, which in case of a judicial proceeding is a court or the chair of the bench, should formerly admit evidence and this action results from the examination of an evidentiary motion. Thus, there is a sequence of actions that lead to the eventual taking of evidence at a trial: (1) filing an evidentiary motion by a party, (2) examination of the motion and admission of evidence by a court or the chair of the bench, (3) the taking of evidence by a party in the course of evidentiary proceeding conducted by the proceeding organ.

4. It must be also taken into account that the provision of Article 404a CPC does not contain a norm authorising a public prosecutor to perform evidentiary activities during a recess or an adjournment in the trial. The norm has not been directly expressed and it cannot result from the interpretation of the contents of the provision. Due to the reasons discussed earlier, the phrase "a public prosecutor may perform necessary activities in order to present evidence before a court" does not mean that he is authorised to perform

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[9] Compare Z. Kmiecik (ed.), *Prawo dowodowe. Zarys wykładu [Evidence law: lecture outline]*, Warszawa 2008, p. 22.

[10] See P. Hofmański, S. Waltoś, *Proces karny. Zarys systemu [Criminal process: System outline]*, Warszawa 2013, p. 376.

[11] See M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: Basic theoretical assumptions]*, Warszawa 1984, p. 413.

evidentiary activities away from the trial, e.g. interview a witness in the prosecutor's office and present this evidence before a court.

In addition to the already presented arguments, it is necessary to state that in the Polish system of criminal procedure law, criminal proceeding is composed of specific stages defined by the statute taking place subsequently, i.e. a preparatory proceeding, a judicial (court) proceeding and a penalty execution proceeding. Possible modifications of the pattern are not important for the present considerations. The borders of each of the criminal process stages are precisely defined. A preparatory proceeding, where the proceeding organ is a prosecutor, has a fixed beginning and end. It ends when the collected evidence is sufficient to file a public complaint or when evidentiary possibilities have been exhausted and facts established by the proceeding organ result in a conclusion that the preparatory proceeding must be unconditionally discontinued[12]. The conclusion of the investigation envisaged in Article 321 § 7 CPC obliges proceeding organs to take the decision on the mode of concluding a preparatory proceeding, which ends with: (1) development of an indictment and filing it to a court (Article 331 § 1 CPC), (2) a prosecutor's motion to convict the accused and impose a penalty in accordance with a plea agreement or other penalties prescribed for a misdemeanour in question (Article 335 § 1 CPC), (3) a prosecutor's motion to a court to discontinue the proceeding due to a perpetrator's insanity and to apply precautionary measures (Article 324 § 1 CPC), (4) a prosecutor's motion to a court to conditionally discontinue the proceeding (Article 336 § 1 CPC), and (5) unconditional discontinuance (Article 322 § 1 CPC). With the conclusion of the preparatory proceeding based on the decision on discontinuance, a prosecutor's supervision of the proceeding ends. From that moment on, all means of supervision specified in Article 326 § 3 CPC are no longer applicable because they refer to supervision over the course of proceedings[13]. Having concluded a preparatory proceeding, a prosecutor is no longer authorised to perform evidentiary activities. At the subsequent proceeding stages, he does not appear as a proceeding organ but a party to a trial.

5. R. Ponikowski draws attention to the fact that "awarding the principle of an adversarial process a priority role in the amended procedure developing the course of an evidentiary proceeding in the course of a trial resulted in the repeal of Article 345 CPC (which authorised a court to refer a case back to a prosecutor in order to eliminate deficiencies in the preparatory proceeding at the stage of preliminary assessment of the indictment) and Article 397 CPC (which authorised a court to discontinue or suspend a trial and suggest a time limit for presenting evidence the taking of which would allow for elimination of the deficiencies noticed) [14]. Thus, in the process of interpreting the provision of Article 404a CPC, referring to the scope of a prosecutor's entitlements laid down in the repealed provision of Article 397 CPC is unjustified and inadmissible. It must be reminded, however, that he repealed provision of Article 397 CPC defined

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[12] See J. Grajewski, *Przebieg procesu karnego [Course of criminal process]*, Warszawa 2012, p. 78.

[13] Compare F. Prusak, *Nadzór prokuratora nad postępowaniem przygotowawczym [Prosecutor's supervision over the preparatory proceeding]*, Warszawa 1984, p. 206.

[14] R. Ponikowski, *op. cit.*, p. 1035.

the course of action of a court in case of recognition that essential deficiencies in preparatory proceeding have become apparent at the trial (§ 1), the mode of a public prosecutor's proceeding in case a court demands additional evidence (§ 2 and § 3) and consequences of a failure to present demanded evidence (§ 4). On the other hand, the conditions for demanding additional evidence by a court were the following: (1) disclosure of essential deficiencies of the preparatory proceeding after a trial has started, (2) lack of possibility of eliminating the deficiencies by a court or causing excessive length of the proceeding beyond a reasonable time limit, (3) lack of possibility of eliminating the deficiencies with the application of Article 396 (a judge designated, another court appointed)[15]. Demand for additional evidence required that a court issued a decision indicating the addressee, evidence a court expected to be provided with and the time when it should be done[16]. When a court issued such a decision, a prosecutor could perform adequate evidentiary activities in person or request that the police do this[17]. Thus, it must be taken into account that the provision of Article 397 § 1 CPC in an abstract way and the above-mentioned decision in a detailed way authorised a prosecutor to perform procedural activities in the form of evidentiary activities during a recess or an adjournment in the trial, thus a judicial stage of the criminal proceeding. Although a trial was conducted, a prosecutor as a criminal proceeding organ was authorised to perform evidentiary activities aimed at obtaining evidence demanded by a court. In other words, a prosecutor had clear legal grounds for performing evidentiary activities at the stage of judicial proceeding but not at a trial. Without the norm laid down in the provision of Article 397 § 1 CPC, a prosecutor would not be able to perform evidentiary activities in the course of a judicial proceeding[18].

However, Article 404a CPC does not directly indicate a possibility of performing evidentiary activities. In this area, it contains a phrase authorising a prosecutor to perform "necessary activities in order to present evidence before a court". The quoted phrase should be interpreted as meaning that a public prosecutor might perform any activities that are not evidentiary ones, which will enable him to file an evidentiary motion, and after it is admitted, the taking of evidence before a court pursuant to Article 167 § 1 CPC. Therefore, based on Article 404a CPC, a public prosecutor can only perform non-proceeding related activities, e.g. seek evidence sources, establish usefulness of information provided by a source of evidence in order to determine a fact or a circumstance and file an adequate motion or evidentiary motions. Thus, a public prosecutor cannot interview a witness, seize objects or perform a search and use the records of these evidentiary activities before a court. Contrary to the earlier quoted statements, a public prosecutor cannot present real evidence before a court unless

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[15] See P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Volume II, Warszawa 2007, p. 484.

[16] *Ibid*., p. 487.

[17] Concerning the conditions and mode of referring a case in trial to supplement preparatory proceeding pursuant to Article 344 § 1 CPC of 1969, see S. Kalinowski, *Rozprawa główna w polskim procesie karnym [Main trial in the Polish criminal process]*, Warszawa 1975, p. 283 and subsequent ones.

[18] Concerning a proceeding organ's competence to conduct a procedural activity, see K. Woźniewski, *Prawidłowość czynności procesowych w polskim procesie karnym [Appropriateness of procedural actions in the Polish criminal process]*, Gdańsk 2010, p. 54 and subsequent ones.

it was protected in circumstances requiring immediate action. A public prosecutor can only seize an object or perform a search in cases not amenable to delay, as laid down in Article 217 § 1 CPC and Article 220 § 3 CPC, and then apply to a court for approval pursuant to Article 217 § 4 CPC and Article 220 § 3 CPC respectively. In the performance of non-proceeding related activities, on the other hand, a public prosecutor is limited to such activities that have not been restricted to the competence of a court. Thus, a public prosecutor cannot, e.g. give consent to performance of operational and surveillance activities that require a court's consent or obtain authorization of such operations in cases not amenable to delay.

6. An opinion that a public prosecutor cannot perform evidentiary activities pursuant to Article 404a CPC finds support in the contents of the amended Article 401 § 1 CPC. The amendment to that provision that came into force on 1 July 2015 consists in an addition that a chair can adjourn a trial in order to enable parties to prepare evidentiary motions. A court should provide parties with an opportunity to prepare new evidentiary motions, especially when the need to do that was revealed in the course of a trial. A motion to order a recess can be filed by any party to the judicial proceeding with grounds for the need to prepare evidentiary motions. Parties can collect information and establish its usefulness for proving some facts or circumstances for the needs of developing evidentiary motions. The scope of activities performed by a public prosecutor is limited, however, to their indispensability for developing a motion or evidentiary motions.

Thus, the provision of Article 404a CPC should be interpreted in conjunction with the provision of Article 401 § 1 CPC because it constitutes its supplement or detailed specification. If the provision of Article 401 § 1 CPC constitutes grounds for ordering a recess in a trial in order to prepare evidentiary motions by parties, the provision of Article 404a CPC defines the scope of activities that a public prosecutor can perform in order to present evidentiary motions. The comments show that grammatical interpretation in the process of interpreting the provision of Article 404a CPC is unreliable. The provision should be interpreted also taking into account *ratio* that is the reason for its introduction to the Criminal Procedure Code, which is determination of the scope of a public prosecutor's activities performed to prepare evidentiary motions. The provision of Article 404a CPC should be interpreted also with the use of the system directive interpretation, which is necessary for the explanation of the concept of "evidence" and "actions" as well as the principle of "equality of arms" in order to explain the scope of steps undertaken by a public prosecutor during a recess or an adjournment in the trial.

The phrase "in order to present evidence before a court" in Article 404a CPC should not be understood as stating that after a recess or an adjournment in the trial, a public prosecutor "presents evidence" that he took outside the course of a trial but in the way that he formulates evidentiary motions to take evidence and after their approval, takes evidence before a court and thus "presents it before a court".

7. Summing up, it must be stated that using the methods of grammatical, functional and structural interpretation, one must draw a conclusion that the provision of Article 404a CPC is useless because it does not provide any "new" normative contents. The

discussed provision means that during a recess or an adjournment in the main trial, a public prosecutor may only perform non-proceeding related actions, consisting in seeking evidence sources and assessing their usefulness for establishing facts important in the criminal process in order to file evidentiary motions. Without Article 404a CPC, one should draw the same conclusion.

BIBLIOGRAPHY

Cieślak M., *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: Basic theoretical assumptions]*, Warszawa 1984.

Dąbkiewicz K., *Kodeks postępowania karnego. Komentarz do zmian 2015 [Criminal Procedure Code: Commentary on the amendments]*, Warszawa.

Grajewski J., *Przebieg procesu karnego [Course of criminal process]*, Warszawa 2012.

Hofmański P., Waltoś S., *Proces karny. Zarys system [Criminal process: System outline]*, Warszawa 2013.

Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Volume II, Warszawa 2007.

Kalinowski S., *Rozprawa główna w polskim procesie karnym [Main trial in the Polish criminal process]*, Warszawa 1975.

Kmiecik Z. (ed.), *Prawo dowodowe. Zarys wykładu [Evidence law: lecture outline]*, Warszawa 2008.

Ponikowski R., [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2015.

Prusak F., *Nadzór prokuratora nad postępowaniem przygotowawczym [Prosecutor's supervision over the preparatory proceeding]*, Warszawa 1984.

Sakowicz A., Opinia prawna na temat nowelizacji przepisów Kodeksu postępowania karnego oraz ustawy z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw w oparciu o projekt ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw [Legal opinion on the amendment to the Criminal Procedure Code and the Act of 27 September 2013 amending the Act – Criminal Procedure Code and some other acts based on the Bill to amend the Act – Criminal Code and some other acts] (the Sejm Paper no. 2393).

Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Volume I, Warszawa 2015.

Woźniewski K., *Prawidłowość czynności procesowych w polskim procesie karnym [Appropriateness of procedural actions in the Polish criminal process]*, Gdańsk 2010, p. 54 and the subsequent ones.

PUBLIC PROSECUTOR'S ACTIONS DURING A RECESS OR AN ADJOURNMENT IN THE MAIN TRIAL

Summary

The legal issue that is discussed in the article is what kind of actions a public prosecutor can perform during a recess or an adjournment in the trial. The issue is questionable in the doctrine of Polish criminal procedure law. The author presents an opinion that a public prosecutor cannot perform any evidentiary actions because there is no clear statutory authorisation and, moreover, because he is a party to the judicial proceeding, and evidentiary activities are restricted for proceeding organs. The author supports the opinion using three methods of legal interpretation: the grammatical, functional and structural ones.

Key words: *recess/adjournment in the trial*, *public prosecutor's actions*, *evidentiary activities*, *adversarial judicial proceeding*, *"equality of arms"*

CZYNNOŚCI OSKARŻYCIELA PUBLICZNEGO W CZASIE PRZERWY ALBO ODROCZENIA ROZPRAWY GŁÓWNEJ

Streszczenie

Problemem prawnym, który próbowano rozwiązać, jest to, jakie czynności może wykonać oskarżyciel publiczny w czasie przerwy albo odroczenia rozprawy. Kwestia ta w doktrynie polskiego prawa karnego procesowego jest sporna. Autor wyraził zaś pogląd, że oskarżyciel publiczny nie może wykonać żadnej czynności dowodowej ze względu na brak wyraźnego upoważnienia ustawowego, a nadto, gdyż jest stroną postępowania, a czynności dowodowe są zastrzeżone dla organów procesowych. Pogląd ten autor uzasadnia wykorzystując trzy metody wykładni przepisów prawa, tj. gramatyczną, funkcjonalną i systemową.

Słowa klucze: *przerwa w rozprawie*, *czynności oskarżyciela publicznego*, *czynności dowodowe*, *kontradyktoryjne postępowanie sądowe*, *„równość broni"*

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PENALTIES EXECUTION CODE REGULATIONS WITH REGARD TO EMPLOYMENT OF CONVICTS FROM THE PERSPECTIVE OF THE EUROPEAN PRISON RULES

GRAŻYNA B. SZCZYGIEŁ

I. Numerous identified dysfunctions of penitentiary isolation show that prison does not educate, does not improve and does not make a convict more pro-social than he was when he was imprisoned. Therefore, the problem of how to treat prisoners in order to help them avoid re-imprisonment, or at least reduce the number of repeat prisoners, remains an up-to-date issue. Penitentiary recidivists constituted over half of all convicts (54.85%) serving imprisonment sentences in Poland in 2014[1].

International community has been working on standard rules for the treatment of prisoners for years. This resulted, first of all, in the Standard minimum rules for the treatment of offenders of 1955[2] or their new version of 1984[3], and at the regional level, a successive version of the European Prison Rules. The above-quoted documents constitute the so-called soft law and are not binding, however, they define minimum standards of humanitarian treatment of prisoners and establish guidelines for individual states on developing rules for the treatment of convicts in penitentiary isolation.

Pursuant to the new concept of prison – defined in the European Prison Rules of 2006 – it is a prison that is based on respect for human rights (principle 1), where life shall be organised in the way approximating as closely as possible the positive aspects of life in the community (principle 5) and which facilitates the reintegration into free society of

[1] Centralny Zarząd Służby Więziennej [Central Prison Service Administration], Statistical information on 2014, sw.gov.pl/Data/Files/001c169lidz/rok-2014.pdf (accessed on 22 Jan. 2016).

[2] The standard rules for the treatment of prisoners were adopted at the 1st UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, adopted in the form of resolution by the UN Economic and Social Council in 1957, the text of the Rules in Archiwum Kryminologii 1989, vol. XVI, p. 277 and subsequent ones.

[3] The standard minimum rules for the treatment of prisoners of 1984, the text in www.htrpol.waw.pl/pliki?Wzorcowe_Reguły_Minimum_Postępowania_z_Wiezniami.pdf (accessed on 15 Dec. 2015).

persons who have been deprived of their liberty (principle 6)[4]. The authors of the Rules for the treatment of prisoners assign a very important role to one of the oldest – since the beginning of modern penitentiary system – means of rehabilitation of convicts, i.e. labour, and formulate a series of fundamental principles, on which this form of social participation of convicts should be based. This induces me to look at the regulations of the Penalties Execution Code governing labour from the point of view of these principles.

II. The European Prison Rules expose the educational aspect of labour and recommend treating convicts' labour as a positive element of the prison regime and bans treating it as punishment (principle 26.1). The authors of the Rules notice an economic aspect of prison employment, however, in their opinion, it should not dominate (principle 26.8). The Rules envisage obliging prisoners to work, subject to their physical and mental fitness, in conditions conforming to the standards that apply in the outside community (principle 105.2, principle 105.3).

Thus, the provisions of international law allow for compulsory work of convicts. Here, it is necessary to mention the Convention of the International Labour Organisation concerning forced or compulsory labour[5], pursuant to which the ban on forced or compulsory labour shall not cover "all work or services exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations" (Article 2). Similarly, international acts on the protection of human rights, i.e. the European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 4 (2))[6] and the International Covenant on Civil and Political Rights (Article 8 (3))[7], ban forced or compulsory labour but do not recognise the work of persons who a court of law sentenced to imprisonment as such[8].

Polish regulations concerning convicts' labour meet the above-mentioned recommendations of the European Prison Rules. The catalogue of convict rehabilitation measures ranks labour first, as it facilitates the acquisition of vocational qualifications, which demonstrates recognition that labour is the main form of individualised rehabilitation in order to achieve the objective of the penalty of imprisonment. And in accordance with

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[4] For more see, inter alia, M. Płatek, Zadania polskiej polityki penitencjarnej w świetle Europejskich Reguł Więziennych [Polish penitentiary policy tasks in the light of the European Prison Rules], *Czasopismo Prawa Karnego i Nauk Penalnych (CzPKiNP)* 2007, vol. 1, pp. 264–265 and *ibid*., Wybrane zasady i instytucje Kodeksu karnego wykonawczego z 1997 r. w świetle Europejskich Reguł więziennych z 11 stycznia 2006 r. [Selected rules and institutions of the Penalties Execution Code of 1997 in the light of the European Prison Rules of 11 January 2006], [in:] *X lat obowiązywania Kodeksu karnego wykonawczego [Ten years of the Penalties Execution Code being in force]*, (ed.) S. Lelentala, G.B. Szczygieł, Białystok 2009, s. 106.

[5] Convention 29 of the International Labour Organisation concerning forced or compulsory labour adopted in Geneva on 28 June 1930, Journal f Laws of 1959, No. 20, item 122.

[6] Convention on the Protection of Human Rights and Fundamental Freedoms, Journal of Laws of 1993, no. 61, item 284.

[7] International Covenant on Civil and Political Rights, Journal of Laws of 1997, no. 38, item 167.

[8] Also see the stand of the European Court of Human Rights [in:] J. Potulski, *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary]*, (ed.) J. Lachowski, Warszawa 2015, p. 465.

the Penalties Execution Code (Article 67 § 1 PEC), the objective of a penalty is to induce a convict to co-operate in the development of a socially desired attitude, especially the sense of responsibility and the need to comply with the legal order and thus to refrain from committing a crime again. Also the Act on employment of prisoners[9] (Article 1.2) emphasises that the aim of employment is first of all positive influence on convicts' attitudes and gaining profits should be subordinated to criminal rehabilitation.

Exposing labour among convicts' participation measures seems to be absolutely justified. Labour makes people develop working habits and most convicts do not have them. It enables them to learn skills that can be useful when they leave prison and contribute to life in compliance with law. It also serves the purpose of maintaining physical and mental health, which is essential in penitentiary isolation. Obviously, economic aspect is also important because a convict can meet his financial obligations owed to relatives (alimony, maintenance, assistance) and liabilities to the state (fines, court proceeding costs) as well as can save money for basic necessities on release from prison.

Labour, pursuant to the Penalties Execution Code (Article 116 (4)), is one of a convict's duties. It is in full compliance with the Constitution[10], which envisages a possibility of an obligation to work imposed by statute (Article 65 (2)).

It must be noticed that an obligation to work is not a peremptory norm. It applies to convicts whose physical and mental fitness has been confirmed by a physician[11]. Prisoners convicted for politically, religiously and ideologically motivated crimes are exempt from the obligation to work (Article 107 PEC)[12].

The legislator provides a penitentiary commission with discretion to make a convict exempt from the obligation to work in case he studies. It seems to be fully justified because most convicts, especially young persons, do not have vocational qualifications. From the point of view of a convict's return to the community, acquisition of qualifications is socially desired because it creates employment opportunities after a penalty has been served. Having a job is also important in case of those convicts who, having left prison, will not be able to do their former job. A penitentiary commission may also make a convict exempt from the labour obligation based on other reasons. According to T. Kalisz[13], this "specific general clause" gives grounds for making exemption flexible. It is hard to disagree with S. Lelental[14], who states that these reasons are going to

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[9] Act of 28 August 1997 on employment of prisoners, uniform text, Journal of Laws of 2014, item 1116.

[10] The Constitution of the Republic of Poland of 2 April 1997 r. passed by the National Assembly on 2 April 1997, approved in the national referendum on 25 May 1997 and signed by the President of the Republic of Poland on 16 July 1997, Journal of Laws of 1997, no. 78, item 483.

[11] Pursuant to the Labour Code (Article 229) an employer cannot employ an employee without a valid medical certificate confirming that their work on the given post is not contraindicated.

[12] For more see G.B. Szczygieł, Obowiązek świadczenia pracy przez skazanych odbywających karę pozbawienia wolności [Prisoners' obligation to work], [in:] *Z aktualnych zagadnień prawa pracy i ubezpieczenia społecznego. Księga Jubileuszowa Profesora Waleriana Sanetry [Current issues of labour law and social insurance. Professor Walerian Sanetra jubilee book]*, (ed.) B. Cudowski, J. Iwulski, Białystok 2013, p. 414.

[13] T. Kalisz, *Zatrudnienie skazanych odbywających karę pozbawienia wolności [Employment of convicts serving imprisonment]*, Wrocław 2004, p. 185.

[14] S. Lelental, *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary]* 4th edition, Warszawa 2012, p. 548.

justify why a convict does not work. However, he also states that the interpretation is not exhaustive. Reasons for not working have been indicated in secondary legislation on detailed rules for employment of convicts[15]. Pursuant to the act (§ 32), these are: illness, participation in proceeding, being on leave, release from prison to pay a visit under no guard's supervision, permission to leave prison and other reasons connected with the functioning of the penitentiary unit. The "other reasons" may be connected with the penitentiary unit administration's obligation to ensure safety, for example, exemption of a convict from work because of a threat to his safety posed by other convicts or a necessity of protecting him (Article 88d PEC). When assessing whether the exemption from the obligation to work is purposeful, a convict's personal conditions and mental health resulting, e.g. in depression, must also be taken into consideration[16].

Labour, in order to be a positive element of prison regime, must be provided for convicts. The authors of the Rules formulate a successive directive addressed to prison authorities. Being aware of possible difficulties with finding work places for convicts, they recommend that the authorities "strive to provide sufficient work of a useful nature" (principle 26.1) suggesting that work for prisoners should be provided by the authorities on their own and in co-operation with private contractors, inside or outside prison (principle 26.9).

Polish regulations meet that standard. Pursuant to the Act on the Prison Service[17] (Article 2 (2)), one of the Prison Service's tasks is penitentiary rehabilitation and criminal rehabilitation first of all through organisation of work conducive to acquisition of vocational qualifications, which obliges it to provide work for prisoners. It is worth mentioning that the Polish legislator also takes into account realities with regard to possibilities of providing work for all prisoners who are fit for it. Pursuant to Article 121 § 1 PEC, convicts are provided work within the bounds of availability.

The Penalties Execution Code envisages various forms of prisoners' employment: referring a convict to a workplace, an employment contract, commissioned work, home work and other types of work under civil law contracts. A convict can be employed for equitable remuneration[18] to clean the facilities of the Prison Service[19], work in their affiliated companies[20] or for other outside contractors based on employment contracts, commissioned work and work from home systems. The differentiation of legal bases of employment and work places is aimed at increasing the employment rate.

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[15] Secondary legislation of the Minister of Justice of 9 February 2004 on detailed rules for employment of convicts, Journal of Laws no. 27, item 242 with subsequent amendments.

[16] M. Petrikowski, Obowiązek pracy skazanych odbywających karę pozbawienia wolności [Prisoners' obligation to work], *Przegląd Więziennictwa Polskiego* 2001, no. 3, p. 83.

[17] Act of 9 April 2010 on Prison Service, uniform text, Journal of Laws of 2014, item 1415 with subsequent.

[18] Secondary legislation of the Minister of Justice of 9 February 2004 on detailed rules for employment of convicts, Journal of Laws no. 27, item 242 with subsequent amendments.

[19] Pursuant to the Act on Prison Service (Article 8 (1)), the organisational units of the Prison Service are: the Central Prison Service Administration, regional inspectorates of the Prison Service, prisons, temporary detention centres, Central Training Centre of the Prison Service and other staff training centres of the Prison Service.

[20] Prison affiliated company, in accordance with the Act on employment of convicts (Article 3 (1)), may be set up and managed as a state-owned company, limited or joint-stock company in which the Treasury or another state entity holds an over 50% stake, and a support company affiliated to the prison.

The European Prison Rules also formulate recommendations on employment of prisoners. As far as possible, the work shall be such as will maintain or increase prisoners' ability to earn a living after release (principle 26.3). The authors recommend indiscrimination on the basis of gender in the type of work provided (principle 26.4) and provision of work that encompasses vocational training for young prisoners (principle 26.5). They believe that it is essential that convicts may choose, within the limits of what is available, the type of employment they wish to participate, proper vocational selection and the requirement of good order and discipline (principle 26.6).

The Penalties Execution Code meets these recommendations. It lays down criteria for referring a convict to work. Pursuant to Article 122 PEC, these are: job, education, interests and personal needs. This catalogue should be supplemented with some criteria laid down in the organisational and disciplinary rules for serving an imprisonment sentence[21], which are: age, gender, service period left as well as safety and order related factors. The use of the expression "especially" with the listed criteria means that there may be other factors not listed in the act. The above-mentioned criteria show a prisoner-oriented attitude. They also take into consideration the reality of penitentiary isolation and the educational functions as well as the isolation and protection function of the imprisonment penalty. S. Lelental[22] rightly notices that since labour, especially the one that is conducive to acquisition of vocational qualifications, is the most important of basic measures of convicts' rehabilitation, "undoubtedly, this directive should be of dominant importance in referring convicts to work".

The free choice of employment is limited. Employment of a convict requires consent and must be in compliance with conditions specified by the prison director. The conditions are designed to ensure an appropriate course of penalty execution. The prison director may withdraw his consent for a convict's employment or work because of reasons connected with the functioning of the prison, especially its security. Another reason for withdrawing his consent for employment is a convict's or an employer's failure to meet employment conditions specified by the prison director.

The fulfilment of the isolation and prevention function of serving the penalty of imprisonment, the second most important one after education, has enormous influence on employment of convicts. Having in mind that according to the principle *ultima ratio*, imprisonment should be served by perpetrators of crimes of the highest social harmfulness, perpetrators who have been sentenced to temporary isolation from the community because of the level of demoralisation and threat to the society, the Penalties Execution Code envisages three types of prisons, i.e. a closed one, a partially open one and an open one. There are different protection systems, types of convicts' isolation and duties resulting from that, and rights to move around the prison, which substantially affects a convict's work place.

A convict serving imprisonment in a closed prison may be employed outside it only if he is escorted there (Article 90 (2)), which to a great extent limits employment

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[21] Secondary legislation of the Minister of Justice of 25 August 2003 on organisational and disciplinary rules regarding the execution of the penalty of imprisonment, Journal of Laws no. 152, item 1493.

[22] S. Lelental, *Kodeks karny wykonawczy Komentarz 4 [Penalties Execution Code: Commentary 4]*, p. 250.

opportunities because of the conditions that must be met in the work place. These conditions, as laid down in secondary legislation on the protection of organisational units of the Prison Service[23] (§14), include protection of the employment area with fencing and establishment of armed guard towers along it as well as an unarmed control station inside. It is also necessary to establish the number of guards escorting convicts taking into account their working hours, work places and the category of convicts.

The legislator treated two groups of convicts referred to this type of prison in a stricter way. Convicts serving a life sentence in a closed prison may work only in this prison (Article 121 § 3 PEC). Convicts who pose serious social threat or threat to the security of the prison may work only in their modules (Article 88b § 3 PEC). Those convicts, as the above-mentioned secondary legislation stipulates (§ 92), cannot be employed to do jobs requiring the use of dangerous objects, operate machines and facilities that can be used to produce dangerous and illegal objects, on posts that may enable them to cause a fire, an explosion or another dangerous incident for the security of the prison and in places enabling them to escape or to contact other persons under no control of the guards.

Convicts serving a sentence in a partially open type of prison have many more employment opportunities. Those convicts may be employed outside prison in the system of reduced escort or without escort, including work at single employee workstations (Article 91 (2) PEC).

Convicts serving a sentence in an open type of prison are in the most favourable situation because employment they are offered is usually outside prison, they do not need escort and can work at single employee workstations (Article 92 (2) PEC). However, in this case, it is important that employers want to employ prisoners.

It is worth mentioning that the recommendation regarding enabling a convict to choose a type of employment is implemented to some extent. If a convict serves a sentence in the system of programmed rehabilitation, which can be chosen by any adult convict while juvenile convicts are obligatorily referred to it, it has influence on the type of employment to some extent. In the system of programmed rehabilitation, a convict participates in the development of an individual programme of rehabilitation and the establishment of the type of employment (Article 95 § 2 PEC[24]).

In case of convicts serving a sentence in the therapeutic system – these are convicts who need specialist rehabilitation because of non-psychotic mental disorders, including convicts sentenced for crimes under Articles 197–203 CC, committed in connection with disorders of sexual preference, persons intellectually disabled and addicted to alcohol or other intoxicating and psychotropic substances and persons physically impaired – if their health condition requires that, they are employed in special work places for the handicapped (Article 96 PEC).

It must be noticed that the legislator, predicting potential problems with finding work places for convicts, suggests employment priorities. Pursuant to Article 122 PEC,

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[23] Secondary legislation of the Minister of Justice of 31 October 2003 on the protection of organisational units of the Prison Service, Journal of Laws of 2003, no. 194, item 1902.

[24] Also see § 14 of secondary legislation of the Minister of Justice of 14 August 2003 on ways of exerting penitentiary influence in prisons and temporary detention centres, Journal of Laws of 2012, item 1409.

work should be provided first of all for convicts who have to pay alimony/maintenance and those whose financial, personal and family situation is particularly bad, which shows respect for humanitarian principles.

The authors of the European Prison Rules pay much attention to remuneration for work and recommend equitable remuneration for the work of prisoners in all instances (principle 26.10). They believe the right to spend at least a part of their earnings on approved articles for their own use and to allocate a part of their earnings to their families is equally important (principle 26.11). Taking care of convicts' future, they suggest encouraging convicts to save part of their earnings, which shall be handed over to them on release or be used for other approved purposes (principle 26.12).

Equitable remuneration shall be understood, pursuant to the International Covenant on Economic, Social and Cultural Rights (Article 7 (a))[25], as the provision of equal remuneration for work without distinction of any kind. It fully corresponds to Article 32 of the Constitution of the Republic of Poland, which states that all persons shall be equal before the law and no one shall be discriminated against in political, social or economic life for any reason whatsoever. According to the Constitutional Tribunal[26], remuneration for work of prisoners is equitable if it is established based on similar principles as those used for work of equal value of persons who are not imprisoned. Forcing convicts to work without the provision of equitable remuneration would be an example of a violation of the constitutional obligation to treat everyone deprived of liberty in a humane manner (Article 41 (4) of the Constitution).

The Polish regulation meets the standard recommended by the European Prison Rules to some extent. The catalogue of convicts' rights that is laid down in the Penalties Execution Code includes the right to receive remuneration for work done under an employment contract (Article 102 (4) PEC). Remuneration for full-time employment is established in the way ensuring the minimum pay level that is laid down in other regulations[27], provided that the work accounts for full monthly working time or full monthly amount of work, which had not always been a norm[28]. In case of incomplete monthly working time or monthly work amount done, proportional remuneration is paid. Convicts are entitled to remuneration for the time when they do not work but are available, provided that it is the employer's fault.

In case they are referred to work, which is the most common form of employment, the role of the prison director is essential because he is involved in negotiating conditions of work and remuneration with the employer. When a convict is referred to do administrative

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[25] International Covenant on Economic, Social and Cultural Rights of 19 December 1966, Journal of Laws of 1997, no. 38, item 169.

[26] Ruling of the Constitutional Tribunal of 23 Feb. 2010, file no. P 20/09, www.okt.trybynal.gov.pl/orzeczenia.

[27] Act of 10 October 2002 on minimum remuneration for work, Journal of Laws no. 200, item 1679 (uniform text).

[28] Until March 2011, the remuneration was to equal at least half the minimum one, which the Constitutional Tribunal questioned. See the judgement of the Constitutional Tribunal of 23 February 2010 (file no. P 20/09), Journal of Laws no. 34, item 191. For more see E. Dawidziuk, *Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych [Treatment of prisoners in contemporary Poland against the background of international standards]*, Warszawa 2012, p. 162 and the subsequent ones.

or cleaning jobs in prison, the prison director decides on remuneration. Secondary legislation on detailed rules for employment of convicts defines rules for employment of convicts to do administrative and cleaning jobs for organisational units of the Prison Service[29].

There are two expressions used in the Penalties Execution Code to govern remuneration issues. Article 123 § 1 PEC discusses rules for remuneration for work and in the next paragraph "remuneration due a convict". According to Article 242 § 15 PEC, it is a sum left after a subtraction of social insurance premium and contributions to Fundusz Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej [Victims and Post-penitentiary Aid Fund][30] and Fundusz Aktywizacji Zawodowej Skazanych oraz Rozwoju Przywięziennych Zakładów Pracy [Convicts Vocational Training and Prison Affiliated Companies Development Fund][31] and constituting an amount subject to personal income tax deduction. Thus, a convict is not paid the whole remuneration. The contribution to the former is 10% and to the latter – 25%. According to K. Potulski[32], these obligatory contributions result in "the reductions of remuneration that are not applicable to other employees and they are extra tax burdens in practice, thus they may and should be recognised as discriminatory practices". Moreover, he believes that the contributions to the funds are not destined for convicts' individual use.

It is difficult to approve of the opinion. It is worth mentioning that a deduction of a contribution to the Victims and Post-penitentiary Aid Fund may be recognised as justified because every convict may be granted post-penitentiary aid on release and when he is still in prison his family that is in a difficult financial situation may be granted this aid, too. Post-penitentiary aid is aimed at providing assistance in social re-adaptation in the first period after release from prison. Obviously, convicts who did not work and thus did not save any resources for the future will benefit more often. Undoubtedly, those who worked may also apply for assistance. Taking these into account, we should not treat the deductions as discriminatory. The deduction of a contribution to the Convicts Vocational Training and Prison Affiliated Companies Development Fund seems to be more controversial but not because the resources are not destined for individual use by convicts. Convicts actually benefit from the funds indirectly. Pursuant to the Act on employment of convicts (Article 8 § 1), the funds are used to finance rehabilitation, especially to create new work places for prisoners and the protection of the existing ones, to develop prison infrastructure that is necessary for rehabilitation, modernisation of prison affiliated companies and their production, organisation of vocational training and training in the field of vocational activeness and skills in job seeking. What raises doubts is the very high rate, which is a quarter, while convicts' remuneration is not very high. In November 2015, the average pay was

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[29] Secondary legislation of the Minister of Justice of 9 February 2004 on detailed rules for employment of convicts, Journal of Laws no. 27, item 242 with subsequent amendments.

[30] Secondary legislation of the Minister of Justice of 13 January 2012 on Funduszu Pomocy Pokrzywdzonym praz Pomocy Postpenitencjarnej [Victims and Post-penitentiary Aid Fund], Journal of Laws of 2012, item 49.

[31] Secondary legislation of the Minister of Justice of 23 January 2012 on Funduszu Aktywizacji Zawodowej Skazanych oraz Rozwoju Przywięziennych Zakładów Pracy [Convicts Vocational Training and Prison Affiliated Companies Development Fund], Journal of Laws of 2012, item 103.

[32] K. Potulski [in:] *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary]*, (ed.) J. Lachowski, Warszawa 2015, p. 485.

PLN 1,178.05. It is worth mentioning that the European Prison Rules do not envisage deductions but they do not ban them, either.

After the deduction of personal income tax, 60% of a convict's remuneration is exempt from enforcement of any dues.

What should be emphasised is the fact that our legislator not only encourages convicts to save a part of their income that they will be handed out on release but also obliges them to do that. In order to provide a convict with money for travel to the place of residence and the living, an amount equal to an average monthly employee's remuneration is collected. The funds are collected in compliance with the rules laid down in the Penalties Execution Code from funds possessed by a convict, i.e. deposited by a convict on admission, earned and any other income. The funds are kept on deposit accounts in Bank Gospodarstwa Krajowego and handed out to a convict on release.

Discussing the issue of remuneration, one cannot ignore work that a convict is not paid for. The Penalties Execution Code envisages three types of such work:

1) cleaning jobs performed for the Prison Service units and territorial self-government provided it does not exceed 90 hours per month (Article 123a § 1 PEC),
2) public works for public administration entities, charities and non-profit organisations, and cleaning jobs for the Prison Service units provided a convict agreed in writing or volunteered to do this (Article 123a § 2 PEC),
3) work in prison-affiliated companies for up to three months in order to learn a job (Article 123a § 3 PEC).

The work that a convict is not paid for raises a few questions. First of all, it must be noticed that a convict is obliged to do cleaning jobs in prison (Article 116 (4) PEC). Taking that into account, a convict may refuse to do other works if he is not paid for doing them.

As far as cleaning jobs in prison are concerned, lack of remuneration for them can be approved of because everybody must share such everyday chores in the closest surrounding.

S. Lelental[33] highlights difficulties connected with establishing what kind of cleaning jobs for the Prison Service organisational units a convict shall be paid for or not. It must be mentioned that an annexe to the secondary legislation on detailed rules for employment of convicts contains a table of „Basic remuneration for cleaning and service jobs done by convicts for the Prison Service organisational units"[34]. Thus, these might be jobs other than those in the annexe.

However, the doubts reported in jurisprudence[35] with regard to a convict's agreement or volunteering to work without remuneration do not stop being topical issues. It is

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[33] S. Lelental, *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary]*, 5th edition, Warszawa 2014, p. 411.

[34] The jobs include: a transport and administration service employee (a cleaner, a laundry worker etc.), a warehouseman's, a cook's and a stoker's assistant and other jobs that do not require vocational qualifications, a librarian, a cable radio broadcasting centre employee, a farmer, an animal breeder, a gardener, a laundry machines operator, a stoker, a skilled worker – a diploma or vocational course certificate holder (in jobs: a hairdresser, a tailor, a shoemaker, a bookbinder, a cook, a butcher, an electrician, a plumber, an upholsterer, a welder, a machanist, a steel fixer, a mechanic etc.) and jobs requiring master craftsman qualifications.

[35] See G.B. Szczygieł, Praca skazanych w Kodeksie karnym wykonawczym [Convicts' work as specified in the Penalties Execution Code], *Przegląd Więziennictwa Polskiego* 1997, no. 16–17, p. 35;

difficult to speak about somebody's voluntariness when a tutor or an officer proposes a convict to work if one takes into account the potential consequences of their refusal, e.g. when a convict's rehabilitation progress is assessed, opinions are developed for the need of temporary release or the issue of the so-called standard pass as well as a convict's application for release on parole. A convict can be awarded a prize for unpaid work, which can encourage them to volunteer to do unpaid jobs in the event there are no opportunities for remunerated employment.

It seems that the range of entities that can benefit from unpaid work is too wide. The justification that it has an educational effect is rational in case of work for charities and non-profit organisations or in case of natural disasters (e.g. floods). But in case of other work, convicts should be remunerated.

Unpaid work in order to acquire vocational qualifications raises fewest doubts (Article 123a § 3 PEC). The period is short because it is only three months and the acquisition of skills is essential for juvenile convicts and those who are unskilled. And they constitute an abundant group.

Another group of recommendations concerning convicts' work refers to the principle of normalisation adopted by the authors of the Rules. Organisation and methods of work in the institutions, according to the authors of the Rules, should be – as closely as possible – similar to work in the community in order to prepare prisoners for the conditions of normal occupational life (principle 26.7). Health and safety precautions for prisoners shall not be less rigorous than those that apply to workers outside (principle 26.13). Provisions shall be also made to indemnify prisoners against industrial injury and occupational disease, on terms not less favourable than those applicable to workers outside (principle 26.14). The Rules draw attention to the provision of at least one rest day a week and sufficient time for education and other activities (principle 26.16). The maximum daily and weekly working hours of the prisoners shall be fixed in conformity with local rules or custom regulating the employment of free workers (principle 26.15). As far as possible, prisoners who work shall be included in national social security systems (Principle 26.17).

Our regulations are in full conformity with these recommendations and are even more favourable to convicts.

The employer is obliged to instruct a convict on how the assigned work should be done, train them in the field of health and safety regulations, fire protection and machinery operation as well as acquaint them with the principles and rules of remuneration.

Convicts working in an institution or a place assigned by the employer are subject to regulations on occupational medicine service[36] and Health and Safety regulations of the Labour Code[37]. Convicts are entitled to social security in the scope specified in

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T. Bulenda, R. Musidłowski, Nowelizacja Kodeksu karnego wykonawczego w 2003 r. (analiza i ocena) [Penalties Execution Code amendment of 2003 (analysis and assessment)], *Przegląd Więziennictwa Polskiego* 2003, no. 40–41, p. 22.

[36] Act of 27 June 1997 on occupational medicine service, Journal of Laws no. 96, item 593 (uniform text).

[37] See Secondary legislation of the Minister of Justice of 17 November 1997 on the scope of application of the Labour Code with respect to health and safety of convicts in prisons and youth detention centres, Journal of Laws of 1997, no. 154, item 1012.

other regulations and to the disabled persons' benefits (Article 102 (4) PEC). As far as working hours are concerned, the Labour Code[38] is applied.

A convict employed and paid for work based on a referral to work or a home work contract after a year of continuous work is entitled to 14 working days' leave of absence and remuneration, and a convict doing unpaid jobs is entitled to 14 days' leave of absence without remuneration. In the event of a full-time employment contract, a convict is entitled to 18 days' leave after a year's period of work. During the leave of absence, a convict has various rights specified by the prison director for each convict individually. The rights include: the entitlement to additional visits or longer ones, the right to buy extra groceries, tobacco products and other products that can be sold in prison, the right to longer walks, and priority or more frequent access to cultural, educational and sports events.

The periods of paid work are treated as full contribution social security periods in compliance with the regulations on pension schemes for employees and their families[39].

III. The analysis of domestic regulations on convicts' work leads to a conclusion that in basic matters they are in compliance with the recommendations of the European Prison Rules. Some doubts arise in connection with convicts' unpaid work and deductions from remuneration. Obviously, an ideal situation is if all convicts fit to work can be employed and get remuneration. From the perspective of rehabilitation, a convict's contribution to his maintenance in prison should be approved of.

T. Szymanowski[40] rightly believes that the assessment of the compliance of domestic regulations with international standards cannot ignore the issue of practical functioning of the given regulations. And this causes problems.

In November 2015, according to the Central Prison Service Administration, there were 66,356 convicts imprisoned and 24,681 of them worked. Thus, the employment rate was 36.6%. Of course, looking at the figures we must remember that some convicts are exempt from work obligation. In fact, 25,675 convicts were exempt (39.08%). The grounds for the exemption were: staying outside prison (138 persons), another criminal proceeding in progress (638 persons) and unfitness for employment (3,610 convicts). Persons made exempt from work obligation because of other reasons constituted a very large group (21,289). This gives rise to concern that the flexible condition for exemption is overused because of difficulties in finding work places for prisoners. 17,123 prisoners (i.e. 25.4%) did not work because of that.

Most convicts did unpaid jobs (58.96%). Workers doing cleaning jobs for the Prison Service organisational units constituted the biggest group: 15,526 (83.32%). 6.559 convicts worked up to 90 hours and 5,976 prisoners agreed or volunteered to work. 3,229 prisoners did public works and 846 convicts worked for charities.

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38 Act of 26 June 1974 – Labour Code, Journal of Laws of 1974, no. 24, item 141 (uniform text).

39 Act of 17 December 1998 on pensions and handicapped benefits paid from the Social Insurance Fund, Journal of Laws of 2013, item 1440 with subsequent amendments.

40 T. Szymanowski, Międzynarodowe standardy wykonywania kary pozbawienia wolności i ich respektowanie w polskim systemie penitencjarnym [International standards of imprisonment execution in the Polish penitentiary system], *Przegląd Więziennictwa Polskiego* 2006, no. 50, p. 25.

Having in mind that labour, in accordance with the European Prison Rules and the Penalties Execution Code, should help to acquire appropriate vocational qualifications, which is especially important from the perspective of convicts' social re-adaptation, it is difficult to assess the use of this participation measure positively because a quarter of prisoners have not been involved. The fact that most convicts remunerated for their work – 6,232 (60.76%) – were employed to do cleaning jobs for the Prison Service organisational units and only 2,558 (24.91%) worked for outside contractors, and 1.812 (17.65%) in prison affiliated companies, does not give cause for optimism because of the objective assigned to this measure by the legislator, i.e. acquisition of appropriate vocational qualifications.

BIBLIOGRAPHY

Bulenda, T. Musidłowski R., Nowelizacja Kodeksu karnego wykonawczego w 2003 r. (analiza i ocena) [Penalties Execution Code amendment of 2003 (analysis and assessment)], *Przegląd Więziennictwa Polskiego (PWP)* 2003, no. 40–41.

Dawidziuk E., *Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych [Treatment of prisoners in contemporary Poland against the background of international standards]*, Warszawa 2012.

Lelental S., *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary 4]*, Warszawa 2012.

Lelental S., *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary]*, 5th edition, Warszawa 2014.

Kalisz T., *Zatrudnienie skazanych odbywających karę pozbawienia wolności [Employment of convicts serving imprisonment]*, Wrocław 2004.

Petrikowski M., Obowiązek pracy skazanych odbywających karę pozbawienia wolności [Prisoners' obligation to work], *Przegląd Więziennictwa Polskiego (PWP)* 2001, no. 3.

Płatek M., Zadania polskiej polityki penitencjarnej w świetle Europejskich Reguł Więziennych [Polish penitentiary policy tasks in the light of the European Prison Rules], *Czasopismo Prawa Karnego i Nauk Penalnych (CzPKiNP)* 2007, vol. 1

Płatek M., Wybrane zasady i instytucje Kodeksu karnego wykonawczego z 1997 r. w świetle Europejskich Reguł Więziennych z 11 stycznia 2006 r. [Selected rules and institutions of the Penalties Execution Code of 1997 in the light of the European Prison Rules of 11 January 2006], [in:] *X lat obowiązywania Kodeksu karnego wykonawczego [Ten years of the Penalties Execution Code being in force]*, (ed.) S. Lelental, G.B. Szczygieł, Białystok 2009.

Lachowski J. (ed.), *Kodeks karny wykonawczy. Komentarz [Penalties Execution Code: Commentary]*, (ed.) J. Lachowski, Warszawa 2015.

Szczygieł G.B., Obowiązek świadczenia pracy przez skazanych odbywających karę pozbawienia wolności [Prisoners' obligation to work], [in:] *Z aktualnych zagadnień prawa pracy i ubezpieczenia społecznego. Księga Jubileuszowa Profesora Waleriana Sanetry [Current issues of labour law and social insurance. Professor Walerian Sanetra jubilee book]*, (ed.) B. Cudowski, J. Iwulski, Białystok 2013.

Szczygieł G.B., Praca skazanych w Kodeksie karnym wykonawczym [Convicts' work as specified in the Penalties Execution Code], *Przegląd Więziennictwa Polskiego* 1997, no. 16–17.

Szymanowski T., Międzynarodowe standardy wykonywania kary pozbawienia wolności i ich respektowanie w polskim systemie penitencjarnym [International standards of imprisonment execution in the Polish penitentiary system], *Przegląd Więziennictwa Polskiego* 2006, no. 50.

PENALTIES EXECUTION CODE REGULATIONS WITH REGARD TO EMPLOYMENT OF CONVICTS FROM THE PERSPECTIVE OF THE EUROPEAN PRISON RULES

Summary

Convicts' labour, as the history of penitentiary systems shows, is an inseparable element of imprisonment penalty execution. The establishment of imprisonment objectives has a significant impact on the concept of convicts' labour. The model of a prison developed in the successive version of the European Prison Rules (2006) treats normalisation and convicts' integration with the society, thus such organisation of prison life that enables a convict to acquire skills important for social re-adaptation, as the main task of the treatment of persons sentenced to penitentiary isolation. In the concept of the penalty of imprisonment, labour becomes one of the essential means of their social participation and its organisation should serve the acquisition of vocational qualifications by convicts. Thus, a question arises whether our regulations on convicts' labour take into consideration the concept of labour that is proposed in the European Prison Rules.

Key words: *convict, employment of prisoners*, *penitentiary rehabilitation*, *convicts' social participation*

REGULACJE KODEKSU KARNEGO WYKONAWCZEGO DOTYCZĄCE ZATRUDNIENIA SKAZANYCH Z PERSPEKTYWY EUROPEJSKICH REGUŁ WIĘZIENNYCH

Streszczenie

Praca więźniów, jak dowodzi historia więziennictwa, to nieodłączny element procesu wykonywania kary pozbawienia wolności. Na koncepcje pracy więźniów istotny wpływ ma określanie celów wykonywania kary pozbawienia wolności. Model więzienia określony w kolejnej wersji Europejskich Reguł Więziennych (2006) za główne zadanie postępowania ze skazanymi w izolacji penitencjarnej uznaje normalizację i integrację ze społeczeństwem, a więc takie zorganizowanie życia w więzieniu, by skazany nabywał umiejętności istotne w społecznej readaptacji. W tej koncepcji wykonywania kary pozbawienia wolności praca staje się jednym z istotnym środków aktywizacji skazanych, a jej organizacja powinna sprzyjać zdobywaniu przez skazanego kwalifikacji zawodowych. Rodzi się więc pytanie, czy nasze regulacje dotyczące pracy skazanych uwzględniają koncepcję pracy zaproponowaną w Europejskich Regułach Więziennych.

Słowa kluczowe: *skazany*, *zatrudnienie skazanych*, *oddziaływanie penitencjarne*, *aktywizacja skazanych*

ACTION IN THE SOCIALLY JUSTIFIED INTEREST VERSUS DEFAMATION IN THE PRESS STATEMENT[1]

ADAM OLEJNICZAK

I Analysis of lawlessness as a reason for providing publicity rights protection by the norms of civil law belongs to a particularly intensive research area within the science of private law and is intensely exploited by the judicature. There is also a lively debate over the justified interest as a circumstance excluding the possibility of recognising conduct of a publicity rights violator as an illegal act. The issue is broad so my reflections are limited to the sphere of civil law and only to problems occurring in case a perpetrator is charged with defamation that is based on facts. I support a thesis that in such cases the profession of the defamer is not important and action "with due diligence" in order to protect a socially justified interest may exclude lawlessness of their conduct only if the charge is genuine.

The conditions for the use of non-pecuniary measures of publicity rights protection are laid in Article 24 § 1 CC, in the first and second sentence of the provision. The use of pecuniary claims, according to the third sentence of Article 24 § 1 CC, may require that other conditions be met, as prescribed in the Code. The provision of Article 24 § 1 CC protects the aggrieved party against unlawful infringement (or threat of infringement) of publicity rights. The legislator wants to provide the aggrieved party with strong protection, which is reflected in two solutions adopted in this provision. Firstly, it does not require that a defamer be imputed guilt. Secondly, although the injured person must prove that he demands that his publicity rights be protected as they were threatened or infringed by the defamer's conduct, the legislator makes the plaintiff exempt from a burden of proof of a commission of an unlawful act or a defamer's negligence. This feature of the act is presumed. Thus, a court will provide protection for the aggrieved party if he proves the infringement of his publicity rights and the defendant does not

[1] The article is a bit different version of the text I developed in Professor Jacek Sobczak's jubilee book.

prove that his action was not lawless[2]. This means that the issue of lawlessness is of primary importance to the discussed matter.

Lawlessness constitutes a classical condition for liability and the legislator decided that defining it is not necessary. Analysis of lawlessness is usually carried out in connection with the issue of guilt. It is due to the fact that a stand developed under the influence of French law has dominated for years. It indicates two elements of guilt: an objective one consisting in the recognition of conduct that does not comply with legal provisions or established moral rules as the perpetrator's fault, and a subjective one treating acts committed by parties causing harm intentionally and because of negligence as being their fault. However, more and more often at present, in relation to the conception developed in criminal jurisprudence, an opinion on two features of an act is propagated, in the form of subjective and objective inappropriateness of the proceeding. I approve of the opinion limiting the concept of guilt to an element classifying conduct causing harm based on the features of the perpetrator only[3]. This way, lawlessness (inappropriateness) constituting a condition for recognising the conduct as being a fault may be analysed independently at a lower risk of treating it subjectively.

Polish legal system does not contain a common, general duty to refrain from causing harm[4]. In order to recognise a party's conduct as lawless, it is necessary to classify their act as banned under the binding legal norms. Responsibility for establishing the scope of lawlessness lies with jurisprudence and court judgements. As a result, a very broad range has been set because it was rightly assumed that it is necessary to strive for assuring a remedy for harm if it results from acts that are commonly recognised as blameworthy. This way, acts banned by legal regulations in Poland, irrespective of their sources, and conduct inconsistent with the principles of social coexistence and good mores are classified as lawless. Legal norms banning such acts must be abstract in character imposing a common duty to behave in a certain way.

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[2] For more about liability for publicity rights infringement, compare J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016; commentary on Article 24 and M. Pazdan, [in:] *System Prawa Prywatnego [Private law system]*, vol. 1, Warszawa 2012, p. 1272 and subsequent ones and the judicature and literature cited therein.

[3] Also compare Z. Banaszczyk, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) K. Pietrzykowski, Warszawa 2011, vol. I, Article 415, Nb 15 and 16; G. Bieniek, [in:] *Komentarz [Commentary]*, book III, vol. I, Warszawa 2006, p. 247 and subsequent ones; W. Dubis, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek i P. Machnikowski, Warszawa 2016, Article 415, Nb 6–8; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna [Liabilities – general issues]*, Warszawa 2014, Nb 470; M. Sośniak, *Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone [Lawlessness of conduct as a condition for civil liability for forbidden acts]*, Kraków 1959, p. 78 and subsequent ones; A. Szpunar, *Nadużycie prawa podmiotowego [Abuse of rights]*, Kraków 1947, p. 112 and subsequent ones.

[4] Compare W. Czachórski, [in:] *System prawa cywilnego [Civil law system]*, vol. III, Part 1, (ed.) Z. Radwański, p. 534, also compare M. Wilejczyk, Dlaczego nie należy chodzić w tłumie ze szpilką wystającą z rękawa? Naruszenie obowiązku ostrożności jako przesłanka odpowiedzialności deliktowej za czyn własny [Why shouldn't you walk in the crowd with a needle sticking out of a sleeve? Infringement of the duty to be careful as a premise of tort liability], *Studia Prawa Prywatnego* 2013, no. 1, p. 56 and subsequent ones.

Protection of publicity rights by civil law is also common in character and that is why the conduct that infringes personal rights protecting them is lawless[5]. Only objective criteria decide whether a perpetrator's action is lawless[6]. However, in some situations, in spite of the violation of a common ban or compulsion established by legal or moral norms, a party's conduct cannot be classified as lawless because of some special circumstances making it impossible. They are called circumstances excluding lawlessness. According to the judicature and legal literature, they include: (1) the aggrieved party's consent, (2) acting based on a legal norm entitling to the infringement of publicity rights, (3) exercising rights and (4) acting in order to defend a justified social or private interest. And this last circumstance will be the subject matter of the considerations that follow.

II Justified social interest, because of the contents of some legal regulations, may constitute a circumstance reversing admissibility of recognising lawlessness of the infringement of publicity rights. The conclusion may be formulated based on some legal regulations, e.g. the Act on the protection of personal data (Article 1 (2) and Article 23), the Act on copyright and related rights (Article 81 (2.1)) or the Act on the press law (Article 14 (6))[7]. However, it does not mean approval of the stand that acting in a justified social interest or an important private interest constitutes, as a rule in the Polish legal system, a non-statutory circumstance reversing lawlessness of an act. Quite the contrary, civil law does not recognise an act in the justified interest as a general condition for limiting the contents of rights. On the other hand, one must share a view that a legislator may limit the laws protecting publicity rights as well as other rights, also with the use of general clauses that aim at protecting certain interests of supra-individual importance[8]. This means that action in a socially justified interest can be considered as a circumstance reversing lawlessness of publicity rights infringement.

There are many reasons why the use of that instrument should be limited to absolutely extraordinary cases and requires meeting a series of conditions with regard to its interpretation and application. To a great extent, I agree with that standpoint presented by A. Pązik indicating "directives on interpretation of social interest as civil

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[5] Compare the ruling of the Supreme Court of 28 February 2007 (V CSK 431/06, Orzecznictwo Sądu Najwyższego Izba Cywilna 2008, no. 1, item 13) and of 1 December 2006 r. (I CSK 315/06, Orzecznictwo Sądu Najwyższegi Izba Cywilna 2007, no. 11, item 169), also: Z. Banaszczyk, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) K. Pietrzykowski, Warszawa 2011, vol. I, Article 415, Nb 25; G. Bieniek, [in:] *Komentarz [Commentary]*, book III, vol. I, Warszawa 2006, p. 248; W. Czachórski, [in:] *System prawa cywilnego [Civil law system]*, vol. III, Part 1, (ed.) Z. Radwański, p. 534; W. Dubis, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek and P. Machnikowski, Warszawa 2016, Article 415, Nb 8; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna [Liabilities – general issues]*, Warszawa 2014, Nb 472.

[6] Compare Z. Radwański, gloss on the ruling of the Supreme Court of 14 May 2003, I CKN 463/01.

[7] Compare J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Ciil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

[8] Compare Z. Radwański, Koncepcja praw podmiotowych osobistych [Concept of personal rights], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1988, vol. 2, p. 8 and subsequent ones; similarly, J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

law justification"[9]. He believes that "both social (group) and individual (private) interests may be subject to this justification". But the latter only when it has a social dimension (apart from one's own interest, it also protects a value that is commonly respected). It refers to a particular and non-abstract social interest. Infringement of publicity rights is assessed as obligatory and maintaining the requirement of proportionality, with respect to both the content and the form (protection of socially high value cannot be achieved in another, less bothersome way). At the same time, "the existence of social interest should be assessed from an objective point of view"[10].

Over the last several years, one can observe that the Polish legislator consistently strives to strengthen civil law protection of publicity rights. Preference of the solutions efficiently protecting publicity rights may be also found in jurisprudence and the judicature. At the same time, such a general clause admitting exclusion of lawlessness as a result of solving the collision between personal and social interests obviously meant substantial weakening of publicity rights protection[11].

This means that there is a need for particularly thorough research into situations in which a more or less general stand is formulated that a justified interest is a circumstance excluding lawlessness of conduct of a perpetrator of publicity rights infringement. This is the case we deal with when the assessment concerns defamation, which consists in dissemination of false information about the aggrieved party, and the perpetrator of the infringement, often a journalist, refers to acting in the socially justified interest and supports it with professional diligence. Beside the stand that the insult based on false information cannot be recognised as lawful because it would lead to depriving the aggrieved party of the protection under Article 24 CC[12], there is another opinion that

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[9] A. Pązik, *Wyłączenie bezprawności naruszenia dobra osobistego na podstawie interesu społecznego [Exclusion of lawlessness of publicity rights infringement due to public interest]*, Warszawa 2014, p. 326 and subsequent ones.

[10] A. Pązik, *Wyłączenie bezprawności... [Exclusion of lawlessness...]*, p. 335; also compare J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

[11] Compare M. Pazdan, [in:] *System Prawa Prywatnego [Private law system]*, vol. 1, (ed.) M. Safjan, Warszawa 2012, p. 1280; Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna [Civil law – general issues]*, Warszawa 2015, p. 174.

[12] Compare B. Kordasiewicz, *Jednostka wobec środków masowego przekazu [Individual versus mass media]*, Wrocław 1991, p. 15 and subsequent ones; *ibid*., review of a monograph, J. Wierciński, Niemajątkowa ochrona czci [Non-pecuniary protection of dignity], *Państwo i Prawo* 2004, vol. 12, p. 103; P. Machnikowski, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek i P. Machnikowski, Warszawa 2016, Article 24, Nb 19; J. Panowicz-Lipska, [in:] Kodeks cywilny. Komentarz [Civil Code: Commentary], *op. cit*.; M. Pazdan, [in:] *System Prawa Prywatnego [Private law system]*, *op. cit*., pp. 1240–1241; Z. Radwański, gloss on the ruling of the Supreme Court of do 14 May 2003, I CKN 463/01, Orzecznictwo Sądów Polskich 2004, vol. 2, item 22; *ibid*., gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sadów Polskich 2005, vol. 9, item 110; S. Rudnicki, Wybrane problemy z zakresu ochrony dóbr osobistych na tle orzecznictwa Sądu Najwyższego [Selected issues of publicity rights protection against the background of the Supreme Court judgements], [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana profesorowi Stanisławowi Sołtysińskiemu [Private law of the transformation times. Professor Stanisław Sołtysiński's commemorative book]*, Poznań 2005, p. 271; J. Sieńczyło-Chlabicz, gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, *Państwo i Prawo* 2005, vol. 7, p. 113 and subsequent ones; P. Sobolewski, gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądów Polskich 2005, vol. 12, item 144.

publication of press material infringing publicity rights cannot be recognised as lawless if it turns out that it contains false information if a journalist acting to protect a justified public interest, maintained due diligence while collecting and processing that material[13].

A. Pązik points out the non-statutory source of using this circumstance to waive lawlessness of an act, stating that public interest may be applied to lawsuits concerning insult based on customary law developed following court judgements[14]. He also thinks that the "application of Article 213 § 1 and 2 of the Criminal Code in connection with Article 24 § 1 of the Civil Code to protect publicity rights allows for exclusion of lawlessness only in case of genuine charges"[15]. At the same time, he indicates the different line of civil courts' judgements. In general, accepting the possibility of public interest existence that waives protection of insulted honour by publishing false information, he rightly notices that it leads to privileging journalists[16]. Thus, does the result of the interpretation have grounds in the binding legal system and hierarchy of values attributed to the legislator? The latter part of the question is of great importance because it is right to say that the shape of a legal institution is more or less strongly connected with the system of values assumed by the legislator. In the area of publicity rights, this relationship is especially strong. It is not easy to realise the hierarchy of values that constitute the foundation of a given set of regulations but it is absolutely necessary to know it to establish legal norms to be coded in statutes. In the discussed case, it is necessary to remember that publicity rights are defined as values that the legal system not only acknowledges but also appreciates.

III First of all, it must be emphasised that the assessment refers only to standpoints formulated with regard to lawlessness of the insult of honour by false statements. Thus, it is necessary to establish the significance of acting in the public interest only in case of dissemination of defamatory information based on false facts, i.e. such that have the form of sentences in the sense of logic because only then it is possible to adjudicate whether they are true or false[17]. Sometimes, before the assessment, it is necessary to

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[13] Especially compare the ruling of the Supreme Court of 14 May 2003, I CKN 463/01, Orzecznictwo S*ądów* Polskich 2004, vol. 2, item 22 and the resolutions of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114. Also compare: J. Barta, R. Markiewicz, Bezprawność naruszenia dobra osobistego wobec rozpowszechnienia w prasie nieprawdziwych informacji [Lawlessness of publicity rights infringement versus dissemination of untrue information in the press], [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana [Legal studies. Professor Maksymilian Pazdan's commemorative book]*, (ed.) L. Ogiegło, W. Popiołek and M. Szpunar, Kraków 2005, p. 796 and subsequent ones; P. Księżak, [in:] *Kodeks cywilny. Część ogólna. Komentarz [Civil Code: General issues. Commentary]*, (ed.) M. Pyziak-Szafnicka and P. Księżak, Warszawa 2014, pp. 332–333; K. Święcka, *Okoliczności wyłączające bezprawność naruszenia dóbr osobistych przez prasę [Circumstances excluding lawlessness of publicity rights infringement by the press]*, Warszawa 2010, p. 161 and subsequent ones; J. Wierciński, Niemajątkowa ochrona [Non-pecuniary protection], *op. cit*., p. 137 and subsequent one.

[14] Compare A. Pązik, Wyłączenie bezprawności [Exclusion of lawlessness], p. 303 and subsequent ones.

[15] A. Pązik, *Wyłączenie bezprawności... [Exclusion of lawlessness...]*, p. 303 and subsequent ones.

[16] *Ibidem*, pp. 163 and 333.

[17] In Article 41 of the Press law, appropriately, the compulsion of truthfulness concerns information on facts (reports on organs' meetings) and not already published assessment. Thus, it is hard to approve of the argument raised in the resolution of the Supreme Court (7) of 18 February 2005 (III CZP

analyse a statement composed of descriptive and evaluative elements in order to select sentences that can be judged to be true or false. If a statement is evaluative, its truthfulness cannot be tested. As a result, the thesis of lawlessness of honour insult refers only to the charges of defamation the falseness of which can be established because they are not based on true facts. Commonly, it is rightly assumed that dissemination of false information about a person is lawless because it impairs dignity and is defamatory. In such a situation, in order to classify an action in public interest as a circumstance excluding lawlessness, it is necessary to find grounds for a thesis that there is a situation in which it is in public interest to disseminate information that turns out to be false, and the aggrieved party is not entitled to protection of his publicity rights under Article 24 CC.

It must be noticed that, in the judicature and the opinions of jurisprudence that approve of admissibility of excluding lawlessness of a published statement in case of defamation by false accusation, the biggest importance is attributed to two arguments for the rightfulness of the interpretation adopted. First, the adopted solution aims to ensure the freedom of speech in connection with the role of the press in the implementation of that value. Second, it waives the threat of troublesome, stigmatising sanction imposed on the perpetrator, a journalist.

In case of the first argument, one must consider consequences of the constitutional right to freedom to express opinions, to acquire and to disseminate information (Article 54 (1) of the Constitution) in the light of constitutionally ensured freedom of the press and other means of social communication (Article 14 of the Constitution). If they allow for public formulation of false and untrue sentences, they can constitute grounds for excluding lawlessness of instances of propagating untruth.

The right to publicly express one's opinions, inter alia via the means of social communication, and freedom of the press are also protected by international agreements (Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 19 of the Universal Declaration of Human Rights, Articles 17 and 19 of the International Covenant on Civil and Political Rights) and statutes (Article 24 CC and Articles 1, 6 and 41 of the Press law). Legal literature and the judicature often present arguments indicating that the freedom of speech is also anchored in the need for ensuring possibly best conditions for the exercise of citizens' rights to "being provided with reliable information, public life openness and social control and criticism" (Article 1 of the Press law). Similarly, the judgements of the European Court of Human Rights protect, under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone's right to freedom of expression, including freedom to hold opinions and to receive and import information and ideas without interference by public authority and regardless of frontiers, which constitutes a guarantee of a democratic society[18].

53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114), that the provision "uses a concept of diligence, not truthfulness of criticism concerning publishing negative assessment of (inter alia) public activities". Journalistic diligence cannot be placed in opposition to the compulsion of publishing truthful information on facts and the legislator does not do so in Article 41 of the Press law.

[18] Compare especially the ruling of the Supreme Court of 14 May 2003, I CKN 463/01, Orzecznictwo Sądów Polskich 2004, vol. 2, item 22 and the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114, and

Undoubtedly, the implementation of this law should not impair dignity, honour and good name of a man, i.e. values that are not less important, which the above-mentioned acts also ensure (Articles 30 and 47 of the Constitution, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 19 of the Universal Declaration of Human Rights, Articles 17 and 19 of the International Covenant on Civil and Political Rights, Article 24 CC and Article 12 od the Press law). This means that it is in the public interest to exclude the provision of such a right to freedom of expression the implementation of which does not infringe fundamental publicity rights. Legal system notices this borderline also when in the Press law imposes an obligation "to present discussed phenomena truthfully" (Article 6 (1) of the Press law). "The term 'phenomena' should be understood as everything that is subject to mental perception, all empiric facts, events, situations, accidents, processes… Obligation to present phenomena truthfully is an order to show facts in accordance with reality"[19].

Thus, in my opinion, a thesis that in every situation it is necessary to consider which legally protected value, freedom of expression on the one hand, and dignity, honour and good name on the other hand, should be preferred by the legal system if statements have been untruthful. In any case, legal norms should not allow for recognising untruthful statements as lawful and legalise them.

Thus, a question arises why the significance and functions of the press are so strongly emphasised, but when assessing its statements it is accepted that the results of that assessment are determined only by the criteria for checking professional conduct of the perpetrator of publicity rights infringement and the consequences of their untruthful statements are not taken into account. Most often it is said that: "unconditional demand that a journalist prove truthfulness of an accusation means that he is requested to meet unrealistic requirements of detailed establishment of facts comparable to those that can be met in the proceeding conducted by state organs appointed and authorised to do this, and this would mean "the end of freedom of speech" or substantially restrict implementation of the function by the press"[20].

The Supreme Court rightly believes that "the obligation of the press (a journalist) to truthfully present phenomena should not be identified with unconditionally understood requirement of proving the truthfulness of accusation", although one cannot agree with the next statement that "the condition for truthfulness of transferred information should be referred to truthfulness of sources, i.e. their diligent selection, check and presentation"[21].

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also J. Barta, R. Markiewicz, Bezprawność naruszenia dobra osobistego wobec rozpowszechnienia w prasie nieprawdziwych informacji [Lawlessness of publicity rights infringement versus dissemination of untrue information in the press], [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana [Legal studies. Professor Maksymilian Pazdan's commemorative book]*, (ed.) L. Ogiegło, W. Popiołek and M. Szpunar, Kraków 2005, p. 796 and subsequent ones, and J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

[19] J. Sobczak, *Ustawa Prawo prasowe. Komentarz [Act on the Press law: Commentary]*, Warszawa 1999, p. 100.

[20] Resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114.

[21] *Ibid*.

Undoubtedly, the role of journalists is not only to inform about facts that can be proved truthful. An unconditional order to refrain from disseminating information until its truthfulness is established must not be formulated. The significance of the media and the freedom of speech is the reason why it is necessary to allow for quickly providing the public with the information the truthfulness of which the provider is not able to prove. However, in such a case, as far as a statement infringing publicity rights is concerned, a provider of the information takes the risk of legal liability and I think that this is the biggest risk among those that journalists have to accept. At the same time, the analysed sphere refers to the risk of liability for the consequences of the perpetrator's conduct[22]. These may be more troublesome than the consequences of the publication for the aggrieved party.

I do not agree with the statements that it means "gagging" or introducing censorship. I do not share an opinion that this interpretation causes that there is an "axiological fracture" between "ethical and professional obligation to publish and recognition of this action as lawless"[23]. The ethical and professional obligation to publish certainly refers to truthful material including information that is essential for public life. This construction finds grounds not only in legal provisions (especially Article 6 of the Press law), but also in professional ethical codes. I think, however, that this professional ethical code does not enclose a journalistic obligation to publish information the truthfulness of which cannot be proved. In the same way as in case of anybody who decides to exercise the freedom of speech, the smaller the probability that his information is truthful, the bigger the risk a journalist takes[24].

However, it is necessary to consider a call that in such a case "there should be a statutory exclusion of the possibility to rule (especially within proceeding securing claims) a ban on publication of journalistic material that infringes publicity rights by making statements the truthfulness of which cannot be established"[25]. It seems to be justified that a court should have grounds for annulling such an injunction if a defendant, in a given time limit, presents circumstances that make the accusation highly probable. If the information is then disseminated, the author of the publication will face the consequences of publicity rights infringement unless he can prove the truthfulness of the information.

Another argument that the sanction on the defamer is flagrantly hard is not convincing, either. The above-mentioned resolution of the Supreme Court characterises its hardship as follows: the consequences of recognising a journalist liable shall not be underestimated because the obligation to make a statement and apologise is for a journalist "a hard sanction and concerns an important sphere such as professional

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[22] In this vivid and right way: J. Sadomski, *Naruszenia dóbr osobistych przez media [Infringement of publicity rights by the media]*, Warszawa 2003, p. 60, although it is worth mentioning that involving liability always refers to consequences of conduct, even if there is a necessity to assess operant behaviour among premises of assigning liability (with liability based on fault).

[23] J. Barta, R. Markiewicz, Bezprawność naruszenia... [Lawlessness of publicity rights infringement...], p. 803.

[24] It must be remembered that lawless publicity rights infringement can also occur as disclosure of true information.

[25] J. Barta, R. Markiewicz, Bezprawność naruszenia... [Lawlessness of publicity rights infringement...], p. 802.

repute, which also belongs to publicity rights. The fact that in case of no guilt on the part of a journalist there is only non-pecuniary liability, does not lessen the significance and consequences of accepting liability by a journalist as it is strictly connected with challenging the compliance of his conduct with the rules of social co-existence"[26].

The Supreme Court treats "challenging the compliance of his [i.e. a journalist's – A.O.] conduct with the rules of social co-existence" to be a particularly hard sanction while, in fact, it concerns only the establishment of an actual and legal state. A sanction consists in an obligation to retract a statement and apologise. Unlike the Supreme Court, I believe that publication of untruthful accusation is not in accordance with moral norms commonly adopted and approved of in our society. It violates them.

I share the belief that public dissemination of information performed several times and sometimes under the pressure of time is not exempt from a possibility of making errors in the course of assessing the truthfulness of some facts. Any regimes of particularly diligent conduct formulated with regard to a professionally performed journalistic job are to minimise this risk, protecting both a potential aggrieved party and a defamer, i.e. a journalist, against dissemination of untruthful information. If, however, an event takes place, the legal consequence in the form of an obligation to retract the statement infringing publicity rights of the aggrieved party cannot be treated as "gagging". This would mean that, except journalists, all the members of the society, all the parties that are subject to civil law, are gagged by the civil law protection of dignity.

Assessing the proportionality of sanctions, it is necessary to take into account the hardship caused for the aggrieved party. The harm caused by dissemination of a statement impairing dignity, honour and good name of a man requires that the defamer not only publicise true information but also apologise to the aggrieved party. Does meeting this requirement mean harm to a journalist's professional repute? Quite the contrary, a lack of his reaction is dangerous for his repute of a diligent professional.

Assessment of each sanction is relative in character and if there are sometimes statements that a defamer is **only** or **solely** obliged to publish a retraction, it is not underestimating the hardship of the sanction, but an indication of the proportion to the consequences of the caused harm. Obligation to retract a statement and apologise, i.e. the consequence that a journalist diligently performing his job may have to face, will be fully proportional to the harm experienced by the aggrieved party.

IV The criterion for being professionally diligent is not the main subject matter of this article. However, due to its importance in one of the presented solutions, I will highlight that I do not share a standpoint that diligence is a criterion for assessing lawlessness of conduct. It is not convincing to state that "when all requirements that a journalist must meet are taken into consideration in order to efficiently refer to action in a justified public interest and maintaining particular carefulness and diligence, it is not possible to accuse a journalist who respected all the rules of a fair objective and appropriate conduct of infringing the rules of social co-existence. The action of a journalist meeting this kind of requirements does not deserve being considered to infringe the rules of

[26] Resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114.

social coexistence and should not be stigmatised as lawless"[27]. The opinion cannot be approved of because in order to deny a defamer's lawlessness, it transfers considerations into the sphere of performance assessment, i.e. the maintenance of diligence in performing duties, and indicates the threat of stigmatising a defamer in case his conduct is recognised as unlawful. However, it does not concern stigmatisation of a journalist. It is the aggrieved party who is stigmatised by a press publication, which is often forgotten, and it is his right to damages that we analyse. The legal system does not assume that the aggrieved party is satisfied only when an innocent defamer is stigmatised.

On the other hand, in order to appropriately interpret the norms of the current legal system, it is necessary to draw attention to the fact that it does not matter whether a journalist deserves or does not deserve to be considered as one who violated the law but it concerns the establishment of a fact whether he did it. What he deserves is another issue and it concerns whether he may be charged with failing to fulfil his professional duties (intentionally or because of negligence), infringement of the rules of carefulness, diligence, in other words if he may be found guilty.

Unlike some try to state, statutory construction of civil law protection of publicity rights does not strengthen arguments justifying the opinion on classification of due diligence as a criterion for the assessment of conduct lawlessness. It seems that in private law, there has not been one single commonly accepted standpoint regarding an overall legal interpretation of a lawless act, which to a great extent results from the tradition of constructing a two-element concept of guilt also covering objective inappropriateness of conduct (lawlessness). This means a possibility of formulating various criteria for assessing lawlessness of conduct depending on the category or type of rights that the instrument is to protect.

Here, it is not possible to indicate and analyse the overall consequences resulting from the adoption to the legal system of an opinion that due diligence constitutes a criterion for the assessment of lawlessness of conduct and is not structurally connected with fault. However, formulating such a thesis in the area of publicity rights protection[28] is particularly groundless and has encountered the right criticism[29], because it leads to substantial weakening of the protection provided. The evolution of the system of publicity rights protection, especially in the area of non-pecuniary protection, has consisted so far in the strengthening of securing the aggrieved party's interests by a departure from the principles of tort-related regime, especially a withdrawal from the necessity of charging a tortfeasor with intentional or at least negligent, neglectful conduct. As a result, an efficient instrument in the form of unconditional rights protecting the aggrieved party against infringement of their publicity rights has been created. The effectiveness of this instrument should not be limited, but quite the contrary – it should be strengthened.

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[27] *Ibidem*.

[28] Compare J. Wierciński, *Niemajątkowa ochrona czci [Non-pecuniary protection of dignity]*, Warszawa 2002, p. 137 and subsequent ones.

[29] Compare Z. Radwański, gloss on the resolution of the Supreme Court of 18 February 2005, III CZP 53/04, Orzecznictwo Sądów Polskich 2005, vol. 9, item 110; B. Kordasiewicz, review of a monograph, J. Wierciński, Niemajątkowa ochrona czci [Non-pecuniary protection of dignity], *Państwo i Prawo* 2004, vol. 12.

V The burden of proof of the truthfulness of information lies on the defendant in a lawsuit concerning publicity rights infringement only when the plaintiff files a complaint claiming loss resulting from untruthful information. A court will examine it based on the overall evidence collected and factual and legal presumptions. Undoubtedly "the role of the press does not consist in just providing information, its role often is to present facts in order to trigger a discussion, make a reader develop their own opinion and to signal the existence of particular threats. Factual and truthful presentation of matters makes it possible to fulfil the tasks of the press and, at the same time, allows for classifying this conduct within the limits of the freedom of speech"[30]. However, the role of the press is never to present untruthful information, communicate it as events and facts that have taken place.

A thesis that the proposed modification of the rules of liability for defamatory dissemination of untruthful information is totally exceptional is not convincing. It is indicated that the modification applies only to journalists (finds grounds for them in the provisions of the Press law) and only for those who meet the requirements of the rules of the highest diligence, which does not undermine the general principle of providing the aggrieved party with efficient legal protection if they have faced false accusations. If, in order to justify the interpretation criticised here, one takes into consideration a thesis of assessing diligence of a perpetrator's conduct as a criterion for establishing lawlessness of an act, I think it is groundless to limit the consequences of that move to the journalistic profession. By the way, the problem does not consist in the scale of exemptions from liability for dignity impairment. Thus, it does not mean that overruling liability, against the commonly binding principle of truthfulness of statements, is a very restrictive exception, because it applies to "journalists only", and only those who are particularly diligent[31] when recognising untruthful information. The problem consists in a lack of legal and axiological justification for a withdrawal from the principle that untruthful press statements are never in the public interest. However, if they occur (may that happen as rarely as possible), a person incurring the harm should be provided with full protection of their dignity. And this should be done with the use of non-pecuniary measures (when a journalist-defamer maintained due diligence) or pecuniary measures (when he was at fault).

At the time of dynamic development in the field of communication, growth in technical means making it possible to almost immediately disseminate information, the stand privileging one professional group in the field of publicity rights protection is doubtful. If a defamer is not a journalist but another person who formulated false accusation based on diligently checked, reliable sources, the possibility of exercising the exemption from liability should be applicable also to them. The role played by the media in public life is especially valuable. The press, thanks to the freedom of speech,

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[30] Resolution of the Supreme Court (7) of 18 February 2005..., *op. cit*.

[31] A. Pązik, *Wyłączenie bezprawności... [Exclusion of lawlessness...]*, p. 163. *Nota bene*, I believe that special diligence required by the Press law (Article 12 (1(1)) is, in the light of Article 355 CC, due diligence, which is laid down in the second paragraph of the provision prescribing consideration of professionalism of the obliged, thus, in case of a journalist's conduct, the assessment should take into account a pattern that includes the knowledge and conscientiousness required in this profession in the given circumstances (for more on this topic, compare J. Sobczak, *Ustawa Prawo prasowe... [Act on the Press law...]*, p. 153 and subsequent ones).

is rightly assigned the role to implement "the citizens' right to reliable information, openness of public life and social control and criticism" (Article 1 of the Press law). However, I am convinced that it does not make grounds for modifying the rules of liability in case of publicity rights infringement. I am omitting the issue concerning definitions of the press and a journalist although it is not irrelevant here. But I am paying most attention to the thesis that identical rules of liability for formulating false accusations should be applied to everybody who disseminates that information regardless of their professional status. Special duties in the area of information collection and dissemination imposed on journalists cannot be a sufficient condition for a withdrawal from general rules of liability.

BIBLIOGRAPHY

Banaszczyk Z., [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) K. Pietrzykowski, Warszawa 2011, vol. I, commentary on Article 415.

Barta J., Markiewicz R., Bezprawność naruszenia dobra osobistego wobec rozpowszechnienia w prasie nieprawdziwych informacji [Lawlessness of publicity rights infringement versus dissemination of untrue information in the press], [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana [Legal studies. Professor Maksymilian Pazdan's commemorative book]*, (ed.) L. Ogiegło, W. Popiołek i M. Szpunar, Kraków 2005.

Bieniek G., [in:] *Komentarz do Kodeksu cywilnego. Zobowiązania [Commentary on the Civil Code: Liabilities]*, Vol. I, Warszawa 2006.

Czachórski W., [in:] *System prawa cywilnego [Civil law system]*, Vol. III, Part 1, (ed.) Z. Radwański, Wrocław 1984.

Dubis W., [in:] *Kodeks cywilny. Komentarz Civil Code: Commentary]*, (ed.) E. Gniewek i P. Machnikowski, Warszawa 2016, commentary on Article 415.

Kordasiewicz B., *Jednostka wobec środków masowego przekazu [Individual versus mass media]*, Wrocław 1991.

Kordasiewicz B., review of a monograph: J. Wierciński, Niemajątkowa ochrona czci [Non-pecuniary protection of dignity], *Państwo i Prawo* 2004, vol. 12.

Księżak P., [in:] *Kodeks cywilny. Część ogólna. Komentarz [Civil Code: General issues. Commentary],* (ed.) M. Pyziak-Szafnicka and P. Księżak, Warszawa 2014, commentary on Article 24.

Machnikowski P., [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek and P. Machnikowski, Warszawa 2016, commentary on Article 24.

Panowicz-Lipska J., [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Articles 23 and 24.

Pazdan M., Dobra osobiste i ich ochrona [Publicity rights and their protection], [in:] *System Prawa Prywatnego [Private law system]*, vol. 1, (ed.) M. Safjan, Warszawa 2012, p. 1225 and subsequent ones.

Pązik A., *Wyłączenie bezprawności naruszenia dobra osobistego na podstawie interesu społecznego [Exclusion of lawlessness of publicity rights infringement due to public interest]*, Warszawa 2014.

Radwański Z., Koncepcja praw podmiotowych osobistych [Concept of personal rights], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1988, vol. 2.

Radwański Z., gloss on the ruling of the Supreme Court of 14 May 2003, I CKN 463/01, Orzecznictwo Sądów Polskich 2004, vol. 2, item 22.

Radwański Z., gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądów Polskich 2005, vol. 9, item 110.
Radwański Z., A. Olejniczak, *Prawo cywilne – część ogólna [Civil law – general issues]*, Warszawa 2015.
Radwański Z., A. Olejniczak, *Zobowiązania – część ogólna [Liabilities – general issues]*, Warszawa 2014.
Rudnicki S., Wybrane problemy z zakresu ochrony dóbr osobistych na tle orzecznictwa Sądu Najwyższego [Selected issues of publicity rights protection against the background of the Supreme Court judgements], [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana profesorowi Stanisławowi Sołtysińskiemu [Private law of the transformation times. Professor Stanisław Sołtysiński's commemorative book]*, Poznań 2005.
Sadomski J., *Naruszenia dóbr osobistych przez media [Infringement of publicity rights by the media]*, Warszawa 2003.
Sieńczyło-Chlabicz J., gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, *Państwo i Prawo* 2005, vol. 7, p. 113 and subsequent ones.
Sobczak J., *Ustawa Prawo prasowe. Komentarz [Act on the Press law: Commentary]*, Warszawa 1999, p. 100.
Sobolewski P., gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądów Polskich 2005, vol. 12, item 144.
Sośniak M., *Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone [Lawlessness of conduct as a condition for civil liability for forbidden acts]*, Kraków 1959.
Szpunar A., *Nadużycie prawa podmiotowego [Abuse of rights]*, Kraków 1947.
Święcka K., *Okoliczności wyłączające bezprawność naruszenia dóbr osobistych przez prasę [Circumstances excluding lawlessness of publicity rights infringement by the press]*, Warszawa 2010.
Wierciński J., *Niemajątkowa ochrona czci [Non-pecuniary protection of dignity]*, Warszawa 2002.
Wilejczyk M., Dlaczego nie należy chodzić w tłumie ze szpilką wystającą z rękawa? Naruszenie obowiązku ostrożności jako przesłanka odpowiedzialności deliktowej za czyn własny [Why shouldn't you walk in the crowd with a needle sticking out of a sleeve? Infringement of the duty to be careful as a premise of tort liability], *Studia Prawa Prywatnego* 2013, no. 1.

ACTION IN THE SOCIALLY JUSTIFIED INTEREST VERSUS DEFAMATION IN THE PRESS STATEMENT

Summary

A perpetrator's action in the socially justified interest is sometimes perceived as a circumstance excluding lawlessness of his conduct. It also applies to a person infringing publicity rights. The topic is broad and triggers a widespread debate. The article focuses on an analysis of civil law issues of publicity rights protection and only the problems that occur in case a perpetrator of publicity rights infringement is charged with defamation, which is based on facts (not opinions). The author supports the thesis that in such cases a defamer's profession is not important, and what can exclude lawlessness of his conduct and only when the accusation is true is an action with "due diligence" within the protection of socially justified interest. Social significance of the press and imposition of special duties in the field of information collection and dissemination on a journalist by the Act on the Press law do not constitute sufficient grounds for modifying the

general rules of liability for dignity impairment only for the representatives of this profession. False press statements are not in the public interest and the aggrieved party should have the right to demand apology also from a journalist who maintained due diligence in his faulty action.

Key words: *justified public interest*, *publicity rights*, *impairment of dignity*, *lawlessness*, *the press*, *untruthful information*, *due diligence*, *apology*

DZIAŁANIE W SPOŁECZNIE UZASADNIONYM INTERESIE A NARUSZENIE CZCI WYPOWIEDZIĄ PRASOWĄ

Streszczenie

Działanie sprawcy szkody w społecznie uzasadnionym interesie jest niekiedy postrzegane jako okoliczność wyłączająca bezprawność jego zachowania. Dotyczy to także zachowania osoby naruszającej dobra osobiste. Zagadnienie jest bardzo obszerne i budzi szeroką dyskusję. Opracowanie ogranicza się do analizy zagadnień cywilnoprawnej ochrony dóbr osobistych oraz wyłącznie do problemów, jakie pojawiają się w razie postawienia sprawcy naruszenia dobra osobistego zarzutu zniesławiającego, który oparty jest na faktach (nie dotyczy opinii). Autor broni tezy, że w tych przypadkach nie jest istotna profesja sprawcy zarzutu, a działanie „z należytą starannością" w obronie społecznie uzasadnionego interesu może wyłączyć bezprawność jego zachowania tylko wówczas, gdy zarzut jest prawdziwy. Społeczne znaczenie prasy i nałożenie na dziennikarza przez ustawę Prawo prasowe szczególnych obowiązków w zakresie zbierania i przekazywania informacji nie stanowią wystarczającej podstawy do modyfikowania tylko dla reprezentantów tej profesji ogólnych reguł odpowiedzialności za naruszenie czci. W interesie społecznym nie leżą nieprawdziwe wypowiedzi prasowe, a pokrzywdzony nieprawdziwą informacją powinien mieć prawo żądać przeproszenia także przez dziennikarza, który dochował należytej staranności w swoich krzywdzących działaniach.

Słowa kluczowe: *społecznie uzasadniony interes*, *dobra osobiste*, *naruszenie czci*, *bezprawność*, *prasa*, *nieprawdziwa informacja*, *należyta staranność*, *przeproszenie*

SELECTED ISSUES OF APPLYING INTERNATIONAL AVIATION LAW BY THE RUSSIAN COURTS

ANNA KONERT
JUNNA ROMANIUK

"(…) since aviation was obviously going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity[1]"

I. INTRODUCTION

Despite the technical and technological development of the aviation industry, there are accidents that generate the problem of repairing the personal injury or material damage incurred by passengers or third parties. One can observe, among others, the following types of cases concerning compensation claims in relationships between the passenger and the airline:

– cases related to death, personal injury or health disorder,
– flight delay or cancellation,
– delay of luggage delivery, destruction, loss or damage of luggage,
– denied boarding,
– others, including cases brought before the court by national supervisory entities for the purpose of protecting consumer rights.

In the case of such occurrences, there arises a complex network of legal relationships connected to damages and compensation. In the case of international transport services provided by a foreign carrier, the court must apply international law.

As noted by Professor Marek Żylicz, aviation law constitutes a multidimensional system. The multidimensionality of this system lies in the fact that it is composed of multiple international treaties, bilateral agreements, secondary laws and national laws[2].

[1] Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 *Harvard Law Review* 497, 498 (1967).

[2] M. Żylicz, *Prawo lotnicze międzynarodowe, europejskie i krajowe [International, European and domestic aviation law]*, Warszawa 2011, p. 21.

Currently there are two systems at work in the international private aviation law with respect to personal injury, baggage and cargo claims and delay in transportation: the Warsaw system and the Warsaw-Montreal system[3].

The Warsaw Convention was the first international convention governing international air travel (officially referred to as the Convention for the Unification of Certain Rules Relating to International Transportation by Air[4]), which was the result of two international conferences (in Paris in 1925 and in Warsaw in 1929) and of work done by the Comité International Technique d'Experts Juridiques Aériens (CITEJA) created by the Paris conference[5]. The first idea came from a Polish proposal made on the general session of Commission Internationale de Navigation Aérienne (CINA) in Stockholm in 1924[6]. However, the official proposal was submitted by France at the 1925 Paris Conference. Today, 155 ICAO member States are part of the Warsaw System. The Convention sought uniformity among the various customs and legal systems and established a uniform set of rules for international air travel[7].

Since aviation develops very fast, the 1929 rules and regulations needed to be modernized. It has been revised and amended multiple times:

- The Hague Protocol of 1955,
- the Guadalajara Supplementary Convention of 1961,
- the Guatemala City Protocol of 1971,
- Montreal Protocols 1, 2, 3 and 4 of 1975.

Theses acts together with the Convention create the Warsaw System *sensu stricto*. There were also a great number of unilateral initiatives, and national and private law measures:

- the Montreal Agreement of 1966,
- the Malta Agreement of 1974,
- the decision of the Constitutional Court in Italy 1985 and the Italian Law 274 of July 7, 1988,
- the Japanese Initiative of 1992,
- New Zealand proposal of 1995,
- the IATA Inter Carrier Agreement on Passenger Liability ("IIA") of 1995,
- the Agreement on Measures to Implement the IATA Inter Carrier Agreement (MIA) of 1996,

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[3] See more A. Konert, *Odpowiedzialność cywilna przewoźnika lotniczego,* Warszawa 2010; P.S. Dempsey, M. Milde, *International air carrier liability: The Montreal Convention of 1999*, Montreal 2005; E. Giemulla, R. Schmid, *Montreal Convention*, Kluwer Law International, The Hague 2006.

[4] Signed at Warsaw on 12 October 1929.

[5] *Ibid*., at 498.

[6] L. Babiński (Polish delegate on the Warsaw conference in 1929), Miedzynarodowa unifikacja prawa przewozu lotniczego na tle Konwencji Warszawskiej [International unification of air carriage in the light of the Warsaw Convention], *Studia Prawnicze* 1968/18.

[7] A. Konert, International court of civil aviation – the best hope for uniformity? *Indian Journal of International Law*, vol. 5/2012.

- the EC Regulation 2027/97 on air carrier liability in the event of accidents amended by Regulation (EC) 889/2002,
- various national laws,

which all create the Warsaw System *sensu lato*[8].

Since the ratification of all these acts is not mandatory, "a single State might be bound to one version of the Warsaw Convention with one State, another version of the Warsaw Convention with another State, a separate bilateral treaty with another State, and a separate contract with a private party[9]." This created a situation where passengers on the same flight are often subject to vastly different liability schemes, depending on each individual's destination, departure point, the home State's ratification of various treaties, and the nation where suit is brought[10].

Since the Warsaw System did not meet the requirements of a modern air transport system, it had to be updated and modernized by creating a new treaty – Convention for the Unification of Certain Rules Relating to International Carriage by Air on 28 May 1999. Today, more than a decade after MC99 came into force (2003), 103 (54%) of ICAO Member States have ratified it.

Warsaw–Montreal system applies to all international carriage of persons, baggage or cargo performed by aircraft for reward[11]. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking (Article 1 § 1). This system creates a set of rules governing airline liability towards passengers and shippers on international flights, which should be applied by national courts.

With respect to the question of denied boarding, cancelled and delayed flights, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91[12], applies. As it was mentioned, claims regarding delayed flights can be made under Warsaw-Montreal system. However denied boarding and cancellation of the flights are not regulated by this system. Under this system, air carrier liability is limited to the sums indicated in the conventions. There is no possibility of obtaining compensation only for moral damage[13].

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[8] *Ibid*.

[9] The U.S. Second Circuit Court, *Chubb & Son*, 214 F.3d at 306.

[10] Jennifer McKay, The Refinement of The Warsaw System: Why the 1999 Montreal Convention Represents The Best Hope For Uniformity, 34 Case W. Res. J. Int'l L. 73. Cited in A. Konert, International court of civil aviation – the best hope for uniformity? *Indian Journal of International Law* no. 5/2012.

[11] The expression „international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention (Article 1 § 2).

[12] Official Journal of the European Union, L46, pp. 1–7 (17-2-2004).

[13] See more A. Konert, *European Vision for Air Passengers,* Warszawa 2014, K. Arnold, EU Air Passenger Rights: Assessment of the Proposal of the European Commission for the Amendment to

Regulation 261/2004 establishes minimum rights for passengers when they are denied boarding against their will (overbooking) and when their flight is cancelled or delayed and it applies:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

In case of denied boarding, cancelled or delayed flight, the air carrier is required to provide passengers with meals, accommodation etc. and also pay compensation (250, 400 or 600 euros). There is no compensation if the flight has been delayed or cancelled due to "extraordinary circumstances". There is no compensation for moral damage.

II. INTERPRETATION OF INTERNATIONAL AND EUROPEAN AVIATION LAW BY RUSSIAN COURTS

In the case of improper performance of the air carriage agreement, a complex network of legal relationships connected to damages and compensation arises. In the case of international transport services provided by a foreign carrier, the court must apply international law. This rule also arises from international private law of the Russian Federation. This law specifies that the law of the country of the carrier shall be applicable[14].

Russia only ratified: the Warsaw Convention of 1929, The Hague Protocol of 1955 and the Guadalajara Convention of 1961 and did not ratify: the Montreal Protocols of 1975, the Guatemala Protocol of 1971 (which did not enter into force) and the Montreal Convention of 1999.

As a result, there are certain divergences between the Russian legal system and the system of the foreign carrier's country, with regard to the carrier's liability.

Russian courts commit typical mistakes in the application of international law. Often they justify judgements with the norms of Russian substantive law and international treaties ratified by the Russian Federation, and interpret them according to the doctrine and judicial decisions of the Russian system. This concerns, in particular, the provisions of the Warsaw Convention, as amended in The Hague, the Russian Act on the protection

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Regulation (EC) 261/2004 and to Regulation (EC) 2027/97' (2013) 38, *Air and Space Law*, Issue 6, K. Arnold, Application of Regulation (EC) No. 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights, *Air and Space Law* (2007): 93, J. Balfour, Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004' (2010) 35 *Air and Space Law*, Issue 1., M. Broberg, Air Passengers' Rights in the European Union: The Air Carriers' Obligations vis-a-vis Their Passengers under Regulation 261/2004, *The Journal of Business Law* (2009), V. Correia, The evolution of air passengers' rights in European Union law, The Aviation & Space Journal, April/June 2011, n°2.

[14] The Federal Law No. 146-FZ of 26 November 2001 – Civil Code of the Russian Federation, part 3, Articles 1186, 1191, 1210,1211,1212 (Collected Legislation of the Russian Federation, 03 December 2001, No. 49, Article 4552.

of consumer rights[15], the Russian Civil Code[16], the Russian Aviation Code[17] and other documents.

For instance, in a case in 2014, a flight was cancelled due to a technical failure. In the claim, a passenger demanded damages and compensation. The Lenin District Court in Krasnodar ruled in favour of the claimant and ordered the airline to pay damages and compensation.

The court decided that a legal relationship arose out of the carriage agreement, which is regulated by the Warsaw Convention of 1929, as amended in The Hague in 1955, and the Russian Civil Code, and that to the extent to which they are not in conflict with the Convention, the Russian legal provisions regarding the protection of consumer rights also apply.

The airline appealed to the Court of Appeal and submitted, among other evidence, the argument of the improper application of substantive law. The Court of Appeal ruled in the appellant's favour, changed the judgement of the District Court and dismissed the claim in its entirety, ruling that the carrier's national law must be applied in the case of international carriage by air conducted by a foreign carrier.

The application of Russian law is a fundamental mistake in such cases.

Many claims demand compensation for moral loss caused by the delay or cancellation of a flight, the delayed delivery, destruction, loss or damage of luggage, denied boarding or other events unrelated to personal injury. Ruling in favour of such demands often constitutes an error with regard to the substantive law of the carrier's country.

The ruling of the District Court for the district of Timoszew-Krasnodar in a case in 2009 can serve as an example. The flight was cancelled due to weather conditions. The Court of First Instance dismissed the claim, but the Court of Second Instance changed the judgement of the Court of First Instance and ruled that the claimant must receive pecuniary compensation for moral loss. The Court of Second Instance stated that, despite justification of the flight cancellation, the airline failed to provide the passengers with meals and hotel accommodation. Consequently, it failed to perform its duty, which constituted the factual basis of the decision to order the compensation.

From our point of view, the stand presented by the Court of Second Instance is highly controversial and in contradiction with the law of the carrier's country, judicial decisions and the commonly adopted doctrine.

The Russian international private law excludes the application of Russian law to cases of international carriage if the court determined the content of the law of the carrier's country. Pursuant to Article 29 of the Montreal Convention, punitive, exemplary or any other non-compensatory damages shall not be recoverable. In view of the above, damages for moral losses and punitive damages are illegal.

The courts' mistake is that they interpret the Warsaw Convention in the light of Russian doctrine and judicial decisions. In the judgement of the Supreme Court of

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15 Law of the Russian Federation on the protection of the consumers' rights No. 2300-1 of 07 February 1992 (Gazette of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation, 09 April 1992, No. 15).

16 The Federal Law No. 51-F3 of 30 Nov. 1994 – Civil Code of the Russian Federation (Collected Legislation of the Russian Federation, 05 Dec. 1994, No. 32).

17 English version is available on: http://www.aviaru.net/english/code/

the Russian Federation of 28 August 1998 in the case of G. vs. the Russian airline Sachalinskie Awiatrassy[18] concerning compensation and damages for a delayed flight, the Supreme Court noted that in similar cases it was ruled that the wronged party was entitled to compensation. From the point of view of the court, the Warsaw Convention is only a small set of rules which do not regulate all relationships between the carrier and the receiver of transport services, including matters related to compensation, and it is possible to apply the provisions of the Russian Act on the protection of consumers' rights with regard to compensation, and the provisions of this Act are not in conflict with international law, but supplement it.

However, one can observe a change in the judicial decisions recently: the courts are more likely to observe the provisions of the Montreal Convention, the doctrine and the judicial decisions of the carrier's country.

For instance, in a case in 2009, the Court of First Instance of Sochi applied Russian law and ignored the law of the carrier's country. The National Court of Krasnodar reviewed the appeal against the legally binding decision in the extraordinary mode and ruled that the decision of the Court of First Instance was invalid due to the improper application of substantive law.

The District Court of Zamoskvoretski in Moscow dismissed the claim of G. and A. against Qatar Airways concerning luggage delay in 2008[19] and citing the Montreal Convention, stated that damages for moral loss and punitive damages are illegal. The Court of Second Instance (for the Capital City of Moscow) agreed with the view of the Court of First Instance and dismissed the appeal as groundless. A similar view was adopted by the District Court of Taganski in Moscow in the case of Z. vs. Qatar Airways (2011/2012)[20], concerning denied boarding, which dismissed the claim for compensation and damages, citing the Montreal Convention. The Court of Second Instance for the Capital City of Moscow dismissed the claimant's appeal and agreed with the Court of First Instance.

Problems with the resolution of similar cases continue to arise because the Montreal Convention does not regulate all matters, for instance the matter of flight cancellation.

Articles 19 and 20 of the Convention regulate only matters related to delays. Moreover, the Convention fails to define a delay. It is not clear whether Article 19 applies to cases of the failure to perform the carriage agreement, for instance in the case of overbooking.

With regard to carriers in EU states, the matter of flight cancellation is partly regulated by the Regulation (EC) No. 261/2004. The judicial decisions of the Court of Justice of the European Union are also helpful.

Russian courts often use analogies in the case of flight cancellation and resolve matters pursuant to Articles 19 and 20 of the Montreal Convention.

Another problem stems from the fact that the courts apply non-uniform interpretations of crucial terms concerning the evaluation of claims related to the amount of damages

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18 http://www.sudbiblioteka.ru/vs/text_big1/verhsud_big_2060.htm

19 The decision is not published.

20 http://tagansky.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&H_date=06.12.2012

in the case of death, personal injury or health disorder or of the term of extraordinary circumstances releasing the carrier from responsibility in the case of flight cancellation.

For instance, in the case of C. and G. vs. Qatar Airways in 2011[21] concerning flight delay, the District Court of Taganski in Moscow ruled that the flight delay due to technical failure was caused by circumstances that cannot be deemed as extraordinary. In a similar case in 2014[22] the District Court of Pervomaiski in Rostov-on-Don accepted the presented evidence and statements of the airline and ruled that the technical failure was caused by extraordinary circumstances, dismissing the claim.

The overly general wording of the norms of international aviation law causes discrepancies in its interpretation.

In the above-mentioned case of 2014[23] concerning flight cancellation due to technical failure, the District Court of Lenin in Krasnodar stated: "the flight delay was caused by circumstances which cannot be deemed extraordinary and are the consequence of a low level of service and the failure to prepare the airplane for flight". The Court of Appeal did not agree with the decision of the District Court and revoked it in its entirety and dismissed the claim.

In the determination of similar cases, it is very important that when applying international law, the courts familiarize themselves with the international judicial decisions and doctrine, instead of basing their interpretation solely on Russian law.

III. CONCLUDING REMARKS

As it is indicated by the International Air Transport Association, the Montreal Convention of 1999 (MC99) established a modern, fair and effective regime to govern airline liability to passengers and shippers on international flights. It was envisaged as the single universal liability regime for international carriage by air, replacing the earlier Warsaw Convention system that had developed haphazardly since 1929. Universal ratification of MC99 would provide many benefits:

- Passengers would enjoy better protection irrespective of the route or ticket type;
- Airlines would enjoy certainty about the rules governing their liability across their international route networks;
- Shippers would be able to use electronic documents of carriage in air cargo, enabling the removal of paper[24].

Regulation 261/2004 has been vehemently opposed by the aviation industry before it was enacted and viciously attacked ever since – like every other 'law' and 'regulation'. The fact that it is attacked attests to its success. The timeliness of flights has substantially improved and the care of passengers has been considerably enhanced.

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[21] http://tagansky.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=166880809&delo_id=1540005&new=&text_number=1

[22] http://pervomajsky.ros.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=16961004&delo_id=1540005&new=&text_number=1

[23] http://kraevoi.krd.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=4314241&delo_id=5&new=5&text_number=1&case_id=4064639

[24] http://www.iata.org/policy/icao-assembly/Pages/icao-montreal-convention.aspx

One cannot forget that transportation (air, ground, sea) is an essential public service that has to be provided irrespective of whether it is profitable or not. In fact, all transportation is more or less heavily subsidised.

The transportation industry is almost brutally competitive and widely fragmented. So, regulation – laws, treaties and conventions are needed to unify/codify the system – one rule for (almost) all. An example of the carriers› complaints is that the fines for delays are uniform instead of being related to the ticket price.

The air carrier liability in respect of passengers and their baggage/cargo is governed either by all provisions of the Warsaw/Montreal Convention or by all provisions of the EU Regulations, relevant to such liability. National courts should therefore apply these rules as a priority. Only if a question is not regulated by these acts, it will be possible to apply a national law in addition (which cannot be contrary to the International law).

The court systems in most EU countries being of considerable quality, over long-running disputes and the regulation's interpretations, are in the process of being straightened out by experienced and independent judges.

Russian court system is different. Russian judges cannot 'forget' about the Russian law even when applying international law or European law (Regulation 261/2004). The courts should familiarize themselves with the international judicial decisions and doctrine instead of basing their interpretation solely on Russian law. Russian courts make typical mistakes in the application of international law justifying judgements with the norms of Russian substantive law and international treaties ratified by the Russian Federation, and interpreting them according to the doctrine and judicial decisions of the Russian system.

BIBLIOGRAPHY

LITERATURE

Babiński L. (Polish delegate on the Warsaw conference in 1929), Miedzynarodowa unifikacja prawa przewozu lotniczego na tle Konwencji Warszawskiej [International unification of air carriage in the light of the Warsaw Convention], *Studia Prawnicze* 1968/18.

Dempsey P.S., Milde M., *International air carrier liability: The Montreal Convention of 1999*, Montreal 2005.

Giemulla E., Schmid R., *Montreal Convention*, Kluwer Law International, The Hague 2006.

Konert A., International court of civil aviation – the best hope for uniformity? *Indian Journal of International Law*, vol. 5/2012.

Konert A., *Odpowiedzialność cywilna przewoźnika lotniczego*, Warszawa 2010.

McKay J., The Refinement of The Warsaw System: Why the 1999 Montreal Convention Represents The Best Hope For Uniformity, 34 Case W. Res. J. Int'l L. 73. Cited in A. Konert, International court of civil aviation – the best hope for uniformity? *Indian Journal of International Law*, vol. 5/2012.

Żylicz M., *Prawo lotnicze międzynarodowe, europejskie i krajowe*, Warszawa 2011.

Official Journal of the European Union, L46, pp. 1–7 (17-2-2004).

PRIMARY AND SECONDARY LEGISLATION

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

The Federal Law No. 146-FZ of 26 Nov. 2001 – Civil Code of the Russian Federation, part 3, Articles 1186, 1191, 1210,1211,1212 (Collected Legislation of the Russian Federation, 03 Dec. 2001, No. 49, Article 4552.

Law of the Russian Federation on the protection of the consumers' rights No. 2300-1 of 07 Feb 1992 (Gazette of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation, 09 April 1992, No. 15).

The Federal Law No. 51-F3 of 30 Nov. 1994 – Civil Code of the Russian Federation (Collected Legislation of the Russian Federation, 05 Dec. 1994, No. 32).

WEBSITES

http://www.sudbiblioteka.ru/vs/text_big1/verhsud_big_2060.htm (accessed: 10 September 2015).

http://tagansky.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=166880809&delo_id=1540005&new=&text_number=1 (accessed: 10 September 2015).

http://pervomajsky.ros.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=16961004&delo_id=1540005&new=&text_number=1 (accessed: 10 September 2015).

http://kraevoi.krd.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=4314241&delo_id=5&new=5&text_number=1&case_id=4064639 (accessed: 10 September 2015).

http://www.iata.org/policy/icao-assembly/Pages/icao-montreal-convention.aspx

SELECTED ISSUES OF APPLYING INTERNATIONAL AVIATION LAW BY THE RUSSIAN COURTS

Summary

In the case of improper performance of the contract of air carriage, there arises a complex network of legal relationships connected to damages and compensation. In the case of international transport services provided by a foreign carrier, the court must apply international law. The aim of the article is to show the application of international aviation law by the Russian courts with respect to the rules of air carrier liability.

Key words: *aviation*, *law*, *passenger*, *case*, *courts*, *convention*, *compensation*, *damage*

NIEKTÓRE PROBLEMY MIĘDZYNARODOWEGO PRAWA LOTNICZEGO W PRAKTYCE ROSYJSKICH SĄDÓW

Streszczenie

Artykuł dotyczy kwestii odpowiedzialności przewoźnika lotniczego w stosunku do pasażerów uregulowanej w prawie międzynarodowym (Konwencja Montrealska z 1999 r.) oraz europejskim (rozporządzenie 261/2004) z punktu widzenia rosyjskich sądów. Konwencja montrealska dotyczy

odpowiedzialności przewoźnika za wypadek lotniczy. Stworzyła ona nowoczesny, sprawiedliwy i skuteczny system odpowiedzialności względem pasażerów i spedytorów w międzynarodowych przewozach. Rozporządzenie 261/2004 dotyczy kwestii niewpuszczenia pasażerów na pokład, opóźnienia lub odwołania lotu. Jest to najbardziej kontrowersyjne rozporządzenie europejskie z zakresu prawa lotniczego. Sądy krajowe powinny stosować zasady wynikające z powyższych aktów w sposób priorytetowy. Tylko jeżeli kwestia nie jest uregulowana w tych aktach, byłoby możliwe zastosowanie posiłkowo prawa krajowego (które nie może być sprzeczne z prawem międzynarodowym). Rosyjscy sędziowie nie omijają jednak nigdy prawa rosyjskiego, nawet przy stosowaniu prawa międzynarodowego lub prawa europejskiego. Celem artykułu jest analiza wyroków tychże sądów w kontekście ochrony praw pasażerów.

Słowa kluczowe: *lotnictwo*, *prawo lotnicze*, *pasażer lotniczy*, *rozporządzenie 261/2004*, *prawo rosyjskie*, *konwencja montrealska z 1999 r.*, *odszkodowanie za wypadek lotniczy*, *ochrona praw pasażerów lotniczych*

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33. Mariusz Muszyński (red. nauk.), Dominika E. Harasimiuk, Małgorzata Kozak, *Unia Europejska. Instytucje, polityki, prawo*, Warszawa 2012.
34. „Myśl Ekonomiczna i Polityczna", Józef M. Fiszer (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1(28)2010, 2(29)2010, 3(30)2010, 4(31)2010, 1–2(32–33)2011, 3(34)2011, 4(35)2011, 1(36)2012, 2(37)2012, 3(38)2012, 4(39)2012, 1(40)2013, 2(41)2013, 3(42)2013, 4(43)2013, 1(44)2014, 2(45)2014, 3(46)2014, 4(47)2014, 1(48)2015, 2(49)2015, 3(50)2015, 4(51)2015, 1(52)2016.
35. Edward Nieznański, *Logika dla prawników*, Warszawa 2006.
36. Bartłomiej Opaliński, Przemysław Szustakiewicz, *Policja. Studium administracyjnoprawne*, Warszawa 2013.
37. Bartłomiej Opaliński, *Rola Prezydenta Rzeczypospolitej Polskiej w procesie stanowienia ustaw na tle praktyki ustrojowej Konstytucji III RP*, Warszawa 2014.
38. Leokadia Oręziak, *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej*, Warszawa 2007.
39. Leokadia Oręziak (red. nauk.), *Finansowanie rozwoju regionalnego w Polsce*, Warszawa 2008.
40. Leokadia Oręziak, Dariusz K. Rosati (red. nauk.), *Kryzys finansów publicznych*, Warszawa 2013.
41. Maciej Rogalski, *Świadczenie usług telekomunikacyjnych*, Warszawa 2014.
42. Dariusz Rosati (red. nauk.), *Gospodarka oparta na wiedzy. Aspekty międzynarodowe*, Warszawa 2007.
43. Dariusz Rosati (red. nauk.), *Euro – ekonomia i polityka*, Warszawa 2009.
44. Grzegorz Rydlewski, Przemysław Szustakiewicz, Katarzyna Golat, *Udzielanie informacji przez administrację publiczną – teoria i praktyka*, Warszawa 2012.
45. Jacek Szymanderski, *Schyłek komunizmu i polskie przemiany w odbiorze społecznym*, Warszawa 2011.
46. Jerzy Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach. Część szesnasta Dekretu przypisywanego Iwonowi z Chartres* (tłum. z jęz. łac.), Warszawa 2009.
47. Janusz Żarnowski, *Współczesne systemy polityczne. Zarys problematyki*, Warszawa 2012.

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